

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

October Term, 2024

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

MOTION TO DISQUALIFY THE NEW HAMPSHIRE ATTORNEY
GENERAL'S OFFICE AND TO DISMISS ALL INDICTMENTS

The Accused moves to disqualify Attorney General John Formella, and all attorneys from his office, and to dismiss the indictments in this case.

By all accounts, including his own, Attorney General Formella is, and has been for years, Governor Christopher Sununu's lawyer. At the same time, in the role of public prosecutor representing the People of the State of New Hampshire, Formella has brought criminal charges against Justice Anna Barbara Hantz Marconi. Formella's key witness in the criminal prosecution of Justice Hantz Marconi is his client, Governor Sununu.

Formella cannot be an impartial and fair prosecutor in these circumstances. When a prosecutor in a criminal case represents a key witness in other matters, the prosecutor has a conflict of interest. He cannot prosecute the criminal case on behalf of the People of the State because he is limited by his duties, such as the duties of loyalty and confidentiality, to his client – the witness. And when the prosecutor is the chief prosecutor in an office, with statutorily mandated duties to direct and supervise his subordinate attorneys, the entire office must be disqualified.

Every accused person has a constitutional right to a prosecutor who evaluates allegations fairly and impartially and only files charges which are justified. When prosecutors act in spite of

conflicting loyalties, they do a disservice to the People and violate the rights of the accused, especially when they take actions as consequential as indicting a sitting Supreme Court Justice.

Attorney General Formella and his subordinate attorneys should not have been handling this matter before the grand jury and should not be prosecuting it now. The Attorney General's Office should be disqualified and all of the indictments dismissed.

Attorney General John Formella Is Governor Christopher Sununu's Lawyer.

1. Christopher Sununu ("Sununu" or "the Governor") is the Governor of New Hampshire.
2. John Formella ("Formella" or "the Attorney General") is the Attorney General of New Hampshire.
3. Before Governor Sununu nominated Formella to be the Attorney General, Formella worked as a private attorney handling legal matters for the Governor and his family. *See* Michael Kitch, *Man in the middle: At 35, John Formella makes his mark as New Hampshire's attorney general*, NH Business Review 8 (July 15, 2022).¹ *See also* Josh Rogers, *After Years Behind The Scenes, Formella Hopes For Bigger Stage As N.H.'s Attorney General*, NHPR (March 17, 2021).² Furthermore, the Attorney General worked on the Governor's political campaign, served on his transition team, and then went on to serve as the Governor's legal counsel. *See* Kitch, *Man in the middle, supra*.
4. On January 5, 2017, Formella became legal counsel for Governor Sununu. *See* News Release, *Sununu To Nominate John Formella As Attorney General*, InDepthNH (March 2,

¹ <https://read.nhbr.com/nh-business-review#2022/07/15/?article=3996683>

² <https://www.nhpr.org/nh-news/2021-03-17/after-years-behind-the-scenes-formella-hopes-for-bigger-stage-as-n-h-s-attorney-general>

2021).³ Sununu selected Formella as his legal counsel in 2016 prior to assuming office. *See Sununu names former GOP chairwoman as chief of staff*, Associated Press (Dec. 21, 2016).⁴

5. On March 3, 2021, Governor Sununu nominated Formella for the position of Attorney General. *Governor and Executive Council Minutes* (March 3, 2021).⁵ On March 24, 2021, the Governor and Executive Council confirmed Formella for Attorney General. *Governor and Executive Council Minutes* (March 24, 2021).⁶ *See also Governor Chris Sununu Statement on John Formella Confirmation* (March 24, 2021).⁷

6. On April 22, 2021, based on Sununu’s nomination and following Executive Council approval, Formella was sworn in as Attorney General for the State of New Hampshire. *John Formella, New Hampshire Attorney General*, National Association of Attorneys General.⁸

7. As Attorney General, Formella is the chief prosecutor for the State of New Hampshire and he is directly responsible for the prosecution of all criminal cases. His client in criminal cases is the People of the State of New Hampshire. As explained in *Wyman v. Danais*, 101 N.H. 487, 490 (1958), the Attorney General has the “ultimate responsibility for criminal law enforcement.” *Wyman* reiterated the “broad language” from *State v. Swift*, 101 N.H. 340, 342-343 (1958), that the Attorney General “is specifically charged with enforcement of the criminal laws of the state, and with supervision of criminal cases pending before the Supreme and Superior Courts,” and that this is “supported by broad statutory language.” *Wyman*, 101 N.H. at

³ <https://indepthnh.org/2021/03/02/sununu-to-nominate-john-formella-as-attorney-general/>

⁴ <https://apnews.com/general-news-ecb1d6adf63648bb85f93d8762919efd>

⁵ <https://sos.nh.gov/media/adsb5eo1/gc-minutes-030321.pdf>

⁶ <https://sos.nh.gov/media/uw1njacy/gc-minutes-032421.pdf>

⁷ <https://www.governor.nh.gov/news-and-media/governor-chris-sununu-statement-john-formella-confirmation>

⁸ <https://www.naag.org/attorney-general/john-formella/>

490. He “[r]epresent[s] the public interest in the administration of the department of justice....”
RSA 21-M:5, I.

8. At the same time, in civil matters, Attorney General Formella represents the Governor and state agencies. The Department of Justice is responsible for “[a]dvising and representing the state and its executive branch agencies in all civil legal matters.” RSA 21-M:2. *See also* RSA 7:6 (“The attorney general shall act as the attorney for the state...”). *Cf. ATV Watch v. N.H. Dep’t of Transp.*, 161 N.H. 746, 761 (2011) (holding that two state agencies, represented by the attorney general’s office, were covered by the attorney-client privilege).

