THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

217-2024-CR-01167

STATE'S OBJECTION TO MOTION TO DISMISS ALL INDICTMENTS

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to Defendant's Motion to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity ("the Motion"). In support, the State represents as follows:

I. Defendant's Motion Unsupported by Affidavit; Should Be Denied

1. Preliminarily, "[this] Court will not hear any motion grounded upon facts, unless such facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys . . . ." N.H. R. Crim. P. 35(i)(1). No such affidavit by Defendant, papers in this case (aside from the charging documents), or agreement by the parties exist to support any factual allegations in Defendant's Motion.

2. Unlike Defendant's Motion to Dismiss based upon an alleged conflict of interest, which has been denied by this Court, the instant Motion makes various unverified factual assertions that are beyond the Court's ability to take judicial notice. Because Defendant seeks to rely on these factual assertions in support of the instant Motion, such assertions must be accompanied by an affidavit. N.H. R. Crim. P. 35(i)(1). Because Defendant has not submitted an

affidavit in support of the factual assertions in the instant Motion, this Court must "not hear" the instant Motion, and the Defendant should either be required to file an affidavit with the Court or the Motion should be denied without prejudice until a motion is properly filed either without factual assertions or accompanied by an affidavit. Id.

3. The reason for the requirement of N.H. R. Crim. P. 35(i)(1) is evident from Defendant's instant Motion. Defendant alleges two different claims based on irreconcilable assertions of facts. On the one hand, Defendant alleges that in meeting with Governor Sununu, she was a private citizen petitioning her government for a redress of grievances. Motion at ¶¶ 12-25.[1] On the other hand, Defendant alleges that her meeting with Governor Sununu was not a meeting between a private citizen petitioning a government official, but a meeting between two government officials conducting official business, and therefore subject to Judicial Immunity. Id. at ¶¶ 33-55.[2] Factual allegations in motions unsupported by an affidavit in accordance with Rule 35 are "devoid of substance." *State v. Stroud*, 216-2020-CR-00820, 2021 N.H. Super. LEXIS 21 at *13 (Hillsborough Super. Ct., May 27, 2021) (*Delker*, J.). The insubstantial nature of unverified factual assertions is evident from Defendant's unverified assertions of contradictory facts concerning the same meeting with Governor Sununu. Rule 35 exists to prevent courts from having to consider every alternative universe of facts a defendant may assert in an effort to "see what sticks" in seeking relief from the court. *See* RSA 641:1, I(b) (perjury includes alleging inconsistent material statements under oath or affirmation). Such motions reliant upon

[1] *See, e.g.*, Motion at ¶21 ("She merely voiced her opinions to a government official;" id. at ¶ 23 ". . . right of citizens to express their opinions to public officials about public matters;" id. at 25 indictments allege "petitioning government officials for the redress of grievances – to be criminal conduct."

[2] *See, e.g.*, Motion at ¶¶ 33-36 (alleging meeting was between her, as a judge, and an executive official "to discuss her recusal and its effect on the docket"); id. at ¶ 42 ("Justice Hantz Marconi was performing judicial duties when she met with the Governor to explain how her recusal was impacting the Court's docket and her judicial tenure."); id. at ¶ 44 ("Justice Hantz Marconi was acting within the scope of the duties of the office when she spoke to the Governor about how her recusal was affecting the Court's docket," including "talk[ing] about the effects of an investigation on the workload of the court . . . ."); id. at 51 ". . . actions undertaken in her capacity as a judge . . .").

unverified assertions of facts (especially contradictory ones) waste the resources of the Court and unnecessarily delay the efficient resolution of a criminal case. If Defendant wishes this Court to consider claims predicated upon factual assertions regarding this meeting, she must: (1) decide which of her allegations about her meeting with Governor Sununu she is going to claim to be true; and (2) attest to such allegation of facts in accordance with Rule 35.

4. As Defendant's Motion is reliant upon these contradictory factual assertions and does not provide this Court with a pure question of law or a proper record upon which to issue a ruling, this Court must not hear the Motion, and the Motion should be denied. N.H. R. Crim. P. 35(i)(1). Without waiving this objection, the State will provide specific objections to the merits of the Motion herein.

