

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

April Term, 2025

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

**MOTION TO DISMISS CHARGES OF CRIMINAL SOLICITATION
OF MISUSE OF POSITION**

The defense moves to dismiss the indictments for Criminal Solicitation of Misuse of Position because, under the State’s interpretation, the statutes which define this crime are unconstitutionally overbroad and vague, both facially and as applied in this case. The correct interpretation of the statutes does not require a finding of unconstitutionality. However, the State’s interpretations render the statutes unconstitutional.¹ The statutes as interpreted by the State are, facially and as applied, unconstitutionally overbroad because they punish the exercise of First Amendment rights. The statutes as interpreted by the State are, facially and as applied, unconstitutionally vague because they fail to put an ordinary reasonable person on notice of what conduct is prohibited and because they invite discriminatory enforcement by the State. For these reasons, as detailed below, the Court should dismiss these indictments.

1. The State alleges that Justice Anna Barbara Hantz Marconi, on or about April 19, 2024, committed the crime of Criminal Solicitation of Misuse of Position in that, “with the purpose that another engage in conduct constituting the crime of Misuse of Position,” she

¹ The defense previously challenged all the indictments as violative of the First Amendment. *See Def. Mot. to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity*, ¶¶ 12-36 [hereafter *Def. Mot. to Dismiss*]. The State had not provided the defense with discovery at the time the prior motion was filed. The defense specifically noted in that prior motion that, once it had discovery, it would raise detailed challenges to vagueness and overbreadth. *See id.* at 11, n. 1 (“The defense will make additional overbreadth and vagueness arguments in subsequent motions”).

“solicit[ed] Pease Development Authority Chairperson Steve Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi[.]” *Indictment* (CID 2257397C).

2. The State also alleges Justice Hantz Marconi, on or about June 6, 2024, committed the crime of Criminal Solicitation of Misuse of Position in that, “with the purpose that another engage in conduct constituting the crime of Misuse of Position,” she “solicit[ed] Governor Christopher Sununu to secure a governmental privilege or advantage for her to which she was not otherwise entitled regarding an investigation into Geno Marconi[.]” *Indictment* (CID 2257398C).

3. Thus, the State has charged the crime of criminally soliciting Sununu and Duprey to commit the crimes of Misuse of Position, rather than a substantive crime.

4. The Criminal Solicitation statute, RSA 629:2, requires the State to prove that the accused, “with a purpose that another engage in conduct constituting a crime,” “commands, solicits, or requests such other person to engage in such conduct.” RSA 629:2, I.

5. Neither indictment specifies what words Justice Hantz Marconi allegedly said, what request was allegedly made, or what privilege or advantage was allegedly sought.

6. As explained below, the Court should dismiss these indictments because the conduct alleged by the State does not fall within the scope of the statutes.

RSA 21-G:23 Is Part of the Executive Branch Ethics Code; It Is Improper to Use the Inchoate Crime of Criminal Solicitation to Apply It to All Citizens.

7. The Misuse of Position statute does not apply to Justice Hantz Marconi because, as a judge, she is not a member of the executive branch. Nor does it apply to PDA Chairperson

Duprey. See RSA 21-G:6-b. See also *D. Mot. to Dismiss Indictment for Criminal Solicitation of Misuse of Position (Duprey)*.

8. RSA Chapter 21-G is the “Executive Branch Reorganization Act of 1983.” RSA 21-G:1. RSA 21-G:23 is in the portion of the chapter devoted to the executive branch. RSA 21-G:21-35.

9. The Misuse of Position statute, RSA 21-G:23, applies to “executive branch official[s] or classified employee[s].” It is a relatively recent provision, adopted in 2004, and modified occasionally in subsequent years. Relevant here, in 2009, the Legislature amended the second prong, to add the language “to which they are not otherwise entitled.” See 2009 NH HB 519.

10. The penalty provision of the Code of Ethics, RSA 21-G:34, confirms that it only applies to executive branch officials because, although being guilty of a misdemeanor, violators “may [only] be subject to disciplinary action as provided in RSA 21-G:31, III(d),” which is a reference to the executive branch ethics committee. That committee only has jurisdiction over “current or former executive branch officials.” RSA 21-G:29, II.

11. In our Court’s only analysis of RSA 21-G, *State v. Actavis Pharma, Inc.*, 170 N.H. 211 (2017), it confirmed that the Ethics Code is confined to executive officials. *Id.* at 217. In furtherance of the “goal...to apply statutes in light of the legislature’s intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme,” it concluded that “[t]here is nothing in the Ethics Code to support a conclusion that the legislature intended to create a private right of action for its violation.” *Id.* at 217-18.

