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Merrimack Superior Court
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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 CHARGE OF OBSTRUCTING GOVERNMENT ADMINISTRATION

The defense moves to dismiss the indictment for Obstructing Government Administration because, according to the State's interpretation, the statute which defines this crime is unconstitutionally overbroad and vague, both facially and as applied in this case. The correct interpretation of the statute does not require a finding of unconstitutionality. However, the State's interpretation renders the statute unconstitutional.[1] The statute as interpreted by the State is, facially and as applied, unconstitutionally overbroad because it punishes the exercise of First Amendment rights. The statute as interpreted by the State is, facially and as applied, unconstitutionally vague because it fails to put an ordinary reasonable person on notice of what conduct is prohibited and because it invites discriminatory enforcement by the State. For these reasons, as detailed below, the Court should dismiss this indictment.

1. The State alleges that Justice Hantz Marconi committed the crime of Obstructing Government Administration (CID 2257294C) in violation of RSA 642:1, I.

[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 defense did not have discovery at the time. 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").

2. Specifically, the State alleges that Justice Hantz Marconi "with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance or purported performance of such a function, engaged in any unlawful conduct…by unlawfully interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi[.]" *Indictment* (CID 2257294C).

3. The State alleges that the conduct took place between April 19, 2024 and June 6, 2024, in Merrimack County, but in terms of what "unlawful conduct" Justice Hantz Marconi is alleged to have committed, the indictment only describes "unlawfully interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi." *Id.* It does not identify the public servant, or the public servant's performance or purported performance of an official duty, that Justice Hantz Marconi is alleged to have interfered with. *Id.*

4. Other charges in this case and the discovery provided by the State show that the factual basis of the charge is an April 19, 2024 phone call between Justice Hantz Marconi and Chairperson Duprey and the June 6, 2024 meeting between Justice Hantz Marconi and then-Governor Christopher Sununu. However, Duprey told investigators that during the April 19th phone call, Justice Hantz Marconi did not try to interfere in the investigation or gain access to information unlawfully. *See, e.g.*, D60/60 (Duprey explaining that Justice Hantz "Didn't request it. Didn't request it, didn't suggest it"); D22/22 ("I think she was very appropriate in not trying to cross the line"); D25/25 ("she did not ask me to tell her any information…I think she was very careful"); D53/53 ("But she – she was careful not to say can you tell me what's going on? What can you tell me?").

5. Likewise, in that June 6th meeting Justice Hantz Marconi expressed her opinions about the suspension due to an Attorney General's investigation and her concerns about the effects of the announcement and investigation on her ability to serve as a Justice of the New Hampshire

Supreme Court. Sununu later told State investigators that there was no "ask" in the meeting, that Justice Hantz Marconi did not ask him to interfere in the investigation or ask him to do anything. *See, e.g.*, D131/14 ("there was no ask"); D133/16 ("there was no action request, no ask"); D134/17 ("Clearly not asking me to do anything"). Sununu said she did not "even imply" such a request and that, in his view, there was "nothing illegal" about the meeting. *See* D147/30 (she didn't "even imply that I should" do something); D154/37 ("I don't think there was anything illegal about it") Sununu's legal counsel, Rudy Ogden was present for the meeting and confirmed Sununu's account to investigators. *See, e.g.*, D195/15; D196-97/15-16; D206-07/25-26.

6. The relevant Obstructing Government Administration statute, RSA 642:1, I, provides that

> A person is guilty of a misdemeanor if that person uses intimidation, actual or threatened force or violence, simulated legal process, or engages in any other unlawful conduct with a purpose to hinder or interfere with a public servant, as defined in RSA 640:2, II, performing or purporting to perform an official function or to retaliate for the performance or purported performance of such a function.

Thus, the State has taken the residual clause of the statute, "engag[ing] in any other unlawful conduct" as a springboard to criminalize Justice Hantz Marconi's exercise of her First Amendment rights to express her opinions and concerns to Duprey and Sununu.