II. Defendant Fails to Properly Plead Claims; Motion Should be Denied

a. Defendant Has Failed to Properly Plead Vagueness

5. Defendant's Motion does not identify any particular statutory language that it seeks to challenge as void for vagueness. However, Defendant's Motion "blur[s] the distinction between the constitutional doctrines of overbreadth and vagueness." *State v. Pike*, 128 N.H. 447, 451 (1986). "[T]he overbreadth doctrine is applicable primarily in the First Amendment area . . . and may render void legislation which is lacking neither in clarity nor precision, whereas the vagueness doctrine is rested on the due process clauses of the Fifth and Fourteenth Amendments and is applicable solely to legislation which is lacking in clarity and precision." *Id.* (quotation omitted). That is, vagueness relates only to the adequacy of the language of the statute itself, whereas overbreadth relates to infringements on constitutional rights (regardless of the language the statute). Because Defendant does not cite any statutory language that she alleges is void for vagueness, Defendant has not pled her challenge for vagueness with specificity and these

portions of the Motion should be denied. *See State v. Wilson*, 169 N.H. 755, 767-70 (2017) (declining to address facial challenge when only as-applied challenge had been properly raised); *ACG Credit Co., LLC v. Gill*, 152 N.H. 260, 264 (2005) (declining to devote resources to an argument not sufficiently developed for review).

b. Defendant Has Failed to Properly Plead Overbreadth

6. Defendant's Motion does not specify whether she challenges the Indictments for overbreadth facially or as-applied to Defendant. Defendant makes sweeping claims that would imply a facial challenge. *See* Motion at ¶ 27 (". . . chilling all citizens of New Hampshire . . ."). Defendant also cites law generally applicable to facial challenges. *See* id. at ¶¶ 26-27. However, Defendant's Motion also relies upon unverified factual assertions peculiar to Defendant in her characterization of her alleged criminal activity that would imply an as-applied challenge. *See* id. at ¶ 11 (Defendant making factual assertions about her conduct in framing issue); id. at ¶ 21 (attempting to distinguish *Hemmati v. United States*, 564 A.2d 739 (D.C. 1989) based upon Defendant's unverified factual assertions). Because Defendant has not pled her challenge for overbreadth with specificity, these portions of the Motion should be denied. *See Wilson*, 169 N.H. at 767-70; *ACG Credit Co., LLC*, 152 N.H. at 264.

c. Defendant Has Only Properly Challenged Validity of RSA 643:1, RSA 642:1

7. Defendant's arguments focus on whether RSA 640:3 (Improper Influence), RSA 643:1 (Official Oppression), RSA 642:1 (Obstructing Government Administration), and RSA 21-G:23 (Misuse of Position) are void for vagueness and overbreadth. *See* Motion at 23. However, while Defendant is charged with violating RSA 643:1 and RSA 642:1, Defendant is not charged with violating RSA 640:3 or RSA 21-G:23 – but rather with violations of RSA 629:1 (Attempt) and RSA 629:2 (Criminal Solicitation). *See State v. Carr*, 167 N.H. 264, 269-70 (2015) (criminal

solicitation, like attempt, is an inchoate crime that does not require the State to prove the elements of the crime solicited or attempted). Accordingly, to the extent Defendant has raised a challenge to the constitutionality of RSA 643:1 and RSA 642:1, Defendant has made no challenge to RSA 629:1 and RSA 629:2, and this Court should only consider claims regarding the constitutionality of RSA 643:1 and RSA 642:1.

d. Defendant Has Failed to Properly Plead Judicial Immunity Claim

8. Defendant argues that the indictments in this case should be dismissed because she is entitled to Judicial Immunity for her alleged actions. Motion at 37-55. However, in addition to not submitting an affidavit attesting to the factual assertions that *are* in the instant Motion, because Defendant has not submitted an affidavit regarding what duties she was performing in a case over which she had "jurisdiction of the subject-matter in [an] action pending before [her]," this Court is without a sufficient record to rule on Defendant's claim of judicial immunity as a matter of law. *Sargent v. Little*, 72 N.H. 555, 556-57 (1904) (discussing jurisdictional requirement for judicial immunity to apply). *See also Suprenant v. Mulcrone*, 163 N.H. 529, 530 (2012) (to determine whether a judicial officer's conduct is protected by immunity, "courts analyze the nature of the duties performed and whether they are closely associated with the judicial process") (quotations omitted). Accordingly, Defendant's Motion to Dismiss the Indictments based upon her claim of Judicial Immunity should be denied.

