

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

Docket No.: _____

Representative Mary Jane Wallner, Senator Lou D'Allesandro,
Speaker of the House of Representatives Stephen Shurtleff, and Senate President Donna Soucy

v.

Christopher Sununu, Governor of the State of New Hampshire

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN
EXPEDITED PRELIMINARY INJUNCTION**

Plaintiffs, Joint Legislative Fiscal Committee Chair Representative Mary Jane Wallner, Fiscal Committee Vice Chair Senator Lou D'Allesandro, Speaker of the House of Representatives Stephen J. Shurtleff, and Senate President Donna M. Soucy, by and through counsel, respectfully submit this Memorandum of Law in support of their Motion for an Expedited Preliminary Injunction for Mandamus, Prohibition, and Declaratory Relief.

This dispute is about the separation of powers in our co-equal, tripartite form of government. A governor and the executive branch must always obtain approval from the legislative branch's Fiscal Committee – even during an emergency pursuant to RSA 9:13-d – before spending any state or federal money not appropriated in the budget. During this emergency the Governor has asserted RSA 4:45, III(e) gives him unaccountable and unilateral power to spend \$1.25 billion of federal funds set to arrive in late April. The plain language of the relevant statutes, appropriately read together, unambiguously demonstrates that the legislature, through its Fiscal Committee, continues to exercise its core function of approving spending during an emergency. The Governor should be enjoined from ignoring the law and assuming the legislative branch's exclusive constitutional authority simply because he declared an emergency.

INTRODUCTION

The New Hampshire Constitution grants the legislative branch sole authority to appropriate state and federal funds for government operations. For any funds unappropriated in the state budget, the Joint Fiscal Committee is the legislative branch's administrative arm to regularly review discrete spending requests from the executive branch. During an emergency, the legislature specifically recognized that the full legislative process for budgeting might be unwieldy, and therefore vested the legislative branch's budgeting power during a crisis with the Fiscal Committee. RSA 9:13-d, entitled "Civil Emergency," unambiguously requires that a governor's spending proposals during a state of emergency first be reviewed and approved by the Fiscal Committee:

Should it be determined by the governor that a civil emergency exists, the **governor may, with the advice and consent of the fiscal committee, authorize such expenditures**, by any department or agency, as may be necessary to effectively deal with said civil emergency and may draw his warrants in payment for the same from any money in the treasury not otherwise appropriated.

(Emphasis added.)

Despite the clear and unambiguous language of RSA 9:13-d, Governor Sununu asserts that his right to declare a state of emergency, by itself, also grants him unconditional and sole power to appropriate and spend public dollars without Fiscal Committee approval. He claims such authority under RSA 4:45, III(e), which provides that a governor may "perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population."

But the general authority provided to a governor in RSA 4:45, III(e) to exercise certain functions designed to protect the civilian population during the course of an emergency, does not permit the governor to usurp core legislative powers and exercise unconstrained budgetary

powers. To arrive at such a conclusion, one must interpret RSA 4:45, III(e) in isolation. But that is not how statutory interpretation works. A governor's general power in RSA 4:45, III(e) cannot override the specific language in RSA 9:13-d that maintains the legislature's oversight role even in times of crisis. Adopting the Governor's interpretation would deprive the legislature of its important role as a check and balance on the executive branch any time a governor declared a state of emergency.

Even if RSA 4:45, III(e) could be read in isolation as the Governor prefers, it would only allow expenditures without legislative approval if "necessary." But no need exists. The Fiscal Committee has capably acted and carried out its duties during this state of emergency. On April 10, it held its first remote meeting, during which it approved executive branch requests to spend state funds, along with federal funds precisely designed for the coronavirus pandemic.