12. To apply the Executive Branch Code of Ethics to a justice of the New Hampshire Supreme Court would violate the separation of powers. The Supreme Court has emphasized that outside the powers of address and impeachment, judicial discipline is an “exclusive, judicial function.” *In re Judicial Conduct Comm.*, 151 N.H. 123, 126 (2004) (cleaned up). See also *id.* at

128 (“the power to regulate the conduct of judges, including the authority to take disciplinary action short of removal, is a judicial power”); *Op. of the Justices*, 140 N.H. 297, 299-302 (1995); *In re Mussman*, 112 N.H. 99 (1972); N.H. Const. pt. I, art. 37.

13. Chairperson Duprey also falls outside of the Executive Branch Code of Ethics. Thus, only the Governor is subject to the Code. Given the myriad discussions, information, and suggestions shared with the Governor by his or her constituents, it would be odd indeed to couch each such interaction as a Criminal Solicitation to convince the Governor to violate the Code of Ethics by seeking a benefit to which the Governor is not entitled.

14. There is nothing in RSA 21-G which indicates the legislature intended for citizens not subject to the substantive crimes in that title, to be potentially liable for soliciting another to violate RSA 21-G:23 or any other provision. Nor should the Court accept the State’s expansive application of RSA 21-G:23 with RSA 629:2, especially considering the constitutional limitations set forth below.

Beyond the Statute’s Text and Legislative History, the Misuse of Position Statute Is Constitutionally Void for Overbreadth, Both Facially and As Applied.

15. If the Court accepts the State’s interpretation of the statutes and finds that the conduct described in the indictments is covered by the statutes, then the defense challenges the Misuse of Position statute, in combination with the Criminal Solicitation statute, as unconstitutionally overbroad, on its face and as applied in this case.

Overbreadth.

16. The First and Fourteenth Amendments to the United States Constitution, as well as Part I, Article 22 of the New Hampshire Constitution, prohibit unconstitutionally overbroad laws. “A statute is void for overbreadth ‘if it attempts to control [conduct] by means which invade areas of protected freedom.’” *State v. Pike*, 128 N.H. 447, 450-51 (1986) (quoting *State v.*

Smith, 127 N.H. 433, 439 (1985)). *See also NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (explaining that “a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms”); *State v. Albers*, 113 N.H. 132, 134 (1973) (quoting same). “The crucial question...is whether the statute...sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.” *Albers*, 113 N.H. at 134 (quotation and citation omitted). Furthermore, the “State’s exercise of its police power may not unreasonably interfere with an individual’s right to free speech.” *Op. of the Justices*, 128 N.H. 46, 49 (1986). As the defense previously explained in detail, the United States and New Hampshire Constitutions protect the rights of citizens to express their concerns about governmental and social issues to public officials. U.S. Const. amends. I and XIV; N.H. Const. pt. I, arts. 14, 15, 22, and 32. *See Def. Mot. to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity*, ¶¶ 12-36 [hereafter *Def. Mot. to Dismiss*]

17. “The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *State v. Brobst*, 151 N.H. 420, 421 (2004) (quotation and citation omitted).

18. The Attorney General’s attempt to criminalize the conversations at issue in this case risks chilling the rights of all citizens in New Hampshire from raising their concerns with their elected or appointed officials for fear that the State will then prosecute them. To avoid this constitutional defect, the Court should interpret RSA 21-G:23 and RSA 629:2 to “supply a limiting construction... without invading the province of the legislature.” *Brobst*, 151 N.H. at

423. If the Court accepts the State’s interpretation of these statutes, the effect will be to render the statutes unconstitutionally overbroad and vague, both facially and as applied.

Facial Overbreadth.

19. “The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.” *State v. MacElman*, 154 N.H. 304, 310 (2006) (quoting *Chicago v. Morales*, 527 U.S. 41, 52 (1999)). Additionally, the doctrine “applies to constitutional challenges of statutes that prohibit conduct, as well as challenges to those statutes prohibiting ‘pure speech’ and ‘conduct plus speech,’” because the “purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *MacElman*, 154 N.H. at 310 (citing *Brobst*, 151 N.H. at 422). “[A]pplication of the overbreadth doctrine is strong medicine to be employed only as a last resort” and thus “[l]egislative enactments are construed to avoid conflict with constitutional rights, and provisions may be cured through judicial construction.” *MacElman*, 154 N.H. at 310 (citing *Brobst*, 151 N.H. at 420; *State v. Smith*, 127 N.H. 433, 439 (1985)).