III. Motion to Dismiss on Grounds of Vagueness and Overbreadth Should be Denied

9. Without waiving the foregoing objections, the State now addresses the merits of Defendant's claims. Defendant's Motion first challenges the indictments on the grounds of vagueness and overbreadth. The issue of whether a law is void for vagueness or overbreadth

because it infringes upon a constitutional right is a question of law. *See State v. Hynes*, 159 N.H. 187, 199 (2009) (such a challenges are "questions of constitutional law").

10. Defendant admits that "there 'is no summary judgment procedure in criminal cases' nor 'a pre-trial determination of sufficiency of the evidence..[sic] [t]he sufficiency of a criminal indictment is determined from its face.'" Motion at 58 (quoting *State v. Bisbee*, 165 N.H. 61, 65-66 (2013) (quotation omitted)). Accordingly, an indictment must only "contain 'the elements of the offense and enough facts to warn a defendant of the specific charges against him.'" Id. (quoting *Bisbee*, 165 N.H. at 64 (citation omitted)).

11. Disentangling Defendant's conflated arguments, the proper analysis would be:

(1) Whether the indictments contain the elements of the offenses and enough facts to warn a defendant of the specific charge, or whether a bill of particulars is required;

(2) If the indictments are adequate, whether the statutes are facially void for vagueness or overbreadth, such as to require dismissal of otherwise valid indictments;

(3) If the indictments are adequate and the statutes are not facially void for vagueness or overbreadth, whether the statutes encompass constitutionally-protected activity that renders the statutes void for overbreadth as applied to Defendant, such as to require dismissal of otherwise valid indictments under facially constitutional statutes; and

(4) If the indictments adequately allege that Defendant violated statutes that are not void for vagueness or overbreadth by engaging in non-protected conduct, to the extent Defendant challenges the allegations in the Indictments and instead claims to have engaged in constitutionally-protected conduct (*e.g.*, to have acted without the requisite *mens rea*), this is the ultimate question for the jury as the finder of fact.

a. Indictments Facially Adequate; Bill of Particulars Not Required

12. "An indictment . . . is sufficient if it sets forth the offense fully, plainly, substantially, and formally . . . ." RSA 601:4. "To be constitutional, the indictment must contain the elements of the offense and enough facts to notify the defendant of the specific charges. An indictment generally is sufficient if it recites the language of the relevant statute; it need not specify the means by which the crime was accomplished or other facts that are not essential to the elements of the crime." *State v. Ortiz*, 162 N.H. 585, 588 (2011) (quotation and citations omitted). *See also State v. Brewer*, 127 N.H. 799, 800 (1986) (An indictment "is sufficient, if the offence be set forth with substantial accuracy and certainty to a reasonable intendment.") (quotation omitted); *State v. Bussiere*, 118 N.H. 659, 661 (1978) ("An indictment is sufficient only if it clearly sets out all of the necessary elements constituting the offense.") (quotation and citations omitted).

13. "The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense and to enable him to prepare an intelligent defense." *State v. Kuchman*, 168 N.H. 779, 784 (2016) (quotations and citation omitted). Accordingly, the State is not required to provide a bill of particulars unless it is "necessary for the preparation of a defense or to preclude a later unconstitutional prosecution." *State v. Steer*, 128 N.H. 490, 494 (1986) (quotation omitted).