9. Formella himself has said that, outside of the criminal prosecution context, Governor Sununu is his client and that they have an attorney-client relationship. *See* NH Journal Podcast, *AG John Formella Talks About Life as NH’s Top Cop*, at 20:27 (Feb. 1, 2023) (“Have we worked closely together in the past? Everyone knows I was his legal counsel, so we have a very close relationship.”) (underline added); *id.* at 19:37 (“As far as the relationship with the governor, for every attorney general, the governor is probably their most important client. So it’s an attorney-client relationship.”) (underline added).⁹

10. The Department of Justice itself has confirmed an attorney-client relationship between Governor Sununu and Attorney General Formella. *See* Press Release, *Attorney General Memo to Governor Sununu Regarding Covid-19 Grant Conditions*, New Hampshire Department of Justice (Oct. 8, 2021) (releasing memo and associated exhibits from the Attorney General “because the Governor has agreed to waive the attorney-client privilege...”) (underline added)¹⁰; Kevin Landrigan, *State House Dome: Protest leaders insist arrests were excessive*, Union Leader

⁹ <https://nhjournal.com/podcast-exclusive-ag-john-formella-talks-about-life-as-nhs-top-cop/>

¹⁰ <https://www.doj.nh.gov/news-and-media/attorney-general-memo-governor-sununu-regarding-covid-19-grant-conditions>

(Oct. 16, 2021) (quoting Attorney General Formella that the opinion “was sent just to the governor, and the governor had the ability to waive the attorney-client privilege”) (underline added).¹¹ See also Ethan DeWitt, *As Sununu indicates support, legal questions around ‘provisional ballot’ bill persist*, NHPR (June 7, 2022) (Michael Garrity, spokesperson for the New Hampshire Attorney General’s Office, explaining that the DOJ “would not comment on any of our attorney-client communications with the governor’s office”) (underline added)¹²; John DiStaso, *NH Attorney General explains why he believes Biden vaccine-testing mandate is ‘not legal,’* WMUR (Sept. 17, 2021) (Formella explaining that “he consulted with the Gov. Chris Sununu as the head of the executive branch ‘and as a client of the office.’”) (underline added)¹³; Mike Grandy, *Memorandum Re: Review and analysis of concerns regarding Wellpath Recovery Solutions, LLC (“Wellpath”) contract to provide child and young adult psychiatric in-patient services at Hampstead Hospital*, New Hampshire Department of Justice (May 3, 2022) (describing memo sent from Department of Justice to Governor Sununu as “attorney-client privileged”) (underline added).¹⁴

11. In short, Attorney General Formella is the chief prosecutor for the State of New Hampshire in criminal matters, but he is also the Governor’s lawyer in civil matters.

¹¹ https://www.unionleader.com/news/politics/statehouse_dome/state-house-dome-protest-leaders-insist-arrests-were-excessive/article_1f5e897d-c20f-5e94-98bf-8b45b9245149.html

¹² <https://www.nhpr.org/nh-news/2022-06-07/as-sununu-indicates-support-legal-questions-around-provisional-ballot-bill-persist>

¹³ <https://www.wmur.com/article/nh-attorney-general-formella-explains-why-he-believes-biden-vaccine-testing-mandate-is-not-legal/37643442>

¹⁴ <https://newhampshirebulletin.com/wp-content/uploads/2022/05/Wellpath.pdf>

As the Chief Prosecutor for the State of New Hampshire, the Attorney General Is Responsible for Making Prosecution Decisions and Supervising All of the Attorneys in His Office.

12. The Attorney General's duty is to supervise the prosecution of all criminal cases in the state. In the words of the Supreme Court, the "prosecutorial voice of the State must be singular." *Bussierre v. Cunningham*, 132 N.H. 747, 755 (1990). Thus, RSA 7:6 provides that, "[t]he attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state...." As noted above, in the *Swift* and *Wyman* cases, the Supreme Court emphasized that the Attorney General has the specific duty of supervising all criminal cases. *Swift*, 101 N.H. at 342-43; *Wyman*, 101 N.H. at 490; *see also Reid v. N.H. A.G.*, 169 N.H. 509, 525 (2016).

13. Thus, Attorney General Formella approves all major decisions made by the subordinate attorneys in his office, including charging decisions.

