

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

**STATE’S OBJECTION TO MOTION TO DISMISS OFFICIAL OPPRESSION  
CHARGE, ALTERNATIVE RELIEF**

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 Official Oppression Charge (CID 2257292C), Or, In the Alternative, To Strike References to the Code of Judicial Conduct (“Motion”). In support of this Objection, the State represents as follows:

1. Defendant was indicted by the Merrimack County Grand Jury in Charge ID 2257292C with one count of Official Oppression (RSA 643:1). RSA 643:1 prohibits, *inter alia*, a public servant from “knowingly commit[ting] an unauthorized act which purports to be an act of his office” or “refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office” when done “with a purpose to benefit himself or another or to harm another.” Defendant is charged in Charge ID 2257292C with violating this statute “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).”

2. The Motion requests that this Court dismiss this charge, or in the alternative, strike the portion of the indictment reading “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).” The Motion is based on the Paragraph 7 of the Preamble to the Code of Judicial Conduct (“CJC”), which states, “The Code is not designed or intended as a basis for civil or criminal liability,” and upon other authority relating to whether a violation of the CJC, standing alone, creates a criminal or civil cause of action. *See Motion* at ¶¶ 2-10. Defendant does not address the issue of whether the CJC can make an act “unauthorized” or impose a duty under RSA 643:1, but rather merely argues that because the CJC does not itself create a criminal cause of action or substantive third-party rights, Charge ID 2257292C must be dismissed.

3. However, the issue of whether a violation of the CJC, standing alone, creates a criminal cause of action is irrelevant to this matter. For purposes of this Motion, the State agrees that there is no criminal charge where the only elements are violating the CJC with a *mens rea*. *See* RSA 625:6 (“No conduct or omission constitutes an offense unless it is a crime or violation under this code or under another statute.”). However, Defendant is not charged with a criminal violation of the CJC, but with violating RSA 643:1. RSA 643:1 contains two *mens rea* elements: (1) knowingly committing an unauthorized act or knowingly failing to perform an official duty; and (2) with a purpose to benefit or harm any person. Accordingly, the proper issue before this Court is whether the terms “unauthorized act” and “a duty imposed . . . by law or clearly inherent in the nature of [Defendant’s] office” include a violation of the CJC and duties imposed on Defendant under the CJC, respectively.

**CJC Makes Actions “Unauthorized,” Duty of Office under RSA 643:1.**

4. Although RSA 643:1 does not define the term, “unauthorized,” the generally accepted usage in this context would be “without or contrary to official authority.” *See* WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 146, 2428 (unabridged ed. 2002) (defining

“unauthorized” as “not authorized;” defining “authorized” as “endorse[d], empower[ed], justify[ed], or permit[ted] by or as if by some recognized or proper authority”); WEBSTERS NEW UNIVERSAL UNABRIDGED DICTIONARY 1989 (2d ed. 1983) (defining “unauthorized” as “not warranted by proper authority”); RSA 21:2 (“Words and phrases shall be construed according to the common and approved usage of language . . .”).

5. In the context of RSA 643:1, acts of public servants are made “unauthorized” by constitutions, civil and criminal laws, administrative rules and regulations, and employment standards and policies. *State v. Birge*, 16 Wash.App.2d 16, 40-41, 478 P.3d 1144, 1158 (Wash.Ct.App. 2021) (citation omitted). “Even though a question of a public servant’s authority may be one of first impression in a court, it is governed by sources of law and delegated authorization outside the criminal code itself, sources to which a public official in any event must turn in order to properly understand his or her job.” *State v. Florea*, 296 Ore. 500, 504, 677 P.2d 698, 701 (Ore. 1984). Whether or not an act is “unauthorized” is generally a conclusion of law. *Id.* at 504, 677 P.2d at 701. Thus, while an act may not be “a crime” (*e.g.*, RSA 631:4; 631:4-a; 631:9, II; 635:1, I) or “unlawful” (*e.g.*, RSA 631:2-b, I(i); 633:2; 633:3; 633:7, I(a)(2); 634:1) because it only violates an employment or ethical code instead of a substantive criminal cause of action, such act can nevertheless be “unauthorized.” Otherwise, there would be no distinction between these terms as used in the Criminal Code.

6. The CJC itself clearly states that it has the force and effect of law, like statutes and other rules that can make acts unauthorized. N.H. Sup. Ct. R. 38, Rule 1.1 (“A judge shall comply with **the law, including the Code of Judicial Conduct.**”) (emphasis added). The CJC is a source of law, outside the criminal code itself, which prohibits certain activities and imposes duties relative to the position of Associate Justice of the New Hampshire Supreme Court, and to

which such Justice “in any event must turn in order to properly understand his or her job.” *Birge* at 40-41, 478 P.3d at 1158; *Florea* at 504, 677 P.2d at 701. Accordingly, while not itself creating a civil or criminal cause of action, the CJC can make an act “unauthorized” or “a duty imposed . . . by law or clearly inherent in the nature of [Defendant’s] office.” RSA 643:1.

