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 OFFICIAL OPPRESSION AND CRIMINAL SOLICITATION OF OFFICIAL OPPRESSION

The defense moves to dismiss the indictments for Official Oppression and Criminal Solicitation of Official Oppression because, according to 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 committed the crime of Official Oppression, RSA 643:1, in that, "with a purpose to benefit herself or another or to harm

[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").

another," she "knowingly committed an unauthorized act which purported to be an act of her office or knowingly refrained from performing a duty imposed on her by law or clearly inherent in the nature of her office…by interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi; and/or violating the New Hampshire Code of Judicial Conduct." *Indictment* (CID 2257292C).

2. The State also alleges that the Justice criminally solicited Official Oppression "with the purpose that another engage in conduct constituting" that crime, when she allegedly "commanded, solicited, or requested another to engage in such conduct…by soliciting Governor Christopher Sununu to misuse his position and/or otherwise interfere with an investigation into Geno Marconi." *Indictment* (CID 2257293C).

3. The defense challenge to the State's reliance on the Code of Judicial Conduct is the subject of a separate motion. *See D. Mot. to Dismiss Official Oppression Charge or to Strike References to Code of Judicial Conduct*. Here, the defense establishes that the Official Oppression statute, RSA 643:1, cannot be applied to Justice Hantz Marconi's alleged conduct in light of the recent *State v. Sargent*, 176 N.H. 713 (2024) decision, and furthermore, that application of the Official Oppression statute, or the combination of the inchoate crime of Criminal Solicitation with the substantive crime of Official Oppression, is both unconstitutionally overbroad and void for vagueness, both facially and as applied.

<u>The Plain Text of the Official Oppression Statute and Our Court's Recent Decision in *State v. Sargent* Shows that the Statute Does Not Reach the Conduct Alleged in the Indictments.</u>

4. The Official Oppression statute reads that

> A public servant, as defined in RSA 640:2, II, is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

RSA 643:1.

5. Our Court recently interpreted this statute in *State v. Sargent*, 176 N.H. 713 (2024). Considering the meaning of "to benefit oneself," the Court concluded that the person "must seek a specific advantage or gain that is more than a momentary or fleeting personal, emotional, or psychological benefit," that is, the accused "acts with a purpose to obtain specific advantage, or to advance or improve his or her situation or that of another." *Id.* at 719. The facts in *Sargent* were insufficient to prove beyond a reasonable doubt "that the defendant sought 'to benefit himself' when he communicated with the complainant" because, although "the defendant sought 'a sympathetic listener' who could provide the defendant with 'company, emotional support, reassurance, validation and other intangible support one would expect from a close personal friend,'" such "'intangible support' is not an advantage or gain that establishes that the defendant sought 'to benefit himself' within the meaning of RSA 643:1." *Id.* at 719, 721. To conclude otherwise, the Court warned, "then potentially *any conversation*…that provided him a momentary personal benefit could constitute a benefit pursuant to RSA 643:1." *Id.* at 720 (italics added).

6. Furthermore, the *Sargent* Court explained, the defendant "never *issued an order* or *made a specific request* or overture of the complainant that would have benefited him, nor did he seek a specific gain or advantage." *Id.* (italics added). Even "suggestive" communications, the Court concluded, did not constitute "a desire for a specific benefit," *id.*, because even possibly "inappropriate" communications that "may warrant employment discipline or termination" do not prove, beyond a reasonable doubt, "that the defendant purposely sought 'to benefit himself,' as contemplated by RSA 643:1." *Id.* at 720-21.

7. In addition, the Court's discussion in footnote one, *id.* at 720, lays out the limits of what constitutes an "unauthorized act." In *Sargent*, the State alleged that the defendant's explicit request that "the complainant come to his house and deliver wine and/or gifts from a community

member while the complainant was on duty" represented an unauthorized act. *Id.* The Court disagreed. "[W]hile potentially inappropriate," the Court explained, such conduct did "not violate the sexual harassment policies" of the town and police department. *Id.* Conversely, if the defendant's objective was "an attempt to get the complainant to physically come to his house, which, when taken in context, violated the sexual harassment policies, the benefit the defendant would have sought in such a case would not have been the wine and/or gifts, but, rather, the complainant's company." *Id.* And that, in turn, would not constitute a benefit as per the Court's earlier analysis. *Id.*