Finally, Governor Sununu's interpretation of RSA 4:45, III(e) violates the separation of powers clause. N.H. CONST., pt. I, art. 37. The legislative branch's core function of appropriating funds is vernaculated as the "power of the purse." This constitutional power is nondelegable. Governor Sununu believes of RSA 4:45, III(e) authorizes him to spend money without the legislative branch. This impermissibly delegates the power of appropriation from the legislative branch to the executive branch in violation of the separation of powers clause. Even if it might be possible that the Governor's view of RSA 4:45, III(e) is faithful to the constitution, the doctrine of constitutional avoidance precludes adopting his statutory interpretation because it raises serious constitutional concerns.

The Plaintiffs are likely to succeed on their request for an order that public dollars cannot be spent without prior approval of the legislative branch during this state of emergency. With \$1.25 billion in federal stimulus monies set to arrive in late April, it is in the public interest to

resolve this dispute now to ensure that this essential economic relief can be properly and swiftly deployed. It is critical for government stability, especially in this public health crisis, that more than one billion dollars are spent in conformity with the rule of law.

BACKGROUND OF THE DISPUTE

A. The Legislative Branch's Fiscal Committee Maintains Power During Emergencies.

The New Hampshire Constitution vests “supreme legislative power” in the legislative branch. N.H. CONST. pt. II, art. 2. This includes the exclusive constitutional power to appropriate state and federal funds for state expenditures: “No moneys are to be issued out of the treasury of the State unless there be an appropriation, or equivalent direction for payment, by the Legislature.” *O'Neil v. Thomson*, 114 N.H. 155, 160 (1974). The Fiscal Committee is the legislative branch's administrative arm for hearing specific requests to spend state or federal funds for purposes the legislature has yet to approve. *See Opinion of the Justices*, 110 N.H. 359, 364 (1970); *Opinion of the Justices*, 118 N.H. 7, 15 (1978).

The legislative branch passes a biennial budget which appropriates dollars into distinct accounting units for each executive branch department. *See* RSA 9:2, 9:8-a, b. Executive branch departments may transfer appropriated funds between their accounting units only with prior approval of the Fiscal Committee. RSA 9:16-a, I; *see also Petition of Strandell*, 132 N.H. 110, 121 (1989) (for example, “within the department of health and human services, funds appropriated for use by the division of mental health and developmental services might be transferred to the division for children and youth services to fill a particular need.”).

In addition to reviewing requests to spend unappropriated state funds, the Fiscal Committee also appropriates federal funds. Only with “prior approval of the fiscal committee” may federal funds in excess of \$100,000 may be spent. RSA 14:30-a, VI; *see also Opinion of the*

Justices, 118 N.H. at 15 (the legislature has constitutional authority to direct the expenditure of federal funds; otherwise the executive branch would administer them “free of any checks and balances and with little political accountability for such actions.”); Exh. F (on April 10 the Fiscal Committee approved DHHS’ request, “pursuant to the provisions of RSA 14:30-a,” to spend \$1.2 million in federal coronavirus funds).

A bipartisan group of five Senators and five Representatives typically meet once a month to exercise the Fiscal Committee’s authority, which includes broad powers “to investigate and consider any matter relative to the appropriations, expenditures, finances, revenues or any of the fiscal matters of the state.” *See* RSA 14:30-a, I, II. Overall, the Fiscal Committee acts as the legislative branch’s “watchdog” over all executive branch expenditures. *Monier v. Gallen*, 120 N.H. 333, 339 (1980).

The Fiscal Committee’s authority over expenditures of all money the legislative branch has yet to approve continues unabated during a state of emergency:

Should it be determined by the governor that a civil emergency exists, the governor may, **with the advice and consent of the fiscal committee**, authorize such expenditures, by any department or agency, as may be necessary to effectively deal with said civil emergency and may draw his warrants in payment for the same from any money in the treasury not otherwise appropriated.

RSA 9:13-d (emphasis added); *cf.* RSA 4:18 (establishing “an emergency fund consisting of such sums as may be appropriated for that purpose by the general court, which may be expended by the governor, with the consent of the council, to aid any state department in any emergency.”).