7. Further, “the inclusion of [the purposeful] *mens rea* requirement” in RSA 643:1, in addition “to protect[ing] honest error from criminal prosecution,” also creates a further requirement of proof other than the mere violation of the CJC in order to form the basis of criminal liability. *People v. Feerick*, 93 N.Y.2d 422, 448, 714 N.E.2d 851, 857 (1999). By way of illustration, if an individual has the prohibited purposeful *mens rea*, but commits an act that is not unauthorized by statute, rule, or policy, then such action would not violate RSA 643:1, “no matter how egregious,” because the person has not committed an “unauthorized act” or violated a duty of office. *People v. Barnes*, 117 A.D.3d 1203, 1207-08, 984 N.Y.S.2d 693, 697-98 (N.Y.App.Div. 2014). Similarly, knowingly violating the CJC – without the additional prohibited purposeful *mens rea* – would not be a violation of RSA 643:1.

8. Accordingly, Defendant’s argument that the CJC does not create a criminal cause of action is irrelevant to the validity of Charge ID 2257292C. Because the CJC can make an action of an Associate Justice of the New Hampshire Supreme Court “unauthorized” or a duty of her office, this indictment does not charge Defendant with violating the CJC as Defendant argues, but with violating the elements of RSA 643:1. Defendant’s Motion should therefore be denied on this ground.

**Defendant’s Argument Leads to Absurd Result of Judicial Immunity from RSA 643:1.**

9. When interpreting statutory language, courts “first look to the language of the statute itself, and, where possible, construe that language according to its plain and ordinary

meaning.” *Caron v. N.H. Dep’t of Emp’t Sec.*, 175 N.H. 540, 544 (2022) (citation omitted). Words of the statute are not examined “in isolation, but, rather, within the context of the statute as a whole.” *Id.* (citation omitted). To “discern legislative intent from the statute as written,” courts “will neither ignore the plain language of the statute nor add words that the lawmakers did not see fit to include.” *Id.* (citations omitted). Courts “construe all parts of the statute together to effectuate its overall purpose and avoid an absurd or unjust result.” *Id.* (citation omitted).

10. The language of RSA 643:1 evinces a clear legislative purpose to criminalize actions by public officials who abuse their authority in order to harm or benefit anyone by means of malfeasance, misfeasance, or nonfeasance in office. Judicial branch employees – including judges – are included in the definition of “public official[s].” RSA 643:1 (“... public servant, as defined in RSA 640:2, II . . . .”); RSA 640:2, II (““Public servant’ means any officer or employee of the state or any political subdivision thereof, **including judges** . . . .”) (emphasis added).

11. The New Hampshire Supreme Court has held that one branch of government cannot regulate the conduct of the members of another branch (*i.e.*, cannot make certain acts unauthorized or duties of office). *See In re Judicial Conduct Comm.*, 151 N.H. 123, 125-26 (2004) (citing *Opinion of the Justices*, 116 N.H. 406, 413 (1976)) (“Similar[] [to the Executive Branch having no power to create conflict-of-interest legislation for members of the Legislative Branch], the regulation of the conduct of judges is the prerogative and responsibility of the judiciary and not of the legislature.”). Accordingly, as only the Judicial Branch (aside from the State Constitution) has the power to make an act of a judge “unauthorized” or a “duty,” then the result of Defendant’s argument is that no judge could ever be charged with abusing their office under RSA 643:1, as virtually all such acts would either be an “unauthorized act” or duty solely by means of judicial regulation (*e.g.*, the CJC).

12. For the Judicial Branch to hold that judges (and only judges) are immune from criminal prosecution under RSA 643:1 for abusing their public office – despite their inclusion in the definition of “public official” – because only the Judicial Branch has the power to regulate judicial conduct, but no power to criminalize such conduct, is an absurd result. Rather, the construction of an “unauthorized act” and duty of office to include regulations of judges by the Judicial Branch (*e.g.*, the CJC) avoids this absurd result by affirming that each branch of government can regulate itself (consistent with *In re Judicial Conduct Comm.* and *Opinion of the Justices, supra*), but that the Legislative Branch can criminalize abuse of office by any and all public officials who knowingly violate the regulations of their respective branches of government when done for a prohibited purpose.

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

- (A) Deny Defendant’s Motion to Dismiss Charge ID 2257292C; 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: April 14, 2025

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**CERTIFICATE OF SERVICE**

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

/s/ Joe M. Fincham II  
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