14. In addition, the law is clear that Attorney General Formella is required to directly supervise his subordinate prosecuting attorneys. *See* RSA 7:17 ("The attorney general shall direct the work of his department" and "may assign such of his duties to the deputy and assistant attorneys general as he may deem advisable and in the interest of the public welfare"). *See also* RSA 21-M:2, I (the department of justice is "under the executive direction of the attorney general"); RSA 21-M:3 (detailing powers of attorney general to nominate or designate subordinates and that those so designated serve "at the pleasure of the attorney general").

As the Chief Prosecutor for the State of New Hampshire, Formella and His Subordinates Have Brought Criminal Charges in a Case Where Formella's Most Important Civil Client, Governor Sununu, Is the Key Witness.

15. Anna Barbara Hantz Marconi is a Justice of the New Hampshire Supreme Court. She was nominated to the Court by Governor Sununu and she was confirmed by the Executive Council.

16. On October 16, 2024, Attorney General Formella obtained grand jury indictments charging Justice Anna Barbara Hantz Marconi.

17. In summary, the Attorney General claims that Justice Hantz Marconi committed crimes by meeting with Governor Sununu, expressing her opinion that an Attorney General investigation of her husband was baseless, and telling the Governor that the investigation was causing her recusal from many cases at the Supreme Court.

18. The Attorney General alleges that Justice Hantz Marconi attempted to commit, and solicited commission of, the crime of Improper Influence by

. . . telling Governor Christopher Sununu that an investigation into Geno Marconi was the result of personal, petty, and/or political biases; that there was no merit to allegations against or subsequent investigation into Geno Marconi; and/or that the investigation into Geno Marconi needed to wrap up quickly because she was recused from important cases pending or imminently pending before the New Hampshire Supreme Court.

Indictment, CID 2257290C; *see also* Indictment, CID 2257291C.

19. The Attorney General also alleges that Justice Hantz Marconi committed, and solicited commission of, the crime of Official Oppression because 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 (New Hampshire Supreme Court Rule 38) (specifically, Rules 1.1, 1.2, 1.3, 2.4, 2.10, 3.1, 3.2, and/or 3.3)

Indictment, CID 2257292C (underline in original); *see also* Indictment, CID 2257293C.

20. The Attorney General further claims that Justice Hantz Marconi's conduct with respect to the Governor amounted to Obstruction of Government Administration and Solicitation of Misuse of Position. Indictment, CID 2257294C; Indictment, CID 2257398C.

21. Finally, the Attorney General claims that Justice Hantz Marconi committed the crime of Solicitation of Misuse of Position by allegedly "soliciting Pease Development Authority

Chairperson Steve Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of...and/or an investigation into” her husband. Indictment, CID 2257397C.

22. Without a doubt, Governor Sununu is the single most important witness for Attorney General Formella regarding these charges. Governor Sununu is identified by name in the lead felony indictment. Moreover, Formella’s case is based upon the meeting and conversation between his client, Governor Sununu, and Justice Hantz Marconi. Obviously, an accused person has a right to confront her accusers. N.H. Const. pt. I, art. 15; U.S. Const. amends. VI, XIV. There is simply no reasonable argument that Sununu is not a witness in this case.

23. The very limited scope of Formella’s allegations underscores the importance of Governor Sununu as a witness to the conversation. In essence, Formella alleges that one public official openly visited another public official to discuss the effects of a pending matter over which neither had any direct authority. Nothing more is claimed.

24. Formella does not claim that there was a secret, back room, after hours meeting between Justice Hantz Marconi and the Governor. The Attorney General could not make such an allegation. Justice Hantz Marconi told the Chief Justice that she intended to meet with the Governor and told others afterward that she had done so. She scheduled a meeting through the Governor’s staff. She was given an appointment on the Governor’s official calendar. She met with the Governor in his office with his legal counsel, Rudolph (Rudy) Ogden, present, during regular business hours. The meeting was open and documented in multiple ways – not exactly the usual route to corruption.

25. Moreover, Formella does not allege that there was any request for a benefit or a promise of any benefit, such as an “ask,” the usual hallmark of corrupt conduct. Again, Formella

could not make such an allegation because there was no request for a benefit or a promise of any benefit. Justice Hantz Marconi did not “ask” the Governor to do anything.

26. Nor does the Attorney General allege that Justice Hantz Marconi made any threat against anyone. For example, the Attorney General does not allege that she threatened to use her position to cause harm to the Governor’s interests or the interests of anyone connected to the Governor or that she would deliberately act or fail to act in a way that would harm any other person or the public at large.

27. With respect to the Duprey claim, CID 2257397C, the Attorney General does not even offer the words allegedly spoken by Justice Hantz Marconi. The allegation is that she attempted to secure a benefit or advantage to which she was not entitled, but that indictment does not say what she allegedly asked for or how she allegedly asked for it.

28. The Accused will show in forthcoming motions that every one of the indictments fails to state a crime, but the case should not ever reach that point because Formella and his office should never have been handling the matter, for the reasons explained below.