B. Governor Sununu Incorrectly Claims the Executive Branch May Spend Unappropriated Funds Without Fiscal Committee Approval During this State of Emergency.

The novel coronavirus pandemic has led Governor Sununu to declare (and redeclare) a state of emergency. *See* Complaint ¶9 (Exhs. A and B, Executive Orders 2020-04; 2020-05).

Governor Sununu has since claimed RSA 4:45, III(e) grants him sole authority to spend state and federal funds without prior legislative branch approval during this state of emergency.

Congress has passed three different acts related to the coronavirus pandemic:

- H.R. 6074 - Coronavirus Preparedness and Response Supplemental Appropriations Act (enacted March 6, 2020)
- H.R. 6201 - Families First Coronavirus Response Act (enacted March 18, 2020)
- H.R. 748 - Coronavirus Aid, Recovery, and Economic Security (“CARES”) Act (enacted March 27, 2020)

Governor Sununu informed the Fiscal Committee that part of the CARES Act would provide New Hampshire with \$1.25 billion in largely unrestricted funds. *See id.* ¶12 (Exh. C, Mar. 31, 2020 correspondence). Governor Sununu also noted his position that Fiscal Committee approval to spend CARES Act funds – about 10% of the state’s \$12.9 billion budget – was “not technically required” under RSA 4:45. *See id.*¹

In lieu of the Fiscal Committee, the Governor declared he would unilaterally establish an eight-member Legislative Advisory Board to provide non-binding recommendations on how his office might spend CARES Act funds.² *See id.* ¶14 (Exh. D, April 7, 2020 correspondence). At a press conference the next day, Governor Sununu confirmed that he would not involve the Fiscal Committee during this state of emergency: “The state of emergency allows me to draw down the

¹ *See also* House Bill 4-FN-A-L, Session Year 2019.

² The Governor attempts to have it both ways. He acknowledges some oversight is necessary but only from his own hand-picked advisory board while, at the same time, circumventing a statutory committee comprised of individuals elected by the people of the State of New Hampshire. This “Legislative Advisory Board” is comprised of members of the Fiscal Committee.

[federal] funds and release them almost as soon as they become available.”³ He also stated that “to ask the Fiscal Committee to meet in open session is not possible. It is not feasible and it is not going to happen.”⁴ (Emphasis added.)

C. Contrary to the Governor’s Assertions, the Fiscal Committee Convened a Public Meeting During this Emergency, During Which it Approved DHHS’ Request to Spend \$1.2 Million in Federal Coronavirus Funds pursuant to RSA 14:30-a, VI.

The Fiscal Committee convened a meeting on March 13, the same day Governor Sununu declared a state of emergency. It next met on April 10 for its typical monthly meeting. *See id.* ¶16 (Exh. E). There it acted on eleven separate spending requests from the executive branch, including approving DHHS’ request to spend \$1.2 million in federal money New Hampshire received from the Families First Coronavirus Response Act. *See id.* ¶17 (Exh. F) (this request was “pursuant to the provisions of RSA 14:30-a, IV”); Exh. E, Item 20-066). DHHS also informed the Fiscal Committee that it had reallocated \$18 million without seeking its consent pursuant to the Governor’s assumed powers under RSA 4:45. *See id.* ¶18 (Exh. E, Items 20-065, 67).

The Fiscal Committee’s is scheduled to convene again next week on April 20. *See id.* ¶19. New Hampshire is expected to begin receiving federal funds from the CARES Act at the end of April. *See id.* ¶20. To prepare for fulfilling their constitutional and statutory duties, the Chair and Vice Chair of the Fiscal Committee, respectively Plaintiffs Rep. Wallner and Sen. D’Allesandro, reiterated their commitment to Governor Sununu to meet as quickly and as often as necessary to accept and expend emergency appropriations under the CARES Act. *See id.* ¶21 (Exh. G, April 10, 2020 correspondence).

