

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Case No. 216-2020-CV-00342

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

**OBJECTION TO PLAINTIFFS' MOTION FOR AN EXPEDITED
PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF
LAW IN SUPPORT OF SAME**

BACKGROUND

I. COVID-19 And The State of Emergency

The Novel Coronavirus (“COVID-19”) is a public emergency unlike any other. In the United States alone, approximately 706,614 people have been confirmed as infected and approximately 37,077 people have died from the virus.¹ Combatting COVID-19 has required an unprecedented effort by American citizens to isolate and avoid gatherings of people. As a result, in addition to the public health crisis, the nation is experiencing an effective economic shutdown. Major institutions and businesses of all

¹ See, e.g., Coronavirus map of the US: latest cases state by state, available at <https://www.theguardian.com/world/ng-interactive/2020/apr/16/coronavirus-map-of-the-us-latest-cases-state-by-state>.

sizes and types have shut down and major events have been cancelled, from March Madness to jury trials.

New Hampshire has not escaped the reach of COVID-19. On March 13, 2020, the Governor issued an executive order declaring a State of Emergency and invoking his emergency management authority pursuant to RSA 4:45, RSA 4:47, and RSA 21-P:35.² In the approximate month since, the Governor, pursuant to the emergency management powers the legislature granted him in those statutes, has issued 33 emergency orders. The emergency orders have been sweeping and aimed, largely, at enforcing the social distancing necessary to combat COVID-19 and implementing measures to best allow New Hampshire to slow the spread of the virus and reduce case counts and fatalities. The Governor issued an emergency order requiring schools to provide learning through remote technology and prohibiting in person classes and activities.³ He issued an emergency order prohibiting first, gatherings of 50 people or more⁴, and, then, gatherings of 10.⁵ This has effectively suspended eating in restaurants, attending religious services, sporting and entertainment events. He has issued an emergency order closing all

² The Governor's Executive Orders declaring a state of emergency and extending it can be found at the following links: (1) Executive Order 2020-04 is available at <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-04.pdf>; and (2) Executive Order 2020-05 is available at <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-05.pdf>.

³ Available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-1.pdf>.

⁴ Available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-2.pdf>.

⁵ Available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-16.pdf>.

nonessential businesses, so that people may avoid workplaces where they could be exposed to and spread COVID-19.⁶ The COVID-19 emergency reaches into all aspects of society, from the work place to social functions to economic well-being. As the Chief Executive of our state, the Governor must take necessary actions – including spending – to lead the effort to prevent COVID-19 from spreading at a rate that would overwhelm the infrastructure necessary to combat it.

The fallout has been significant. Hospitals in New Hampshire, who have stopped all elective procedures, estimate that they are losing collectively approximately \$200 million per month.⁷ The Governor created a \$50 million Emergency Relief Fund for hospitals. Since March 17, New Hampshire has experienced 127,067 new unemployment claims and has paid \$35 million in unemployment benefits through 125,206 payments. This is because COVID-19 has resulted in record numbers of layoffs, in response to which the Governor issued an emergency order on March 17 expanding unemployment benefits eligibility to those who have lost jobs due to COVID-19. These expenditures necessarily occurred within days or weeks of the declaration of the State of Emergency, and represent significant sums of public funds. COVID-19 is not a million dollar emergency; it will be well over a billion dollar emergency for New Hampshire.

⁶Available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-17-1.pdf>.

⁷ NHHA Statement on Funding to Support Hospitals & Health Systems' Response Efforts to the COVID-19 Crisis, available at <https://www.nhha.org/index.php/whats-new/1549-nhha-statement-on-funding-to-support-hospitals-health-systems-response-efforts-to-the-covid-19-crisis>.

Simultaneous with declaring a State of Emergency, the Governor activated the Emergency Operations Center (“EOC”), led by a Unified Command consisting of the Commissioner of the Department of Health and Human Services, the Brigadier General in command of the New Hampshire National Guard, and the Assistant Commissioner of Safety. Exhibit 1, Affidavit of Perry Plummer ¶¶ 1-2. The EOC is located within the Department of Safety Incident Planning and Operation Center in Concord. *Id.* ¶ 2. The Unified Command of the EOC is responsible for all aspects of managing the COVID-19 emergency and protecting the people of New Hampshire from this pandemic. *Id.* ¶ 3.

The magnitude and pace of the COVID-19 emergency make it unique. *Id.* ¶ 5. Not only does the virus spread easily and rapidly, but it currently affects the entire globe. *Id.* ¶ 6. The contagious nature of the virus makes protecting first responders, healthcare workers, and other front line workers critical. *Id.* ¶ 7. But much of what is needed to protect against the spread of the virus and to combat it is manufactured in one country, China. *Id.* ¶ 9. As a result, New Hampshire competes with the entire world for a limited supply of critical equipment. *Id.* ¶¶ 8-10. The pace of the COVID-19 emergency requires fast decisions, many of which require the expenditure of public funds to address the public health emergency and provide immediate and broad economic relief. *Id.* ¶¶ 8-29.

The Assistant Commissioner of Safety Perry E. Plummer is one of the three leaders of the Unified Command. In his testimony, Mr. Plummer details the unique demands and stresses COVID-19 places on emergency management. *Id.* ¶¶ 8-29. Mr. Plummer has lost the opportunity to purchase supplies and equipment simply because he

has taken the time to consult with colleagues, only to find out that the equipment has already been sold. *Id.* ¶ 11. In other instances, Mr. Plummer has been faced with urgent needs to keep vital businesses up and running. *Id.* ¶¶ 18-19, 25-26, 28. In one instance, Mr. Plummer made the decision to find and purchase 20,000 masks so that a company that occupies a critical place in the grocery supply chain could remain open. *Id.* ¶¶ 18-19. In another instance, Mr. Plummer has had to make in the moment decisions to reserve hotel rooms to allow first responders or the homeless a place to quarantine after having been exposed to or infected with COVID-19. *Id.* ¶¶ 20-22.

In one extraordinary episode, Mr. Plummer, over an 18 hour period, negotiated the reservation of a FedEx jet, and worked with a New Hampshire business owner with contacts in China to find critical supplies of masks, gloves, Tyvek suits, and other materials. *Id.* ¶¶ 15-17. Those efforts brought 91,000 pounds of supplies and equipment into New Hampshire. *Id.* Mr. Plummer had to make a multitude of decisions to spend public funds to purchase that equipment in real time, without delay. *Id.*

As Mr. Plummer testifies, waiting 24 hours to make a purchase means losing the opportunity. *See id.* ¶ 29. Losing the opportunity means jeopardizing those working to combat the pandemic in New Hampshire, and losing lives of those infected with COVID-19.

II. Governor's Statutory Emergency Powers

The Governor has directed and authorized Mr. Plummer's, and the entire EOC's actions, including to spend public funds as necessary to manage the COVID-19 emergency. *See Plummer Aff.* ¶¶ 3-4. The Governor has acted pursuant to broad

emergency powers granted to him for this very purpose, in RSA 4:45, RSA 4:47, and RSA 21-P. In 2002, the General Court passed, and Governor Jeanne Shaheen signed into law, N.H. Laws 2002, Chapter 258, An Act Relative To Public Health Emergency Preparation And Response (HB 1478). This comprehensive chapter law contains amendments to numerous emergency related statutes, including provisions of law contained in RSA chapter 107-C that would later become RSA 4:45-:47.

RSA 4:45, I gives the Governor “the power to declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.” RSA 21-P:35 defines “State of Emergency” as “that condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize *extraordinary* measures, actions and procedures to lessen or mitigate possible harm.” RSA 21-P:35, VIII (Emphasis added). Emergency management is defined as “the preparation for and the carrying out of all emergency functions, including but not limited to . . . to prevent, minimize and repair injury or damage resulting from any natural or human cause” RSA 21-P:35, V.

An executive order declaring a “state of emergency” must specify the: (a) nature of the emergency; (b) political subdivisions or geographic areas subject to the declaration; (c) conditions that have brought about the emergency; and (d) duration of the state of emergency, if less than 21 days.” RSA 4:45, I.

During a declared state of emergency under RSA 4:45, the Governor is vested with broad powers, including (a) “[t]o enforce all laws, rules, and regulations relating to emergency management and to assume control of any or all emergency management forces and helpers in the state,” (b) “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,” and (c) “[t]o provide for and compel the evacuation of all or part of the population from any stricken or threatened area or areas within the state and to take such steps as are necessary for the receipt and care of such evacuees.” RSA 4:45, III(a)-(c).

The Governor is also vested with the broad authority “[t]o 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 extraordinarily broad grant of authority signals the legislature’s intent that the Governor may take whatever action necessary, including the expenditure of public funds, to manage and combat an emergency, and, more specifically, to promote the safety and protection of the civilian population.

The legislature also contemplated that, in times of emergency, the federal government might disburse emergency federal funds to New Hampshire to assist. Through RSA 21-P:43, the legislature granted the Governor the unilateral authority to accept federal grants or aid related to emergency management subject to whatever conditions the federal government might attach to that money during a declared state of

emergency, without executive council or fiscal committee approval. The combination of these two statutes – RSA 21-P:43 and RSA 4:45, III(e) – grant the Governor the authority, in a time of emergency, to accept and spend federal funds provided to help abate the emergency. None of these statutes references the Fiscal Committee.

The Governor’s emergency powers, however, are not without any check. RSA 4:45, I allows the Governor to declare a State of Emergency only after he has found that a disaster of major proportions is imminent or has occurred and that the safety and welfare of the people of New Hampshire require the invocation of RSA 4:45. RSA 4:45, II(a) allows the Governor to extend a State of Emergency after 21 days only if he follows the same procedures and makes the same findings. RSA 4:45, II(c) reserves to the legislature the power to terminate a state of emergency through a concurrent resolution passed by majority vote of each chamber. In these provisions, the legislature has carefully balanced the grant of broad executive power – including spending – to the Governor against the need to maintain the ability to check that broad power should it see fit.