Attorney General Formella Has Conflicts of Interest Because He Cannot Fulfill His Duties to His Client, Governor Sununu, and at the Same Time Be an Impartial and Fair Prosecutor.

29. Attorney General Formella has conflicts of interest under New Hampshire Rule of Professional Conduct 1.7.

30. New Hampshire Rule of Professional Conduct 1.7(a) provides, in part, that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest” and a concurrent conflict of interest exists if “the representation of one client will be directly adverse to another client [or] there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” N.H. R. Prof. Conduct 1.7(a)(1)-(2).

31. “Rule 1.7(a) is an objective standard and does not rely upon the lawyer’s subjective belief about his ability to remain impartial.” *Clauson’s Case*, 164 N.H. 183, 190 (2012) (quoting *In re O’Brien*, 26 A.3d 203, 209 (Del. 2011)). As the New Hampshire Supreme Court explained, the “language of the rule is broad” and it governs “conflicts arising out of the representation of a client and the lawyer’s responsibilities to third parties.” *Boyle’s Case*, 136 N.H. 21, 23 (1992).

32. New Hampshire Rule of Professional Conduct 1.11(d)(1) states that “a lawyer currently serving as a public officer or employee is subject to Rules 1.7 and 1.9.” Thus, Rule 1.7 applies to the Attorney General’s Office. As explained in *State v. Collins*, 2024 N.H. 7, ¶ 15 (2024), “[p]ursuant to New Hampshire Rule of Professional Conduct 1.11(d)(1), a lawyer serving as a public officer or employee is explicitly subject to the conflict-of-interest provisions set forth in Rules 1.7 and 1.9. Accordingly, we disagree with the trial court’s legal conclusion that Rule 1.7 does not apply to prosecutors.”

The First Conflict – Formella Cannot Serve Two Clients in the Same Case.

33. Attorney General Formella has a conflicting interest under Rule 1.7(a) because he cannot fulfill his duties of loyalty and confidentiality to his client, the Governor, and at the same time fulfill his duties to be an impartial and fair prosecutor in a criminal case in which the Governor is a witness. The interests are both “directly adverse,” and, certain to create a “significant risk” that Formella’s representation of the People of the State of New Hampshire “will be materially limited by” his responsibilities as a lawyer to the Governor. N.H. R. Prof. Conduct 1.7(a)(1)-(2).

34. The New Hampshire Supreme Court’s decision in *Rogowicz v. O’Connell*, 147 N.H. 270 (2001) is instructive. There, Rogowicz filed a domestic violence petition against O’Connell and an emergency order of protection was issued. *Id.* at 272. O’Connell then allegedly violated the order. *Id.* The County Attorney declined to prosecute. *Id.* However, the Family Division

judge allowed an attorney representing Rogowicz in the civil restraining order matter to prosecute O'Connell criminally for contempt. *Id.* On appeal, the New Hampshire Supreme Court held that the attorney who served as both private counsel and public prosecutor had a conflict and should have been disqualified. *Id.* at 275. The Court explained that the “potential for the private interests...to influence the discharge of...prosecutorial duties was readily apparent.” *Id.* The Court “simply [could] not reconcile” the “conflicting duties of private attorneys and prosecutors and the ethical obligations of both to avoid even the appearance of impropriety.” *Id.*

35. Other states recognize the same principle. In *Price v. Commonwealth*, 72 Va. App. 474, 484-85 (2020), the court reversed a conviction because the trial court failed to disqualify a prosecutor who represented a victim/witness in the criminal case and in the civil action arising from the same facts because, as private counsel, the lawyer owed the client “duties of loyalty and confidentiality,” but in the criminal case the lawyer was “was expected to rid himself of all partialities, disclose exculpatory evidence, and pledge his efforts to nothing but the independent administration of justice.” *Id.* at 483, 489. The court said that “the likelihood of conflict between these two duties rises to the level of an overwhelming probability.” *Id.* at 489 (quotation and citation omitted). Thus, the court found both a violation of due process and of Virginia’s Rule of Professional Conduct 1.7(a). *Id.* See also *Ganger v. Peyton*, 379 F.2d 709, 712 (4th Cir. 1967) (finding a conflict of interest where prosecuting attorney simultaneously represented defendant’s wife in a divorce proceeding); *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. Crim. App. 1997) (having “no hesitation in concluding that the participation by special prosecutors who represent the victim in a civil matter arising from the same incident giving rise to the criminal prosecution is a violation of a defendant’s rights”); *Commonwealth v. Eskridge*, 529 Pa. 387, 389 (1992) (finding conflict of interest where district attorney’s private law partners represent the victims in civil suits against the defendant).