³ John DiStaso, *NH Primary Source: Sununu, Democratic lawmakers at odds over COVID-19 spending procedure*, WMUR, April 9, 2020, <https://www.wmur.com/article/nh-primary-source-sununu-democratic-lawmakers-at-odds-over-covid-19-spending-procedure/32088498>.

⁴ Garry Rayno, *Sununu, Legislative Leaders Spar Over COVID-19 Stimulus Funds*, InDepthNH, April 8, 2020, <http://indepthnh.org/2020/04/08/sununu-legislative-leaders-spar-over-covid-19-stimulus-funds/>.

Later that same day, after hearing that the Fiscal Committee had just approved DHHS' request to spend federal funds designed for the coronavirus, Governor Sununu reiterated his intention to ignore the Fiscal Committee when spending unappropriated funds during this emergency.⁵ There is no barrier to the Fiscal Committee meeting at the call of the chair. It has begun receiving public input on possible uses of the funds with a dedicated email address. *See id* ¶23.

LEGAL ARGUMENT

A four-part framework governs the determination of whether preliminary injunctive relief is appropriate. Trial courts must consider: (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, namely, the hardship to the non-movant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect, if any, of the Court's ruling on the public interest. *See Unifirst Corp, v. City of Nashua*, 130 N.H. 11, 14-15 (1987).

The Plaintiffs are likely to succeed on the merits. This is not an instance where it is unclear how the law should apply. The legislative branch has considered in detail what enhanced powers the executive branch may use to manage an emergency situation. It chose not to delegate its constitutional duty to appropriate spending during an emergency to the governor. Instead, it has unambiguously articulated that unappropriated funds may be spent by the executive branch during an emergency only with the Fiscal Committee's approval.

Further, the balance of hardships strongly favors Plaintiffs in their capacity as elected officials and stewards of public funds. More than one billion dollars of taxpayer dollars could be spent in violation of the law. The public will have no plausible way of recovering such funds.

⁵ NH Homeland Security and Emergency Management Facebook Page, video of April 10, 2020 press conference, <https://www.facebook.com/NH.HSEM/videos/2682548192017368/>, at 16:00 to 18:30.

The public interest will be served by ensuring enforcement of the constitution and related statutes prior to the arrival of more than one billion dollars of federal funds. An order from this co-equal branch of government is necessary to ensure the Governor Sununu and the executive branch obtain Fiscal Committee approval before spending unappropriated funds.

The Plaintiffs Will Likely Succeed on the Merits

A. The State Constitution precludes the executive branch from spending money without prior approval from the legislative branch.

While this dispute can be resolved on statutory construction, the New Hampshire Constitution provides important context. Part II, Article 2 of the State Constitution vests the legislature with “supreme legislative power,” which includes the exclusive authority to make appropriations. *O’Neil v. Thomson*, 114 N.H. 155, 160 (1974). “No moneys are to be issued out of the treasury of the State unless there be an appropriation, or equivalent direction for payment, by the Legislature.” *Id.*; *see also Opinion of the Justices*, 118 N.H. at 15 (the legislature also directs the expenditure of federal funds by the executive branch).

Specifically to this issue, Part II, Article 56 obligates a governor to ensure that state expenditures conform with the purposes as appropriated by the legislature:

No moneys shall be issued out of the treasury of this state, and disposed of...but by warrant under the hand of the governor for the time being, by and with the advice and consent of the counsel, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

Put a different way, “no payments should be made from the public treasury except for public purposes and in accordance with the law.” *State v. Kimball*, 96 N.H. 377, 380 (1950). As the legislative branch has sole authority to appropriate money, “the executive branch may expend public funds only to the extent, and for such purposes, as they may have been appropriated by the legislature.” *New Hampshire Health Care Ass’n v. Governor*, 161 N.H. 378, 387 (2011); *see*

also RSA 9:19 (no state official “having control of public funds appropriated by the general court shall use any part of such funds for any other purpose than that for which they were appropriated”); RSA 9:20 (personal liability flows from violations of RSA 9:19).