III. The Fiscal Committee

The Fiscal Committee is a creature of statute – RSA 14:30-a – which consists of ten members, five from the each of the New Hampshire House and Senate. RSA 14:30-a, I. The Fiscal Committee is not the legislature. It is a joint committee of the legislature. Through statute, the legislature has specifically delineated the Fiscal Committee’s functions. First, the committee shall “assist, advise, and supervise the work of the legislative budget assistant,” including “the discretion to investigate and consider any matter relative to the appropriations, expenditures, finances, revenues or any of the fiscal

matters of the state.” RSA 14:30-a, II. Second, the Fiscal Committee “shall consider recommendations proposed to it by the legislative performance audit and oversight committee. . . .” RSA 14:30-a, III. Third, the Fiscal Committee must approve the expenditure of any non-state funds in excess of \$100,000, including federal aid, “which under state law require the approval of the governor and council for acceptance and expenditure.” RSA 14:30-a, VI (sections IV and V have been repealed). The Fiscal Committee cannot appropriate, nor can it sue and its existence is not established by or referenced in the New Hampshire Constitution.

IV. The Coronavirus Aid, Recovery, and Economic Security (“CARES”) Act

As part of its response to COVID-19, with unprecedented speed, the federal government enacted the Coronavirus Aid, Recovery, and Economic Security (“CARES”) Act on March 27, 2020.⁸ The magnitude of the CARES Act perhaps best demonstrates the magnitude of the COVID-19 crisis. Through the CARES Act, Congress has appropriated approximately \$2 trillion to go toward fighting the COVID-19 pandemic.

Title V of the CARES Act creates the Coronavirus Relief Fund within the Social Security Act (42 U.S.C. 301 at seq.). H.R. 748, the CARES Act, <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>, at 221. Section 601(a) appropriates \$150,000,000,000 from the Treasury of the United States for making payments to States, Tribal governments, and units of local government. *Id.* Under Section 601(b)-(c), the Secretary of Health and Human Services is authorized to make

⁸ The entire Act is available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

direct payments from that fund to the States of not less than \$1,250,000,000 for fiscal year 2020. H.R. 748, the CARES Act, <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>, at 222. Section 601(d) specifies that a state “shall use the funds provided . . . to cover only those costs of the State . . . that—(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this for the State . . . ; and (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020. H.R. 748, the CARES Act, <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>, at 223. Section 601(f) mandates Inspector General Oversight with regard to these funds. H.R. 748, the CARES Act, <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>, at 223-24.

New Hampshire will receive a total of \$1.25 billion from the Coronavirus Relief Fund. Because these federal CARES Act funds relate to the emergency management function of the state, the Governor may accept these federal funds, without fiscal committee participation, subject to the federal conditions attached to them. RSA 21-P:43.

V. Fiscal Committee Involvement

On March 27, 2020, the Fiscal Committee sent a letter to the Governor stating that it could meet quickly to accept any federal funds that may be made available. **Exhibit 2.** In response to this invitation, on March 31, 2020, the Governor presented the acceptance and expenditure of the \$1,250,000,000 federal CARES Act flex funds to the Fiscal

Committee for approval on March 31, 2020. *See* Compl.at **Exhibit C**. In his letter, the Governor stated that he did not believe he had to submit the item under RSA 4:45 and RSA 21-P:43, but regardless he presented the fiscal committee with the opportunity to vote on the acceptance and expenditure of the \$1,250,000,000 federal CARES Act flex funds. *Id.* The fiscal committee chose not place the item on the agenda, requesting instead that the Governor resubmit it as an informational item. *See* **Exhibit 3**. The Legislative Budget Assistant, Michael Kane, later informed the Governor’s office that the fiscal committee did not place the item on the agenda because the fiscal committee did not have the authority to act on it. *Id.*

VI. Executive Order 2020-06

In anticipation of the arrival of the CARES Act funds, on April 14, 2020, the Governor issued Executive Order 2020-06, An order establishing the Governor’s Office for Emergency Relief and Recovery and processes and procedures for allocation and expenditure of COVID-19 emergency funds. **Exhibit 4.**⁹ This executive order sets forth many findings illustrating the severity of the COVID-19 emergency. **Exhibit 4** at 2. Executive Order 2020-06 details the different types of emergency relief funds being provided to the state, including \$1,250,000,000 from the CARES Act Coronavirus Relief Fund or so-called “flex funds.” **Exhibit 4** at 3. Executive Order 2020-06 also details the federal conditions attached to these “flex funds” and identifies RSA 4:45, 4:47, 21-P:35, 21-P:37, and 21-P:43 as the authority pursuant to which the General Court has vested him

⁹ Executive Order 2020-06 is available at the following link: <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-06.pdf>.

with authority to accept these funds and use them to take necessary and extraordinary actions during a state of emergency. **Exhibit 4** at 3-5.

Executive Order 2020-06 also finds that “it is appropriate for greater Legislative involvement in the development of proposals for allocation and expenditure of these emergency funds than is typical of other federal funds, while still allowing for a process that enables quick and nimble action.” **Exhibit 4** at 4. Executive Order 2020-06 also seeks to solicit “the input of a wide variety of public and private sector stakeholders,” to establish “an expedited schedule for the development of a plan for the allocation and expenditure of CARES Act emergency relief funds,” and to establish “an infrastructure for the oversight and management of such funds.” **Exhibit 4** at 4.

Based on all of these various findings, Executive Order 2020-06 establishes the Governor’s Office for Emergency Relief and Recovery (“GOFERR”). **Exhibit 4** at 5. The GOFERR will be led by a Director, a Deputy Director, and such additional staff as the Director deems necessary to operate. *Id.* Executive Order 2020-06 also establishes the GOFERR Legislative Advisory Board, “which shall work with the Director, the staff of GOFERR, and the GOFERR Stakeholder Advisory Board to develop recommendations for the allocation and expenditure of CARES Act emergency relief funds.” *Id.* The Legislative Board shall consist of four members of the Senate and four members of the House of Representatives, with equal representation from the two largest parties in each body, appointed by the Governor. *Id.* The Legislative Board shall elect a chair from among their membership and remains in existence for the duration of the existence of GOFERR. *Id.* Executive Order 2020-06 details the process for how

GOFERR works and how the Legislative Board and Stakeholder Advisory Board interface with the Director of GOFERR and his staff. *Id.* at 5-7.

All of the plaintiffs are members of the GOFERR Legislative Board and had been invited to participate in this capacity before commencement of this lawsuit.

VII. This Lawsuit

On April 13, 2020, the plaintiffs, several members of the General Court represented by Senate Legal Counsel, filed suit against the Governor. In their complaint, the plaintiffs assert that this case presents an inter-branch dispute, between the General Court and the Governor. That assertion is incorrect. Neither the House nor the Senate has authorized this lawsuit. The Joint Legislative Fiscal Committee has also not authorized this lawsuit and it has not been granted the statutory power to file lawsuits. RSA 14:30-a.

What this case really presents is a dispute between individual members of the General Court, in their official capacities, and the Governor, in his official capacity. These individual legislators seek a Writ of Mandamus (Count I), a Writ of Prohibition (Count II), a Declaratory Judgment for Violations of RSA 9:13-d, RSA 9:16-a, and RSA 14:30-a (Count III), a Declaratory Judgment for a Violation of Part I, Article 37 of the New Hampshire Constitution (Count IV), and Expedited Preliminary Injunctive Relief (Count V).

The plaintiffs move for preliminary injunctive relief. Their motion should be denied for at least the following seven reasons:

- (1) Members of the General Court lack standing to maintain this action because their alleged injury is institution, not personal, and neither the House, Senate, or Joint Legislative Fiscal Committee has authorized this suit;
- (2) Part II, Articles 41 and 56 of the New Hampshire Constitution, RSA 21-P:43, and RSA 4:45 permit the Governor to accept and expend funds to carry out the General Court's mandate 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";
- (3) Neither RSA 9:13-d, RSA 9:16-a, nor RSA 14:30-a restrict the Governor's emergency power authority under RSA 21-P:43 or RSA 4:45, III(e);
- (4) To the extent RSA 9:13-d, RSA 9:16-a, or RSA 14:30-a purport to allow the fiscal committee to approve or disapprove a proposed executive branch expenditure, they are unconstitutional under Part I, Article 37, in violation of the separation of powers;
- (5) Even assuming a violation of the separation of powers doctrine exists, such a violation does not create *per se* irreparable harm, and, with respect to the \$1.25 billion federal CARES Act flex funds, the plaintiffs already had and voluntarily declined their opportunity to vote on acceptance and expenditure of those monies;
- (6) Members of the General Court have one or more adequate remedies at law, including acting under RSA 4:45 to end the present state of emergency or passing new laws or repealing existing laws to constrain the Governor's authority; and
- (7) The public interest does not favor the issuance of an injunction in the midst of a rapidly unfolding emergency where the global resources needed to combat the emergency and keep the civilian population safe and alive are scarce, spending decisions need to be made within minutes, and a failure to act could exacerbate the situation.

Accordingly, for all of the above reasons, and for the reasons explained in further detail below, the plaintiffs' motion for a preliminary injunction should be denied, and the Governor's motion to dismiss filed this day with this objection should be granted.

STANDARD OF REVIEW

“The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” *New Hampshire Dep’t of Env’tl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007) (citation omitted). “A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” *Id.* (citation omitted). To be entitled to preliminary injunctive relief, the plaintiffs must show that: (1) they would likely succeed on the merits; (2) that there is an immediate danger that they will suffer irreparable harm; and (3) that there is no adequate remedy at law. *Id.* Courts also consider whether the public interest would be served by granting the injunction. *See UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987).

ANALYSIS

I. The Plaintiffs Have No Likelihood Of Success On The Merits.

A. The Plaintiffs Lack Standing To Maintain This Action.

“[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress.” *Teeboom v. City of Nashua*, 172 N.H. 301, 307 (2019) (quoting *Duncan v. State*, 166 N.H. 630, 642-43 (2014)). “In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect.” *Id.* (quoting *State v. Actavis Pharma*, 170 N.H. 211, 215 (2017)) (quotation omitted). “Neither an abstract interest in ensuring that the State Constitution is observed nor an injury

indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest.” *Id.* (quoting *Actavis Pharma*, 170 N.H. at 215). “Rather, the party must show that its own rights have been or will be directly affected.” *Id.* (quoting *Actavis Pharma*, 170 N.H. at 215). These standing requirements are “similar to those imposed by Article III of the Federal Constitution.” *Duncan*, 166 N.H. at 642.

