STATE OF NEW JERSEY v. GEORGE E. NORCROSS, III, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION — CRIMINAL MERCER COUNTY DOCKET NO.: MER-24-001988 INDICTMENT NO.: 24-06-00111-S

REPLY BRIEF IN FURTHER SUPPORT OF PHILIP A. NORCROSS'S MOTION TO DISMISS THE INDICTMENT

MARINO, TORTORELLA & BOYLE, P.C.
437 Southern Boulevard
Chatham, New Jersey 07928-1488
(973) 824-9300

Attorneys for Philip A. Norcross

On the Brief:

Kevin H. Marino (Atty. No. 023751984)
John D. Tortorella (Atty. No. 017871999)
Erez J. Davy (Atty. No. 103142014)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

Other Authorities

In addition to the compelling arguments made in the reply brief filed in support of all Defendants' omnibus motion to dismiss the Indictment, Defendant Philip A. Norcross ("Philip Norcross") respectfully submits this reply brief in further support of his auxiliary motion to dismiss the Indictment.

PRELIMINARY STATEMENT

In a desperate attempt to salvage this misbegotten prosecution, the State (a) distorts the law governing motions to dismiss an indictment; (b) miscasts Defendants' facial challenge to the Indictment as jury argument; and (c) reads the theft-by-extortion statute on which that instrument turns to encompass behavior the Criminal Law Revision Commission expressly exempted from its reach—then uses that misreading to transform Philip Norcross's routine practice of law (which it now concedes was "licit" behavior) into participation in the criminal conspiracy it conjures. Based on that analytical house of cards, the State tries to cow the Court into believing it would exceed its authority by dismissing what the State repeatedly describes as the grand jury's work.

None of this is right. First, the Court must dismiss an indictment where, as here, its facts do not state a crime. As correctly noted by one of the cases on which the State itself relies, the standard that applies to motions to dismiss an indictment is the same one the United States Supreme Court announced in Conley v. Gibson, which governed civil motions to dismiss a complaint for more

than fifty years. Under that standard, a complaint was dismissed if the facts it alleged, proven to be true, would not state a claim on which relief could be granted. Judged by that clearly applicable standard, the Indictment must be dismissed.

Second, whether Philip Norcross performed the acts he is charged with performing—petitioning the Legislature; advising a client; negotiating with an adversary; and advocating for a client—is a question of fact. And it is not in controversy; for purposes of this motion, he asks the Court to assume that he did. But whether, as the Indictment charges, doing any of those things violated the law is not an allegation of fact, it is a conclusion of law. That is for the Court to decide, not the jury. And no, doing those things, or agreeing to do them, is not a crime.

Third, the State's ham-handed modification of the extortion and criminal-coercion statutes notwithstanding, the Appellate Division recognized in State v. Roth that economic menaces, including hardball economic bargaining, do not constitute such crimes. As a result, Philip Norcross's perfectly "licit" acts did not become acts in furtherance of the criminal conspiracy the State imagines based on George Norcross's hardball economic bargaining. The State argues that whether the conduct charged in the Indictment was hard bargaining or extortion is a question of fact for the jury. No it's not. Whether George Norcross

said the things he is accused of saying to Carl Dranoff is a question of fact; for purposes of this motion, the Court may assume he did. But whether making those statements is extortion is for the Court, and the Court alone, to determine. In light of Roth, which channeled and indeed quoted the Commentary to the Final Report of the New Jersey Criminal Law Revision Commission (the "1971 Commentary") the State ignores, the answer is easy and indisputable: they do not.

As for the State's attempt to convince this single-judge Court that dismissing the Indictment would be an unprecedented step, upsetting the natural order of things, that is pure nonsense. Every motion to dismiss an indictment returned by a grand jury that has ever been granted has been granted by a single judge. And despite the State's overt attempt to attribute its own distortion of the law to the grand jury—which the State claims embodies the people's voice, to which the Court should defer—the State's relationship with the grand jury is very much a garbage-in, garbage-out affair. The State presents evidence of the defendant's conduct, tells the grand jury it is criminal, and drafts the indictment the grand jury returns. Where, as here, the conduct the State says is criminal is simply not, the grand jury's indictment is fatally flawed. To dismiss such an indictment is not to discredit the grand jury. It is to reject the perversion of the grand jury system that occurs when the prosecution misstates the law.

