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

REPLY TO STATE'S OBJECTION TO MOTION TO DISMISS INDICTMENT FOR CRIMINAL SOLICITATION OF MISUSE OF POSITION (DUPREY)

The Accused, Justice Anna Barbara Hantz Marconi, respectfully replies to the State's Objection to her Motion to Dismiss the indictment for Criminal Solicitation of Misuse of Position, because Pease Development Authority (PDA) Chairperson Duprey is not an executive branch official. Completely failing to address the arguments of the defense motion, the State instead misreads the relevant caselaw, cherry-picks statutory language, and ignores relevant authority in an attempt to convince the Court that the PDA is a part of the executive branch and that its chairperson, Steve Duprey, is an executive branch official. The State is wrong. The statutory language could not be clearer that the PDA is not part of the executive branch. This Court should dismiss the indictment.

1. The prosecution had a grand jury return an indictment, CID 2257397C, which alleges that Justice Hantz Marconi committed criminal solicitation of misuse of position, RSA 21-G:23, "by soliciting Pease Development Authority Chairperson Steve Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi, or words to that effect[.]"

2. The statute on which the indictment is based, RSA 21-G:23, provides that "No executive branch official or classified employee shall…[u]se his or her position with the state to secure privileges or advantages for himself or herself, which are not generally available to governmental employees, or to secure governmental privileges or advantages for others to which they are not otherwise entitled." RSA 21-G:23, II (underline added). "Any person who knowingly or willfully violates" the section "shall be guilty of a misdemeanor." RSA 21-G:34.

3. Thus, an alleged violation of the statute depends on the solicitee, the person allegedly being solicited, being either an "executive branch official" or a "classified employee."

4. In its motion to dismiss, the defense explained that the "Chairperson of the Pease Development Authority is neither an executive branch official nor a classified employee," pointing to *inter alia*, RSA 21-G:21, II-a, RSA 6:44, RSA 21-G:6-b, RSA 99-D:2, and RSA 21-I:49. *See D. Mot. to Dismiss Indictment for Criminal Solicitation of Misuse of Position (Duprey)* at ¶¶ 4-16 [hereafter *D. Mot.*]. And, as the State admits, "the concept of a legislatively created entity independent of the executive branch is not at all novel." *State's Obj. to Mot. to Dismiss Indictment for Criminal Solicitation of Misuse of Position (Duprey)* at ¶ 3 (quoting *State Employees Ass'n of N.H. v. State*, 161 N.H. 558, 563 (2011)) [hereafter *St. Obj.*].

5. Nonetheless, the State ignores plain statutory language and instead jumps to a purported three-part test to determine whether the PDA is "independent" or "executive." *St. Obj.* at ¶ 3. According to that test, "the issue of whether an agency is independent or executive depends on three factors: (1) the language of the authorizing statute creating the agency, (2) whether the agency (or its board of trustees) owe [sic] a duty to beneficiaries, and (3) whether there is administrative gloss on the statute established by the agency's history of functioning independently." *Id.* (citing *State Employees*, 161 N.H. at 563 and *N.H. Retirement Sys. v. Sununu*, 126 N.H. 104, 108 (1985)).

6. The Court should not even reach the question of whether the State's claimed factors are applicable.

7. RSA 12-G:3, I, describes the PDA as "a body politic and corporate of the state" and a "public instrumentality." Nowhere does it describe the PDA as an agency under the executive branch. To the contrary, the PDA is explicitly carved out from the executive branch. RSA 6:44, I(i) unambiguously classifies the PDA as a "component unit[] of the state government" which is "not part of the executive, legislative, or judicial branches." *See also* RSA 21-G:6-b (describing the "Organization of the Executive Branch" and not listing the PDA).

8. The "[n]ot part of the executive" branch language is clear, and the Court need look no further in determining that the PDA is not part of the executive branch.

9. When the language of a statute "is clear and unambiguous, we need not look beyond the words of the statute to discern its meaning." *Appeal of N.H. Troopers Ass'n*, 175 N.H. 167, 177 (2022) (citation omitted). The plain language of the law is the obvious end of the inquiry. This Court should "neither consider what the legislature might have said nor add words that it did not see fit to include." *N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ*, 173 N.H. 648, 652 (2020). The Court's analysis should end at this point. It should not follow the State down the road of adding words to a clear statute or speculating about what the legislature might have said.

The State's Argument Is a Red Herring.