14. Defendant's Motion makes no allegation that the Indictments do not contain the elements of the offense or enough facts to notify the defendant of the specific charges. Rather, Defendant asserts a theory of defense as the basis for her requested dismissal or bill of particulars. *See* Motion at ¶ 59. Defendant also conflates her claim of overbreadth with her challenge to the sufficiency of the Indictments. *See* id. at ¶ 62-63 (claiming inability to prepare a

defense and need for bill of particulars because of alleged overbreadth). However, Defendant's Motion shows that the Indictments are adequate, and thus a bill of particulars is not required. Defendant has been provided with sufficient notice of the specific acts (*i.e.*, meeting with Governor Sununu and conversations with Chairman Duprey) to advance separate and contradictory theories of defense in the Motion related to the elements and factual bases for the charges. The Indictments fully set forth each element of the crimes charged and provide Defendant with notice of the episode of conduct that has subjected her to prosecution, which would also prevent Defendant from being subjected to a second prosecution. Rather than alleging that there is a need to prevent a subsequent prosecution or prepare a defense, Defendant argues that because her defense (*i.e.*, she acted without the requisite *mens rea*) is true, the Indictments must allege something other than what they charge on their face, and therefore a bill of particulars is required.[3]

15. To the extent Defendant claims that the allegations in the indictment "cannot be the basis for a criminal prosecution" (id. at ¶ 59) because the mere words and/or actions of Defendant are insufficient to show criminal intent, such claims go to the weight of the evidence (*i.e.*, whether the State can meet its burdens of proof and persuasion at trial) and not the sufficiency of the Indictments. *See State v. Craig*, 167 N.H. 361, 379 (2015) ("Because persons rarely explain to others the inner workings of their minds or mental processes, a culpable mental state must, in most cases, . . . be proven by circumstantial evidence. The jury is entitled to infer the requisite intent from the defendant's conduct in light of all the circumstances in the case because conduct illuminates intent.") (quotations and citations omitted). Accordingly, this Court

[3] Such a solipsistic argument is analogous to an alleged drug dealer claiming that because she claims to not have sold narcotics as charged in an indictment, a bill of particulars is required to clarify what she is alleged to have done – because she claims she did not sell narcotics.

should deny Defendant's request to dismiss the Indictments and to require a bill of particulars because the Indictments are constitutionally sufficient, allow Defendant to prepare a defense, and prevent subsequent prosecution for the same conduct.

b. Statutes Charged in Indictments Not Void for Vagueness

16. As stated in ¶ 5, *supra*, vagueness relates to the adequacy of the language of the statute itself. Accordingly, the test for vagueness is an objective test (*i.e.*, vagueness is a facial challenge, not as applied to particular facts and circumstances). "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 the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *Wilson*, 169 N.H. at 770 (quoting *Hynes*, 159 N.H. at 200). "It is well established that the specificity required to uphold a statute need not be contained in the statute itself, but rather, in the context of related statutes, prior decisions, or generally accepted usage." *Hynes*, 159 N.H. at 200 (quotation omitted). Further, "a scienter requirement in a statute ameliorates the concern that the statute does not provide adequate notice to citizens regarding the conduct that is proscribed," as does the use of "plain and easily understandable words." *State v. MacElman*, 154 N.H. 304, 308 (2006) (citations omitted). "A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *Wilson*, 169 N.H. at 767 (quoting *State v. White*, 164 N.H. 418, 423 (2012)).

17. Defendant's Motion does not cite any relevant language of any of the statutes Defendant is charged with violating as being void for vagueness, but rather conflates her claim of vagueness with arguments related to overbreadth. Accordingly, this Court should deny Defendant's request for dismissal on the basis of vagueness as being inadequately pleaded. To

the extent the Court wishes to consider these undeveloped claims of vagueness, the State responds as follows.

i. RSA 629:1 (Attempt) is Not Void for Vagueness

18. Defendant has not challenged RSA 629:1 as void for vagueness, and as such, this Court should not consider such a challenge to the validity of this statute. Without waiving this objection, the State provides a response to the issue of whether RSA 629:1 is void for vagueness.