One need look no further than the topic sentence of the State's brief in opposition to the Defendants' motions—"Government is supposed to be open to all the people on neutral terms"—to appreciate the mischief afoot here. Whether that statement reflects the will of the framers is open to debate, but it surely is not an aspiration enforced by the criminal laws. The State would have this Court allow it to argue to a petit jury that Defendants, led by George Norcross, violated the criminal laws of this State by availing themselves of superior access to the New Jersey Legislature and Camden city government. That is flatly wrong and tremendously dangerous. Would jurors be open to punishing with convictions (and therefore prison) persons more powerful than themselves if told their conduct was criminal? That very possibility—that the jury might convict Defendants for conduct that, while perhaps off-putting to the average citizen, is not criminal—is what makes it absolutely essential that this Court do its sworn duty and dismiss this Indictment for failure to state a crime.

ARGUMENT

I. THE COURT MUST DISMISS THE INDICTMENT BECAUSE THE FACTS IT ALLEGES DO NOT STATE A CRIME.

The Indictment must be dismissed because the kind of economic threats it alleges are beyond the scope of New Jersey's extortion and criminal-coercion statutes. Federal law construing the Hobbs Act is in accord. These common-sense limitations are especially important here; if the Indictment were to survive

Defendants' motions to dismiss, every lawyer in this State would risk extortion and criminal-coercion charges any time he or she represented an economically powerful or politically well-connected client.

In arguing otherwise, the State only highlights the Indictment's deficiencies. As a threshold matter, the State misstates the standard against which the Indictment must be judged. Contrary to the State's rhetoric, indictments are not invalid only when they are "palpably untenable" or "unclear"; they are equally defective when their factual allegations, accepted as true, do not meet the statutory elements of the crimes they charge. That is the case here. The State's assertion that Defendants overlook inconvenient allegations, urge favorable fact-specific inferences, or inject facts of their own is simply untrue. Defendants accepted each of the Indictment's factual allegations as true, never deviating beyond the four corners of that pleading, and demonstrated that they did not charge a crime as a matter of law. Far from being "novel," Defendants' motions vindicate the basic principle that the conduct charged in an indictment must itself be criminal.

In his moving brief, Philip Norcross cited extensive law for the unassailable point that a court must dismiss an indictment when the facts as alleged, accepted as true, do not amount to a crime. Rather than embrace this settled standard and argue that the Indictment's allegations meet it, the State

raises a series of arguments designed to deflect from its fundamental obligation to plead facts that amount to a crime. None has merit.

First, the State argues that the Defendants improperly treat the Indictment as the "totality" of the State's case-in-chief, suggesting that the Indictment could be saved based on unstated allegations. Not so. Defendants are not attacking the quality of the State's evidence. Rather, they are assuming for purposes of their motions that the State has evidence to prove each and every one of its factual allegations. They are not demanding a proffer of each document and piece of testimony the State may introduce at trial. Defendants' motions treat the Indictment's allegations as the totality of the charges against them and ask the only question that matters: whether any of it is criminal. The answer to that question is a resounding no.

To the extent the State suggests it can salvage the Indictment by relying on some hidden allegation it could have but failed to allege, it is wrong. The State is required to provide Defendants with adequate notice of the charges against them. This obligation requires the State to present an indictment that alleges "all the essential facts of the crime." State v. Dorn, 233 N.J. 81, 93 (2018) (cleaned up); see also State v. Fortin, 178 N.J. 540, 633 (2004) ("[T]he State must present proof of every element of an offense to the grand jury and specify those elements in the indictment."); State v. De Vita, 6 N.J. Super. 344,

347 (App. Div. 1950) ("The essential facts constituting the crime must be directly stated in the indictment."). The State cannot avoid dismissal by alluding to an "essential fact" it failed to include in the Indictment.

Second, the State argues that the Defendants have ventured beyond the four corners of the Indictment to challenge the sufficiency of the State's evidence. Wrong again. With the exception of the branch of William Tambussi's motion that cites grand jury materials (which the State has, by agreement, not addressed), Defendants have limited their arguments to the allegations in the Indictment. As they have repeatedly explained, they have accepted those allegations as true for purposes of their motions and have afforded the State the benefit of every reasonable inference. This approach differs decisively from that taken by the defendants in the cases cited at pages 34–35 of the State's brief. See United States v. Wedd, 993 F.3d 104, 121 (2d Cir. 2021) ("[T]here is no merit in Wedd's argument that the district court should have looked beyond the four corners of the Indictment to evaluate the adequacy of its aggravated identity theft pleading."); United States v. Phillips, 690 F. Supp. 3d 268, 277 (S.D.N.Y. 2023) (stating the general rule that "the Court will not look beyond the face of the indictment and draw inferences as to proof to be adduced at trial") (cleaned up).