10. The State asks this Court to consider a three-factor "test," but such a "test" is only applicable when a statute is ambiguous, which is not the case here. The State's three factors are first drawn from the Supreme Court's discussion in *N.H. Retirement System v. Sununu*, 126 N.H. 104 (1985), which resolved an ambiguity in the statute that established the New Hampshire Retirement System, RSA 100-A, to determine whether it was independent of the executive branch. The Court said that the RSA 100-A is ambiguous because it "does not expressly state

whether or not the System is an entity that is independent from the executive branch." *Id*. at 108. The only reason the Court identified factors related to the legislature's intent is because the statue is ambiguous. Thus, the Court pointed to "[t]hree factors [that] convince us that the legislature intended the system to be an independent entity…". *Id.* at 108. Nowhere did the Supreme Court instruct us to disregard the plain language of a statute which is not ambiguous and is instead quite clear.

11. Similarly, in *State Employees Ass'n of N.H. v State*, 161 N.H. 558 (2011), the Court was required to interpret RSA 9:1 and determine whether the Community College System of New Hampshire (CCSNH) was an executive branch entity. The Court expressly stated, "we find that the statute is ambiguous and, therefore, turn to legislative history and related statutes for indications of legislative intent." *Id*. at 562. In that context, the Supreme Court referenced the three factors in *N.H. Retirement System* but found the second factor "inapplicable" and had no need to apply the third factor considering the evidence provided by the unambiguous language of the statute and legislative history. *Id.* at 563. Thus, *State Employees* has no bearing on the situation here because there is nothing ambiguous about RSA 6:44, I(i).

12. Importantly, the factors used in both *N.H. Retirement System* and *State Employees* predate our legislature's adoption of RSA 21-G:6-b and RSA 6:44. *See* Laws of the State of New Hampshire, 2019 session, chapter 346, sections 309-10. Since the legislature has now delineated the "Organization of the Executive Branch," *id.* at 309, and the "Component Units of State Government," *id.* at 310, there is no need to resort to the State's purported test.

13. Furthermore, in the two cases the State cites, *N.H. Retirement System* and *State Employees*, the Supreme Court found both not to be part of the executive branch. *N.H. Retirement System*, 126 N.H. at 105; *State Employees*, 161 N.H. at 563, 566. Subsequent to that, and as described above, the legislature specifically detailed the "Component Units of State

Government" which "are not part of the executive…branch[]." RSA 6:44. And the legislature listed the organizations at issue in those cases, the "Community college system of New Hampshire" and the "Retirement system of New Hampshire," as not part of the executive branch RSA 6:44, I(a),(j). And, of course, the legislature also listed the Pease Development Authority as not part of the executive branch. RSA 6:44, I(i). Why would the legislature make a list of organizations which are not part of the executive branch, reaffirming the determinations in *State Employees* and *N.H. Retirement Systems*, and also list the PDA, if it had any intention of the PDA being part of the executive branch? The State's objection mentions none of this.

Even Applying the State's Inappropriate Three-Part Test Would Not Lead to a Finding that the PDA Is Part of the Executive Branch.

14. Even if the Court looks beyond the plain language of the statute, the result is the same. The State says that the reference in the PDA's operating budget statute, RSA 12-G:32, to RSA 9:1 through 9:9 shows that the PDA is an executive branch agency. *See St. Obj*. at ¶ 5 ("The authority shall comply with the requirements of RSA9:1 through 9:9, relative to the budget."). The State observes that the budget statute is not referenced in the enabling statute for the CCSNH and also observes that the budget process is only applicable to an "executive branch" agency, not independent agencies. *St. Obj*. at ¶ 4. From this, the State postulates that the PDA does not operate under the "full power" of the PDA Board, because it is subject to portions of the budget process.

15. What the State ignores, however, is the second sentence of RSA 12-G:32, which states that "[t]he authority shall include in its biennial estimate of the expenditure requirements of the division of ports and harbors a separate line item titled 'Reimbursement to Pease Development Authority for Services' and request a reasonable estimated amount to cover such costs as necessary." The PDA does not submit its entire budget through the budget process, only

those portions thereof that involve reimbursable payments. Moreover, participation in the budget process does not convert the CCSNH into an executive branch agency. *See* RSA 188-F:6, VI (CCSNH Board "shall submit its budget in accordance with RSA 9:4-e"). Nor does it change the non-executive branch status of the NH Retirement System. *See* RSA 100-A:16, III(a) (requiring retirement board to participate in the preparation of the executive budget).