<u>The Statute's Legislative History Confirms It Does Not Reach Such the Conduct at Issue Here.</u>

7. Because "any other unlawful conduct" is ambiguous, the Court must look to the statute's legislative history and that of the Model Penal Code upon which the statute is based. The Report on the Codification of New Hampshire Laws explained that this statute "is a modified version of the Model Penal Code, § 242.1." *Report of Commission to Recommend Codification of Criminal Laws* § 587:1, comment at p. 93 (1969). The Commentary to the Model Penal Code for Section 242.1, in turn, shows that this statute was never intended to

reach core First Amendment activity. While that Commentary explains that there is a "broad residual offense" designed to "provide[] a hedge against the ingenuity of offenders" and to "facilitate[an] appropriately narrow definition of the serious forms of obstruction carrying felony penalties," the residual clause "must incorporate certain limitations lest it nullify policy decisions expressed elsewhere." Model Penal Code Commentary, § 242.1(2) at p. 203 (1985) (underline added). The Commentary immediately continues

> For example, Section 240.2(1)(d) of the Model Code restricts the crime of improperly influencing official behavior to the context of judicial or administrative proceedings and thus excepts from criminal liability simple requests for favored treatment from legislators, law enforcement officers, and the like. It would be inconsistent, therefore, to prohibit in Section 242.1 all efforts to obstruct, impair, or pervert a governmental function…. Finally, it is necessary to avoid drafting the residual obstruction offense in terms so expansive that they might be construed to cover political agitation against government policy or other exercise of civil liberties.

Id. (underline added). Thus, just as the Improper Influence statute does not apply to discussions with executive or legislative officials, *see D. Mots. to Dismiss Attempt to Commit and Criminal Solicitation of Improper Influence*, so too does the Obstructing Government Administration statute not apply to those same discussions.

8. The Commentary does not end there. It further goes on to explain that "Section 242.1 requires that the defendant *purposely* obstruct, impair, or pervert a government function by one of the specified means" and therefore "the provision requires that the actor have a conscious objective to engage in the conduct proscribed by this offense." Model Penal Code Commentary, §242.1(2) at p. 204 (1985) (italics in original). Since, as noted above, the offense explicitly excludes discussions with executive and legislative officials, the actor, Justice Hantz Marconi could not have had the "conscious objective to engage in the conduct proscribed by [the] offense." *Id.* Her conduct was explicitly not proscribed.

9. Even more to the point given the facts of this case, the Commentary goes on to say

> Section 242.1 further requires that the obstruction actually take place. Preparatory, incomplete, and equivocal conduct is excluded from the offense. Of course, prosecution for attempt may lie under Section 5.01, but in that case the actor's preparatory conduct must be sufficiently indicative of his obstructive purpose to amount to a substantial step toward completion of the offense.

Id. (underline added). The State has not alleged, nor can it allege, that any obstruction actually took place. Its own witnesses deny it. If the State has other, unrevealed evidence which it claims establish actual obstruction, it should be required to produce that information.

10. Finally, Comment 2 of the Commentary concludes with

> Section 242.1 does not punish all acts that obstruct a government function. The generality of the crime has been confined by limiting its application to (i) violent or physical interference, (ii) breach of official duty, and (iii) any other act that is unlawful independently of a purpose to obstruct the government. Certain forms of conduct are also expressly excepted from the reach of the provision.

Id. (underline added). Thus, the Commentary confirms that the catchall provision is not designed to punish any act that the State can construe as obstructing a government function. And since the State has not alleged that Justice Hantz Marconi committed any "violent or physical interference" or "breach of official duty," *see D. Mot. to Dismiss Official Oppression Charge or to Strike References to Code of Judicial Conduct*, it must allege an "act that is unlawful independent[] of a purpose to obstruct the government." Model Penal Code Commentary § 242.1(2) at p. 204. As the Commentary goes on to explain, this "phrase requires explication," and "[g]enerally, it refers to any affirmative violation of a legal duty, whether imposed by criminal statute, tort law, or administrative regulation," an "example would be impersonating a candidate in a civil service examination." *Id.* at § 242.1(5) , pp. 206-07. As the Commentary reiterates, an "important limitation on the reach of this phrase [other unlawful act] is that the act must be unlawful independently of the actor's purpose to obstruct government" because "[o]therwise, any obstructive conduct would suffice for liability under this section, and policy decisions expressed elsewhere in the Model Code would effectively be nullified." *Id.* Petitioning

executive or legislative officials is not unlawful, rather it is expressly protected by the First Amendment to the United States Constitution and by Part I, Articles 14, 22, and 31 of the New Hampshire Constitution. Such freedom is at the very core of representative government.

11. This commentary is important because the New Hampshire Supreme Court has said we look to the Model Penal Code and its commentaries for guidance." *State v. Formella*, 158 N.H. 114, 117 (2008). *See also State v. Lamy*, 158 N.H. 511, 515 (2009) (because "our Criminal Code is largely derived from the Model Penal Code…we have looked to the Model Penal Code and its commentaries when interpreting analogous New Hampshire statutes") (citing *State v. Donohue*, 150 N.H. 180, 183 (2003)); *State v. Chandonnet*, 124 N.H. 778, 780 (1984) ("We have held, however, that in addition to the language of the statute itself, 'the legislative history of a statute can be taken into consideration in arriving at its meaning….Reports of commissions established to prepare or recommend statutory revisions can prove to be valuable aids in construing particular statutes.'") (quoting *Corson v. Brown Prods.*, 119 N.H. 20, 23 (1979)).