19. RSA 629:1 is based upon Model Penal Code § 5.01. The New Hampshire Supreme Court has already ruled New Hampshire's criminal statute prohibiting attempted crimes is "not . . . unconstitutionally vague for it gives reasonable notice of the prohibited conduct, sets up an ascertainable standard of guilt, and there is no showing that it encourages erratic and arbitrary police action." *State v. Blake*, 113 N.H. 115, 120 (1973) (upholding constitutionality of previous attempt statute) (citations omitted). *See also State v. Davis*, 108 N.H. 158, 160 (1967) (discussing attempted statutory rape), *overruled on other grounds by State v. Ayer*, 136 N.H. 191 (1992). Further, the plain and ordinary language of RSA 629:1 provides a requirement that the person must do or omit to do something that is a substantial step toward the commission of a crime "under the circumstances as he believes them to be." RSA 629:1, I. *See also*, RSA 629:1, II (defining "substantial step"). Accordingly, RSA 629:1 is not facially void for vagueness.

ii. RSA 629:2 (Criminal Solicitation) is Not Void for Vagueness

20. Defendant has not challenged RSA 629:2 as void for vagueness, and as such, this Court should not consider such a challenge to the validity of this statute. Without waiving this objection, the State provides a response to the issue of whether RSA 629:2 is void for vagueness.

21. RSA 629:2 is based upon Model Penal Code § 5.02. The New Hampshire Supreme Court has already defined the plain and ordinary meaning of the term "solicitation."

Petition of State (State v. Laporte), 157 N.H. 229, 231-32 (2008). The New Hampshire Supreme Court has also stated that solicitation is analogous to the crime of attempt (which is not void for vagueness), stating that "[s]olicitation to [commit a crime] becomes attempted when the solicitation meets the requisites of the attempt statute. Thus, one is guilty of [an attempt] if one's fruitless criminal solicitation of another to commit [a crime] is (1) carried out 'with a purpose that a crime be committed' and is (2) 'an act or omission constituting a substantial step toward the commission of the crime.' RSA 629:1, I." *State v. Kilgus*, 128 N.H. 577, 583-85 (holding that solicitation to commit murder may constitute attempt to commit murder when the defendant "has completed all the preliminary steps for the hired murder to take place"). Further, RSA 629:2 has a scienter requirement that a person act "with a purpose that another engage in conduct constituting a crime." RSA 629:2, I. Thus, like RSA 629:1, RSA 629:2 "gives reasonable notice of the prohibited conduct, sets up an ascertainable standard of guilt, and there is no showing that it encourages erratic and arbitrary police action." *Blake*, 113 N.H. at 120. Accordingly, RSA 629:2 is not facially void for vagueness.

iii. RSA 643:1 (Official Oppression) is Not Void for Vagueness

22. RSA 643:1 is based upon Model Penal Code §243.1. Although the issue has never been ruled upon by the New Hampshire Supreme Court, other states with analogous statutes have held that such statutes are not unconstitutionally void for vagueness. *See, e.g.*, *State v. Heaton*, 125 Wash.App. 1035 (Ct. App. Wash. 2005); *Campbell v. State*, 139 S.W.3d 676 (Ct. App. Tex. 2003); *State v. Wood*, 67 Or.App. 218, 678 P.2d 1238 (Ct. App. Ore. 1984); *Zuniga v. State*, 664 S.W.2d 366 (Ct. App. Tex. 1983); *State v. Birge*, 16 Wash.App.2d 16, 470 P.3d 1144 (Ct. App. Wash. 2021). Further, RSA 643:1 includes two *mens rea* requirements, with "the inclusion of [the purposeful] *mens rea* requirement" being "to protect honest error from criminal

prosecution." *People v. Feerick*, 93 N.Y. 2d 443, 448, 714 N.E.2d 851, 857 (1999). Thus, the statute "*negates* the possibility" that mere error in judgment or other blunder or incompetence could be subject to criminal prosecution and "erects high barriers to prevent a criminal court from reviewing mere errors of judgment on the part of public officials." *Id.* (emphasis in original). Accordingly, under the plain and ordinary meaning of the words in RSA 643:1, the statute provides a person of ordinary intelligence a reasonable opportunity to understand that if any public official commits an act that purports to be an act of their office that is actually unauthorized (or fails to perform an official duty) – not merely because of an error in judgment, but in order to confer or receive a benefit or inflict some harm – then such conduct is subject to criminal liability under RSA 643:1. Accordingly, RSA 643:1 is not void for vagueness.