B. The Fiscal Committee oversees and approves unappropriated expenditures during a state of emergency.

The legislature’s power to make appropriations and “to monitor their expenditure is an established legislative function under the constitution and statutes.” *O’Neil*, 114 N.H. at 162. In this vein, the legislative branch may pass legislation to “preserve its function as the policy-making branch of our State government.” *Monier v. Gallen*, 120 N.H. 333, 339 (1980). This includes creation of the Fiscal Committee. *Opinion of the Justices*, 110 N.H. 359, 364-65 (1970). As the “administrative arm for purposes of ensuring its role in policy-making,” *id.*, the Fiscal Committee is the legislative branch’s “watchdog.” *Monier*, 120 N.H. at 339. This oversight role continues during an emergency. RSA 9:13-d; *see also* RSA 9:16-a; RSA 14:30-a.

At least one former governor has adhered to this view. Governor Benson declared a state of emergency due to flooding one year after RSA 4:45, III(e) was enacted. *See Exh. H*, Exec. Order 2003-9. In response to Governor Benson’s request, the Fiscal Committee appropriated \$1 million to the office of emergency management. *See Exh. I*, Aug. 13, 2003 meeting minutes.

D. Fiscal Committee approval is required before the executive branch spends unappropriated state and federal funds during this state of emergency.

- a. The specific mandate of RSA 9:13-d controls over the general language of RSA 4:45, III(e).

When examining the language of a statute, the plain and ordinary meaning are ascribed to the words used. *Grand China, Inc. v. United Nat. Ins. Co.*, 156 N.H. 429, 431 (2007). Words and phrases are not considered in isolation, but rather within the context of the statute as a whole. *Id.* When interpreting two statutes that deal with a similar subject matter, they are construed so that

they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Id.* “It is a well-settled rule that to the extent two statutes conflict, the more specific statute...controls over the general statute.” *Ford v. New Hampshire Dep't of Transp.*, 163 N.H. 284, 294 (2012).

The legislature expressly affirmed its constitutional role of setting the state’s fiscal policy during a state of emergency in RSA 9:13-d. It requires a governor to obtain “the advice and consent” of the Fiscal Committee to spend unappropriated funds during an emergency.

Governor Sununu ignores RSA 9:13-d, along with RSA 9:16-a and 14:30-a, and instead relies on RSA 4:45, III(e) to claim that he has unfettered discretion to spend unappropriated funds without Fiscal Committee approval during any emergency. It provides that during a state of emergency, a governor’s “additional emergency powers” include the general ability “to perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.” RSA 4:45, III(e).

The precise mandate of RSA 9:13-d does not conflict with the general authority of RSA 4:45, III(e). During a state of emergency it is plausible for a governor to both act as “necessary to promote and secure the safety and protection of the civilian population,” *see* RSA 4:45, III(e), while still adhering to the particular prerequisites of obtaining Fiscal Committee approval before spending unappropriated funds. *See* RSA 9:13-d; RSA 9:16-a; RSA 14:30-a. The Fiscal Committee proved this on April 10. At this meeting the committee reviewed and acted on eleven separate items, which included approving DHHS’ proposed expenditures of federal coronavirus funds. They did so without issue or delay. These actions have not precluded Governor Sununu from exercising any emergency powers to protect the public’s safety.

The Governor's emergency powers under RSA 4:45, III(e), and the executive branch's obligations to the Fiscal Committee under RSA 9:13-d, RSA 9:16-a, and RSA 14:30-a, may be reasonably interpreted so they do not contradict each other and lead to sensible results. The Governor's duty to obtain Fiscal Committee approval before spending unappropriated state or federal funds during this emergency controls over any general emergency management power in RSA 4:45, III(e).