Third, the State argues that Defendants are not, in fact, accepting all the allegations in the Indictment as true because they do not concede that they engaged in a "criminal enterprise," engaged in a criminal conspiracy, or committed the crimes of extortion or coercion. (Opp. at 35–36.) That argument is frivolous. Philip Norcross and his co-defendants accepted the factual allegations in the Indictment as true and explained why they did not amount to crimes. (See Philip Norcross MTD at 1, 2, 16–17, 24; Omnibus MTD at 3–9.)

But a court "disregard[s] legal conclusions to determine whether the alleged facts constitute a crime." United States v. Harder, 168 F. Supp. 3d 732, 737 (E.D. Pa. 2016). Thus, it is entirely appropriate for Philip Norcross to seek dismissal because the facts alleged in the Indictment do not support the legal conclusion that he committed "criminal extortion." (Opp. at 36.) See also Rich v. Shrader, No. 09-cv-0652, 2010 U.S. Dist. LEXIS 98267, at *39 (S.D. Cal. Sept. 17, 2010) (accepting the factual allegations in a complaint as true but not the "legal conclusion that these facts constitute extortion").[1]

The State is therefore wrong to argue that to accept the facts alleged in the Indictment is "to concede guilt." (Opp. at 36.) Only by accepting the

[1] In accordance with R. 1:36-3, we are submitting a Compendium of Unpublished Opinions, which contains copies of the unpublished opinions cited in this memorandum of law. Counsel has not located any unpublished opinions contrary to those cited.

Indictment's legal conclusions would Defendants concede guilt. Challenging those conclusions as inconsistent with the law is to attack the Indictment on its face.

Fourth, and relatedly, the State suggests that Defendants have raised challenges other than those addressed to the facial sufficiency of the Indictment. For that argument, the State relies on cases, such as Dorn, 233 N.J. 81, that discuss challenges to the adequacy of the notice an indictment provided or proceedings before the grand jury. But Defendants have not argued that the Indictment did not provide them with adequate notice or addressed the adequacy of the State's grand jury presentation. Rather, they contend that the notice provided them reveals that the State has charged them for conduct that is not criminal and remain silent as to the distorted picture the State painted for the grand jury.

The State also cites State v. Sivo, 341 N.J. Super. 302 (Law Div. 2000), for the proposition that indictments should not be judged under the federal standard applicable to civil motions to dismiss because an indictment's factual allegations must first be approved by the conscience of the community. Sivo does not support that erroneous contention. The defendants there were charged with gambling and building their gambling hall on wetlands. See id. at 308. They did not challenge the substance of the indictment or the sufficiency of the

evidence. They argued that the State had deceived the grand jury into indicting them by promising a continuing investigation into policemen and politicians. See id. at 322–27. The indictment was dismissed as to the individual defendants based on that deception. See id. at 327. That bears no relation to the challenge Defendants have raised here.

Contrary to the State's contention, federal law does not support its illusory distinction between an analysis of the law and the application of law to undisputed facts. (See Opp. at 34 n.3.) As Philip Norcross previously demonstrated, federal courts routinely dismiss indictments when the specific facts alleged "'fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.'" (Philip Norcross MTD at 15–17 (quoting United States v. McGeehan, 584 F.3d 560, 565 (3d Cir. 2009), and collecting additional authority).) The federal decisions the State cites at page 34 of its brief illustrate this same principle. In United States v. Brissette, 919 F.3d 670 (1st Cir. 2019), the district court analyzed whether the "facts alleged in the indictment," along with the government's proffer of evidence for purposes of resolving a dismissal motion, met the obtaining-of-property element of a Hobbs Act prosecution. See id. at 676. On de novo review, the First Circuit reversed the dismissal order after first interpreting that element and applying that interpretation to the "factual" nature of the charges. See id. at 676–86.

In United States v. Sittenfeld, 522 F. Supp. 3d 353 (S.D. Ohio 2021), the court explained that dismissal of an indictment is appropriate if "the government alleges facts showing that, as a matter of law, the charged crime did not occur." Id. at 366 (emphasis in original). The court explained that, under this approach, dismissal would be appropriate if an indictment alleged a "threat" that was not proscribed by a criminal statute. See id. In that circumstance, the "factual allegations" in the indictment would fail as a matter of law to meet the legal elements of the charged crime. See id.