iv. RSA 642:1 (Obstructing) is Not Void for Vagueness

23. RSA 642:1 is based upon Model Penal Code § 242.1. By its plain language, this statute prohibits a person from "engaging in . . . unlawful conduct with a purpose to hinder or interfere with a public servant . . . performing or purporting to perform an official function." RSA 642:1. The New Hampshire Supreme Court has already held that similar language is not unconstitutionally vague. *See State v. Albers*, 113 N.H. 132, 135-36 (1973) (holding that "unlawful act" means "unlawful *criminal* acts," and that "[t]his interpretation . . . cures any vagueness which may have inhered in these words since the conduct prohibited is clear") (emphasis in original). Accordingly, RSA 642:1 is not void for vagueness.

v. RSA 640:3 and RSA 21-G:23 are Not Void for Vagueness

24. As stated in ¶ 7, *supra*, Defendant is not charged with violating RSA 640:3 or RSA 21-G:23, and the State is not required to prove the elements of these charges at trial.

Accordingly, Defendant does not have standing to assert a challenge to these statutes. Without waiving this objection, the State responds as follows.

25. RSA 640:2 is based upon Model Penal Code § 240.2. By its plain terms, RSA 640:3, I(b) prohibits a person from purposely seeking to privately influence a public servant's official discretion "on the basis of considerations other than those authorized by law." The plain and ordinary meaning of the words in the statute, combined with the "purposely" scienter requirement, provides a person of ordinary intelligence with notice of the prohibited conduct. *MacElman*, 154 N.H. at 308. Accordingly, RSA 640:2 is not void for vagueness.

26. RSA 21-G:23, by the ordinary meaning of its plain terms, provides notice to a person of ordinary intelligence that a member of the executive branch may not use their public position "to secure governmental privileges or advantages for others to which they are not otherwise entitled." Accordingly, RSA 21-G:23 is not void for vagueness.

c. Statutes Not Facially Void for Overbreadth

27. "A statute is void for overbreadth if it attempts to control conduct by means which invade areas of protected freedom." *State v. Briggs*, 147 N.H. 431, 435 (2002). "[T]he 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. The criterion of 'substantial overbreadth' **precludes a court** from invalidating a statute on its face simply because of the possibility, however slight, that it might be applied in some unconstitutional manner." *Id.* at 310 (quotation and citations omitted) (emphasis added). "The application of the overbreadth doctrine is strong medicine to be employed only as a last resort," as "[l]egislative enactments are construed to avoid conflict with constitutional rights." *Id.* (quotation and citations omitted).

28. Defendant has no right to interfere with a criminal investigation. *See Briggs*, 147 N.H. at 535 ("defendants do not have a protected freedom to interfere with an officer performing an official function"). The statutes in this case each possess an unauthorized action element combined with a scienter requirement that avoids any conflict with constitutional rights. *See* RSA 629:1, I (no constitutional right to take "a substantial step toward the commission of a crime" "with a purpose that a crime be committed"); RSA 629:2, I (no constitutional right to "command[], solicit[] or request[] [another] person to engage" in criminal conduct "with a purpose that another engage in conduct constituting a crime"); RSA 643:1 (no constitutional right to knowingly commit "unauthorized act" with a purpose to harm or benefit); RSA 642:1 (no constitutional right to engage in "unlawful conduct with a purpose to hinder or interfere with a public servant"); RSA 640:3 (no constitutional right to privately address a public servant with a purpose to have such public servant exercise their discretion "on the basis of considerations other than those authorized by law"); RSA 21-G:23 (no constitutional right to "secure governmental privileges or advantages" to which a person is "not otherwise entitled").

29. "[W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact on the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited." *Brown v. Hartlage*, 456 U.S. 45, 55 (1982). "[E]very court that has addressed the issue, including this one, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of spoken or written words." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 244 (4th Cir. 1997). "[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v. Varani*, 435 F.2d

758, 762 (6th Cir. 1970). *See also* Laurence H. Tribe, *American Constitutional Law* 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of Volkswagen parts.").