20. Any statute which seeks to criminalize discussions with legislative or executive officials is antithetical to the eight-hundred years of common law legal history protecting the right to petition government officials for redress of grievances. *See Def. Mot. to Dismiss*, ¶¶ 12-25. The State’s interpretation of the Misuse of Position statute is substantially overbroad because it seeks to criminalize constitutionally protected discussions with legislative or executive officials while providing no notice as to what specific words or conduct are criminally prohibited. It “extend[s] to speech traditionally accorded the most solicitous protection of the

first amendment; namely, criticism of the government’s performance of its duties.” *In re Petition of Brooks*, 140 N.H. 813, 819 (1996).

21. In *Brooks*, our Supreme Court struck down Supreme Court Rule 37(17) which provided for confidentiality in the attorney disciplinary process. *Id.* at 815. The rule at issue permanently barred criticism of the PCC process and hindered mere “public discussion,” debate which “lies at the heart of the first amendment” and whose regulation “must pass the strictest of constitutional tests.” *Id.* at 819.

22. Similarly here, the citizens of New Hampshire who may wish to inform or complain to their elected officials “may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *MacElman*, 154 N.H. at 310. By the State’s logic, if the Department of Justice initiates a civil or criminal investigation, the citizens of New Hampshire are prohibited from commenting on those investigations to their elected officials, even when those officials have no influence over the investigations. The State could prosecute any citizen’s comment to a public official criticizing government activities merely by alleging that such commentary was intended to cause a government official to misuse his position. Nothing could be more antithetical to representative government.

23. The United States Supreme Court has already cautioned against these overbroad interpretations that threaten to chill constitutionally protected speech. In *McDonnell v. United States*, 579 U.S. 550 (2016), the Court explained that expansive interpretations of criminal statutes related to corruption would “raise significant constitutional concerns” because the “basic compact underlying representative government *assumes* that public officials will hear from constituents and act appropriately on their concerns[.]” *Id.* at 574-75 (italics in original).

24. The State’s interpretation of the Criminal Solicitation and Misuse of Position statutes is not content neutral because it applies only to critics of state action. A citizen would not be

prosecuted for telling the Governor what a great job he was doing if his Attorney General initiated an investigation into someone. “Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citations omitted).

25. The State’s expansive interpretation of the Misuse of Position and Criminal Solicitation statutes is not narrowly tailored to serve a compelling state interest. Its interpretation provides for no time, place, and manner restrictions or other narrow tailoring that our Courts have frequently used to uphold restrictions on First Amendment-protected conduct. *See State v. Bailey*, 166 N.H. 537, 545-46 (2014) (upholding park curfew ordinance because of the city’s “significant interest in ensuring that its parks are adequately protected, and because that interest would be less efficiently achieved without the park curfew than with it, the regulation satisfies the requirement of narrow tailoring”); *State v. Gubitosi*, 157 N.H. 720, 728 (2008) (holding portion of harassment statute not unconstitutionally overbroad because it “is narrowly tailored to the illegal communications sought to be prevented”); *State v. Hodgkiss*, 132 N.H. 376, 388 (1989) (signage ordinance not unconstitutionally overbroad because “the ordinance does not burden any expressive activity beyond what is necessary to achieve its substantial and legitimate goal, and is therefore tailored with sufficient limits to satisfy first amendment standards”). Here, by contrast, the State has ignored the statute’s plain text and legislative history to advance an interpretation of the Misuse of Position statute that could criminalize any number of discussions, arguments, opinions, petitions, and the like aimed at public officials.

26. By using the Criminal Solicitation statute to sidestep the statute’s focus and instead prosecute a justice and a judge for expressing her opinions to government officials, the State has unmoored the Misuse of Position statute from its constitutionally required limitations. Any

citizen's comments, anywhere, at anytime, on any matter, to any executive branch official are criminalized.

As Applied Overbreadth.

27. Even if this Court determines that the combination of the Criminal Solicitation and Misuse of Position statutes is not facially overbroad, the Court still should determine whether that combination is “unconstitutional as applied to the particular facts of this case.” *State v. Theriault*, 158 N.H. 123, 126 (2008).