Contrary to the State's claim, the federal law Philip Norcross cites is therefore entirely consistent with New Jersey law and exemplifies the analysis the Court should undertake here. Using these federal precedents as guidance does not, as the State contends, import the "plausibility" standard that governs in federal civil cases pursuant to Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). (Opp. at 36–37 & n.5.) This was made clear by the court in Sittenfeld, which explained that federal courts do not employ this plausibility standard to resolve motions to dismiss indictments. See 522 F. Supp. 3d at 366 ("[T]his Court holds that something like the outdated Conley v. Gibson, 355 U.S. 41, 78 (1957), standard from the civil context applies to criminal complaints. Under Conley, . . . [a] plaintiff's

claim was subject to dismissal only if the facts alleged in the complaint showed, as a matter of law, that the plaintiff could not prevail on his or her claim.").

The State misleadingly suggests otherwise by noting that one of the cases Philip Norcross cited, United States v. O'Connell, No. 17-cr-50, 2017 U.S. Dist. LEXIS 171160 (E.D. Wis. Oct. 16, 2017), analogized its analysis to that undertaken by a court when confronted with a Rule 12(b)(6) motion to dismiss. (See Opp. at 37 n.5.) O'Connell did not reference the reigning plausibility standard, but rather cited to a federal decision that predated Iqbal and Twombly by over a decade. See O'Connell, 2017 U.S. Dist. LEXIS 171160, at *6 (citing United States v. Apple, 927 F. Supp. 1119, 1121 (1996)). Thus, directly contrary to the State's argument, the standard federal courts apply in deciding whether to dismiss an indictment is identical to that applicable here.

Fifth, the State suggests that dismissal would disrespect the grand jury's function in our "criminal justice system." (Opp. at 30 (cleaned up); see also id. (suggesting it would be improper for a "single judge" to dismiss an indictment).) But it is the function of the court—not the grand jury—to determine what the law is, which is precisely the role it exercises when it dismisses an indictment that fails to allege a crime. See, e.g., State v. Riley, 412 N.J. Super. 162, 166–67 (Law Div. 2009) (dismissing six-count indictment returned by grand jury); see also State v. Brady, 452 N.J. Super. 143, 166 (App. Div. 2017) (holding it

improper to allow the grand jury to determine a legal issue); United States v. Brewbaker, 87 F.4th 563, 579 (4th Cir. 2023) ("[T]he district court, and not the grand jury, must decide questions of law."). Indeed, any presumption that a grand jury has returned a valid indictment disappears if the jury was misinformed about the law. See State v. Bell, 241 N.J. 552, 561 (2020) ("[W]here a prosecutor's instructions to the grand jury were misleading or an incorrect statement of law, the indictment fails.") (cleaned up).

II. WHETHER PHILIP NORCROSS COMMITTED CRIMES BY ENGAGING IN THE ACTS CHARGED IN THE INDICTMENT IS NOT A QUESTION OF FACT FOR A JURY BUT A QUESTION OF LAW FOR THE COURT.

The State acknowledges that a motion to dismiss should be granted when it successfully challenges the facial sufficiency of an indictment. But it contends that facial challenges entail no analysis of the facts at all. That is simply not so. Every case that dismissed an indictment for facial insufficiency required the court to consider what was factually alleged against what the charged statutes proscribed. This is precisely the analysis the courts performed in State v. Perry, 439 N.J. Super. 514 (App. Div. 2015), and State v. Riley, 412 N.J. Super. 162 (Law Div. 2009), which the State characterizes as decisions that addressed only matters of "pure statutory interpretation." (Opp. at 30; see also id. at 32–33.)

In Perry, the court analyzed whether a statute that proscribed driving with a suspended license applied to criminalize the defendant's act of driving beyond

a sentenced term of suspension but before his license was reinstated. 439 N.J. Super. at 519. In conducting its analysis, the court first determined, as a matter of statutory construction, that the statute did not prohibit driving during this period. See id. at 525–27. It then applied this interpretation to conclude that none of the offenses at issue occurred during the relevant periods of suspension and affirmed or dismissed the indictments at issue. See id. at 532.

Similarly, in Riley, the court analyzed whether this State's computer-crime laws prohibited employees from accessing computer data in a manner prohibited by their employers. 412 N.J. Super. at 165–66. After analyzing the statute's language, legislative history, caselaw, and principles of construction, the court concluded that the statute did not reach that broadly. Id. at 191. The facts the court assessed were the allegations in the indictment, which the court accepted as true. See id. at 167 ("For the purposes of deciding the motion, the court will accept the facts as alleged by the State.").