Prior Precedent Shows the Statute Does Not Reach the Alleged Conduct.

12. The cases of *State v. Diamond*, 146 N.H. 691 (2001) and *State v. Briggs*, 147 N.H. 431 (2002) confirm that the obstruction statute does not reach the First Amendment conduct at issue here.

13. In *Diamond*, the defendant was convicted of Obstructing Government Administration for stepping in front of a police officer who had arrested a protestor for disorderly conduct and refusing to move despite his repeated commands. *Diamond*, 146 N.H. at 692-93. The defendant was charged under the "unlawful act" provision of RSA 642:1. *Id.* at 695. The defendant contended that because "standing in front of an officer and refusing to move when directed [was] not otherwise unlawful under any criminal law, tort law, or administrative regulation," he could not be convicted. *Id.* The Supreme Court disagreed, and agreed with the State, that the other

unlawful act that the defendant was committing was disorderly conduct in that the defendant refused a lawful order issued to a person to prevent him from committing the crime of resisting arrest. *Id.* at 695-96.

14. Here, by contrast, the State has not alleged a specific crime that Justice Hantz Marconi committed (nor could it because of her First Amendment rights) and instead offers the conclusory claim that she was "unlawfully interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi." *Indictment* (CID 2257294C). Those allegations are false, but even if wrongly assumed to be true, they fail to state a criminal offense and therefore cannot serve as the predicate "unlawful act" required by *Diamond* and the statute.

15. Furthermore, in *Diamond*, the defendant alleged that, as discussed above, "the commentary to the analogous Model Penal Code provision cautions against drafting the provision so broadly that it might apply to political protest over government policy or the exercise of other civil liberties." *Id.* at 696. But because the defendant did not argue that the plain language of the statute was ambiguous, as Justice Hantz Marconi has here, the Court found "no justification for looking beyond the plain language of the statute." *Id.* Furthermore, the Court agreed with the State that the "defendant's conduct was not passive political protest" because he "actually stepped in front of" the police officer, and therefore "notwithstanding its alleged political motivation, [the defendant's conduct] falls within the scope of RSA 642:1." *Id.* at 696-97. Stepping in front of a police officer as he is arresting someone, even during a political protest, is a far cry from expressing one's opinions about a matter of public importance to an executive official.

16. Relatedly, in *Briggs*, the defendants were charged and convicted of Obstructing Government Administration for arguing with a Fish and Game officer and using a vehicle to

block the officer's ability to leave the property. *Briggs*, 147 N.H. at 432-33. On appeal, "the defendants argued that there was insufficient evidence that they acted with the requisite mental state to commit the crime of obstructing government administration." *Id.* at 433. Finding that there was, our Court explained that "[w]ith respect to intent…the statute requires only a conscious object to interfere with the public servant; the defendant's underlying or ultimate motive for doing so is irrelevant." *Id.* at 434. Because the defendants had "in fact, interfered with an officer who was performing an official function" and two of the defendants testified as to their desire to block the officer's truck, that was their "conscious object." *Id.* Thus "there was sufficient evidence to find that each of the defendants acted 'purposely.'" *Id.*

17. The Court in *Briggs* had no trouble concluding that the Fish and Game officer was performing an official function because he was checking fields for illegal activity, even if the obstruction took place while he was attempting to exit the fields. *Id.* at 434-35. Here, however, the indictment fails to specify which public official was performing an official function, and the State has already conceded that the Governor has no authority or discretion over an Attorney General investigation.

18. Finally, relevant to the overbreadth challenge made below, *Briggs* involved an entirely different situation. The Court explained that "[b]ecause the defendants do not have a protected freedom to interfere with an officer performing an official function" it could reject the defendants' arguments. *Briggs*, 147 N.H. at 435. In contrast to those circumstances, all citizens of New Hampshire, including justices of the Supreme Court, have a protected freedom in informing executive and legislative officials about matters of public concern, whether that be pending legislation, suspensions of government employees, government investigations, government policies, or other government activities. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all

matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). *See also Meyer v. Grant*, 486 U.S. 414, 421, 425 (1988) (citizens' "right freely to engage in discussions concerning the need for [political] change is guarded by the First Amendment" where "the importance of First Amendment protections is 'at its zenith'"); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("each and every citizen has an inalienable right to full and effective participation in the political processes…").