28. The State alleges that Justice Hantz Marconi “commanded, solicited, or requested another to engage in [conduct constituting the Crime of Misuse of Position]...by soliciting Pease Development Authority Chairperson Steve Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi[.]” *Indictment* (CID 2257397C). It further alleges that Justice Hantz Marconi “commanded, solicited, or requested another to engage in [conduct constituting the Crime of Misuse of Position]...by soliciting Governor Christopher Sununu to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding an investigation into Geno Marconi[.]” *Indictment* (CID 2257398C).

29. The State alleges no threats, promises, bribes, asks, or anything of the like. *See Def. Mot. to Dismiss* at ¶¶ 8-11, 25; *D. Reply St. Obj. Mot. Dismiss* at ¶¶ 13-17, 23.

30. According to the discovery produced by the State, Sununu says, that in the June 6, 2024, meeting there was “no ask,” no request for any action, and no request for any benefit, and nothing illegal about the meeting. Sununu’s own conclusion was, “I don’t think there was anything illegal about it.” D154/D37. *See also* D144/27.

I think she was, yeah, I think she was talking about the court itself, that the cases would – every time she has to recuse herself my, from what I understand, they have to bring somebody else in usually to take her, her position. And there’s a process to do all of that,

but I think she felt like because it was a large number of cases she was concerned the court as whole was gonna get backed up. These cases were gonna, you know, get backed up themselves and the, the work of the court was, it was impeding the work of the court from getting done is what her concern was. D126/9.

No, there was no ask, there was nothing Governor, I wish you could do this, or there was nothing like that. There's no, there's no request of me or anything like that, and – and there was no, yeah, no. It was more just expressing her frustration with the process, with, you know, what – what she was dealing with I should say, not the process but what, you know, what she was dealing with. But there was no ask, or expression that I should be doing anything. D131/14.

It was kind of just coming in, sitting down, expressing frustration and hoping that the thing would, would move quicker, and that's, that's all she said. D132/15.

It seems like she was just expressing frustration 'cause there – like I said, there was no action request, no ask, frustration with the process. Hoping that it would move along, and that's kind of how we left it. D133/16

She was expressing frustration. Clearly not asking me to do anything. D134/17.

She didn't ask anything of me. She was frustrated with, that she had to recuse herself. Frustrated seeing the process as a wife. But I think, I think that was it. D137/20.

I, I didn't get the sense that, I didn't get the sense that anything was illegal about the conversation. D144/27

No, I mean about halfway through the conversation I kept waiting, is she gonna ask me for something, or for something, or to do something, like and even imply that I should, Governor, you need to dah, dah, dah, no, never came. So there's technically no ask of me. D147/30

But I, I reiterated, I don't think there was anything illegal about it, but I'm, I'm not a lawyer. D154/37.

(underline added).

31. The Governor's legal counsel, Rudy Ogden, was present for the June 6th meeting. He confirmed the substance of the conversation.

... but to be clear there was never a, this needs to end quickly and can you please ask DOJ to end this quickly. There was never anything like that. D196/15.

[T]hat's why I say in terms of her not asking for anything, it – it never was, it never went more than saying this needs to end quickly...Like it was never it needs to end quickly and

geez, if you talk to them you should tell them that, or this needs to end quickly and I think you can do that. It was never anything like that. D196-97/15-16.

[T]o be clear she never said you should get this to conclude quickly, or – or like DOJ, you should engage with DOJ to get them to conclude quickly. It was always this, you know, this needs to be wrapped up. It's hard, and it's hard on both me and my colleagues. D206-07/25-26.

(underline added).

32. Not surprisingly, similar to Sununu and Ogden, and although not subject to the Executive Branch Code of Ethics, Steve Duprey's comments regarding his phone conversation with Justice Hantz Marconi do not reveal any evidence of unlawful conduct. According to Duprey, Justice Hantz Marconi "was calling, obviously, because I'm a friend." D29/29. Justice Hantz Marconi said to Duprey that the investigation of her husband "puts [her] in a very difficult position" because she would have to inform the Chief Justice and "recuse [her]self from all cases going forward which is...going to increase the work burden for other people." D20/20. *See also* D22/22 ("this just is very difficult, but that was it"); D41/41 ("This is, obviously, going to be hard for our family or something to that effect" and "I have to let Chief Justice know and takes me out of a quarter of our cases"); D42/42 ("I'm going to have to tell the Chief Justice and recuse myself from 20 to 25% of our cases").