8. Applying the principles established in *Sargent*, the State has not and cannot identify a specific request or ask by Justice Hantz Marconi to then-Governor Sununu. Therefore, the State cannot establish that Justice Hantz Marconi acted "with a purpose to obtain a specific advantage, or to advance or improve…her situation or that of another." *Sargent*, 176 N.H. at 719. The discovery may suggest that Justice Hantz Marconi may have sought a "sympathetic listener" but that is precisely the sort of "intangible support" that our Court concluded "is not an advantage or gain that establishes that the defendant sought 'to benefit [her]self' within the meaning of RSA 643:1." *Id.*

9. Second, beyond the Code of Judicial Conduct, which is addressed in another defense motion, the State has not alleged how Justice Hantz Marconi committed an "unauthorized act." Even consulting the Code, Rule 3.2 specifically authorizes Justice Hantz Marconi's conduct. Rule 3.2 ("A judge shall not…consult with an executive…official, except in connection with matters concerning the law, legal system or administration of justice…or, when the judge is acting pro se in a matter involving the judge's legal or economic interests…). Nevertheless, the plain text of the statute is clear: the "unauthorized act" must "purport[] to be an act of [her] office." RSA 643:1. The State has not alleged and cannot allege any such act, considering the

discovery produced. Sununu denies any such conduct, saying he saw nothing illegal, and his account is confirmed by his own legal counsel. *See, e.g.*, D131/14; D133/16; D134/17; D147/30; D154l37; D195/15; D196-97/15-16; D206-07/25-26. *See also* Court's March 19, 2025 Order (concluding that "deliberative statements involving recusal" are not "the substance of the Defendant's conversations *as alleged*.") (emphasis added)).

The History of the Official Oppression Statute Confirms that It Was Not Designed to Reach the Conduct Alleged Here.

10. RSA 643:1, the Official Oppression statute, was adopted in 1971. As the *Report of Commission to Recommend Codification of Criminal Laws* explains,

> This section is based on New York Penal Law, § 195.00. It replaces RSA 587: 31 which punishes any public officer who "wilfully [sic] neglects any duty of his office". Under this section, it is clear that the offense may be committed by affirmative acts as well as by omission. It is limited by the requirement that the official seek to benefit himself or hurt another when he acts improperly. Mere bad judgment is not an offense.

Commission to Recommend Codification of Criminal Laws, *Report of Commission to Recommend Codification of Criminal Laws* § 588:1 cmt at 97 (1969). The Commission Staff Notes to the analogous New York penal law, § 195.00, explains that it is a replacement for "some thirty former Penal Law provisions which defined misdemeanor offenses of misfeasance and nonfeasance by public servants" that now "condenses this general area of official misconduct into one offense." N.Y. Penal Law § 195.00 (Consol., Lexis Advance through 2025 released Chapters 1-7). *See also People v. Feerick*, 93 N.Y.2d 433, 445 (1999) (the "current official misconduct statute replaced more than 30 prior crimes, all of which dealt with specific malfeasance or nonfeasance in the accomplishment of official duties"). The Commission Staff Notes further explain that a "specific mens rea is predicated: criminal liability only attaches only when the offender intends 'to obtain a benefit or to injure or deprive another person of a benefit'" so as to "exclude[] unauthorized conduct or neglect of duty, which, though possibly a

proper basis for removal or disciplinary action in some instances, does not seem a fair basis for the automatic imposition of criminal sanctions." *Id. See also Feerick*, 93 N.Y.2d at 445 ("The Legislature intended to encompass flagrant and intentional abuse of authority by those empowered to enforce the law.").

11. The statute has two mens rea requirements. Under the New York statute, "the People not only must show that the public servant knew his or her acts were an 'unauthorized exercise of his official functions' but also must show that the public servant did so with the 'intent to obtain a benefit or deprive another person of a benefit.'" *Id.* at 446. That is because "the Legislature sought to ensure that good faith miscalculations in the exercise of official judgment did not run the risk of a criminal prosecution." *Id.* Furthermore, the "Bartlett Commission, which drafted and recommended the official misconduct statute, stated that this benefit ingredient 'excludes unauthorized conduct or neglect of duty, which, though possibly a proper basis for removal or disciplinary action in some instances, does not seem a fair basis for the automatic imposition of criminal sanctions.'" *Id.* (citation omitted). "Proof that a public servant intended to receive a benefit along with proof that he or she also knew the acts were 'unauthorized' *negates* the possibility that the misconduct was the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum" and thereby "erects high barriers to prevent a criminal court from reviewing mere errors of judgment on the part of public officials." *Id.* at 448 (italics in original).