- b. The legislature carved out explicit exceptions to RSA 9:13-d when granting the executive branch emergency powers, but not under RSA 4:45, III(e).

The legislature understood how to explicitly allow the executive branch to sidestep Fiscal Committee approval in emergency situations. It granted a governor no such authority in RSA 4:45, III(e). First, RSA 21-P:53, II allows the Commissioner of DHHS – “without the approval of the governor's council or the legislative fiscal committee, and notwithstanding the provisions of RSA 4:45, 9:13-d, and 9:19, and any other law to the contrary” – to purchase and distribute medicine during a state of emergency. Second, RSA 4:45, III(b) allows a governor to “sell, lend, lease, give, transfer, receive, or deliver materials or perform services for emergency management purposes on such terms and conditions as the governor shall prescribe and *without regard to the limitations of any existing law*, and to account to the state treasurer for any funds received for such property.” (Emphasis added.). “[W]e will not consider what the legislature might have said or add language that the legislature did not see fit to include.” *In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 479 (2006); *see also Conrad v. Hazen*, 140 N.H. 249, 251 (1995) (“The legislature's choice of language is deemed to be meaningful.”). The plain language of RSA 4:45, III(e) includes no exception to Fiscal Committee requirements.

Further, interpreting RSA 4:45, III(e) to allow the Governor to expend funds in this emergency without the legislative branch's approval would improperly nullify the existing

requirements of RSA 9:13-d RSA 9:16-a, and RSA 14:30-a. “Repeal by implication occurs when the natural weight of all competent evidence demonstrates that the purpose of a new statute was to supersede a former statute, but the legislature nonetheless failed to expressly repeal the former statute.” *In re Regan*, 164 N.H. 1, 7 (2012). “Because repeal by implication is disfavored, if any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed.” *Id.*; see also *Weare Land Use Ass'n v. Town of Weare*, 153 N.H. 510, 511–12 (2006) (“The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.”); *Appeal of Town of Hampton Falls*, 126 N.H. 805, 809 (1985) (“It is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter.”).

As illustrated earlier, the relevant statutes can be reasonably construed together to disregard the possibility of repeal by implication. A governor may act to promote the public’s safety while simultaneously seeking Fiscal Committee advice and consent. Unlike other laws relating to the executive branch’s emergency authority, RSA 4:45, III(e) contains no exception to Fiscal Committee oversight. The specific mandates of RSA 9:13-d, RSA 9:16-a, and RSA 14:30-a remain operative in this state of emergency.

- c. The Fiscal Committee’s ability to properly function during this state of emergency moots any potential effect of RSA 4:45, III(e).

Even assuming RSA 4:45, III(e) could be interpreted in isolation and its general authority be construed as repealing all other statutes concerning the Fiscal Committee’s broad powers, its ability to normally function with telephonic hearings during this state of emergency moots any potential applicability of RSA 4:45, III(e).

RSA 4:45, III(e) confines a governor's emergency powers to "promote and secure the safety and protection of the civilian population" as is "*necessary*." (Emphasis added.) During this state of emergency, the Fiscal Committee met on April 10. It approved DHHS' request to transfer state funds into different divisions and spend federal funds designed to provide coronavirus-related relief. The Fiscal Committee plans to meet again on April 20, 2020; it can meet sooner if necessary. *See* RSA 91-A:2, II (a public body may normally meet with 24 hours' notice, or sooner in an emergency). Even assuming RSA 4:45, III(e) could allow the Governor to bypass the Fiscal Committee, it is not "necessary" to do so under these circumstances. The Fiscal Committee has declared and demonstrated its ability to meet as quickly and often as possible to perform its constitutional and statutory duties. Bypassing the legislative branch is not essential to maintain the proper functioning of state government in this emergency.

d. Governor Sununu's interpretation of RSA 4:45, III(e) violates the separation of powers clause.