The doctrine of standing “is built on a single basic idea – the idea of separation of powers.” *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Its aim is to keep the judicial power within its proper constitutional sphere and it demands careful scrutiny as to whether the plaintiffs’ claimed injury “is personal, particularized, concrete, and otherwise judicially cognizable.” *Id.*

While no New Hampshire Supreme Court case deals directly with the standing of individual members of the state legislature in their official capacity to sue the executive branch, the United States Supreme Court confronted the issue in *Raines v. Byrd*, 521 U.S. 811 (1997). In that case, the United States Supreme Court held that individual legislators, proceeding without the approval of the institutions they were members of, lacked a personal, particularized, concrete injury sufficient to maintain suit. In so holding, the United States Supreme Court emphasized that “our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Id.* at 820-21. The Court explained that the legislators had not been “singled out for specially unfavorable treatment as opposed to other Members of their

respective bodies” nor had they “been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*.” *Id.* at 821 (emphasis in original). Rather, their claim ran generally with their seat, meaning not to a particular legislator, and thus presented a generalized, institutional injury that was not personal to them. *Id.* The United States Supreme Court also observed that the legislators’ votes were not “completely nullified,” either directly on the legislation passed or “[i]n the future” when the legislature could vote to repeal the legislation they were concerned about or exempt a future appropriation from that legislation. *Id.* at 823-24. Finally, the United States Supreme Court observed that judicial intervention in these types of disputes had not been a historical practice. *Id.* at 826-28.

As a result, the United States Supreme Court concluded that the members of Congress “alleged no injury to themselves as individuals,” that “the institutional injury they allege is wholly abstract and widely dispersed,” and that “their attempt to litigate this dispute at this time and in this form is contrary to historical experience.” *Id.* at 829. The United States Supreme Court also attached “some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action” and noted that its conclusion “neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).” *Id.* Accordingly, the United States Supreme Court held that these “individual members of Congress do not have a sufficient

‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.” *Id.* at 830.

In this case, the plaintiffs lack standing to press their claims. They have failed to allege an injury personal to them. Rather, their injury is institutional: they allege impairment of the Joint Legislative Fiscal Committee’s ability to approve the Governor’s expenditure of funds. Neither the House nor the Senate nor the Joint Legislative Fiscal Committee has authorized this suit, and the Joint Legislative Fiscal Committee possesses no statutory authority that would permit it to initiate suit. The injury is not personal to the plaintiffs, but is widely dispersed among all members of the General Court. Additionally, the General Court retains many adequate remedies to alter the present situation. It may, for example, convene and end the declared state of emergency by concurrent resolution under RSA 4:45, II(c) or it may convene and repeal or otherwise modify RSA 21-P:43 or RSA 4:45, III(e). The plaintiffs’ votes have therefore not been “completely nullified,” both now and in the future, in a manner that would confer upon them standing to sue.

The authority on legislative standing aligns with the New Hampshire Supreme Court’s standing jurisprudence. In *Duncan v. State*, 166 N.H. 630, 642 (2014), the New Hampshire Supreme Court recognized that Part II, Article 74 of the New Hampshire Constitution imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution. It therefore struck down a statutory amendment to RSA 491:22 that gave taxpayers “an equitable right and interest in the preservation of an orderly and lawful government within [the] district.” The New Hampshire Supreme

Court held that “[t]he standing required by our constitution is not satisfied by the abstract interest in ensuring that the State Constitution is observed.” *Duncan*, 166 N.H. at 643. In response to this holding, a narrow amendment to Part I, Article 8 of the New Hampshire Constitution was adopted in 2018 providing “any individual taxpayer eligible to vote” with standing to petition the Superior Court “to declare whether the State . . . has spent, or has approved spending, public funds in violation of a law . . . or constitutional provision.” In other words, New Hampshire Supreme Court jurisprudence does not recognize a generalized form of legislator standing where individual members of the General Court in their official capacities may petition the courts to try to enforce their preferred interpretation of the laws or the constitution.

Other courts similarly have held that individual legislators acting without authorization from the legislature itself and complaining of unauthorized expenditures by executive officials lack standing to press those claims. *See, e.g., Morrow v. Bentley*, 261 So. 3d 278, 293 (Ala. 2017) (“A single legislator, acting individually, does not have standing to prosecute an injury to the entire legislature.”); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1215 (10th Cir. 2016) (holding that legislators’ allegation that they had been “deprive[d] . . . of their ability to perform the ‘legislative core function[] of . . . appropriation’ ” was an institutional injury and that, therefore, the legislators, absent the legislature’s authorization, lacked standing to prosecute the action on the legislature’s behalf); *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 150 (Minn. Ct. App. 1999) (holding that “it is apparent that the senator is alleging an institutional, not a personal, injury” where the senator alleged that state funds had been expended without

a legislative appropriation); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975) (holding that four federal legislators whose complaint alleged that executive-branch officials' unauthorized expenditures violated the United States Constitution's Appropriation Clause lacked standing to prosecute the action).

As the Alabama Supreme Court recently held, “[a]bsent such [institutional] authorization, however, it does not appear that other jurisdictions have found that either a single legislator or a small bloc of legislators has standing to prosecute an action alleging an institutional injury to the legislature.” *Morrow*, 261 So. 3d at 294. “Indeed, to hold otherwise could result in a scenario where a single legislator, perceiving a ‘separation-of-powers injury’ to the legislature as a whole, purports to bring an action seeking to redress the alleged injury, yet the majority of the legislature he or she purports to represent perceives no injury at all.” *Id.* The *Morrow* Court concluded that “the plaintiffs’ allegation that the defendants’ alleged funding of the project with moneys not authorized by the Act was a usurpation of the legislature’s appropriation power *alleges an institutional injury to the legislature as a whole because only the legislature can appropriate state funds.*” *Id.* (emphasis added).

Additionally, suits by a committee or subcommittee of a larger body, like the fiscal committee, fail absent the authorization of the body that controls it. *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928) (suit by a committee or subcommittee failed absent specific authority from the House); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544 (1986) (“Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.”).

Moreover, as legislators, the plaintiffs have available to them a panoply of political remedies that are not available to private litigants, including (a) ending the state of emergency under RSA 4:45, (b) passing laws modifying the emergency powers statutes at issue, or (c) repealing the emergency powers statutes at issue. “Given the variety of possible political remedies plaintiffs have as congressmen, it is appropriate to defer to the political branches of government, out of respect for the traditional restricted role of the judiciary in disputes between the Legislative and Executive Branches, and in keeping with the Constitution’s separation of powers structure.” *Kucinich v. Bush*, 236 F. Supp. 1, 11 (D.D.C. 2002); see *Raines*, 521 U.S. at 829 (finding a lack of standing, in part, because the congressional plaintiffs had not been “deprive[d] . . . of an adequate remedy”).

Accordingly, the plaintiffs, a handful of individual representative and senators, in their official capacity as legislators, lack the type of direct, personal injury required to have standing under the New Hampshire Constitution to maintain this suit. They are therefore not likely to succeed on the merits for this reason.¹⁰

¹⁰ The plaintiffs also lack capacity to bring this action. Regardless of the merits of the dispute, the legislature lacks the power and authority under the New Hampshire Constitution to enforce state laws, including by way of civil lawsuit. *Opinion of the Justices (Requiring Attorney General To Join Lawsuit)*, 162 N.H. 160 (2011). The plaintiffs’ prosecution of this suit in their official capacities would therefore violate Part I, Article 37’s separation of powers provisions. While the plaintiffs may disagree with the Governor’s interpretation of the law, in their official capacities as legislators, they lack the capacity to try to enforce their preferred interpretation through this civil action.

B. Part II, Articles 41 And 56, RSA 21-P:43 And RSA 4:45, III(e) Permit The Governor To Accept and Spend Funds Without Fiscal Committee Approval To Combat The Present Emergency; RSA 14:30-a, RSA 9:13-d, RSA 9:16-a, And Part I, Article 37 Do Not Constrain that Authority.

Part II, Article 41 of the New Hampshire Constitution firmly vests in the Governor the power to spend. *N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 387, 389 (2011). What is more, the constitution permits the Governor to spend funds from the state treasury “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.” N.H. Const. Pt. II, Art. 56. The function of this provision is “to insure that 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) (quoting *Willar v. Commonwealth*, 9 N.E.2d 405, 406 (Mass. 1937)).

Relevant to this dispute and the federal CARES Act funds, the legislature, through RSA 21-P:43 and RSA 4:45, III(e), has granted to the Governor the unilateral power to accept and spend federal emergency funds, subject to the conditions of their grant, in a State of Emergency. On the one hand, RSA 21-P:43 expressly vests the Governor with the power to accept federal emergency funds, with no further approvals. Through RSA 21-P:43, the legislature specifically removed the Fiscal Committee approval required to accept non-emergency federal funds, provided in RSA 14:30-a, VI. On the other hand, RSA 4:45, III(e) very broadly allows the Governor 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.” It is hard to imagine a grant of emergency power

of greater breadth, and it strains statutory construction to argue that this broad grant includes all necessary actions except the power to spend. These two emergency power statutes work together to allow the Governor to accept and spend emergency federal funds during a State of Emergency to protect the civilian population.

The legislature crafted RSA 4:45 and 21-P in the shadow of the September 11 tragedy. N.H. Laws 2002, Chapter 258, Section 258:1 at 442-43 (Statement of Purpose). The legislators contemplated exactly what has occurred in the COVID-19 pandemic: a situation in which a rapidly moving state-wide emergency has prevented the legislature itself from meeting, and which requires an executive, equipped with broad emergency powers, to act, albeit for no more than 21 days at a time, but in the moment as the executive alone sees as necessary to protect the civilian population. The COVID-19 emergency illustrates how any other construction of the emergency powers statutes would frustrate that legislative intent. Put another way, if the emergency powers statutes proscribe ANY expenditure without Fiscal Committee approval, the Governor would have very little emergency power at all. COVID-19 would not be nearly as contained as it is in New Hampshire, and New Hampshire citizens would be impacted in an even more profound way. That construction, in short, runs directly contrary to the intent of the legislature, expressed in its plain statutory language: “[t]o 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).