36. Not surprisingly, in a parallel circumstance, courts have routinely disqualified criminal defense counsel attempting to represent both the accused and a witness. *See, e.g., United States v. Williams*, 902 F.3d 1328, 1329 (8th Cir. 2018) (finding a conflict of interest where defense counsel simultaneously represented prosecution witness); *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000) (same); *Coleman v. State*, 93 So. 3d 145, 154 (Ala. Crim. App. 2012) (same); *State v. Watson*, 620 N.W.2d 233 (Iowa 2000) (en banc) (same); *Austin v. State*, 327 Md. 375, 389-90 (1992) (same and collecting cases); *Littlejohn v. State*, 593 So. 2d 20 (Miss. 1992) (same). *See also* Restatement (Third) of the Law Governing Lawyers § 129 cmt. d, reporter’s note (2000) (“The rule that a defense lawyer may not simultaneously represent the prosecutor or a prosecution witness is well settled and has been applied in cases where no actual prejudice to the defendant has been shown.”) (citations omitted). *See also State v. Mountjoy*, 142 N.H. 648, 651 (1998) (“when a trial court...is made aware of any potential for, or actual, conflict of interest in which a defense attorney concurrently represents a defendant and a State’s witness, it is required to conduct an inquiry on the record to investigate the extent of the conflict.”).

37. These cases demonstrate that when a lawyer prosecutes a criminal case in which he also represents a witness, his representation of one client, the witness, will be either directly adverse to his representation of another client, the People, or, at a minimum, create a significant risk that one representation is materially limited by the other, in violation of Rule 1.7(a). That is exactly what Attorney General Formella is trying to do here and why he must be disqualified.

The Second Conflict – Formella Has a Personal Interest.

38. Beyond the duties Formella owes to Sununu due to their attorney-client relationship, Formella also has a conflict of interest under Rule 1.7(a)(2) regarding his “personal interests.”

39. Rule 1.7(a)(2) states that “a lawyer shall not represent a client . . . if there is a significant risk that the representation of one or more clients will be materially limited by . . . a

personal interest of the lawyer.” As the ABA’s Criminal Justice Standards for the Prosecution Function explain, a prosecutor “should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships.” ABA Standards for Criminal Justice: Prosecution Function 3-1.7(f). Furthermore, a “prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.” *Id.*

40. Formella became a member of the New Hampshire bar in 2012. He worked as a private attorney for Sununu and his businesses, worked on Sununu’s political campaigns, then served as legal counsel to Sununu from 2017 to 2021, prior to Sununu nominating Formella to be Attorney General in March 2021. Following the announcement of the indictment of Justice Hantz Marconi, Governor Sununu praised Attorney General Formella, saying that he “really appreciate[s] the Attorney General” and that “he’s done a phenomenal job.”

@AdamSextonWMUR, X.com (Oct. 17, 2024, 12:23pm).¹⁵ To say the least, Formella’s career and success have been tied to his support of Sununu.

41. Importantly, the question is not whether Formella subjectively believes he can be impartial and not be influenced by his personal connections to Sununu. An objective standard must be applied. *Clauson’s Case*, 164 N.H. at 190. From an objective point of view, there is a reasonable likelihood that Formella’s personal interests regarding Sununu will materially limit Formella’s ability to be an impartial and fair prosecutor. That’s why Formella cannot handle this case.

¹⁵ <https://x.com/AdamSextonWMUR/status/1846950116579516851>

Formella Is Not the Only Lawyer in the Attorney General’s Office Who Has a Conflict of Interest Under Rule 1.7(a)(2).

42. In addition to the conflicts created by Formella’s representation of, and loyalty to, Sununu, the fact that this case is being prosecuted by attorneys from the Public Integrity Unit (PIU) of the Attorney General’s Office creates an additional conflict of interest under Rule 1.7(a)(2) due to the personal interests of the PIU attorneys and the Governor’s power over the PIU.

43. Attorney General Formella has assigned two attorneys from the Public Integrity Unit to handle the frontline prosecution of this case, subject to his supervision as required by statute. Those two attorneys are Dan Jimenez and Joe Fincham.

44. Unlike other divisions of the New Hampshire Department of Justice, the Public Integrity Unit is not statutorily created; rather, it exists by order of the Governor. *Compare* RSA 7:8-a (establishing the division of public protection); RSA 21-M:6 (same); RSA 7:8-b (establishing the division of legal counsel); RSA 21-M:7 (same) *with* Exec. Order No. 2020-19, ¶ 8(a) (Oct. 7, 2020) (Governor Sununu unilaterally directing the establishment of the “Public Integrity Unit within the Department of Justice using existing resources within the Department” and ordering the Attorney General to “submit recommendations to the Governor for additional necessary resources...”).¹⁶ Then-Attorney General Gordon MacDonald, now Chief Justice MacDonald, and a material witness in this case, established the PIU shortly after the Governor’s order. *See* Gordon MacDonald, *Exec. Order 2020-19 Progress Report* (Oct. 30, 2020).¹⁷ MacDonald specifically recommended Attorney Jimenez for the PIU. *Id.*

¹⁶ <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-19.pdf>

¹⁷ <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/202011-doj.pdf>

45. Thus, as a result of how it was created, Governor Sununu has unique powers over the PIU. Sununu determines what funding to recommend to the legislature for the PIU. Furthermore, he has the power to unilaterally dissolve the unit by executive order. Stated another way, Sununu has the power to defund the Public Integrity Unit and put Jimenez and Fincham out of work. Among the “personal interests” that might affect a prosecutor’s impartiality, the power of an important witness to abolish the prosecutor’s job would seem to rank fairly high.