The same type of analysis informed the decisions the State erroneously claims did not involve an assessment of the undisputed facts. See State v. Higginbotham, 257 N.J. 260, 266–67, 269 (2024) (describing the sixteen counts alleged in the indictment and the indictment's factual allegations before analyzing whether a subsection of a criminal statute was unconstitutionally overbroad); State v. Morrison, 188 N.J. 2, 14, 19 (2006) (analyzing the

"concepts of distribution, possession, and joint possession of a controlled dangerous substance" under the Comprehensive Drug Reform Act and then "apply[ing] the concepts and principles discussed to the facts of this case"); State v. Thompson, 402 N.J. Super. 177, 194–204 (App. Div. 2008) (analyzing the sufficiency of certain counts in indictments against the "legal background" setting forth the proper interpretation of the State's official-misconduct statutes); State v. Mason, 355 N.J. Super. 296, 300–05 (App. Div. 2002) (analyzing the scope of conduct prohibited by N.J.S.A. 2C:30-2 and applying that law to conclude that the official-misconduct count in an indictment was properly dismissed because the undisputed facts showed that defendants acted as "private citizens performing services pursuant to government contracts").

Bereft of any authority to support its position, the State goes on to invent a distinction between criminal statutes that are "legally impossible" to violate and those that are legally possible to transgress. (Opp. at 28, 30, 31, 32, 33, 35, 36, 40.) This is nonsensical wordplay. It is legally impossible to commit any crime beyond the reach of a criminal statute. That is why "[a]n agreement to violate civil statutes or regulations is not a crime." State v. Campione, 462 N.J. Super. 466, 493 (App. Div. 2020).

III. AS HARDBALL ECONOMIC BARGAINING IS NOT A CRIME, PHILIP NORCROSS'S PRACTICE OF LAW DID NOT VIOLATE OR CONSTITUTE AN AGREEMENT TO VIOLATE THE LAW.

In his opening brief, Philip Norcross demonstrated that, to satisfy due process, criminal statutes must draw clear lines separating criminal from lawful conduct. (Philip Norcross MTD at 27–28.) He further demonstrated that the State's interpretations of the extortion and coercion statutes, if upheld, would impermissibly ensnare attorneys in criminal prosecutions for zealously representing their clients. (Id. at 29.)

The State disputes none of these principles. Instead, it argues that Philip Norcross transgressed the law by leveraging George Norcross's "reputation" in negotiations. (Opp. at 1.) But reputation matters when it conveys a threat of prohibited conduct, such as the prospect of violence. This is not a mafia case, where use of a "made man" with a reputation for violence carries with it an implied threat of violence. Here, the State repeatedly acknowledges that George Norcross had a reputation for being politically well-connected. He is indeed a powerful person, having served as Executive Chairman of insurance brokerage Conner Strong & Buckelew and Chairman of the Board of Cooper University Health Care. That is not a crime. Nor could it be, given that citizens are within their constitutional rights when they use their political capital to influence public officials.

Neither can the State discharge its obligation to plead a crime by hiding behind its conspiracy allegations, as it tries to do in defending the Indictment's allegations against Philip Norcross. The State argues that it was not required to prove that each Defendant "personally completed racketeering acts." (Opp. at 2.) But that uncontroversial proposition does not relieve the State of its obligation to plead an agreement to commit an actual crime—and with respect to RICO, two predicate acts—regardless of who did so. The Indictment fails because it fails to plead any crime by anyone. Without a crime, there can be no agreement to commit one.

The State likewise comes up short when it argues that the Indictment pleads conduct that strayed beyond the accepted bounds of "hard bargaining" or "commercial transactions." (Opp. at 2–3.) These are legal conclusions unsupported by the facts alleged in the Indictment. So too the State's contentions that it pleaded official misconduct, illegal financial facilitation of criminal conduct, and corporate misconduct. All these allegations are derivative of the State's legally deficient extortion and coercion charges. With no distinct allegation to support them, they also fail as a matter of law.

In its Opposition, the State does not dispute that the factual allegations specific to Philip Norcross concern acts that are standard fare for lawyers. Those allegations describe Philip Norcross's acts of bringing his legal expertise to bear

on draft legislation affecting urban redevelopment, advocating for or advancing the interests of clients such as the Cooper Foundation and Cooper Hospital when negotiating or strategizing real-estate deals and redevelopment projects, and helping City officials develop litigation strategies. (See Philip Norcross MTD at 3–13.) According to the State, what distinguishes the work of Philip Norcross from other lawyers is that he "agreed" to commit the crimes that were the objects of the charged conspiracies. (Opp. at 98–99.) But the Indictment does not allege a single fact to support that conclusion.