For example, if certain medical equipment is needed to secure the safety and protection of the civilian population, like masks or ventilators, and there is a global

shortage of them, the Governor must be empowered to spend money to acquire them as soon as they become available or risk losing them to another purchaser. *Plummer Aff.* ¶¶ 8-17. Similarly, if a majority of the legislature, or a majority of the fiscal committee, were to acquire COVID-19 and could not convene or act, the Governor must be empowered to spend money to obtain needed medical supplies, equipment, and other items to help facilitate saving their lives and the lives of others. It cannot be that the Governor must permit the present state of emergency to descend into an irreversible calamity because he cannot obtain an approval from the fiscal committee. After all, the constitution is “not a suicide pact” and its laws should not be construed to create one. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); *Edmond v. Goldsmith*, 183 F.3d 659, 663 (7th Cir. 1999) (“When urgent considerations of the public safety require compromise with the normal principles . . . , the normal principles may have to bend. The Constitution is not a suicide pact.”).

In a declared state of emergency, the Governor needs the ability to act and respond immediately, potentially within minutes or hours, at any time of day, to ever-changing circumstances. Indeed, when the legislature intended to restrict the Governor’s authority to act unilaterally under the emergency powers statutes, it did so expressly. For example, under RSA 4:46, I, the Governor may only take certain real or personal property during a declared state of emergency “with the advice and consent of the executive council.” RSA 4:45, III does not contain similar restrictions, but is broadly worded to allow the Governor to act unconstrained by various administrative processes

that may apply in less dangerous times so he might effectively combat the emergency and protect the public to the greatest extent practicable. As mentioned, RSA 21-P:43 removes the Fiscal Committee altogether from the process of accepting federal emergency funds.

Against this powerful legal authority, the plaintiffs seek an injunction against ANY expenditure without prior Fiscal Committee approval. See, e.g., Pls.’ Memo. of Law at 19 (Request for Relief A). The plaintiffs, who do not speak for the Fiscal Committee as a whole, claim that the committee can meet every day, and can convene on 24 hours’ notice, apparently suggesting that the Fiscal Committee is nimble enough to react to the COVID-19 emergency. But Mr. Plummer’s testimony reveals why one hour, much less 24 hours’ notice, is insufficient in nearly all instances. Plummer Aff. ¶¶ 5-29. And one wonders whether the Fiscal Committee could, or would, maintain a quorum for 18 hours while approving the multitude of individual expenditures that Mr. Plummer had to approve in the moment to fill a cargo jet to New Hampshire with 91,000 pounds of critical supplies and equipment. *Id.* ¶¶ 15-17. This State of Emergency has no modern precedent and requires extraordinary measures. The legislature recognized that in RSA 4:45, 4:47 and 21-P. Consequently, the plaintiffs’ suggestion that the Fiscal Committee must approve any expenditure in an emergency, including those that must be made at a moment’s notice, does not withstand scrutiny and demonstrates why the plaintiffs’ construction of RSA 4:45 is incorrect.

“Any grant of executive authority must be construed to accomplish the Legislature’s purpose.” *Worthington v. Fauver*, 440 A.2d 1128, 1134 (N.J. 1982). “This

is especially true when those statutes operate to protect the public health, safety and welfare, especially during emergencies.” *Id.* Large-scale emergencies “inherently preclude prior prescription of specific, detailed guidelines.” *U.S. v. Yoshida Intern., Inc.*, 526 F.2d 560, 581 (U.S. Ct. Custom & Patent Appeals 1975). And emergency power legislation generally lacks the regular administrative procedures that attend similar processes during non-emergent times. *See id.* at 581-82 (“The need for prompt action, another essential feature of a national emergency, precludes the otherwise oftprovided requirement for prior hearings, extensive fact finding, Tariff Commission reports to the President, and the like.”). That is because “[e]mergencies, by definition, require a quick, decisive response.” *Id.* at 582. “Of the three branches of government, only the Executive has a continuing, spontaneous capability for mounting such a response.” *Id.* Indeed, “if every law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate, prompt means for dealing with emergencies.” *Id.* at 583.

Assistant Commissioner Plummer’s affidavit reflects that reality and shows precisely why the General Court granted the Governor such broad authority under RSA 4:45, III(e) following the September 11, 2001 terrorist attacks. Accordingly, for all of the above reasons, the Governor has the constitutional authority under Part II, Articles 41 & 56 and the statutory authority under RSA 21-P:43 and RSA 4:45, III(e) to accept and expend federal CARES Act flex funds and other unappropriated general funds as necessary “to promote and secure the safety and protection of the civilian population,” RSA 4:45, III(e). The General Court holds the ultimate check on that authority: it may

convene and by a majority vote of both chambers end the state of emergency. The plaintiffs' arguments to the contrary are without merit, as detailed below.

1. RSA 14:30-a, VI Does Not Apply Because RSA 21-P:43 Authorizes The Governor To Accept The Federal CARES Act Money Unilaterally.

The plaintiffs assert that RSA 14:30-a, VI constrains the Governor's authority to accept and expend non-state federal funds given to the state to pay for costs incurred in responding to the COVID-19 state of emergency during a declared state of emergency under RSA 4:45, I. The argument lacks merit. While RSA 14:30-a, VI gives Fiscal Committee approval over the acceptance and expenditure of federal funds in some instances, it expressly states that "[a]ny non-state funds in excess of \$100,000, whether public or private, including refunds of expenditures, federal aid, local funds, gifts, bequests, grants, and funds from any other non-state source, *which under state law require the approval of governor and council for acceptance and expenditure*, may be accepted and expended by the proper persons or agencies in the state government only with the prior approval of the fiscal committee of the general court." (emphasis added). The federal CARES Act flex funds at issue in this litigation do not require "the approval of the governor and council for acceptance and expenditure." Rather, under RSA 21-P:43, the Governor may unilaterally accept these federal funds during a declared state of emergency, without fiscal committee approval. Accordingly, RSA 14:30-a, VI does not apply in this case.

2. RSA 9:13-d Does Not Apply Because The Governor Has Not Invoked It And It Does Not Restrict The Authority Granted Under RSA 4:45.

Perhaps the centerpiece of the plaintiffs' argument is their contention that RSA 9:13-d precludes the Governor from spending any (a) federal CARES Act flex funds, (b) other federal funds, and (c) unappropriated general state funds. This argument is incorrect.

For RSA 9:13-d to be applicable, the Governor must specifically invoke it. The statute reads,

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. In determining whether a civil emergency exists, the governor shall consider whether there is such imminent peril to the public health, safety and welfare of the inhabitants of this state so as to require immediate action to remedy the situation. This section shall not be construed to enlarge any of the powers which the governor may possess under the constitution or other statutes.

(Emphases added).

The Governor has made no determination that a "civil emergency" exists under RSA 9:13-d. He has made a determination that a "state of emergency" exists under RSA 4:45, I and RSA 21-P:35, VIII. A "state of emergency" is a "condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm." RSA 21-P:35, VIII. A "state of emergency" under RSA 21-P:35, VIII means something different than a "civil

emergency” under RSA 9:13-d, and the invocation of a “state of emergency” under RSA 4:45, I brings with it a host of different powers. In other words, the legislature has chosen to offer the Governor two different avenues when confronted with an emergency. The Governor has elected to act pursuant to RSA 4:45 and RSA 21-P:35, and no party disputes that the COVID-19 situation falls within the definitions of emergency and the parameters of those statutes, nor does any party contend that the Governor has improperly declared a State of Emergency. Consequently, because the Governor has not invoked RSA 9:13-d, that statute does not constrain his emergency authority to act pursuant to RSA 4:45-:47 and RSA 21-P:34-:48.

RSA 9:13-d also does not apply in this case because Part II, Articles 41 and 56 of the New Hampshire Constitution and RSA 4:45, III(e) already authorizes the Governor “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.” The General Court did not encumber this broad grant of authority with requirements that every expenditure that is needed to meet a declared state of emergency have fiscal committee approval. The General Court could have included that limitation in RSA 4:45, III(e), but did not do so. This court should therefore not read such a limitation into the statute. *See, e.g., Rankin v. South Street Downton Holdings, Inc.*, 172 N.H. 500, 502-03 (2019). Accordingly, RSA 9:13-d does not apply or otherwise restrict the Governor’s legislatively-granted authority under RSA 4:45, III(e).

3. The Plaintiffs Have Not Shown How RSA 9:16-a Is Applicable And, In Any Event, It Does Not Restrict The Governor’s Authority Under RSA 4:45, III(e).

RSA 9:16-a applies to the transfer of funds. It permits funds to be transferred under certain circumstances and restricts those transfers under other circumstances. RSA 9:16-a does not apply in this case because RSA 4:45, III(e) already authorizes the Governor “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.” The General Court did not encumber this broad grant of authority with requirements that every transfer of funds over a specific amount that is needed to meet an emergency have fiscal committee approval. The General Court could have included that limitation in RSA 4:45, III(e), but did not do so. This court should therefore not read such a limitation into the statute. *See, e.g., Rankin*, 172 N.H. at 502-03. Accordingly, RSA 9:16-a does not apply or otherwise restrict the Governor’s legislatively-granted authority under RSA 4:45, III(e).

4. The Acceptance And Expenditure Of Funds In Accordance With Part II, Articles 41 And 56, RSA 21-P:43, And RSA 4:45, III(e) Without Fiscal Committee Approval Does Not Violate Part I, Article 37.

The plaintiffs also assert that the acceptance and expenditure of federal funds and the expenditure of unappropriated state general funds without fiscal committee approval violates Part I, Article 37. They seem to assert that the Joint Legislative Fiscal Committee has a role to play in the New Hampshire Constitution and within the doctrine of the separation of powers. The plaintiffs’ assertion is incorrect and ignores the litany of

cases holding that when legislative committees like the fiscal committee purport to be able to approve or disapprove executive branch expenditures, that purported authority is unconstitutional under the separation of powers doctrine. *Opinion of the Justices*, 129 N.H. 714, 720 (1987); see, e.g., *Advisory Opinion In Re Separation Of Powers*, 295 S.E.2d 589 (N.C. 1982) (the statute which purports to give the joint legislative committee on governmental operations power to control major line item budget transfers proposed to be made by the Governor as administrator of the budget exceeds the power given to the legislative branch, constitutes an encroachment upon the responsibility imposed on the Governor to administer the budget, and violates the principle of separation of governmental power); *Anderson v. Lamm*, 579 P.2d 620, 627 (Colo. 1978) (“[T]he requirement for Joint Budget Committee approval unconstitutionally infringes upon the executive’s power to administer appropriated funds.”); *State ex rel Schneider v. Bennett*, 547 P.2d 786, 797 (Kan. 1976) (State Finance Council overseeing use of budget appropriations held to be an unconstitutional encroachment on powers of the executive): *In re Opinion of the Justices to the Governor*, 341 N.E.2d 254, 257 (Mass. 1976) (“[T]o entrust the executive power of expenditure to legislative officers is to violate [the mandated separation of powers] by authorizing the legislative department to exercise executive power.”); *State ex rel Meyer v. State Board*, 176 N.W.2d 920, 926 (Neb. 1970) (“[The legislature] cannot through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of the government. It cannot administer the appropriation once it has been made.”); *People v. Tremaine*, 168 N.E. 817, 827 (N.Y. 1929) (Crane, J., concurring) (holding unconstitutional a requirement that a

legislative committee sit with the governor in decisions regarding spending of money on state buildings (see separate opinion of Justice Crane)).