30. Nothing in these statutes prohibits an individual from lawfully petitioning the government for a redress of grievances or speaking publicly about such matters. A person of ordinary intelligence would understand that while he or she petitions his or her government and may speak on matters publicly, he or she cannot attempt, solicit, or otherwise seek to obtain *illegal* actions from governmental officials or to otherwise corruptly influence the government – in the same way that laws prohibiting bribery (*see* RSA 640:2) do not overbroadly prohibit an individual from petitioning his or her government officials to act in a certain way (*i.e.*, provide governmental action in exchange for the speech conduct of writing a check to the government official). *See State v. Hanes*, 171 N.H. 173 (2018) (discussing role of defendant's subjective intent as required by statute in avoiding conflict with First Amendment). Accordingly, on their face, each of these statutes is not overbroad such as to encompass protected First Amendment conduct.

d. Indictments Not As-Applied Void for Overbreadth

31. The Indictments charge Defendant with acting with criminal intent in engaging in her actions. *See Briggs*, 147 N.H. at 435 (no "protected freedom to interfere with an officer performing an official function); *Brown*, 45 U.S. at 55 (criminal solicitation "may properly be prohibited"). Accordingly, to the extent Defendant seeks to challenge the Indictments as void for overbreadth as applied to her conduct, she must do so based on the facts as alleged in the Indictments. Defendant cannot make such a challenge based on her version of the facts without

stipulating to the allegations – including the *mens rea* as charged in each Indictment. *See State v. Grant-Chase*, 01-S-1141, 2002 N.H. Super. LEXIS 10 at *9 (Hillsborough-North Superior Court, Feb. 8, 2002) (*Lynn*, J.) ("Assuming the State is able to prove these facts [alleged in the indictments], there is no possible way that such conduct on the part of the defendant would be protected by the free speech guarantees of the state or federal constitutions") (citations omitted). That is, for purposes of this challenge, this Court must assume that Defendant's intent in meeting with Governor Sununu was (*inter alia*) to improperly influence the criminal investigation into her husband, and that her intent in calling Chairman Duprey was to obtain a special governmental privilege or advantage to which she was not entitled. As such, this Court could consider whether, as applied to this Defendant, the indictments unconstitutionally swept protected conduct within the scope of criminal statutes (which they would obviously not).

32. However, Defendant does not argue that the Indictments, on their face, sweep protected conduct within the scope of criminal statutes. Instead, Defendant seeks to deny that she acted with the requisite *mens rea* because she was not soliciting crimes or otherwise attempting to improperly influence the investigation into her husband, but rather was merely petitioning a government official or performing the duties of a judicial officer. She would then have the Court accept her defense as true, and then rule that the unattested facts that she alleges – and not the facts as alleged by the grand jury in the Indictments – make the statutes unconstitutional as applied to her.

33. It is the role of the jury at the conclusion of trial – not this Court in a pre-trial proceeding – to decide which of these competing versions of the facts are correct, including whether Defendant acted with the requisite *mens rea* as alleged. If, as Defendant asserts under contradictory theories, she did not act with the requisite *mens rea*, then the issue of whether such

conduct would be constitutionally protected would be moot, as the jury would find Defendant not guilty. If, as the grand jury alleged and the State contends, she did act with the requisite *mens rea*, then the issue of whether such conduct would be protected conduct would also be moot, as Defendant has no constitutional right to engage in criminal conduct. Because these are the only competing outcomes in a criminal trial of contested facts, *Bisbee* acknowledges that there "is no summary judgment procedure in criminal cases," as there is no need for such a procedure (short of a finding of fact by the jury following trial) once a grand jury has returned a facially valid indictment. *Bisbee*, 165 N.H. at 65 (quotation omitted).

34. To the extent Defendant seeks to raise an as-applied challenge without stipulating to the allegations in the Indictments (including allegations regarding her *mens rea*), Defendant seeks to have this Court usurp the role of the jury and rule on the type of motion for summary judgment disavowed in *Bisbee* (and which Defendant acknowledges to be improper). Accordingly, the Indictments are not overbroad as applied to Defendant. To the extent Defendant contests the allegations in the Indictment with regards to her criminal intent, this is a matter of fact solely for a jury, not this Court, to decide.

IV. Motion to Dismiss Should Be Denied on Grounds of Judicial Immunity

35. In addition (and contrary) to claiming that she was acting as a private individual, Defendant alleges (without a supporting affidavit) that she "was acting within the scope of the duties of the office" of Associate Justice of the New Hampshire Supreme Court when she engaged in the acts alleged in the indictments. Motion at ¶ 44. Defendant claims that, as such, she is entitled to judicial immunity for the crimes charged. Motion at ¶¶ 37-55.