33. Duprey never said that Justice Hantz Marconi did anything other than express concerns about her ability to do her job and her husband's suspension without any reason. Time and again, Duprey told investigators that Justice Hantz Marconi did not try to interfere in the investigation or gain access to information unlawfully. Duprey told investigators that "she was being appropriately careful not to ask me for any details." D18/18. *See also* D19/19 (Duprey "didn't get the sense that she was fishing."); D22/22 ("I think she was very appropriate in not trying to cross the line"); D24/24 ("she was – she was careful"); D25/25 ("she did not ask me to tell her any information...I think she was very careful"); D37/37 ("she was careful, appropriately

careful”); D42/42 (“I mean, she was careful – I’m not asking for anything you can’t tell me”); D53/53 (“But she – she was careful not to say can you tell me what’s going on? What can you tell me?”); D54/54 (Duprey explaining that she didn’t ask how long Geno would be on leave or anything like that, rather she just made statements); D58/58 (“Did she ask you for anything --.” “No.”).

34. When asked at the conclusion of his interview, “Did you have any indications that Justice [Hantz] Marconi thought that you could change that Geno was on leave,” Duprey responded “No” and added, “No. Didn’t request it. Didn’t request it, didn’t suggest it. No.” D60/60.

35. Moreover, both Duprey and Governor Sununu told investigators they didn’t believe Justice Hantz Marconi thought they had any influence over the investigation into her husband. D60/60 (Duprey); D130-31/13-14 (Sununu).²

36. Under the State’s interpretation, a citizen cannot complain to their representative about the length of time a cold case sits dormant. A citizen cannot comment to a government official about perceived failures or impacts of governmental action as long as investigation is pending. And, in this situation, a neighbor, family member, or former colleague of Geno Marconi cannot express concern directly to officials (or by op-ed) about the perceived unfairness of the investigation and suspension. Any commentary on an open investigation is a Criminal Solicitation of Misuse of Position. The State’s interpretation sweeps too broadly.

² If the State has any evidence of other conduct or circumstances alleged to support its charges of Criminal Solicitation of Misuse of Position, beyond what is set forth in the indictments or in the documents already in the record of this case, the court should require the State to make a proffer of that evidence with citations to discovery that has been provided to the defense. (The defense makes the same request in its Motion for a Bill of Particulars.) The court should then rule on the as applied overbreadth challenge and dismiss this indictment.

As Interpreted by the State, the Statutes Are Also Void for Vagueness, Both Facially and As Applied.

33. Just as the United States Supreme Court in *McDonnell* had overbreadth concerns, so too did it express vagueness concerns: “public officials could be subject to prosecution, without fair notice, for the most prosaic interactions.” 579 U.S. at 576. The defense challenges the Misuse of Position statute, in combination with the Criminal Solicitation statute, as unconstitutionally vague, on its face and as applied in this case.

34. Vague statutes are unconstitutional pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. *See State v. Porelle*, 149 N.H. 420, 422 (2003). “A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement.” *State v. Wilson*, 169 N.H. 755, 770 (2017) (quoting *State v. Hynes*, 159 N.H. 187, 200 (2009)). “The underlying principle of vagueness is that no person should be held criminally responsible for conduct which he or she could not reasonably understand to be proscribed.” *State v. Pratte*, 158 N.H. 45, 48 (2008) (quoting *State v. Lamarche*, 157 N.H. 337, 340-41 (2008)). When “First Amendment interests are at stake, courts apply the vagueness doctrine with special exactitude.” *Montenegro v. N.H. DMV*, 166 N.H. 215, 222 (2014) (quotation and citation omitted).

Facially Vague.

35. If the Court accepts the State’s interpretation of RSA 21-G:23, II, and RSA 629:2, the statutes are unconstitutionally vague because they fail to supply the citizens of New Hampshire with a reasonable opportunity to understand what conduct is prohibited and because they authorize or even encourage arbitrary and discriminatory enforcement. *Wilson*, 169 N.H. at 770.

36. “A statute is not unconstitutionally vague as long as its prohibitions ‘are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.’” *State v. Lamarche*, 157 N.H. 337, 340 (2008) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)). The relevant portion of the Misuse of Position statute criminalizes using an executive branch position “to secure governmental privileges or advantages for others to which they are not otherwise entitled.” RSA 21-G:23, II.

37. The State’s reading of the statute encourages arbitrary or discriminatory enforcement. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement.” *Montenegro*, 166 N.H. at 222 (quoting *Grayned v. City of Rockford*, 408 U.S. 108-09 (1972)). “The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.” *Montenegro*, 166 N.H. at 222 (quoting *United Food v. Southwest Ohio Regional Transit*, 163 F.3d 341, 359 (6th Cir. 1998)).