Moreover, the Joint Legislative Fiscal Committee is not of constitutional dimension. It is referenced nowhere in the New Hampshire Constitution and serves solely as a “legislative watchdog,” with the power to review spending, investigate, and audit expenditures. How state money is spent to carry out legislative directives is an exclusively executive branch function. Neither the General Court nor its fiscal committee may usurp that executive function. N.H. Const. Pt. I, Art. 37.

Thus, the plaintiffs’ arguments that RSA 14:30-a, VI, RSA 9:13-d, and RSA 9:16-a apply in this case in the manner they suggest would impede a clear delegation of the Governor’s expenditure powers. The Fiscal Committee cannot, consistent with Part I, Article 37, wield what amounts to a legislative veto over the Governor’s spending decisions. *See Opinion of the Justices*, 129 N.H. at 718–19. Consequently, if RSA 14:30-a, VI, RSA 9:13-d, and RSA 9:16-a operate as the plaintiffs contend—and they do not for the reasons stated above—they violate the separation-of-powers doctrine and cannot be enforced.¹¹

Accordingly, the Governor’s acceptance of federal CARES Act flex funds and other federal funds and his proposed expenditure of them and other unappropriated funds

¹¹ The plaintiffs can find no refuge in *Monier v. Gallen*, 120 N.H. 333 (1980), or the *Opinion of the Justices*, 110 N.H. 359 (1970). Unlike this case, neither of those cases involved a delegation of executive authority to the Fiscal Committee. Both decisions are therefore inapposite, and the plaintiffs’ reliance upon them is misplaced.

pursuant to the General Court’s grant of authority to him in RSA 4:45, III(e) and without fiscal committee approval does not violate Part I, Article 37.

5. Conclusion

The Governor has the constitutional and statutory authority to accept the federal CARES Act flex funds and other federal emergency funds and to expend those funds and other unappropriated general funds without fiscal committee approval under Part II, Articles 41 and 56 of the New Hampshire Constitution, RSA 21-P:43, and RSA 4:45, III(e). Neither RSA 14:30-a, RSA 9:13-d, RSA 9:16-a, or Part I, Article 37 stand as an obstacle to those actions. As a result, the plaintiffs are not likely to succeed on the merits of Counts I-V of their complaint.

II. The Plaintiffs Have Failed To Show Any Irreparable Harm.

The plaintiffs have failed to identify any irreparable harm they will suffer. At best, they assert that their constitutional rights will be violated, presumably because they have alleged a violation of Part I, Article 37. Pls. Memo. of Law at 17. However, the separation of powers doctrine is a structural safeguard, not a personal constitutional right, and its violation alone does not give rise to irreparable harm. *See, e.g., John Doe Co. v. Consumer Financial Protection Bureau*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (“the violation of separation of powers by itself is not invariably an irreparable injury”); *Am. Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 431 (N.D.N.Y. 1989) (explaining that per se irreparable harm is caused only by violations of “‘personal’ constitutional rights (coupled with, for example, some physical harm or loss of liberty, i.e., some tangible harm), to be

distinguished from provisions of the Constitution that serve ‘structural’ purposes -- i.e., a provision of the Constitution relating to the division of power, say, between the States and the federal government, the violation of which is not necessarily accompanied by any tangible harm.”); *State v. Moore*, 354 P.3d 505, 510 (Idaho Ct. Appeals 2015) (“Neither Easley nor Moore individually holds a constitutional right to the separation of powers. It is, after all, a principle of organization of government not an individual constitutional right.”).

Also, the factual record also does not support a finding of irreparable harm as to federal CARES Act flex funds. The Governor afforded the fiscal committee the opportunity to place acceptance and expenditure of the federal CARES Act flex funds on their agenda for a vote. The fiscal committee did not put it on their agenda for a vote, claiming a lack of jurisdiction. Also, no recommendations have been produced from the GOFFER Director or any GOFFER committee, a process which provides legislators with significant involvement, meaning that the plaintiffs cannot demonstrate any risk that the funds are imminently to be spent.

Finally, the statutes the plaintiffs cite do not operate as they contend. Consequently, the plaintiffs have failed to show irreparable harm or even why they require an injunction of any sort at this juncture.

III. The Plaintiffs Have Numerous Adequate Remedies At Law.

The plaintiffs, in their official capacities as legislators, also have numerous adequate remedies at law that preclude the need for injunctive relief. Most notably, the General Court can, among things, convene in order to (a) end the state of emergency

under RSA 4:45, (b) pass laws modifying the emergency power statutes, or (c) repeal the emergency power statutes. *See, e.g., Raines*, 521 U.S. at 829 (explaining that congressional plaintiffs were not “deprive[d] [of] . . . an adequate remedy” because “they may repeal the Act or exempt appropriations bills from its reach”); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 9 (D.D.C. 2002) (“These congressmen have remedies they can use as political leverage to prevent the President’s unilateral termination of the ABM Treaty as part of the give-and-take discussion and compromise envisioned by the Framers of the Constitution.”).

Accordingly, the plaintiffs have failed to show that they lack the requisite adequate remedy at law needed to obtain an injunction in this case.

IV. The Public Interest Tips In Favor Of The Governor.

This court may take judicial notice of the fact that the President of the United States and the Governor of New Hampshire have declared a public health emergency caused by the exponential spread of COVID-19. “The surge of COVID-19 cases causes mounting strains on healthcare systems, including critical shortages of doctors, nurses, hospital beds, medical equipment, and personal protective equipment (“PPE”).” *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *2 (5th Cir. Apr. 7, 2020). “Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities.” *Id.* at *9. “These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis.” *Id.*

“The public has a critical interest in preventing the further spread of the coronavirus.” *Castillo v. Barr*, 2020 WL 1502864, at *6 (C.D. Cal. March 27, 2020). The Governor and his command staff must be able to commit to funds, including federal CARES Act flex funds, to purchase critical supplies such as medical equipment and personal protective equipment needed to combat the COVID-19 emergency immediately upon being notified of their availability. They must also be able to respond in other ways, that will occur in the future as this emergency continues to unfold and that are not knowable today. Failing to be able to timely respond could result in deaths, the closures of hospitals, nursing homes, and other facilities, and could jeopardize critical supply chains into the state like the grocery supply chain. *Plummer Aff.* ¶¶ 8-29. Further, a preliminary injunction restraining the Governor and his command staff from making these critical, immediate spending decisions, backed by the threat of contempt, could “create confusion and fear that would disrupt current efforts and make matters worse.” *Russell v. Harris County*, 2020 WL 1866835, at *11 (S.D. Tex. April 14, 2020).

In short, no credible arguments exists that the public interest favors the issuance of a preliminary injunction. The result of such an injunction will only worsen the emergent situation that already exists and threatens only to make the Governor and his command staff unable to protect the public in critical ways. Accordingly, the plaintiffs’ request for injunctive relief in this case should be denied on this basis, particularly given that members of the General Court have other political remedies available to them.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for an expedited preliminary injunction should be denied, and the defendant's motion to dismiss filed today should be granted.

Respectfully submitted,

CHRISTOPHER T. SUNUNU,
GOVERNOR OF THE STATE OF NEW
HAMPSHIRE

By his attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: April 18, 2020

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CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that a copy of the foregoing objection to plaintiffs' motion for an expedited preliminary injunction and incorporated memorandum of law in support of same, was sent via the court's e-filing system to the following counsel of record:

Gregory L. Silverman, Esquire, counsel for Senator Lou D'Allesandro, and Senate President Donna Soucy

Paul Twomey, Esquire, counsel for Representative Mary Jane Wallner, and Speaker of the House of Representatives Stephen Shurtleff

Date: April 18, 2020

/s/ Daniel E. Will

 Daniel E. Will

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

Docket No.: 216-2020-CV-00342

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

v.

Christopher T. Sununu, Governor of the State of New Hampshire

AFFIDAVIT OF PERRY E. PLUMMER

I, Perry E. Plummer, being over the age of 18, swear as follows:

1. I serve as the Assistant Commissioner for the New Hampshire Department of Safety.
2. Prior to my current position, I worked for the City of Dover Fire & Rescue for 25 years, where I spent 9 years as Fire Chief and Emergency Management Director. I then served as Director of Homeland Security and Emergency Management, and was responsible for coordinating New Hampshire's response to major disasters as well as planning, training and exercising to ensure readiness at the local and state levels of government to ensure the safety and security of New Hampshire citizens. I also served as Homeland Security Advisor, in which I coordinated homeland security activities working with federal partners, other New Hampshire agencies, local governments, other states and the private sector. Over my state career, I have managed 17 major disasters and 5 states of emergency, and many more at the local level in my municipal career.

3. In March, 2020, in response to the COVID-19 threat and the Governor declared a state-wide state of emergency and activated the Emergency Operations Center ("EOC"). The EOC is a command center set up per state emergency management guidelines, to bring the most critical people and resources together to manage an emergency. EOC staffing can vary with the emergency. The COVID-19 EOC is led by the Governor and a "Unified Command" of the Commissioner of Health and Human Services, Lori Shibinette, and Brigadier General William Conway, Director of the Joint Staff, New Hampshire, and me. The organizational chart for the COVID-19 related EOC is attached to my affidavit as Exhibit A. The EOC is physically located within the Incident Planning & Operation Center of the New Hampshire Department of Safety in Concord.