<u>Persuasive Precedent from Other Jurisdictions Shows that The Statute Must Yield to Constitutional Guarantees.</u>

19. The Maine Supreme Court's decision in *State v. Janisczak*, 579 A.2d 736 (Me. 1990) is instructive. There, the defendant was charged with obstructing government administration for approaching police and yelling and hurling epithets at police while they attempted to arrest another individual. *Id.* at 737-38. The Maine Supreme Court was tasked with determining whether there was sufficient evidence to conclude that the defendant "engaged in a criminal act [Maine's equivalent of "engag[ing] in any other unlawful conduct] with intent to obstruct the arrest." *Id.* at 738. The Court agreed with the defendant that "the conduct for which he could be found criminally liable under the disorderly conduct statute – intentionally making loud and unreasonable noises – falls, in these circumstances, within the scope of constitutionally protected speech, and therefore evidence of his conduct [could] not be used to convict him." *Id.* at 739. If "intentionally making loud and unreasonable noises," *id.*, falls "within the scope of constitutionally protected speech," so too does informing government officials about one's opinion of a suspension, investigation, and the effect of that investigation on the performance of one's job.

<u>Beyond the Statute's Text and Legislative History, the Obstructing Government Administration Statute Is Constitutionally Void for Overbreadth, Both Facially and As Applied.</u>

20. The point of the foregoing is that the Court should not reach the constitutional arguments raised herein because the statute does not apply to the conduct described in the indictment. However, if the Court accepts the State's interpretation of the statute and finds the conduct described in the indictments is covered by the statute, then the defense challenges the Obstructing Government Administration statute as unconstitutionally overbroad, on its face and as applied in this case.

Overbreadth.

21. 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*]

22. "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).

23. The State'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. The Accused asks this Court to look to the statute's plain text and legislative history to interpretate RSA 642:1, I to "supply a limiting construction of the statute" that would "limit the scope of the statute without invading the province of the legislature." *Brobst*, 151 N.H. at 423. But if it does not, and it accepts the State's interpretation, contrary to the plain text of the law and its legislative history, the statute is also unconstitutionally overbroad, both facially and as applied.

Facial Overbreadth.

24. "'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)).

25. 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 D. Mot. to Dismiss*, ¶¶ 12-25. The State's interpretation of the Obstructing Government Administration 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).

26. 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.

27. Similarly here, the citizens of New Hampshire who may wish to inform 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 said investigations with their elected officials, even when those officials have no influence over said investigations. The State could prosecute any public comment on government activities merely by alleging that such commentary was intended to obstruct government administration. Nothing could be more antithetical to representative government.

28. 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).

29. The State's interpretation of the Obstructing Government Administration statute 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).

30. The State's expansive interpretation of the Obstructing Government Administration statute 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 Obstructing Government Administration statute that could criminalize any number of discussions, arguments, opinions, petitions, ad the like aimed at public officials.

As Applied Overbreadth.

31. Even if this Court determines that the Obstructing Government Administration statute is not facially overbroad, the Court still must determine whether it is "unconstitutional as applied to the particular facts of this case." *State v. Theriault*, 158 N.H. 123, 126 (2008).

32. It is here. The State alleges that Justice Hantz Marconi "engaged in…unlawful conduct…by unlawfully interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi." *Indictment* (CID 2257294C).

33. As the Accused has consistently maintained, the State alleges no threats, promises, bribes, asks, or anything of the like. *See also D. Mot. Dismiss for First Amendment and Judicial Immunity* at ¶¶ 8-11, 25; *D. Reply St. Obj. Mot. Dismiss* at ¶¶ 13-17, 23). 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).

34. 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).

35. If the State can successfully allege that the mere expression of opinion and concern for her continued service on the Supreme Court, without any improper asks, threats, bribes, or the like, obstructs government administration, then the State's interpretation sweeps in broad swaths of constitutionally protected conduct. Moreover, defendants will be forced to wait through the State's presentation of evidence before raising an as applied challenge, forcing them to bear the significant burdens of a criminal prosecution, trial, and potential appeal before they can vindicate their constitutional rights. *See, e.g.*, *State v. Sargent*, 176 N.H. 713 (2024) (conviction reversed on non-constitutional grounds).[2]

As Interpreted by the State, the Statute Is Also Void for Vagueness, Both Facially and As Applied.

36. 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 Obstructing Government Administration statute as unconstitutionally vague, on its face and as applied in this case.

