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 CHARGES OF OFFICIAL OPPRESSION AND CRIMINAL SOLICITATION OF OFFICIAL OPPRESSION

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 Charges of Official Oppression and Criminal Solicitation of Official Oppression ("the Motion"). In support, the State represents as follows:

Motion Precluded by *Res Judicata*, Collateral Estoppel, Waiver

1. The Motion argues that the criminal statutes (RSA 629:2; 643:1) "are, facially and as applied, unconstitutionally overbroad because it punishes the exercise of First Amendment rights" and, "facially and as applied, unconstitutionally overbroad because they punish the exercise of First Amendment rights" and "are, facially and as applied, unconstitutionally vague because they fail to put an ordinary reasonable person on notice of what conduct is prohibited and because they invite discriminatory enforcement by the State." Motion at *1. Defendant acknowledges that she has raised these arguments before in her Motion to Dismiss All Indictments on First Amendment, Right of Redress, and Judicial Immunity Grounds ("the 1A Motion"), but claims that because discovery has been exchanged in the interim, the instant Motion is somehow appropriate for this Court to reconsider. Motion at *1, n.1.

2. When considering (and denying) the 1A Motion, this Court properly limited its factual analysis to those facts as alleged in the indictments, such that this Court's reasoning in previously denying these same arguments would be unaffected by the continuing discovery process. Order Denying 1A Motion at *4, n.1. This Court further noted that the Court "must defer to the grand jury's determinations" about sufficiency of the evidence at this stage, which would also be unaffected by the continuing discovery process. Order on 1A Motion at *14.

3. Defendant cites no authority and offers no reasoning for how the ongoing discovery process can affect a facial challenge to indictments or statutes. Any such reasoning would lead to the absurd result that every new discovery disclosure would allow a party to relitigate facial challenges to indictments already ruled on by the Court. The fact that the defense "noted" in its prior Motion that it was reserving the right to raise additional grounds to seek dismissal does not give Defendant a legal basis to file this Motion. If Defendant wished to have this Court reconsider its ruling on Defendant's vagueness and overbreadth challenges (or to raise new arguments regarding this issue), she and her counsel should have availed themselves of their legal means of doing so: by filing a motion to reconsider within the timeframe allowed. *State v. Plantamuro*, 171 N.H. 253, 259 (2018) (legal issues regarding a trial court's order "must be presented to the trial court in a motion for reconsideration" in order to be preserved) (citations omitted).

4. "In its most basic formulation, the doctrine of collateral estoppel bars a party to a prior action . . . from relitigating any issue or fact actually litigated and determined in the prior action. Res judicata, or 'claim preclusion,' is a broader remedy and bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation." *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (quotation omitted).

5. "For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so." *Stewart v. Bader*, 154 N.H. 75, 80-81 (2006).

6. There are three elements for *res judicata* to apply: "(1) the parties in both actions are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment of the merits." *Riverbend Condo Ass'n v. Groundhog Landscaping & Prop. Maint.*, 173 N.H. 372, 375 (2020).

7. In this case, the parties have already litigated, and this Court has already ruled on, the issues of vagueness and overbreadth, both facially and as applied, and this Court has already denied the 1A Motion on these grounds. Order Denying 1A Motion at *9-15, 17. To the extent Defendant seeks to raise new arguments not briefed in the 1A Motion, these arguments were waived by the filing of the 1A Motion. *State v. Mountjoy*, 142 N.H. 648, 652 (1998) (when Defendant proceeds on one line of argument but does not brief another, the argument not briefed is deemed waived). Relitigating the issues of vagueness and overbreadth through collateral attacks on this Court's ruling wastes the resources of the parties and the Court. Accordingly, under the doctrines of collateral estoppel, *res judicata*, and waiver, the Motion should be denied.

Motion Should be Denied on Merits

8. Because Defendant raises identical challenges to those that have already been objected to by the State and denied by the Court, the State incorporates by reference all arguments as contained in its objection to the 1A Motion captioned "State's Objection to Motion

to Dismiss All Indictments," and all findings and reasoning in this Court's Order denying the 1A Motion.

9. "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).

10. 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 challenges are "questions of constitutional law"). "[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).

Statute Not Void for Vagueness

11. As stated in ¶ 10, *supra*, vagueness "is applicable solely" to issues regarding a statute's "clarity and precision." *Id.* (quotation omitted). Accordingly, despite Defendant's asserted challenge of vagueness as applied to her (*see* Motion at ¶¶ 56-59), the test for vagueness is an objective test (*i.e.*, vagueness is a facial challenge, not as applied to particular facts and circumstances). Defendant cites no authority for the proposition that she can challenge the language of a statute for being vague as applied to her.

12. "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). "In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." *Hynes*, 159 N.H. at 199-200. "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)).

13. 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." *State v. Blake*, 113 N.H. 115, 120 (1973). Accordingly, RSA 629:2 is not facially void for vagueness.

14. 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.

15. Again, "[t]he Defendant's argument [in the Motion], however, makes no reference to the particular . . . statutory language that she claims [is] vague," which is "insufficient to meet her high burden of overcoming the presumption of constitutionality." Order on 1A Motion at *10. Accordingly, the statutes are not void for vagueness.