4. The Unified Command, along with the Governor, is responsible for planning and executing the strategy to combat COVID-19, and for overseeing and directing all activities associated with that effort. My normal office is located at the Department of Safety on Hazen Drive in Concord, but I have worked exclusively at the EOC since it was activated in March. The unified command makes literally hundreds of decisions each day, many of which involve spending public funds, as part of our work to manage and guide the State through this state of emergency.

5. In my career, I have worked for three different Governors through 17 presidentially declared disasters and 5 New Hampshire states of emergency. As mentioned, I have managed 17 disasters and 5 states of emergency. The COVID-19 emergency is unique to anything I have experienced because of its magnitude and pace. The nature of the COVID-19 emergency places intense demands on those working to protect the state, and requires responses unique to any emergency I've experienced.

6. In terms of magnitude, prior states of emergency or national disasters typically are confined to the state, northern New England, New England or some other region within the country. By contrast, COVID-19 is global. Prior states of emergency or national disasters typically have a short duration: a flood or an ice storm, for example, may knock power out for a period of days or maybe weeks. By contrast, the COVID-19 pandemic has been an emergency in New Hampshire officially since early March, unofficially since February, may not have yet peaked in New Hampshire, may continue for several months, and could affect any person in the state, regardless of their location.

7. In terms of pace, COVID-19 spreads rapidly and easily, and as a result places unexpected stress on emergency management infrastructure such as hospitals, first responders, and others, who risk becoming overwhelmed by the sheer volume of demands on their resources and the difficulty of keeping themselves virus free while doing their jobs. Rapid response is the only way to combat this emergency.

8. The global nature of the COVID-19 emergency creates extreme stressors on markets and availability of necessary equipment and supplies. In an emergency limited to the state or to the region, emergency needs, such as supplies and equipment, can be sourced easily. States or regions, for example, who are not experiencing the emergency can provide necessary items. Suppliers warehouse supplies and they can be shipped quickly and reliably.

9. The majority of the supplies and equipment necessary to combat COVID-19 are manufactured in China. Because of the global scope of the emergency, nearly every country in the world is competing for the same, limited amounts of critical supplies and equipment. In addition, shipping times have increased and have become unpredictable. In addition to the question of whether supplies are available is the question of whether they can be delivered in

time. All of that creates the need to make immediate decisions and take immediate actions. At times, we have lost an opportunity to purchase supplies simply because I took 10 minutes to discuss the purchase with my colleagues.

10. The uniquely international nature of the manufacturing and supplies makes purchases difficult. The EOC has spent hundreds of hours checking on suppliers claiming to have necessary equipment to ascertain whether they are who they say they are. In addition, suppliers now require cash payment, and most seek payment in advance of delivery. The Unified Command staff has refused those terms and agrees to pay, in all instances, only upon delivery. While that policy best protects public funds, it has also cost the State the opportunity on some occasions to purchase supplies.

11. When the EOC first activated early in the pandemic, the Unified Command staff tried to adhere to standard procurement practices such as multiple quotes for items. It soon became clear that it could not do that. The State lost the opportunity to purchase a significant lot of N95 masks for health care workers because I hung up the phone to consult with my Unified Command colleagues, and, when I called back, that particular supply had been sold. In another instance, I had an opportunity to purchase certain protective clothing at a set price. When I called back to lock in an order, the price had risen. Delay in committing jeopardizes the ability to purchase at all.

12. Particular equipment has been nearly impossible to source. I have had at least 80 phone calls trying to purchase ventilators. So far, I have not succeeded in finding any New Hampshire can purchase. When I manage to find some, I will need to purchase them immediately or New Hampshire will not have them.

13. The number of decisions Unified Command has to make every day that involve the expenditure of public funds is enormous, ranges from the simple to the complex, and each requires immediate response. I spend much of my day on the telephone, chasing down leads on equipment and supplies and trying to make deals. Every time we lose an opportunity, we collectively worry that we won't be able to protect someone from this virus.

14. What follows are a few examples. I could list hundreds more, and I say that only to try to communicate that this situation is highly unique and extremely demanding from the standpoint of obtaining the necessary supplies and infrastructure to combat this pandemic.

15. **The Cargo Jet:** Recently a FedEx cargo jet supplied New Hampshire with 91,0000 pounds of personal protective equipment, including masks, Tyvek suits, goggles, gloves and other supplies. That opportunity arose through Dean Kamen. Mr. Kamen has business contacts in China and offered to dispatch them to scour for available supplies. Over an 18 hour period, I had near constant calls, various types and amounts of supplies were located and we needed to commit to purchase them in the moment in real time. In many instances, the particular supplies were sold by the time they arrived at a factory to pick them up.

16. The plane was filled box by box as supplies were located and actually purchased. Chinese authorities imposed permitting and shipping expenses. They inspected cargo and confiscated some of it, requiring the sourcing of additional supplies and equipment. The flight and equipment had to be paid for. The Unified Command had no time to undergo any specific spending process, such as Fiscal Committee review. If the state wanted to protect its citizens, it had to act to commit the funds, acquire the supplies and timely get them out of China and to New Hampshire. The State could not have procured those supplies, much less that volume of

supplies, if it had to wait 24 hours to act so the Fiscal Committee could convene, review, and approve these proposed expenditures.

17. We could not have procured any of those supplies, much less that volume, if we had to wait 24 hours to act.

18. Grocery Supply Chain: C&S Wholesale Grocers in Keene is the largest wholesale grocery supply company in the country, and its supply chain stocks a large portion of the shelves in New Hampshire grocery stores. I received a call from C&S that they had run out of masks, that they could not find any to purchase, and that, without them, they could not risk their employees' health and would close. We located and purchased 20,000 masks to keep them open. The Unified Command staff had to make that decision in the moment, including to spend as necessary, to keep them open. These situations crop up constantly. Budd Foods in Manchester needed thermal thermometers to screen employees coming into the work place, could not find any, and planned to close. The Unified Command found and purchased thermometers to keep them open.

19. We could not have helped these grocery supply chains stay open if we had to wait 24 hours to act.

20. Emergency Quarantine: 6 members of a SWAT team in a New Hampshire police department were exposed to COVID-19. They could not return to their homes and families nor the police station. The Unified Command had no choice but to install them in a hotel to quarantine.

21. Homeless people with COVID-19 were getting released from hospitals because they were not sick enough to remain in the hospital. Their return to a homeless shelter would potentially infect the entire shelter, a particularly vulnerable population. Their protection, and the protection

of the people of New Hampshire required us to take action. The Unified Command installed them in hotels to quarantine.

22. The State could not have kept these (and others) exposed to or infected with COVID-19 from returning to places where they would likely expose others if we had to wait 24 hours.

23. **The Call Center:** Shortly after the EOC activated, the Unified Command realized that we needed a call center for public inquiries and information. We made the decision at 8 p.m., and by 10 a.m. the next morning, had the call center established, operational and staffed. That required, among other things, sending people to every Staples in the area to purchase headsets for the call center staff. We had to purchase cables and other hardware. DOIT, the state's IT agency, had to rebuild many laptops overnight to ready them for call center use. I required state agencies to provide me three employees to staff the call center. We needed to purchase food for the workers as well.

24. While we could have gotten the call center up and running even if we had to wait for 24 hours, it would have come at the expense of the safety and security of the many New Hampshire citizens who began calling us the morning we opened.

25. **The Child Care Center:** A child care center called because it had run out of hand sanitizer, could not find any to purchase, and could not open the following day without it. If child care centers begin to close, critical employees, such as health care workers, supply chain workers, or government employees may not be able to go to work. Overnight, the Unified Command found, purchased and delivered hand sanitizer to keep the center open.

26. We could not have kept that child care center open if we had to wait for 24 hours.

27. **State and Local Employees:** Certain employees throughout state and local government in New Hampshire have various skill sets. I have had to requisition employees from state and

local agencies. For example, a member of the Concord Fire Department, who also contracts with the State, has a skill set that EOC needed immediately. He is now working in the EOC during the state of emergency, and the State will reimburse Concord for his salary.

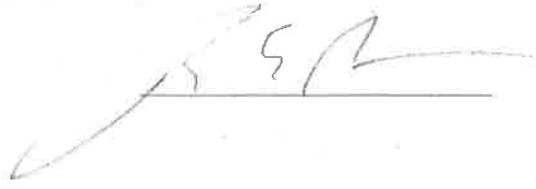
28. Riverbend Mental Health's Medication Administering Needs: The Riverbend mental health treatment center called the EIC with a concern that they could not help outpatients who come to Riverbend to receive antipsychotic medication, because they could not risk allowing them into the facility. They wanted to set up a drive through medication process in their parking lot. They needed a tent and needles among other things. We procured both for them so that critical mental health treatment could continue uninterrupted.

29. These are just a few examples of what happens many times a day at the EOC, and just part of our responsibilities in the Unified Command. The pressure from the transferability of the virus and the global competition for the same materials to combat it, requires us to act immediately even when the expenditure of public funds is required. We would not have been able to do what has been necessary to protect the people of New Hampshire, which is our charge, if we did not have the ability to make and execute decisions in the moment.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: 4/17/2020



THE STATE OF NEW HAMPSHIRE

COUNTY OF MERRIMACK

Before me, personally appeared PERRY PLUMMER and acknowledged the foregoing to be true and accurate to the best of his knowledge and belief.