12. The meeting in which Justice Hantz Marconi expressed to Governor Sununu her opinions about a suspension and criminal investigation over which he had no authority, and her frustration because the investigation was interfering with her duties as a Justice of the New Hampshire Supreme Court, is outside of the intended scope of prohibited conduct.

Beyond the Statutes' Text and Legislative History, As Interpreted by the State, These Statutes Are Constitutionally Void for Overbreadth, Both Facially and As Applied.

13. The point of the foregoing is that the Court should not reach the constitutional arguments raised herein because the statutes do not apply to the conduct described in the indictments. However, if the Court accepts the State's interpretation of the statutes and finds the conduct described in the indictments is covered by the statutes, then the defense challenges the Official Oppression statute, both independently and in combination with the Criminal Solicitation statute, as unconstitutionally overbroad, on its face and as applied in this case.

Overbreadth

14. 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*]

15. "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).

16. 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. The defense asks this Court to look to the statute's plain text and legislative history to interpretate RSA 643:1 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, the defense challenges the constitutionality of the statutes.

Facial Overbreadth

17. "'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).

18. 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 Official Oppression 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).

19. 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.

20. 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 <u>prohibited</u> from commenting on said investigations with their elected officials, because such commentary constitutes an "unauthorized act" which interferes with, attempts to interfere with, or solicits another to interfere with the investigation. The State could prosecute any public comment on government activities merely by alleging that such commentary was

intended to "interfere" with government officials. Nothing could be more antithetical to representative government.

21. 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).

22. The State's interpretation of the Official Oppression 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. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citations omitted).

23. The State's expansive interpretation is not narrowly tailored to serve a compelling state interest. Its interpretation of the Official Oppression statute and the Criminal Solicitation statute 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 Official Oppression statute that could criminalize any number of discussions, arguments, opinions, petitions, and the like aimed at public officials.

As Applied Overbreadth.

24. Even if this Court determines that the Official Oppression statute and the combination of the Criminal Solicitation and Official Oppression statutes are not facially overbroad, the Court still must determine whether they are "unconstitutional as applied to the particular facts of this case." *State v. Theriault,* 158 N.H. 123, 126 (2008).

25. They are here. The State alleges that Justice Hantz Marconi, "with a purpose to benefit herself or another or to harm another, knowingly committed an unauthorized act which purported to be an act of her office; or knowingly refrained from performing a duty imposed on her by law or clearly inherent in the nature of her office…by interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi[.]" *Indictment* (CID 2257292C). It further alleges that Justice Hantz Marconi, "with the purpose that another engage in conduct constituting the crime of Official Oppression, commanded, solicited, or requested another to engage in such conduct…by soliciting Governor Christopher Sununu to misuse his position and/or otherwise interfere with an investigation into Geno Marconi[.]" *Indictment* (CID 2257293C).

26. As the defense has consistently maintained, 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. The plain text of the relevant portion of the Official Oppression statute requires an "unauthorized act which purports to be an act of…office" or "refrain[ing] from performing a duty imposed…by law or clearly inherent in the nature of his office." RSA

643:1. But if the State can successfully allege that the mere expression of opinion, without any improper asks, threats, bribes, or the like, constitutes an unauthorized act or the failure to perform a duty clearly inherent in the nature of the office, then the State's interpretation sweeps in broad swath s of constitutionally protected conduct. All public officials would be prevented from expressing their opinions, while at the same time non-public officials would be prevented from offering opinions to public officials. Our Legislature has already preempted such a move: "a person employed as a public employee in any capacity shall have a 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 Appeal of Booker*, 139 N.H. 337 (1995). Furthermore, "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." RSA 98-E:2.

27. 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]

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

28. 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

[2] If the State has any evidence of other conduct or circumstances alleged to support its charges of Official Oppression or Criminal Solicitation of Official Oppression, 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.

Official Oppression statute, alone and in combination with the Criminal Solicitation statute, as unconstitutionally vague, on its face and as applied in this case.

29. 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

30. If the Court accepts the State's interpretation of RSA 643:1, 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.

31. "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)).