16. Furthermore, just as the Court in *N.H. Retirement Sys.* gave "broad interpretation to the term 'full power and authority'" in the statute to support "the conclusion that the legislature intended the board to have the power to administer the System independently of the executive branch," *id.* at 108-09, so too did the legislature give the PDA "full power and authority" related to foreign trade zones. *See* RSA 12-G:38, III-IV.

17. The State also says that "the PDA's board of directors are required to file a statement of financial interest for executive branch employees." *St. Obj.* at ¶ 6 (underline added). But they ignore the fact that the required financial disclosure forms are different. *Compare* RSA 12-G:5 (PDA disclosure form) *with* RSA 15-A:5 (executive branch disclosure form). If the PDA were part of the executive branch, there would be no need for a separate form.

18. Likewise, the State thinks it relevant that the PDA must reimburse the department of administrative services its portion of indirect costs for "centralized business services." *See St. Obj.* at ¶ 6. This provision was not added to the PDA until 2009, so unless the State is claiming that the Legislature subtlety made the PDA an executive branch agency almost twenty years after its establishment, its relevance is unclear. But more importantly, other non-executive branch agencies also reimburse the State for certain administrative costs. *See* RSA 100-A:14, XIII (N.H. Retirement System reimbursement); RSA 188-F:7, V (CCSNH reimbursement).

19. Finally, ignoring the clear text of RSAs 12-G:3, I, 6:44, and 21-G:6-b, the State seeks to bolster its reading of the statute with an incomplete interpretation of legislative history. *See St.*

Obj. at ¶ 8. The State claims that because the legislature changed the language of the authorizing statute from "body politic and corporate having a distinct legal existence from the state and not constituting a department of state government" to "body politic and corporate of the state," "the legislature specifically intended the PDA to be an executive state agency." *St. Obj.* at ¶ 8 (quoting SB 351-FN, Session Year 1990, Senate Journal, p. 236 and SB 351-FN, Session Year 1990, House Journal, p. 864).[1]

20. The State misreads the legislative history. In the initial bill, SB 351, Senator Dupont, the chief sponsor, explained, "the commission is similar to other authorities that we have out there such as the Industrial Development Authority, the New Hampshire Housing Finance Authority…. It is not a part of State government." SB 351, Session Year 1990, Senate Journal, p. 230. When asked by another senator whether it would be appropriate for the State Treasurer to be a member, Senator Dupont responded, "no, I don't think that is appropriate. This is, by choice of the existing commission, this is not a part of State government." *Id.* at 232. He explained, "the point I am trying to make is this commission is not being put into place to recognize political interests that have been involved in the first commission. It is a group of, hopefully, business people that will have the responsibility for putting this development forward." *Id.* Nowhere in any of his or any other senators' remarks was there any discussion about making the PDA an executive branch agency. *Id.* at 228-33.

21. Then, as the State already conceded, the House changed the language because of concerns from the FAA. Specifically, the "first important change" of the "major Commerce Committee changes" was to "address[] the concern of the Federal Aviation Authority in that it

[1] The journals are too voluminous to be attached to this reply, however, they can be found here: https://scholars.unh.edu/senate_house/115/ (Senate); https://scholars.unh.edu/senate_house/72/ (House).

was mandated that the Development Authority be a state agency. This mandate has been addressed." SB 351-FN, Session Year 1990, House Journal, p. 861 (underline added). The House again said nothing about turning the PDA into an executive branch agency. It simply needed to be a "state agency" for purposes of the FAA.

22. In the State's argument, this modest change was actually the "legislature specifically intend[ing] the PDA to be an executive state agency." *St. Obj.* at ¶ 9. Did any House member speak to this specific intent? No. *See* Session Year 1990, House Journal, pp. 881-85. The Speaker commended the House for "sit[ting] down and work[ing] with the FAA, the Governor's office, the Senate office and the Attorney General's office and com[ing] out with a proposal that is so well accepted." *Id.* at 885. Furthermore, the House's amended analysis described how the "bill establishes the Pease Air Force Base development authority. The authority shall be governed by a board consisting of 7 directors." *Id.* at 881. Again, if the House had dramatically changed the bill to put it under the authority of the executive branch, surely it would have been mentioned in the governance portion of the analysis. The silence is telling.