Even assuming 4:45, III(e) supplanted RSA 9:13-d, RSA 9:16-a, and RSA 14:30-a, the result would be a scheme that would allow a governor to bypass the Fiscal Committee and spend unappropriated funds however desired whenever he or she declared a state of emergency. This interpretation would constitute an unconstitutional encroachment on a fundamental power of the legislative branch.

The State Constitution provides that the three branches of government should be "kept as separate from, and independent of, each other, as the nature of a free government will admit...." N.H.CONST. pt. I, art. 37. A "general delegation of power with uncontrolled discretion even in a narrow field exceeds constitutional limits." *Smith Ins., Inc. v. Grievance Comm.*, 120 N.H. 856, 861 (1980). The legislative branch's core function of appropriating funds is known as the "power of the purse." *Opinion of the Justices*, 140 N.H. 297, 302(1995); *see also New Hampshire Health*

Care Ass'n, 161 N.H. at 387 (“The New Hampshire Constitution specifically charges the legislative branch with appropriating and the executive branch with spending state revenue.”).

The legislature’s power to make appropriations is a nondelegable duty. *See generally* 16 C.J.S. Constitutional Law § 454 (“Violation of the separation of powers provision of a state constitution occurs when the executive branch, rather than the legislature, determines how, when, and for what purpose public funds shall be applied in carrying on the government.”). For example, in *In re Opinion of the Justices to the Senate*, proposed legislation would have established a “Stabilization Fund,” which would have given the Massachusetts governor “the authority to prevent the appropriation of money from the Fund.” *Id.* at 1203. This proposed law would have “impermissibly delegate[d] the power of appropriation from the legislative branch to the executive branch of government and thus violate[d] the separation of powers provision of the Massachusetts Constitution.” *Id.*

Governor Sununu’s interpretation of RSA 4:45, III(e) grants himself unaccountable discretion to appropriate public dollars whenever he declares an emergency. Such a broad transfer of the legislative branch’s essential powers to the executive branch constitutes a violation of the separation of powers clause.

- e. The doctrine of constitutional avoidance precludes construing RSA 4:45, III(e) to allow a governor to spend unappropriated funds under a state of emergency.

Even if it might be possible that the Governor’s view of RSA 4:45, III(e) is faithful to the Constitution, the doctrine of constitutional avoidance precludes adopting his statutory interpretation because it raises serious constitutional concerns. Under the well-established doctrine of constitutional avoidance, a statute is construed whenever reasonably possible “to avoid bringing it into conflict with the constitution.” *State v. Paul*, 167 N.H. 39, 44 (2014). A construction that raises “a significant question as to its constitutionality” are to be avoided. *Id.*

As shown above, the Governor's preferred reading creates serious concerns of an unconstitutional encroachment of the executive branch on legislative branch authority. The drafters of the New Hampshire Constitution maintained so little trust in a unilateral executive that they created the executive council to create yet another layer of oversight on a governor's use of executive power. *See, e.g.*, N.H. CONST. pt. II, arts. 46, 47, 49-a, 56; *see also* RSA 4.

Governor Sununu's preferred interpretation that RSA 4:45, III(e) grants him sole power to appropriate funds whenever he declares a state of emergency should be declined under the doctrine of constitutional avoidance.

E. The remedies of mandamus and prohibition provide full and adequate relief.

This dispute is inherently about the separation of powers. Governor Sununu has already appropriated funds without prior legislative approval from the Fiscal Committee, and has claimed RSA 4:45, III(e) grants him the continuing authority to do so during this emergency. The Plaintiffs, in their capacity as officers of the Fiscal Committee and the General Court, have demonstrated mandamus and prohibition are the necessary remedies so the executive branch conforms with the law.⁶