The State reads the laws of extortion and criminal coercion to proscribe the use of a client's economic or political power to achieve any property transfer or action. If mere representation of such a client carried with it an implicit threat of criminal extortion, every attorney in this State who represents powerful clients in business settings could be prosecuted for doing so. Were that the case, there would be no clear line "separating criminal from lawful conduct." State v. Pomianek, 221 N.J. 66, 85 (2015).

A. The Charged Extortion and Coercion Statutes Do Not Proscribe Threats Based on the Use of Political Influence.

As shown in Defendants' Omnibus Reply Brief, whether the Indictment charges a crime turns on what constitutes "unlawful" or "wrongful" conduct within the meaning of three criminal statutes, N.J.S.A. 2C:20-5 (theft by extortion), N.J.S.A. 2C:13-5 (criminal coercion), and 18 U.S.C. § 1951 (Hobbs

Act). (See Omnibus Reply at 9, 10.) That question reduces to whether it is criminal to threaten the use of one's political influence.[2]

The answer is clear. As stated unequivocally in the Commentary to the 1971 Criminal Law Revision Commission, State v. Roth, 289 N.J. Super. 152 (App. Div. 1996), and extensive federal caselaw, economic threats can only amount to criminal conduct when the victim has a pre-existing right to be free of the threatened action. (See Omnibus MTD at 13–14; Omnibus Reply at 12.) The State admits this. (See Opp. at 60–61.) And the use of political influence is not—and cannot be—prohibited by the extortion and coercion statutes because it consists of constitutionally protected conduct. (See Omnibus MTD at 24–26; Omnibus Reply at 16–20.) These protections are especially important as they relate to Philip Norcross, who petitioned the Legislature and Camden city representatives in his capacity as an attorney representing his brother's interests. As the court made clear in EDF Renewable Dev., Inc. v. Tritec Real Estate Co., 147 F. Supp. 3d 63 (E.D.N.Y. 2015), efforts to influence political decision-makers in matters entrusted to their governmental functions—even

[2] Although the State relies liberally on organized-crime cases that involved threats of physical violence, no such threats are alleged here. (See Omnibus Reply at 21–22 & n.5 (distinguishing United States v. DiSalvo, 34 F.3d 1204 (3d Cir. 1994); United States v. Coppola, 671 F.3d 220 (2d Cir. 2012); United States v. Boggi, 74 F.3d 470 (3d Cir. 1996); and United States v. Goodoak, 836 F.2d 708 (1st Cir. 1988)).

when those efforts are designed to harm competitors—is conduct that "clearly constitutes [constitutionally protected] lobbying within the meaning of the Noerr-Pennington doctrine." Id. at 70.

The State provides no reasoned response to EDF and the constitutional principles it applied. Instead, it observes that these protections may disappear when a party steps beyond the bounds of zealous advocacy to engage in conduct "'alleged to be criminal.'" (Opp. at 94 (quoting EDF, 147 F. Supp. 3d at 69).) But this is precisely the point. Here, the State has not identified any criminal conduct—for example, bribing a public official—that could deprive Philip Norcross of Noerr-Pennington's broad protections. See EDF, 147 F. Supp. 3d at 69.

Rather, the State theorizes that the threat of leveraging one's political influence is itself criminal. That is not the law. To the contrary, the constitution expressly protects the rights of citizens to use "all the political powers" they can "muster" when petitioning the government. Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 145 (1961). This undermines the animating principle suggested by the very first sentence of the State's opposition brief: that our criminal laws enforce the principle that government must be open to all people on neutral terms. Or, stated differently, that exercising political influence and one's reputation for having it are somehow crimes. That Philip

Norcross leveraged his brother's political influence and cultivated "close ties with government officials" is "the essence" of constitutionally protected conduct. Boone v. Redevelopment Agency of San Jose, 841 F.2d 886, 894 (9th Cir. 1988). This Court should decisively reject the State's arguments to the contrary.

B. The State's Opposition Confirms That the Indictment's Factual Allegations as to Philip Norcross Do Not State Crimes.

The Indictment alleges that Philip Norcross engaged in the following conduct: (i) petitioning the Legislature with respect to the EOA; (ii) structuring and closing the L3 Complex deal on terms favorable to Cooper Health; (iii) negotiating the purchase of Dranoff's property rights relating to the development of the Triad1828 Centre and 11 Cooper; and (iv) petitioning City officials to "slow down" an approval Dranoff requested and create a "legal strategy" to deal with Dranoff's Camden interests. (See Philip Norcross MTD at 18–26.)