[2] If the State has any evidence of other conduct or circumstances alleged to support its charge of Obstructing Government Administration, beyond what is set forth in the indictment 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.

37. 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.

38. If the Court accepts the State's interpretation of RSA 632:1, I, the statute is unconstitutionally vague on its face because it fails to supply the citizens of New Hampshire with "a reasonable opportunity to understand what conduct is prohibits" and because it "authorizes or even encourages arbitrary and discriminatory enforcement." *Wilson*, 169 N.H. at 770.

39. "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 Obstructing Government Administration statute criminalizes "intimidation, actual or threatened force or violence, simulated legal process,

or engag[ing] in any other unlawful conduct with a purpose to hinder or interfere with a public servant….performing or purporting to perform an official function." RSA 642:1, I.

40. Crucially here, the statute does not define "unlawful conduct" or "official function." The other *actus rei* of the statute are "intimidation, actual or threatened force or violence, [or] simulated legal process." These are all either well-established crimes or elements of other well-established crimes. *See, e.g.*, RSA 649:40-b (prohibiting intimidation of election officers); RSA 659:40, II (prohibiting voter intimidation); RSA 631:7 (student hazing can involve intimidation); RSA 632-A:2 (aggravated felonious sexual assault can involve actual use of force); RSA 636:1 (robbery can involve use or threatened use of force); RSA 631:2-b (domestic violence can involve use or threatened use of force); RSA 507:15 (prohibiting frivolous legal actions); RSA 638:14 (prohibiting simulation of legal process); RSA 633:6, VI (defining "abusing or threatening abuse of law or legal process").

41. The statutory construction canon *noscitur a sociis* holds that "the broader term itself takes on the more specialized character of its neighbors, under the rule that applies as to well to one term within a series as it does to an individual within a group." *Home Gas Corp. v. Strafford Fuels*, 130 N.H. 74, 82 (1987).

42. Interpreting "unlawful conduct" to include constitutionally protected First Amendment activity, and "official function" to include any government action, leaves the citizens of this State potentially criminally liable for conduct "he or she could not reasonably understand to be proscribed." *Pratte*, 158 N.H. at 48. The State could charge any conversation with a government employee or any social media post about government operations as Obstructing Government Administration. But "[m]aintenance of the opportunity for free political discussion is a basic tenant of our constitutional democracy." *Cox v. Louisiana*, 379 U.S. 559, 552 (1965).

43. Likewise, 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)).

44. 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))

45. The Obstructing Government Administration statute as written and as interpreted by the State leaves unfettered discretion to law enforcement and prosecutors to unilaterally determine what speech obstructs government administration. It lets them pick and choose which statements to public officials are obstructive and which are not.

Vague As Applied.

46. The State's construction of RSA 642:1, I is unconstitutional as applied to Justice Hantz Marconi.

47. The indictment is vague as applied because it describes a 48-day window (April 19 to June 6) when Justice Hantz Marconi is alleged to have engaged in unspecified unlawful conduct with a purpose to hinder or interfere with an unnamed public servant(s) performing unknown official functions.

48. As detailed above, the evidence produced in discovery does not identify any unlawful obstruction. There is no evidence of a request for a benefit or for any action. Sununu himself denies any such request and denies perceiving anything illegal about the conversation. Where Sununu himself says there was no effort to cause him to engage in any conduct or to prevent him from engaging in any conduct, and where he has no power over any investigation conducted by the Attorney General, then there cannot be any obstruction of his actions as a government official. More to the point here, if no one, including Sununu, is able to divine what conduct the State claims was a crime, how is any reasonable person supposed to be on notice? This is exactly this kind of vagueness – the law being undefined and mercurial, meaning whatever the State wants it to mean in any particular situation – that permits and even encourages arbitrary and discriminatory enforcement.

49. In short, even if not facially vague, the manner in which the State attempts to interpret the statute and apply it here certainly renders the statute unconstitutional.

<u>The "Speech Integral to Criminal Conduct" Doctrine Does Not Save this Indictment.</u>

50. 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).

51. 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).

52. *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.

53. 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.

54. 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.

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[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.

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 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 it 'at its zenith.'"); *Buckley v. Am. Constitutional Law Found*., 525 U.S. 182, 186-87 (1999) (quoting same).

55. 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.

56. Unfortunately, that is precisely what the State has done here. The State has alleged that merely by 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 obstructed government administration. That is not how our system works.

Conclusion.

For all of the foregoing reasons, the Court should dismiss the indictment for Obstructing Government Administration.

WHEREFORE, the defense respectfully requests that the Court dismiss the indictment for Obstructing Government Administration.

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