A writ of mandamus is designed for the "amelioration of exigent circumstances and the correction of a plain legal error by the government." *Guarracino v. Beaudry*, 118 N.H. 435, 437 (1978); *see also* *Petition of CIGNA Healthcare*, 146 N.H. 683, 687 (2001) (this remedy is used to compel a public official to perform a compulsory act that the official has refused to perform); *c.f.* New Hampshire Practice (Civil Practice and Procedure) § 38.29[3] (3d ed. 2010) (mandamus relief used to compel the appropriation of public funds). Mandamus relief may be issued where

⁶ While the legislature has the authority to rescind a state of emergency, *see* RSA 4:45, II(c), it need not take such drastic measures because the Fiscal Committee retains fiscal oversight authority during such periods.

the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief. *Petition of CIGNA Healthcare*, 146 N.H. at 687.

Plaintiffs likewise seek a writ of prohibition. It prevents “officers or persons from usurping or exercising jurisdiction with which they are not vested.” *Petition of CIGNA Healthcare*, 146 N.H. at 687; *see also New Hampshire Retail Grocers Ass’n v. State Tax Comm’n*, 113 N.H. 511, 516 (1973) (prohibition issued to prevent state agency from enforcing an erroneous interpretation of the law).

These remedies are necessary to ensure that Governor Sununu and other executive branch officials obtain approval from the Fiscal Committee before spending funds the legislative branch has yet to appropriate during this emergency.

The Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief.

The Plaintiffs’ claims inherently involve constitutional issues in their capacity as presiding officers of the legislative branch. Courts have held that this by itself presumes a showing of irreparable harm. *See, e.g., Awad v. Ziriah*, 670 F.3d 1111, 1131 (10th Cir. 2012) (“[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012) (“First, as a general matter, there is a presumption of irreparable harm when there is an alleged deprivation of constitutional rights.”).

Further, there is ongoing harm from Governor Sununu’s alleged constitutional and statutory violations of spending public funds without legislative approval. He has already “approved” the expenditure of millions of dollars without legislative involvement. His public comments have definitively declared an intention to continue spending taxpayer money without prior approval from the legislative branch, even after the Fiscal Committee approved an

executive branch request to spend federal coronavirus money. If a preliminary injunction is not issued and such expenditures are declared unlawful, the public will have no plausible way of recovering such funds.

Other Equitable Considerations.

The other prerequisites for a preliminary injunction are met. Plaintiffs have no cause of action for money damages. The balance of hardships strongly favors Plaintiffs in their capacity as officers of the Fiscal Committee and legislative branch. Governor Sununu has purportedly “authorized” millions of dollars in spending already. More than one billion dollars of federal funds could be expended in violation of New Hampshire’s Constitution and state law after it arrives near the end of April. The public interest will be served by enforcing New Hampshire law prior to the arrival of this money to ensure economic relief is properly and rapidly delivered.

CONCLUSION

Governor Sununu does not have unilateral authority to spend public funds however he sees fit simply because he declared a state of emergency. During this pandemic the Fiscal Committee has carried out its responsibility to provide advice and consent over budget decisions. The plain language of the statutes shows this dispute should be resolved in favor of the Plaintiffs to ensure the legislative branch may provide a check and balance over more than one billion dollars set to be spent in the coming months.

REQUESTS FOR RELIEF

Accordingly, Plaintiffs respectfully request that this Court enter the following relief:

- A. An order preliminarily enjoining Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch from spending unappropriated state or federal funds without approval from the Joint Legislative Fiscal Committee during this state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b), pending the final resolution of this case.
- B. Such other relief as the Court deems just and proper.

Respectfully submitted,

REPRESENTATIVE MARY JANE WALLNER,
SENATOR LOU D'ALLESANDRO,
STEPHEN SHURTLEFF, SPEAKER OF THE
HOUSE OF REPRESENTATIVES, AND
DONNA SOUCY, SENATE PRESIDENT

By their attorneys,

SENATE LEGAL COUNSEL

Dated: April 13, 2020

By: /s/ Gregory L. Silverman

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