The State's opposition makes clear that none of this conduct is criminal. Indeed, the State now contends that the grand jury "did not [even] charge" Philip Norcross with a crime for any of these activities. (Opp. at 100.) Rather, the State argues that he was charged for "agreeing" to the conspiracies alleged in the Indictment and for taking actions to further them. (Id.) In addition, the State argues that his statement to CFP's CEO that it should partner with George

Norcross's chosen developer on the L3 Complex deal was a criminal threat. These claims are meritless.

Passage of the EOA. In his opening brief, Philip Norcross demonstrated that it was not a crime to participate in drafting legislation or to urge the Legislature to pass laws on terms that would advance George Norcross's interests. (Philip Norcross MTD at 18–19.) In fact, he showed that this activity was constitutionally protected. (Id.) The State now abandons these allegations, thinly arguing that they were included in the Indictment simply to provide "background" on the political power and objectives of the alleged RICO enterprise. (Opp. at 94 n.18; see also id. at 101 (representing that the grand jury did not charge Philip Norcross's "lobbying activities" as crimes).)

That is a pleasant fiction. The Indictment expressly alleged that "influencing the New Jersey Legislature" to pass legislation that greatly increased tax-credit awards for projects in Camden was an object of the charged conspiracy. (Indictment ¶ 215(d).) Indeed, the State's gossamer statute-of-limitations argument turns on the notion that continued receipt of tax credits resulting from that exercise of influence extended the "conspiracy" to the present day (and for many years yet to come).[3] Had the State included the EOA

[3] Under that argument, the State could prosecute a conspiracy decades after the commission of a conspirator's last overt act. That nonsensical position, directly contrary to controlling law, is persuasively rebutted—indeed, dismantled—in

influence allegations solely for background purposes, there would have been no need for the Indictment to charge this as an object of the RICO conspiracy. In all events, the State has now conceded—as it must—that there is nothing remotely unlawful about petitioning the Legislature; the right to do so is a hallmark of the "open government" principle the State espouses in this case.

L3 Complex. The actions ascribed to Philip Norcross with respect to the L3 Complex are quotidian affairs of transactional lawyers: requesting updates from CFP's CEO; noting how much CFP would have to pay for windows; advising Cooper Health about how it might secure tax credits; and telling CFP's CEO that having a certain individual serve as its co-chair would help it mend fences with George Norcross. (Philip Norcross MTD at 5–8.) Having secured the Indictment based in part on those allegations, the State now admits that nothing about Philip Norcross's "representation of Cooper Hospital" is criminal. (Opp. at 101.)

Instead, the State now argues that the only criminal act Philip Norcross actually took (as opposed to conspiring to take) was to threaten CFP's CEO by telling him that CFP was not allowed to partner with its chosen developer and

---

Defendants' omnibus briefs and those filed by Dana Redd, and merits no further attention here. It bears mention only because it reveals the lengths to which the State will go to catch its quarry in this misguided prosecution.

had to use George Norcross's preferred partner instead. (Opp. at 55–56.) The State acknowledges that the Indictment does not charge Philip Norcross with using any threatening language in doing so, but says the CEO took his message as a threat to the CEO's position and CFP's funding based on two episodes[4] involving George Norcross that occurred more than a decade earlier. (Id. at 55–56.) That is absurd. The alleged directive Philip Norcross issued is well attenuated from those episodes—which, moreover, involved constitutionally protected petitioning conduct. (See Omnibus Reply at 22.) And in all events, the directive amounted to no more than a lawful economic threat because CFP had no pre-existing right to public funding and CFP's CEO had no pre-existing right to keep his job. (See id. at 23.)

The State asks the Court to ignore all this because, it says, Defendants will "have every chance to argue at later stages of this case that they did not engage in such behavior." (Opp. at 56.) This misapprehends both Defendants' argument on this point and the Court's function on this motion. Defendants are not arguing that they did not do what the Indictment alleges. Rather, they

[4] The Indictment alleges: (i) a decade or more earlier, George Norcross had a dispute with a prior CEO, after which "the Camden government had cut off or reduced funding to CFP," which some "believed" had been at Norcross's behest; and (ii) in 2001, George Norcross tried "to induce a councilman in Palmyra, New Jersey to fire a municipal employee." (Indictment ¶¶ 53–54.)

contend that what is alleged does not amount to extortion or coercion. It is clear that, as a matter of law, Philip Norcross did not issue any criminal threat relating to the L3 Complex. As a result, the Court cannot await a later stage of the case to address this fatal defect in the Indictment. It must dismiss the case now for failure to state a crime.