32. As discussed above the Official Oppression statute does not define "benefit" or "unauthorized act." The *Sargent* Court, *see* ¶¶ 5-7 *supra*, limited the scope of benefit to avoid criminalizing "any conversation…that provided…a momentary personal benefit." *Sargent*, 176 N.H. at 720. There must be some "*actual* advantage" and cannot be so broad as to encompass "the momentary personal, emotional or psychological." *Id.* at 718-19 (italics in original). But if expressions of opinions about government affairs, without any specific ask or request, constitute an illegal benefit or the criminal solicitation of an illegal benefit, then an "ordinary person exercising ordinary common sense" would have no way to "sufficiently understand and comply with" the law. *Lamarche*, 157 N.H. at 340. How are public employees to know what they can say when on the one hand, they "shall have a 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, and on the other hand, the State will criminally prosecute those same public employees for Official Oppression (or Criminal Solicitation of Official Oppression) for those very opinions? In the same vein, how do ordinary citizens know when and when not to offer opinions to public officials to avoid prosecution for soliciting Official Oppression?

33. 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)).

34. 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))

35. The Official Oppression statute as currently interpreted by the State leaves unfettered discretion to law enforcement and prosecutors to unilaterally determine what constitutes the sort of "unauthorized act" or "benefit" that violates the statute.

Vague As Applied.

36. The State's construction of RSA 643:1 is unconstitutional as applied to Justice Hantz Marconi. The "unauthorized act" alleged in the indictment is a meeting between Justice Hantz Marconi and then-Governor Sununu where she expressed her opinions about the suspension and investigation into her husband and its effect on her ability to fulfil her duties as a Justice of the New Hampshire Supreme Court. *See Indictments* (CID 2257292C, 2257293C).

37. Justice Hantz Marconi's expressions of her opinions and its effect on the Court are not "unauthorized acts." 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.

38. Furthermore, 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. He told State investigators 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. And for that very reason, Sununu did not "think there was anything illegal about it." D154/D35; *see also* D144/27.

39. The State cannot use the undefined phrases "to benefit" and "unauthorized act" to criminalize conversations with elected officials about matters of public or private concern. But that is precisely what it has done here.

<u>Using the Inchoate Crime of Criminal Solicitation Does Not Render Vague Statutes Clear.</u>

40. The State's decision to also charge the inchoate crime of Criminal Solicitation, in addition to the substantive crime of Official Oppression, does not save the indictment.

41. 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.

42. 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).

43. 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).

44. Regarding First Amendment concerns, the Commentary describes 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). *Model Penal Code* § 5.02(3)(b), pp. 377-79 (1985). *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.")

45. In *State v. Carr*, 167 N.H. 264 (2015), our Court discussed the necessary elements of a Criminal Solicitation indictment but did 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)

46. "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).

47. 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 Criminal Solicitation to commit a crime.

48. Here, the State has not alleged that Justice Hantz Marconi strongly urged anyone to do anything unlawful. Rather, the indictment only alleges 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[.]" *Indictment* (CID 2257293C). The indictment does not identify what unauthorized act, purporting to be an act of his office, the Governor was solicited to perform, again leaving it up to conjecture and surmise.

<u>Nor Is the State Saved by the "Speech Integral to Criminal Conduct" Exception to the First Amendment.</u>

49. 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).

50. 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).

51. *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.

52. 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.

53. 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.

[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).

54. 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.

55. 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 about an ongoing suspension and investigation, Justice Hantz Marconi has committed the crimes of Official Oppression and Criminal Solicitation of Official Oppression.

Conclusion.

For all of the foregoing reasons, the Court should dismiss the indictments for Official Oppression and Criminal Solicitation of Official Oppression.

WHEREFORE, the defense respectfully requests that the Court dismiss the indictments for Official Oppression and Criminal Solicitation of Official Oppression.

Dated this 18th day of April, 2025.

Respectfully submitted,

/s/ Richard Guerriero
Richard Guerriero
N.H. Bar # 10530
Oliver Bloom
N.H. Bar # 277555
Lothstein Guerriero, PLLC
Chamberlain Block
39 Central Square, Suite 202
Keene, NH 03431
(603) 352-5000

Jonathan Kotlier
Pro Hac Vice, by 2024-10-23 order of this court
Nutter, McClennen & Fish
155 Seaport Blvd
Boston, MA 02210
(617) 439-2000

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