Dated: 04/17/2020

Matthew Hotchkiss

MATTHEW HOTCHKISS
EXPIRES 01/08/2025



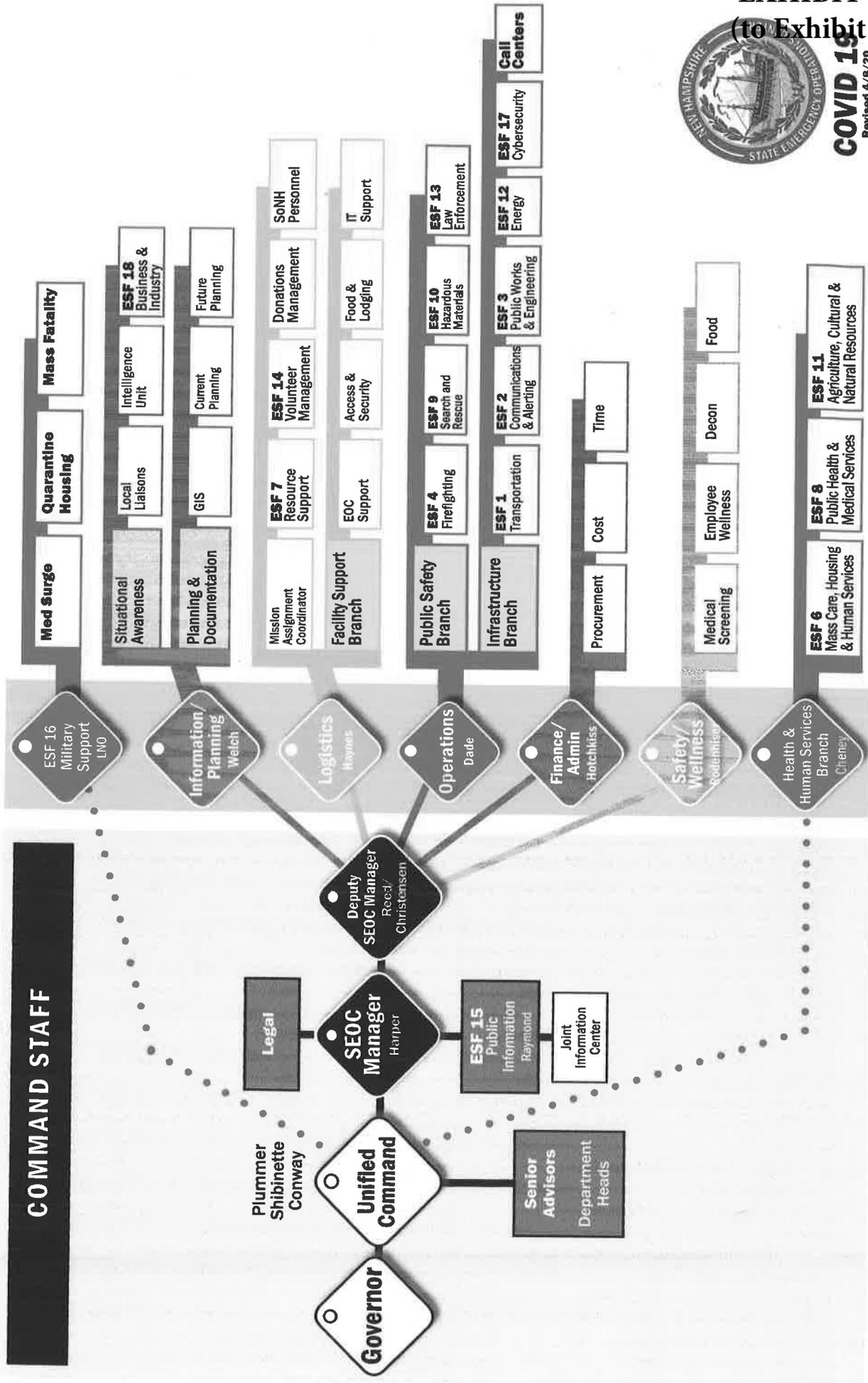
1/1/68
NATIONAL BUREAU OF HEALTH STATISTICS
U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

0500/1/68

EXHIBIT A
(to Exhibit 1)



COVID 19
Revised 4/8/20





**THE GENERAL COURT
OF
NEW HAMPSHIRE**
Concord, NH 03301

March 27, 2020

Dear Governor Sununu,

First, thank you for all of your work as the state continues to fight the COVID-19 pandemic.

We wanted to let you know that the Fiscal Committee will hold a remote meeting on Friday, April 10th at 10 am. This meeting will be used to accept any federal funds and to hear from Departments on any needs that they have that can and should be addressed by the Fiscal Committee. We understand at this time Departments may be stretched thin so we will make this meeting as efficient as possible to ensure all can get back to their work in fighting the ongoing pandemic.

The meeting will be held using the same technology used for the Governor and Executive Council meeting held this past week. In the coming days we will provide all the relevant info so that the public, staff, and department heads may participate.

If you know of any urgent federal funds that must be accepted, in addition to the funds in the stimulus package, please do not hesitate to reach out to the committee and we will make sure to include those funds on the agenda. Additionally, if an emergency meeting of Fiscal is needed to accept federal funds, we will be happy to call the meeting to accept them.

Thank you for your time and we look forward to continuing to work with you and our state agencies to help make sure New Hampshire is doing all that it can to flatten the curve in this pandemic and protect the health and wellbeing of Granite Staters as much as possible.

Sincerely,

Rep. Mary Jane Wallner /s/
House Finance Chair

Senator Lou D'Allesandro /s/
Senate Finance Chair

Galdieri, Anthony

From: Michael Kane <Michael.Kane@leg.state.nh.us>
Sent: Sunday, April 5, 2020 8:45 AM
To: Bettencourt, David; Formella, John
Cc: Christopher Shea
Subject: Fiscal Committee

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Good Morning D.J. and John,

I hope you are all doing well. I know that Legislative Leadership has been in contact with the Governor's Office relative to Fiscal Committee and sent a letter requesting the Governor resubmit his original Fiscal request as an informational item. As such, you will see that there is currently no item relative to the CARES fund on the current agenda. The Fiscal Committee did not have the authority to act on behalf of the Legislature since the item was not being requested under a statute specifically granting such authority. The Governor's request also clearly stated he believed he already had the authority to act pursuant to RSA 4:45 and RSA 21-P:43 and did not require Fiscal approval. I understand that Leadership's letter stated the Committee will accept the item as an informational item and wanted State agencies to use RSA 14:30-a as the funds begin coming in. I know there are ongoing discussions between the Governor and Legislative Leadership but I am not involved in those conversations, so I cannot provide any further comment.

Since the regular agenda has been set, distributed, and publicly posted on Friday afternoon, the Chairman of the Fiscal Committee can allow a late item by the Governor's Office if that is how you wish to proceed. In that event, you may email Representative Wallner and myself prior to the meeting with any item and we can ensure the members receive it in a timely manner. As far as an example of format, you will see two informational items at the end of the agenda from DHHS which inform the Committee of transfers approved by the Governor pursuant to the Executive Order, but they do not request approval from the Committee since the action was authorized pursuant to that order rather than the standard 9:16-a (transfers) process which specifically requires Fiscal approval.

Obviously I leave it up to the Governor's Office to decide how they would like to proceed, but if you need any assistance or have any questions for me, please do not hesitate to ask. You can also call my cell phone at 340-1445 if you would like to discuss by phone instead.

Take care.

Mike Kane
LBA



**STATE OF NEW HAMPSHIRE
OFFICE OF THE GOVERNOR**

CHRISTOPHER T. SUNUNU
Governor

**STATE OF NEW HAMPSHIRE
BY HIS EXCELLENCY
CHRISTOPHER T. SUNUNU, GOVERNOR**

Executive Order 2020-06

An order establishing the Governor's Office for Emergency Relief and Recovery and processes and procedures for allocation and expenditure of COVID-19 emergency funds

WHEREAS, on Friday, March 13, 2020, the President of the United States declared a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak; and

WHEREAS, on Friday, March 13, 2020, the Governor issued Executive Order 2020-04, An order declaring a state of emergency due to the Novel Coronavirus (COVID-19); and

WHEREAS, on Friday, March 13, 2020, the Governor activated the Emergency Operations Center at the Incident Planning and Operations Center in Concord to assist in the State's response to the COVID-19 outbreak; and

WHEREAS, on Friday, April 3, 2020, the Governor issued Executive Order 2020-05, which extended the State of Emergency declared in Executive Order 2020-04, and all emergency orders issued pursuant thereto, for an additional 21 days; and

WHEREAS, as of April 13, 2020, the Centers for Disease Control and Prevention (CDC) reports that every U.S. state has reported cases of COVID-19 to the CDC, and that 554,849 confirmed cases of COVID-19 have occurred in the United States and territorial partners with 21,942 deaths; and

WHEREAS, experts anticipate that while a high percentage of individuals affected by COVID-19 will experience mild flu-like symptoms, some will have severe symptoms and require hospitalization, particularly individuals who are elderly or already have underlying chronic health conditions; and

WHEREAS, experts indicate that COVID-19 is most commonly spread from an infected symptomatic person to others through respiratory droplets, including:

- Through the air by coughing and sneezing;
- Close personal contact, such as touching or shaking hands;
- Touching an object or surface with the virus on it, then touching your mouth, nose, or eyes before washing your hands.

WHEREAS, the CDC reports that COVID-19 may be spread may be spread by people who are not showing symptoms; and

WHEREAS, the CDC reports that COVID-19 is spread mainly from person to person, that COVID-19 is currently spreading very easily and sustainably, and that the best way to prevent illness is to avoid being exposed to COVID-19; and

WHEREAS, as of April 13, 2020, the CDC reports that 49 U.S. states and territorial partners are reporting some community spread of COVID-19, meaning people have been infected with the virus who may not have the usual risks of international travel or known contact with a confirmed case; and

WHEREAS, in the 31 days since the Governor declared a State of Emergency, the COVID-19 outbreak in New Hampshire has expanded significantly; and

WHEREAS, as of April 13, 2020, the Department of Health and Human Services, Division of Public Health Services has reported 1,020 cases of COVID-19; 23 deaths; 152 hospitalizations; 2,250 individuals are being monitored; and all counties in the State have been impacted; and

WHEREAS, the Department of Health and Human Services, Division of Public Health has found that community-based transmission of COVID-19 continues to increase in the State and has been identified in the majority of counties; and

WHEREAS, the White House and CDC have extended their Slow the Spread Guidelines for COVID-19 to April 30, and these guidelines direct Americans to, among other things, work from home whenever possible; avoid social gatherings of more than 10 people; avoid eating and drinking at bars, restaurants and food courts; and avoid discretionary travel; and

WHEREAS, state and local health and emergency response organizations must continue to use all available preventative measures to combat the spread of COVID-19, which will require access to services, personnel, equipment, facilities, and other resources, potentially including resources beyond those currently available, to prepare for and respond to any potential cases and the spread of the virus; and

WHEREAS, if COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other states and countries, the number of persons requiring medical care may exceed locally available resources, and controlling outbreaks minimizes the risk to the public, maintains the health and safety of the people of New Hampshire, and limits the spread of infection in our communities and within the healthcare delivery system; and