Triad1828 Centre/11 Cooper. The State fails to identify any action Philip Norcross took regarding development of the Triad1828 Centre and 11 Cooper that amounted to a crime. Instead, it argues that the criminal act with respect to this transaction consisted of George Norcross using the f-word on a call with Dranoff and stating that he would make sure that Dranoff never did business in Camden again. (Opp. at 53.) First, these alleged statements are not criminal threats. They at most threatened Dranoff with economic consequences he had no pre-existing right to avoid. Second, the State does not allege that Philip Norcross made any threats on this call, only that he was "on the line" when they were made. (Id.) The State thus concedes that it does not base its extortionate-threats charge on anything Philip Norcross said that transgressed the extortion and coercion statutes.

Radio Lofts. In his opening brief, Philip Norcross demonstrated that the Indictment fails to allege that he took any illegal action relating to Dranoff's relinquishment of his development rights to the Radio Lofts. (Philip Norcross

MTD at 24–26.) Those actions allegedly consisted of (i) participating in weekly stakeholder meetings that involved various City officials; (ii) advising City officials during one such meeting that an approval Dranoff needed to sell a property should be "slowed down" to create an overall "legal strategy" to deal with Dranoff's Camden interests; and (iii) participating in discussions relating to the CRA's decision to terminate Dranoff's redevelopment option for the Radio Lofts and its subsequent efforts to respond to Dranoff's lawsuit. (Id. at 24–25.) In addition to being standard fare for lawyers, all of these actions consisted of constitutionally protected petitioning conduct. (Id. at 25–26.)

The State does not argue otherwise. In fact, the State does not even argue that any criminal threat was issued in connection with Dranoff's decision to sell his Radio Lofts property rights as part of his settlement with the City. Instead, the State now contends that the events leading to the City's lawsuit with Dranoff were simply evidence of George Norcross's ability to "follow through" on any implied threat to use the "instruments of City government." (See Opp. at 65.) But this is just an admission that the State has not charged any separate crime with respect to the Radio Lofts saga—and cannot do so, given that its theory depends on protected constitutional efforts to use the "instruments of City government." It is thus clear that the State has failed to identify any action

Philip Norcross took relating to the Radio Lofts that was not within his constitutional petitioning rights, much less any action that is criminal.

C. The State Cannot Salvage Its Deficient Allegations against Philip Norcross by Relying on Its Conspiracy Allegations.

Despite all but acknowledging that the Indictment does not allege any conduct by Philip Norcross that was actually a crime, the State argues that his motion should nonetheless be denied because he agreed to commit the conspiracies alleged in the Indictment. (See Opp. at 44–45, 101.) But as the State concedes, any RICO conspiracy must be founded on an agreement that some member of the alleged RICO enterprise would commit "'at least two predicate acts.'" (Id. at 44 (quoting State v. Ball, 141 N.J. 142, 176 (1995).) Here, the Indictment fails to identify any crime committed by anyone.

That reasoning applies with equal force to the State's other conspiracy charges because the "agreement to commit a specific crime is at the heart of a conspiracy charge." State v. Samuels, 189 N.J. 236, 245 (2007); see also Campione, 462 N.J. Super. at 493 ("A conspiracy requires an actual agreement [with another] for the commission of the substantive crime.") (cleaned up). With no underlying crime, there can be no agreement to commit one. Thus, the State's derivative conspiracy allegations fall of their own weight.

CONCLUSION

In its zeal to vindicate its vision of what the criminal law should do—"ensure that government is open to all people on neutral terms"—the State ignored what the law actually does and secured an indictment that arrogates the legislative function, charging as crimes conduct that does not transgress any law passed by the Legislature, including some expressly protected by our federal and state constitutions. Now, in a bid to insulate that obvious misuse of power from Defendants' appropriate cries of foul, the State invites the Court to "butt out" and let a jury decide whether to embrace its insidious redraft of the criminal law. For the reasons expressed on this motion, the Court should decline that invitation and dismiss the Indictment without delay.

Dated: December 19, 2024

Respectfully submitted,

MARINO, TORTORELLA & BOYLE, P.C.

By: _____

Kevin H. Marino
John D. Tortorella
Erez J. Davy
437 Southern Boulevard
Chatham, New Jersey 07928-1488
Attorneys for Philip A. Norcross