38. Clear standards for enforcement are especially important in the First Amendment context because a vague statute “operates to inhibit the exercise of those freedoms” and because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Montenegro*, 166 N.H. at 222 (quoting *Grayned*, 408 U.S. at 109). And while “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,” nevertheless “when First Amendment interests are at stake, [c]ourts apply the vagueness doctrine with special exactitude.” *Montenegro*, 166 N.H. at 222 (quoting *United States v. Williams*, 553 U.S. 285, 304

(2008) and *Act Now to Stop War v. District of Columbia*, 905 F. Supp. 2d 317, 351 (D.D.C. 2012)).

39. The Misuse of Position statute as interpreted by the State leaves unfettered discretion to law enforcement and prosecutors to unilaterally determine what constitutes the sort of “privileges or advantages” that citizens are allowed to discuss or raise with their elected officials. It lets law enforcement and prosecutors pick and choose which citizens are allowed to make requests or express concerns to government officials and which cannot.

Vague As Applied.

40. The State’s construction of RSA 629:2, I and RSA 21-G:23, II is unconstitutional as applied to Justice Hantz Marconi. The sole specific acts alleged in both indictments are that Justice Hantz Marconi is alleged to have: (1) solicited Chairperson Duprey “to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi,” *Indictment* (CID 2257397C), and (2) solicited then-Governor Sununu “to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding an investigation into Geno Marconi[.]” *Indictment* (CID 2257398C). The indictments do not specify what “privilege and/or advantage” Justice Hantz Marconi allegedly sought or identify how she was, as a citizen of this State, “not otherwise entitled” to expressing such opinions or concerns. *Id.*

41. Justice Hantz Marconi is, in fact, entitled to express her opinions and concerns about the suspension and investigation and its effect on the New Hampshire Supreme Court. That is, the First Amendment of the United States Constitution and Part I, Article 22 of the New Hampshire Constitution protect the rights of citizens to express their opinions to elected officials. *See, e.g., State v. Nickerson*, 120 N.H. 821, 824 (1980) *superseded by statute as stated in State v.*

Biondolillo, 164 N.H. 370, 378 (2012) (“It is not surprising that both the State and Federal Constitutions address themselves to the right of the people to...raise public attention to matters they consider of importance because ‘[m]aintenance of the opportunity for free political discussion is a basic tenant of our constitutional democracy.’”) (quoting *Cox v. Louisiana*, 379 U.S. 536, 552 (1965)). A statute explicitly protects her “full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies.” RSA 98-E:1; *see also* Judicial Code of Conduct Rule 3.2.

42. As set forth in the quoted material above, the evidence produced in discovery does not describe any conduct that is not protected by the First Amendment. If the State has other evidence, then the Court should order the State to identify that evidence so that the Court may rule on this motion.

Using the Inchoate Crime of Criminal Solicitation Does Not Render Vague Statutes Clear.

43. The State’s decision to also charge the inchoate crime of Criminal Solicitation does not save the indictments.

44. The Criminal Solicitation statute, RSA 629:2, requires the State to prove that the accused, “with a purpose that another engage in conduct constituting a crime,” “commands, solicits, or requests such other person to engage in such conduct.” RSA 629:2, I.

45. The language of the New Hampshire Criminal Solicitation statute is based on the Model Penal Code. *See State v. Kaplan*, 128 N.H. 562, 563 (1986).

46. As the Commentary to the Model Penal Code explains, Section “5.02 preserves the traditional requirement of ‘specific intent’” in that “an actor must have ‘the purpose of promoting or facilitating’ the commission of a crime” because it “is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the actor’s purpose that the crime be committed.” Model Penal Code Commentary § 5.02, Comment

3, p. 371 (1985). The law requires a “purpose to promote or facilitate the commission of a crime..., together with a command, encouragement, or request to another person that he engage in specific conduct that would constitute the crime[.]” *Id.* at Explanatory Note, p. 365 (underline added).