If the Case Moves Forward, Other Conflicts Are Likely to Arise.

46. It is not yet clear when or how Justice Hantz Marconi’s conversation with Governor Sununu came to the attention of Attorney General Formella. If the Governor or the Governor’s staff/legal counsel initiated the investigation by reporting the conversation to Formella, Jimenez, or Fincham, then these Attorneys General may themselves be witnesses in this case. The Accused has requested but has not yet been provided discovery from the State, thus those allegedly participating in the conversation with the Governor and his staff are not yet known. Depending on whether and how accounts of the conversation differ, those first reports of what was said may be important evidence.

47. New Hampshire Rule of Professional Conduct 3.7 is clear: a “lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness....” The narrow exceptions are when “the testimony relates to an uncontested issue,” “the testimony relates to the nature and value of legal services rendered in the case,” or “disqualification of the lawyer would work unreasonable hardship on the client.” N.H. R. Prof. Conduct 3.7(a)(1)-(3). As the Commentary explains, “[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.” N.H. R. Prof. Conduct 3.7, 2004 ABA Model Code Comment [1]. The rationales for the rule are

“eliminating the possibility that the attorney will not be a fully objective witness, and reducing the risk that the trier of fact will confuse the roles of advocate and witness and erroneously grant special weight to an attorney’s argument.” *McElroy v. Gaffney*, 129 N.H. 382, 389 (1987).

Furthermore, it “reflects a broad concern that the administration of justice not only be fair, but also appear fair.” *Id.* (quotation and citation omitted).

48. Whether this conflict develops remains to be seen, but the risk is there that the prosecutors in this case represent, or have loyalties to, witnesses, or are witnesses themselves.

49. Beyond the rules of professional conduct, the ethics code for executive branch employees is implicated when the Attorney General has a conflict of interest. RSA 21-G:22 provides that “[e]xecutive branch officials...shall avoid conflicts of interest” and “shall not participate in any matter in which they...have a private interest which may directly or indirectly affect or influence the performance of their duties.” The law defines a “conflict of interest” as “a situation, circumstance, or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty.” RSA 21-G:21, II. And an “executive branch official” means “the governor, members of the executive council, every commissioned, unclassified, or nonclassified executive branch employee other than one elected by the legislature, every constitutional official as defined by RSA 15-B:2, II [“the secretary of state, the state treasurer, their deputies, assistants, and all employees of their departments”], and any person other than a classified employee who conducts business on behalf of the governor, an executive branch official, or executive branch agency, including a volunteer.” RSA 21-G:21, II-a; RSA 15-B:2, II. Accordingly, the Attorney General is subject to the conflict-of-interest statute and his longstanding relationship with the Governor, as a lawyer and as a political supporter, requires his and his office’s disqualification from any prosecution of Justice Hantz Marconi.

Justice Hantz Marconi and the People of New Hampshire Deserve a Prosecutor Who Does Not Have a Conflict of Interest.

50. An accused person in New Hampshire has state and federal constitutional rights to a prosecutor who is free from conflicts of interest and who can act within the bounds of the Rules of Professional Conduct for attorneys.

51. Part I, Article 35 of the New Hampshire Constitution states, “It is essential to the preservation of the rights of every individual, h[er] life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice.” Likewise, Part I, Article 15 guarantees due process of law. *See State v. Hinkley*, 174 N.H. 414, 418 (2021). *See also* U.S. Const. amend. XIV. The New Hampshire Supreme Court has “caution[ed] prosecutors to avoid misstatements of evidence, improper argument, or other improper conduct.” *State v. Preston*, 121 N.H. 147, 151 (1981). The Court “hold[s] public prosecutors to a high standard of conduct.” *State v. Scarlett*, 118 N.H. 904, 905 (1978) (citing *State v. Arthur*, 118 N.H. 561, 563 (1978)). “It is the prosecutor’s duty to remain under appropriate restraint and to avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he or she is entitled.” *Rogowicz* 147 N.H. at 274 (quotation and citation omitted).

52. “A public prosecutor ‘differs from the usual advocate [in that] his duty is to seek justice, not merely to convict.’” *Preston*, 121 N.H. at 151 (quoting ABA Code of Professional Responsibility, EC 7-13 and citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). And “the prosecutor has a duty to the public to achieve justice and a duty to the defendant to never lose sight of the fact that the defendant is entitled to a full measure of fairness.” *Rogowicz*, 147 N.H. at 274 (quotation and citation omitted, cleaned up).

53. It is beyond dispute that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” N.H. R. Prof. Conduct 3.8, 2004 ABA Model Code

Comment [1]. *See also State v. McAdams*, 134 N.H. 445, 454 (1991) (Batchelder and Johnson, JJ., concurring) (quoting same); *Preston*, 121 N.H. at 151 (explaining that a “public prosecutor differs from the usual advocate in that his duty is to seek justice, not merely to convict”) (cleaned up, quotation and citation omitted).