36. As a matter of law, while judges enjoy civil immunity for certain official acts in the State of New Hampshire, judges do not enjoy judicial immunity from criminal prosecution.

See Gould v. Director, N.H. Div. of Motor Vehicles, 138 N.H. 343, 345 (1994) (noting that in applying judicial immunity from civil liability, "the **proper remedy against a judicial official for his actions taken in that capacity is** a combination of judicial review and of **inter-system curbing of** arbitrary or **lawless behavior** . . . .") (citations omitted) (emphasis added); *Everitt v. GE*, 156 N.H. 202, 222 (2007) (Legislature is "free to enact legislation" subjecting a public official to liability where such official would otherwise enjoy common-law immunity from suit). *But see Sargent*, 72 N.H. at 556-57 (in 1904 case discussing judicial immunity from civil liability, citing a case from New York that applied the doctrine to civil and criminal cases).

37. To the extent this Court finds that judicial immunity applies in the criminal context, the issue of whether Defendant is entitled to judicial immunity for her alleged criminal conduct is also a question of law. *See Vandenberg v. Hamilton*, 2014-0379, 2015 N.H. LEXIS 241 at *4-5 (N.H. Sup. Ct., Jan. 8, 2015) (unpub. opinion) (holding guardian *ad litem* was entitled to quasi-judicial immunity "as a matter of law"). For judicial immunity to apply, Defendant's alleged acts must have been committed in a matter where she had "jurisdiction of the subject-matter in [an] action pending before [her]." *Sargent*, 72 N.H. at 556-57 (1904). *See also Suprenant*, 163 N.H. at 530 (to determine whether a judicial officer's conduct is protected by immunity, "courts analyze the nature of the duties performed and whether they are closely associated with the judicial process") (quotations omitted); Motion at ¶ 41 (admitting that Defendant has the burden to show that she was engaged in a judicial function).

38. Defendant offers the following unattested assertions of fact that she was engaged in the following judicial acts: (1) taking official action regarding her recusals (Motion at ¶ 42); and (2) taking official action regarding the management of the Court's docket (id. at ¶ 43). Defendant makes no allegation that her conversations with Chairman Duprey are covered by

judicial immunity. *See* id. at ¶ 44 (discussing only meeting with Governor Sununu). Defendant also does not allege how meeting with Governor Sununu – the head of the Executive Branch – was in any way related to carrying out these purportedly judicial functions, or what role the Governor plays (or even could play) in her recusals or the management of the Court's docket. Defendant does not (and cannot, based upon her recusals) argue that she had any judicial role in the criminal investigation into her husband or any of the then-pending litigation before the New Hampshire Supreme Court wherein the New Hampshire Department of Justice was a party.

39. Defendant is not charged with recusing herself from cases or for managing the Court's docket. Defendant is charged with attempting to unlawfully interfere into the investigation of her husband and for soliciting information from an executive branch official to which she was not entitled. To the extent Defendant may claim to have been motivated by judicial concerns, these are not judicial *acts*.

40. Further, Defendant's assertions are inapposite to the allegations in the Indictments – that is, that she was not acting with a benign purpose such as she alleges (without attesting to the veracity of such an assertion), but that she was acting with a purpose to interfere with a criminal investigation into her husband. As interference in the criminal investigations by the Executive Branch is not a judicial function, the Indictments for Defendant's actions do not implicate any form of judicial immunity. As the Indictments allege that Defendant was engaged in actions that would not be covered by judicial immunity, resolution of her contrary assertions are questions of fact for the jury to decide – that is, whether she acted with the requisite *mens rea* as charged in the Indictments. It would be improper for this Court to take (one version of) Defendant's factual assertions as true, which are in opposition to the charges in the Indictments,

and rule on the ultimate issue in this case. Accordingly, Defendant's Motion on grounds of judicial immunity should be denied.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Deny Defendant's Motion to Dismiss All Indictments; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Date: December 31, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via email and the Court's e-filing system to counsel of record.

/s/ Dan A. Jimenez
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