Statute Not Facially Void for Overbreadth

16. "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).

17. Defendant still has no right to interfere with a criminal investigation. Order Denying 1A Motion at 13-14 (explaining Defendant has no right to interfere with investigation into her husband, as grand jury found). *See Briggs*, 147 N.H. at 535 ("defendants do not have a protected freedom to interfere with an officer performing an official function"). The statute at issue possess an unauthorized action element combined with a scienter requirement that avoids any conflict with constitutional rights. *See* 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 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").

18. Nothing in the statutes at issue prohibit an individual from lawfully exercising a constitutional right. Order Denying 1A Motion at 14-15 (finding "that the conduct alleged in the indictments is [not] protected conduct"). 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 solicit another person to commit a crime or seek to have decisions made about a criminal investigation or prosecution based on who the target is married to. *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, the statutes are not overbroad such as to encompass protected First Amendment conduct. Order Denying 1A Motion at 9-15, 17.

Indictments Not Void for Overbreadth As Applied;
There is (Still) No Summary Judgement in Criminal Cases

19. 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. Order Denying 1A Motion at 14 (grand jury determination about facts regarding Defendant's *mens rea* must be deferred to by this Court at this stage of proceedings). *See also 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).

20. However, Defendant does not argue that the Indictments, on their face, sweep protected conduct within the scope of criminal statutes. Instead, Defendant (again) seeks to engage in a summary judgment proceeding under the guise of an as-applied overbreadth challenge (which this Court has already denied).

21. As this Court has already noted in its denial of the 1A Motion, 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. Order Denying 1A motion at *14. If, as the grand jury found 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. 61, 65 (2013) (quotation omitted).

22. To the extent Defendant seeks to raise an as-applied challenge without stipulating to the allegations in the Indictment (including allegations regarding her *mens rea*), Defendant again 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 has acknowledged to be improper). Accordingly, the Indictments are not overbroad as applied to Defendant. Order Denying 1A Motion at 9-15, 17. To the extent Defendant contests the allegations in the Indictment with regards to her criminal intent, this is a matter of fact to be decided at trial. Id.

23. Further, Defendant's repeated arguments about the lack of an explicit *quid pro quo* are irrelevant. *See State v. Farrington*, 161 N.H. 440, 446-47 (2011) ("Nowhere in the plain and ordinary meaning [of solicitation] do we discern any requirement that the defendant must explicitly or affirmatively ask the victim to engage in [prohibited conduct] as the defendant suggests. While we agree that the defendant did not explicitly or affirmatively ask [the victim] to engage in [prohibited conduct], a jury could have found that the defendant intended his communications to [solicit Victim]."); *State v. Labrie*, 171 N.H. 475, 484-85 (2018) (citations omitted) (in that reaffirming lack of need for explicit request under *Farrington*, noting that "[t]he defendant's actions prior to, during, and after [solicitation] support the jury's finding of the requisite intent at the time [of the solicitation]"). *See also United States v. Blagojevich*, 794 F.3d

729, 738 (7th Cir. 2015) ("[T]he statute does not have a magic-words requirement. Few politicians say, on or off the record, 'I will exchange official act X for payment Y.' Similarly persons who conspire to rob banks or distribute drugs do not propose or sign contracts in the statutory language. 'Nudge, nudge, wink, wink, you know what I mean' can amount to [a crime], just as it can furnish the gist of a Monty Python sketch.").

Additional Arguments Raised by Defendant

24. Defendant argues that *State v. Sargent*, 176 N.H. 713 (2024) is applicable to the indictments at issue. *Sargent* is a case about the sufficiency of the evidence where the Court found that there was insufficient evidence that the defendant acted with a purpose "to benefit himself." *Sargent*, 176 N.H. at 715. The Court found that it was error for the trial court to interpret "the term 'to benefit himself [as] broad enough to include the momentary personal, emotional or psychological benefit, if any, that defendant sought to achieve" as "[t]o conclude otherwise would . . . criminalize[] virtually any empathetic, interpersonal conversation which could be the basis for seeking a momentary personal benefit." *Id*. at 718-19. Instead, the Court found that a person "must seek a specific advantage or gain that is **more than a momentary or fleeting** personal, emotional, or psychological benefit." *Id.* at 719. That is, "benefit," as used in RSA 643:1, is not "momentary or fleeting," but rather is "a specific advantage, or to advance or improve his or her situation or that of another." *Id*. In this case, Defendant is charged with seeking to benefit herself or another with regard to the investigation into her husband, Geno Marconi, through an unauthorized act (and with soliciting then-Governor Sununu to do the same). Affecting a criminal investigation into another is not "momentary or fleeting," but rather is the type of "specific advantage [to herself] or improve[ment] of [Defendant's] situation or that of another" that the Court approved (by contrast) as a qualifying "benefit" under RSA 643:1. *Id*.

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

(A) Deny Defendant's Motion; 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: May 5, 2025

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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/ Joe M. Fincham II
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