54. Prosecutors must avoid conflicts of interest. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803-4 (1987). As that Court explained, “[j]ustice must satisfy the appearance of justice and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite.” *Id.* at 811-12 (quotation and citation omitted).

55. An accused person’s right to due process is violated when the prosecutor of criminal charges has a conflict of interest. As a Virginia appellate court has explained,

This role as a minister of justice carries with it high ethical obligations and a duty of impartiality. A [prosecutor] has duties to conduct the impartial prosecution of the accused and to ensure that the accused receives a fair trial. The prosecutor is obligated to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. The prosecutor is ultimately accountable not to any victim but to justice. In this context, a conflict of interest on the part of the prosecution in itself constitutes a denial of a defendant’s due process rights...

Price, 72 Va. App. at 485 (cleaned up, internal quotations and citations omitted). *See also Lux v. Commonwealth*, 24 Va. App. 561, 569 (1997) (holding that the “due process rights of a criminal defendant under both the Virginia and United States Constitutions are violated when the defendant is prosecuted by a [prosecutor] who has a conflict of interest relevant to the defendant’s case”); *Ganger*, 379 F.2d at 714 (holding that a prosecutor with a conflict of interest violates the Due Process Clause’s guarantee of fundamental fairness); *Eldridge*, 951 S.W.2d at 782 (Tenn. Crim. App. 1997) (collecting “[n]umerous cases [which] have either found express due process violations or due process implications relating to the participation of an interested prosecutor”); *State v. Hill*, 2018 Tex. App. LEXIS 6514, at *5 (Tex. App. Aug. 15, 2018)

(holding that “the absence of an impartial and disinterested prosecutor can also violate a defendant’s due process rights”).

Attorney General Formella’s Conflict of Interest Disqualifies His Entire Office.

56. Usually, when one prosecutor has a conflict of interest, a prosecutor’s office can “screen” that prosecutor so that the rest of the office is not disqualified. That is because imputations of conflict of interest do not generally apply to government officers. *See Collins, supra* at ¶ 16. New Hampshire instead uses “a more flexible, case-by-case approach, in which the circumstances of a particular case are evaluated to determine whether disqualification of the entire office is required.” *State v. Addison*, 166 N.H. 115, 121-25 (2014) (internal quotation and citation omitted); *Collins, supra* at ¶ 17.

57. However, where the attorney with the conflict of interest has supervisory authority over the rest of the office and has direct responsibility for charging decisions, courts have imputed the conflict to the entire prosecutorial office. Most often, this is because the disqualified prosecutor has authority over other prosecutors in the office. *See, e.g., State v. Tippecanoe Cty. Court*, 432 N.E.2d 1377, 1379 (Ind. 1982) (holding that the disqualification of the entire prosecutor’s office was required because “the prosecutor...had administrative control over the entire staff”); *People v. Lepe*, 164 Cal. App. 3d 685, 689 (Cal. Ct. App. 1985) (explaining that because subordinate prosecutors were “hired...evaluated...promoted...and fired” by the district attorney, they could not “say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar [the district attorney] himself from participation in the case”); *State v. Nickels*, 195 Wn.2d 132, 139 (2020) (describing how “administrative oversight of cases, control over office policy, and the power to terminate employees at will—highlight the many factors that weigh strongly in favor of a presumptive rule

of office-wide disqualification”); *People v. Pomar*, 95 Cal. App. 5th 504, 516 (Cal. Ct. App. 2023) (upholding disqualification of entire district attorney’s office because of district attorney’s conflict and her “broad discretion to hire, fire, promote, and demote every attorney in her office”); *State v. Fox*, No. 48466-8-II, 2017 Wash. App. LEXIS 806, at *7 (Ct. App. Apr. 4, 2017) (unpublished opinion) (reversing conviction due to disqualified prosecutor and explaining, “[a]lthough screening procedures were set in place, such procedures are only sufficient when the prosecutor involved is a deputy prosecutor.”).

58. In New Hampshire, as detailed above, the Attorney General “shall have and exercise supervision of the criminal cases pending . . . in superior court” like this case. RSA 7:6. As provided in RSA 7:17, the “attorney general shall direct the work of his department” and “may assign such of his duties to the deputy and assistant attorneys general as he may deem advisable....”

59. Thus, in this case, Formella is statutorily obligated to supervise the attorneys directly handling the prosecution of Justice Hantz Marconi. *See Swift*, 101 N.H. at 342-43; *Wyman*, 101 N.H. at 490 (“the Attorney General is specifically charged with enforcement of the criminal laws of the state, and with supervision of criminal causes pending before the Supreme and Superior Courts”). As a result, his entire office is disqualified.

The Conflicts of Interest Require Dismissal of All Indictments.