47. Regarding First Amendment concerns, the Commentary emphasizes the “specificity of conduct solicited.” *Id.* at § 5.02(3)(b), p. 375. In “an effort to protect legitimate agitation,” the solicitation statute requires that “the speaker solicit ‘specific conduct’ that would constitute the crime that he is charged with pursuing to promote.” *Id.* at 376-77 (underline added). It “is necessary under this formulation that, in the context of the knowledge and position of the intended recipient, the solicitation carry meaning in terms of some concrete course of conduct that it is the actor’s object to incite.” *Id.* at 377 (underline added). Nevertheless, even the authors of the Model Penal Code had trouble squaring their language with the United States Supreme Court’s contemporaneous decisions in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *Hess v. Indiana*, 414 U.S. 105 (1973). *See* Model Penal Code Commentary § 5.02(3)(b), pp. 377-79. *See also State v. Grant-Chase*, 2002 N.H. Super. LEXIS 10; 2002 WL 31059372 at *7-8 (Lynn, J.) (“The drafters of the Model Penal Code recognized that there could be instances when activity falling within the reach of a criminal solicitation statute would approach the boundaries of protected speech...” and “the dividing line between that speech which is protected and that which may form the basis for criminal prosecution is the distinction between abstract advocacy of indiscriminate measures versus the concrete solicitation of specific acts”); *Sheeran v. State*, 526 A.d 886, 891 (Del. 1987) (“The need for specificity is crucial to protect the Constitutional guarantee of free speech” because “[u]nless the advocacy of a violation of law is directed at inciting or producing imminent lawless action and is likely to incite or produce such action, the State cannot criminalize such advocacy.”)

48. In *State v. Carr*, 167 N.H. 264 (2015), our Court discussed the necessary elements of a Criminal Solicitation indictment but does not reach First Amendment considerations. As the Court explained, solicitation “is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.” *Id.* at 269 (quoting Robbins, *Double Inchoate Crimes*, 26 Harv. J. Legis. 1, 29 (1989)). The solicited conduct need not occur. *Carr*, 167 N.H. at 269. The State need only identify the solicited crime. *Id.* The State does not need “to plead and prove the elements of the solicited crime,” as “it requires no overt act other than the offer itself.” *Id.* at 270. “‘Criminal solicitation’ encompasses both the *actus reus* of ‘soliciting’ and the *mens rea* of having the ‘purpose that another engage in conduct constituting a crime.’” *Petition of State (State v. Laporte)*, 157 N.H. 229, 232 (2008)

49. “The plain meaning of solicitation is ‘to entice’ or ‘to strongly urge.’” *Petition of State*, 157 N.H. at 232 (quoting Webster’s Third New International Dictionary 2169 (unabridged ed. 2002)). *See also State v. Jennings*, 159 N.H. 1, 4-5 (2009) (“the plain and ordinary meaning of the transitive verb “solicit” includes the following: “to make petition to: ENTREAT ? [sic] to approach with a request or plea...to move to action: serve as an urge or incentive to...to strongly urge...insist upon...to entice or lead astray by or as if by specious arguments: lure on and esp[ecially] into evil...to endeavor to obtain by asking or pleading: plead for...to seek eagerly or actively...to have an effect on (a person or thing) through some natural influence or property...to seek to affect...to serve as a temptation or lure to: ATTRACT”) (quoting Webster’s Third New International Dictionary 2169 (unabridged ed. 2002)); *Oxford English Dictionary* (defining “solicit” as “To entreat or petition (a person) for, or to do, something; to urge, importune; to ask earnestly or persistently”), https://www.oed.com/dictionary/solicit_v?tab=meaning_and_use (last visited April 18, 2024).

50. In other words, the solicitor must strongly urge the solicitant to do something specifically for there to be an inchoate offense. Furthermore, if the intended conduct is beyond the scope of the prohibitions in the substantive statute, there cannot be a purpose to violate the substantive statute, and therefore there cannot be a Criminal Solicitation to commit a crime.

51. Here, the State has not alleged or produced discovery that indicates that Justice Hantz Marconi strongly urged anyone to do anything unlawful. Rather, the indictments only allege that Justice Hantz Marconi committed the crime of Criminal Solicitation “by soliciting” then-Governor Sununu “to misuse his position and/or otherwise interfere with an investigation into Geno Marconi,” or that she committed the same crime “by soliciting Pease Development Authority Chairperson Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi[.]” *Indictments* (CID 2257293C, 2257294C). They identify no words, asks, or requests.

Nor Is the State Saved by the “Speech Integral to Criminal Conduct” Exception to the First Amendment.