23. When the bill returned to the Senate, did any senator mention that "the legislature specifically intended the PDA to be an executive state agency"? *St. Obj.* at ¶ 8. The answer is of course no. *See* Session Year 1990, Senate Journal, pp. 1074-75. Senator Dupont discussed changes to the composition of the PDA Board and concerns about zoning. *Id.* at 1075. The State would have this Court believe that the prime sponsor of the PDA bill, who had repeatedly proclaimed that "this is not a part of State government," ¶ 20 *supra*, would be completely silent when the "legislature specifically intended the PDA to be an executive state agency." *St. Obj.* at ¶ 9. The State added in the word "executive" to try and makes its point. But it cannot change the historical record.

24. One further point bears explication. As the defense noted in its motion, PDA employees are distinct from executive branch employees in the indemnity statute, RSA 99-D:2. *See D. Mot.* at ¶ 11. According to the State's theory, however, even as the legislature "specifically intended the PDA to be an executive state agency," *St. Obj.* at ¶ 9, the legislature continued to carve PDA employees out as a separate category in the indemnification statute. *See* SB 351, Session Year 1990, House Journal, pp. 878-79; Enrolled Bill Amendment to SB 351-FN, Session Year 1990, Senate Journal, pp. 1262-63. But, of course, there would be no need to do this if the legislature had intended the PDA to be a normal executive branch agency.

25. The other factors identified by the State are no more persuasive. The State misreads "the fiduciary obligation owed by its trustees to its beneficiaries," *State Employees*, 161 N.H. at 563, into a broader "duty of the PDA board consistent with the Executive Branch rather than a limited fiduciary duty to beneficiaries." *St. Obj.* at ¶ 12. However, as our Court noted in *State Employees*, that "factor [was] inapplicable" just as it is inapplicable here. But insofar as the State posits that the PDA does not owe discreet duties to classes of individuals, they are wrong. The PDA statute, specifically RSA 12-G:1, II, obligates the PDA to serve the interests of affected communities. *See also* RSA 12-G:43, I(a) (describing discrete duties of the division of ports and harbors for local communities). It is precisely that local concern that animated legislatures during the PDA's creation and which resulted in a board of directors approximately half of whom are appointed by local communities. *See* RSA 12-G:4, I. Accordingly, the PDA and the division of ports and harbors do serve a particular constituency and the State is incorrect to suggest otherwise.

26. Finally, the State claims that the "administrative gloss" doctrine supports its position. When a statute is clear, a court need not apply the administrative gloss doctrine. *See, e.g.*, *State v. Priceline.com, Inc*, 172 N.H. 28, 38 (2019) ("the administrative gloss doctrine applies only when

a statutory provision is ambiguous"). But even if it were relevant, the State inverts the burden: they are the ones required to show an administrative gloss that the PDA is an executive branch agency, not the reverse. *See St. Obj.* at ¶ 13. The sole evidence they offer to support their unprecedented claim of executive branch authority is that the Department of Justice's Civil Bureau has occasionally provided legal counsel to the PDA. *Id.* (citing RSA 7:8). They fail to note that the PDA has its own independent legal counsel. RSA 12-G:4, VI. The DOJ only defends the PDA upon request pursuant to RSA 99-D:2. The PDA enters contracts over $10,000 without the Governor and Executive Council's approval. RSA 12-G:8, VIII. The PDA reports to a host of legislative officials, not just the governor, for its audits and annual reports. RSA 12-G:29. And the local community board members are removed by their municipal appointing authorities. RSA 12-G:4, II. Contrary to the State's erroneous suggestion, there is extensive evidence of the PDA operating independently and no history of the PDA operating under the authority of the executive branch. To the extent that "administrative gloss" is considered, it shows that the PDA is not part of the executive branch.

Conclusion.

27. In summary, the State's objection fails to address the central points of the defense motion – that the law clearly says that the PDA is not an executive branch agency. Instead, the State directs the Court to look at a three-factor test that is not really a test and which, according to the cases cited by the State, has no application when the law is unambiguous. Then the State cherry-picks evidence to support its conclusion, and misreads the relevant statutes, precedent, and legislative history.

WHEREFORE, the defense respectfully requests that the Court order that the indictment alleging Criminal Solicitation of Misuse of Position (CID 225739C) be dismissed.

Dated this 24th day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Richard Guerriero