60. New Hampshire grand jury proceedings are a secret one-sided affair. *See generally State v. Hall*, 152 N.H. 374 (2005); McNamara, 1 NH Practice Series: Criminal Practice & Procedure § 20.12 - § 20.18 (2024). Grand jurors are sworn to secrecy. RSA 600:3; N.H. R. Crim. P. 8(b)(6). Prosecutors are in complete control of the witnesses and evidence presented. McNamara, *supra*, §§ 20.15, 20.18. The Rules of Evidence do not apply. N.H. R. Evid.

1101(d)(2). Defense counsel is barred from the room. *State v. Cobb*, 143 N.H. 638, 659 (1999); *State v. Canatella*, 96 N.H. 202 (1950). Prosecutors are not required to present exculpatory evidence even if they know about it. *Hall*, 152 N.H. at 377.

61. As a result of these rules, no one represents the accused in the grand jury room. No one cross-examines any witness to challenge their testimony. No one makes any arguments on behalf of the accused. If there is any chance that a grand jury will make a fair decision about whether to indict a person, rather than simply signing off on the indictments presented to them, it depends on the impartiality of the prosecutors.

62. The prosecutors here are not impartial. As detailed above, the Attorney General, who is the chief prosecutor and also the lawyer for the star witness, has conflicting loyalties which cannot be avoided because he oversees the entire office. At the same time, the frontline prosecutors have their own conflict of interest since they hold their jobs by the grace of the same star witness.

63. Dismissal of an indictment may be appropriate under a court's general supervisory authority where prosecutorial misconduct, while short of constitutional error, has prejudiced a defendant or affected the charging decision by the grand jury. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988). *See generally State v. Courtemarche*, 142 N.H. 772, 774 (1998) (explaining that while prosecutors have broad discretion regarding charging decisions, “[t]he State’s discretion, however, is not unlimited, for the trial courts are empowered to curb that discretion where it is used to inflict confusion, harassment, or other unfair prejudice upon a defendant.”); *State v. MacLeod*, 141 N.H. 427, 434 (1996) (holding that “trial courts have both the authority and the obligation to curb the prosecution’s broad discretion” when a charging decision “poses a danger of confusion, harassment, or other unfair prejudice”) (*citing State v. Goodwin*, 116 N.H. 37, 38 (1976), *State v. Bergeron*, 115 N.H. 70, 72 (1975)).

64. Considering the one-sided nature of a grand jury proceeding, the prosecution's control of the process, and a defendant's constitutional right to a conflict-free prosecutor, there is unfair prejudice warranting dismissal in circumstances such as those in this case. Decisions from other jurisdictions show that dismissal is appropriate in these circumstances.

65. In *People v. Zimmer*, 51 N.Y.2d 390 (1980), the Court of Appeals of New York reversed a trial court's denial of a motion to dismiss an indictment where the district attorney, at the time he presented the case to the grand jury, was corporate counsel to, and a stockholder in, the defendant's company. *Id.* at 392. "The conflict was plain" because the "corporation and its stockholders in effect were the complainants." *Id.* at 395. As New York's highest court asked,

Assuming he intended to be as fair and objective as fair could be, in presenting this evidence where did his role as partisan corporate attorney end and where did that of nonpartisan District Attorney begin? At what point was he serving which of his two masters? To put the questions is to state the problem, a problem instinct with due process implications.

Id. The same questions must be asked here.

66. In *State v. Culbreath*, 30 S.W.3d 309, 317-18 (Tenn. 2000), the court found that participation by a private attorney hired by a special interest group to assist the prosecution resulted in a violation of due process which required dismissal. It "rendered the proceedings fundamentally unfair." *Id.* at 318. Because the "private attorney's conflict of interest tainted the entire prosecution of the case well before the charges were presented to the grand jury," the Court concluded that the "proceedings were inherently improper and that dismissal of the indictments [was] the appropriate remedy...." *Id.*

Conclusion.

67. To say the least, this case presents a rare, if not unique, situation. That may explain why the Attorney General's Office itself has not recognized the conflict of interest (counsel for the Accused did raise the issue of a conflict with the Attorney General's Office prior to indictment). In any event, the Court should not be concerned that it is setting precedent for future cases, that its ruling on this motion will affect any other case, or that its ruling would disrupt the usual operations of the Attorney General's Office. There simply are not going to be many, if any, other criminal cases in which the Governor is a witness and his lawyer, the Attorney General, is acting as prosecutor. The concern should be, instead, that the Attorney General had conflicts of interest when he sought the indictments of a sitting Supreme Court Justice. That is plainly what happened here. It is always important to respect the rule of law and the need for impartiality and fairness, but it is especially important now. The Court should disqualify the Attorney General and all of his subordinates, and dismiss the indictments.

WHEREFORE, the Accused respectfully requests that the Court:

- (a) Disqualify Attorney General John Formella and all of the attorneys in the Department of Justice from prosecuting the case;
- (b) Dismiss all of the indictments; and,
- (c) Hold an evidentiary hearing on this motion if the prosecution disputes any factual assertions in the foregoing motion.

Dated this 31st day of October, 2024.

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