52. The so-called “speech integral to criminal conduct” exception to the First Amendment arises from the Supreme Court’s statement that speech “intended to bring about a particular unlawful act has no social value; therefore, it is unprotected.” *United States v. Hansen*, 599 U.S. 762, 783 (2023) (citing *United States v. Williams*, 553 U.S. 285, 298 (2008)). Thus, “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.” *Williams*, 553 U.S. at 299, as is solicitation of unlawful sex discrimination in employment, *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973), and picketing where the “sole, unlawful and immediate objective was to induce [a

target] to violate” anti-trade-restraint law, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

53. To “qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as anti-trust conspiracy, extortion, or in-person harassment.” *United States v. Sryniawski*, 48 F.4th 583, 588 (8th Cir. 2022) (internal citations omitted). *See also People v. Burkman*, 15 N.W.3d 216, 236 (Mich. 2024) (explaining that “for the exception to apply, the speech must be integral to some conduct or scheme that is illegal in nature and independent of the speech that might be used to facilitate or accomplish the conduct or scheme”). But “[i]f a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn’t apply.” *United States v. Osinger*, 753 F.3d 939, 954 (9th Cir. 2014) (Watford, J., concurring).

54. *Sryniawski* is instructive because it also involved speech in the political realm. *Sryniawski*, 48 F.4th at 585. The defendant was charged with cyberstalking and extortion for a series of emails he sent to a legislative candidate. *Id.* On appeal, the Eighth Circuit concluded that the evidence was insufficient to support a cyberstalking conviction consistent with the First Amendment. *Id.* at 585, 587-89. For that court, the *mens rea* element, that the “defendant act with the intent to harass or intimidate,” when construed in the broadest sense “would infringe on rights protected by the First Amendment” because the First Amendment “prohibits Congress from punishing political speech intended to harass or intimidate in the broad senses of these words.” *Id.* at 587 (quotation and citations omitted). The statute “cannot be applied constitutionally to a defendant who directs speech on a matter of public concern to a political candidate with intent merely to trouble or annoy the candidate.” *Id.* The same holds true for expressing opinions to politicians.

55. The government “may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that [the government] has criminalized.” *Sryniawski*, 48 F.4th at 588. *See also Burkman*, 15 N.W.3d at 236 (explaining how “[s]ince *Giboney*, courts and legal scholars have expressed the need to apply the speech-integral-to-criminal-conduct exception with caution” because “[o]therwise, under the broadest interpretation of the exception, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense”) (quotations and citations omitted). In drafting the criminal laws, the legislature cannot define constitutionally protected speech as a crime. Put simply, the First Amendment (and Article 22) limits the Legislature; the Legislature does not limit the First Amendment.

56. The Supreme Court’s decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), does not change the analysis.³ *Counterman* dealt with “true threats of violence” and the mental state required to place such threats outside the scope of First Amendment protections. *Counterman* recognized, but did not involve, political speech. Political speech is not treated as threats of violence. “Dissenting political speech [is] at the First Amendment’s core.” *Counterman*, 600 U.S. at 81. *See also R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position” of constitutional protection, while “obscenity and fighting words receive the least protection of all”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny’ and we uphold the restriction only if it is narrowly tailored to serve an

³ Similarly, *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) was a “true threats” case where an anti-tax activist told an IRS agent, *inter alia*, “I’m an expert rifleman and I’ll blow your head off... That is not a threat; it’s a promise; what I’m going to do to you.” *Id.* at 760-61. Likewise, *State v. Briggs*, 147 N.H. 431 (2002) is not a case about speech at all but about physical interference with a Fish and Game Officer.

overriding state interest.”); *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (“discussion of political issues” is “an area in which the importance of First Amendment protections is ‘at its zenith.’”); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999) (quoting same).

57. The discussions of *scienter* in *Counterman* have no application to the circumstances in this case where there was no threat of violence, no threat of any criminal conduct, and no request for any criminal conduct – only the discussion of concerns and expressions of opinion to an executive official. Unlike the threats of violence in *Counterman*, the alleged discussions here are “core” and “most protected” speech under the First Amendment. This Court must afford those discussions the First Amendment protection they deserve.

58. Unfortunately, that is precisely what the State has done here. The State has alleged that, merely by calling Steve Duprey and meeting with the then-Governor, and expressing her opinions and concerns about an ongoing investigation and its impact on her continued service on the Court, that is, core political speech and speech undoubtedly protected by the First Amendment and Article 22, Justice Hantz Marconi has solicited the crimes of Misuse of Position. That is not how our system works.

Conclusion.

For all of the foregoing reasons, the Court should dismiss the indictments for Criminal Solicitation of Misuse of Position.

WHEREFORE, the defense respectfully requests that the Court dismiss the indictments for Criminal Solicitation of Misuse of Position.

Dated this 18th day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that Senior Assistant Attorney General Dan Jimenez and Assistant Attorney General Joseph Fincham are registered e-filers in the Court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service.

/s/ Richard Guerriero