WHEREAS, it is imperative to continue to prepare for and respond to suspected or confirmed COVID-19 cases in New Hampshire, implement measures to mitigate the spread of COVID-19, and prepare to respond to an increasing number of individuals requiring medical care and hospitalization; and

WHEREAS, as of April 13, 2020, during the State of Emergency the Governor has issued emergency orders that, among other things, (i) require public K-12 schools to transition to remote instruction and support, (ii) prohibit scheduled gatherings of 10 or more and require restaurants and bars to transition to take out and delivery only, (iii) temporarily prohibit disconnection or discontinuance of certain services, including public utilities, in the event of non-payment, (iv) temporarily prohibit evictions and foreclosures; (v) dramatically expand access to State unemployment benefits for individuals impacted by COVID-19, (vi) close non-essential businesses and mandate that Granite Staters stay home with limited exceptions (vii) expand access to Telehealth Services to protect the public and health care providers, and (viii) restrict hotels and other lodging providers to provision of lodging for vulnerable populations and essential workers; and

WHEREAS, the COVID-19 pandemic has caused unprecedented financial and economic damage across numerous sectors of the State's economy, including healthcare, manufacturing, hospitality, and numerous other sectors, and this damage must be addressed immediately in order to minimize long term and detrimental economic impacts to the greatest extent possible; and

WHEREAS, since issuing Emergency Order #5 on March 17, 2020 expanding eligibility for unemployment compensation benefits for those whose employment has been impacted by COVID-19, there have been over 100,000 new claims for unemployment benefits filed in New Hampshire thus exceeding in three weeks the total number of initial claims filed in the past three years; and

WHEREAS, on March 27, 2020, the United States Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") and President Donald Trump signed the CARES Act into law; and

WHEREAS, the CARES Act provides significant emergency relief funding to New Hampshire, including the following (all of which hereafter referred to as "CARES Act emergency relief funds"): (i) \$7,496,020 in Community Development Block Grant funds, (ii) \$3,800,000 in Emergency Solutions funds, (iii) \$404,880 in Housing for Persons with AIDS (HOPWA) funds, (iv) \$3,262,422 in Election Security Grant funds, (v) \$4,410,342 in Byrne-JAG State and Local Law Enforcement Grant funds, (vi) \$6,947,671 in Childcare and Development Block Grant funds, (vii) \$82,534,000 in Education Stabilization funds, (viii) \$5,448,000 in Public Health Emergency Preparedness (PHEP) funds, (ix) \$37,891,454 in Federal Transit Administration Grant funds, (x) \$5,541,000 in Low Income Home Energy Assistance Program funds, (xi) \$427,000 in National Endowment for the Arts funds, (xii) \$423,000 in National Endowment for the Humanities funds, and (xiii) \$1,250,000,000 from the CARES Act Coronavirus Relief Fund ("flex funds"); and

WHEREAS, the \$1,250,000,000 in flex funds that New Hampshire is set to receive may only be used to cover costs incurred by the State that (i) are necessary expenditures incurred due to the public health emergency with respect to COVID-19; (ii) were not accounted for in the budget most recently approved as of the date of enactment of the CARES Act; and (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020; and

WHEREAS, it is reasonable to expect that the United States Congress may enact additional legislation that provides increased and additional federal relief and stimulus funding to the State of New Hampshire; and

WHEREAS, in the wake of the September 11, 2001 terrorist attacks, the General Court enacted legislation giving the Governor broad authority to take necessary and extraordinary actions, which includes the expenditure of funds, during a State of Emergency, with this authority now codified in various statutes including RSAs 4:45, 4:47, 21-P:35, 21-P:37, and 21-P:43; and

WHEREAS, RSA 21-P:35, V defines "emergency management" as "preparation for and the carrying out of all emergency functions, including but not limited to emergency response and training functions, to prevent, minimize, and repair injury or damage resulting from the occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or human cause, including but not limited to fire, flood, earthquake, windstorm, wave actions, technological incidents, oil or chemical spill, or water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, drought, infestation, explosion, terrorist act, or riot."; and

WHEREAS, pursuant to RSA 21-P:37, “In the event of disaster beyond local control, the governor may assume direct operational control over all or any part of the emergency management functions within the state.”; and

WHEREAS, pursuant to RSA 21-P:43, “Whenever the federal government or any federal agency or officer offers to the state, or through the state to any of its political subdivisions, services, equipment, supplies, materials, or funds by way of gift, grant or loan for purposes of emergency management the state, acting through the governor...may accept such offer, subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer.”; and

WHEREAS, during a State of Emergency, RSA 4:45, III(b) gives the Governor the authority 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.”; and

WHEREAS, during a State of Emergency, the Governor has the authority, pursuant to RSA 4:45, III(e), 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.”; and

WHEREAS, during a State of Emergency, the Governor has the authority, pursuant to RSA 4:47, III, to “make, amend, suspend and rescind necessary orders, rules and regulations to carry out the provisions of this subdivision in the event of a disaster beyond local control.”; and

WHEREAS, the outbreak of COVID-19 has confronted the State with an unprecedented public health emergency and with financial and economic devastation resulting therefrom, which require the State to respond rapidly to ensure that necessary supplies, economic infrastructure, and other appropriate emergency responses are provided immediately; and

WHEREAS, the State must manage and expend emergency relief funds consistent with the urgent need and required expedited timetable for expending CARES Act emergency relief funds; and

WHEREAS, it is critical that the process for expending CARES Act emergency relief funds be transparent and provide for accountability and appropriate oversight; and

WHEREAS, it is appropriate to provide for greater Legislative involvement in the development of proposals for allocation and expenditure of these emergency funds than is typical for other types of federal funds, while still allowing for a process that enables quick and nimble action; and

WHEREAS, it is also appropriate to solicit the input of a wide variety of public and private sector stakeholders in determining the appropriate allocation of CARES Act emergency relief funds; and

WHEREAS, it is necessary to establish an expedited schedule for the development of a plan for the allocation and expenditure of CARES Act emergency relief funds and an infrastructure for the oversight and management of such funds; and

WHEREAS, it is necessary to establish an infrastructure for the oversight and management of additional emergency funds that the State may receive from subsequent Federal legislation; and

WHEREAS, the Governor has the authority to create offices for the purpose of receiving federal funds and implementing federal grant programs¹.

NOW, THEREFORE, I, Christopher T. Sununu, Governor of the State of New Hampshire, by the authority vested in me pursuant to Part II, Article 41 of the New Hampshire Constitution, Executive Order 2020-04 as extended by Executive Order 2020-5, and New Hampshire RSAs 4:45, 4:47, 21-P:35, 21-P:37, and 21-P:43, do hereby order, effective immediately, that:

1. There is hereby established within the Executive Department the Governor's Office for Emergency Relief and Recovery ("GOFERR"), which shall have the power and responsibilities to assist the Governor and Legislature with and direct State agencies on the management and expenditure of (i) emergency relief funds received under the CARES Act and (ii) any additional Federal emergency funds received to address the impacts of the Novel Coronavirus (COVID-19). All Executive Branch agencies shall coordinate with and report to GOFERR on the allocation and expenditure of such funds.
2. GOFERR shall be led by a Director (the "Director") appointed by and serving at the pleasure of the Governor. The Director shall be in charge of the operations of GOFERR and directly responsible to the Governor.
3. The Director shall, with prior approval of the Governor, appoint a Deputy Director and such additional staff as the Director deems necessary to carry out the operations of GOFERR. To the maximum extent feasible, the staff of GOFERR shall be made up of current State employees who the Governor may, in consultation with the Director, temporarily assign to GOFERR. Any State employee who is temporarily assigned to GOFERR shall be entitled to the same salary and benefits to which they would otherwise be entitled in their position as a State employee and shall remain employees of their State agencies for all other purposes, except that their duties during the period of temporary assignment shall be supervised by the Director.
4. There is hereby established the GOFERR Legislative Advisory Board (the "Legislative Board") which shall work with the Director, the staff of GOFERR, and the GOFERR Stakeholder Advisory Board to develop recommendations for the allocation and expenditure of CARES Act emergency relief funds, or other Federal COVID-19 emergency funds received by the State, consistent with the processes specified in this Order or amendments thereto. The Legislative Board shall meet regularly and as often as it deems necessary to develop its recommendations. Meetings of the Legislative Board shall be conducted in compliance with RSA chapter 91-A. Membership of the Legislative Board shall consist of four members of the Senate and four members of the House of Representatives, with equal representation from the two largest parties in each body, appointed by the Governor. The members of the Legislative Board shall elect a chair from among their membership. The Legislative Board shall remain in existence for the duration of the existence of GOFERR.
5. There is hereby established the GOFERR Stakeholder Advisory Board (the "Stakeholder Board") which shall work with the Director, the staff of GOFERR, and the Legislative Board to develop recommendations for the allocation and expenditure of CARES Act emergency relief funds, or other Federal COVID-19 relief and recovery funds received by the State, consistent with the processes specified in this Order or amendments thereto. The Stakeholder Board shall meet regularly and as often as it deems necessary to develop its recommendations. Meetings of the Stakeholder Board shall be conducted in compliance with RSA chapter 91-A. The Stakeholder Board shall consist of nine members appointed by the Governor, and the members of the Board shall elect a chair from among

¹ See Executive Order 2009-01, issued by Governor John H. Lynch on January 30, 2009.

their membership. The Stakeholder Board shall remain in existence for the duration of the existence of GOFERR.

6. The Legislative Board and Stakeholder Board shall coordinate dates and times for their meetings to avoid overlap. The Legislative Board and Stakeholder Board may hold joint meetings that, if held, shall be chaired by the Chair of the Legislative Board.
7. Due to the urgent need for timely disbursement of CARES Act emergency relief funds, GOFERR, the Legislative Board, and the Stakeholder Board shall develop their recommendations for allocation and expenditure of CARES Act emergency relief funds, and the Governor shall authorize plans for allocation and expenditure of such funds, according to the following process, to the extent practicable:
 - a) The Legislative Board and Stakeholder Board shall work with GOFERR staff to provide to the Director any initial advice and recommendations they develop for allocation and expenditure of CARES Act emergency relief funds.
 - b) The Director shall work with GOFERR staff to review the advice and recommendations of the Legislative Board and the Stakeholder Board and meet with the Boards as necessary to discuss their recommendations.
 - c) After consultation with the Legislative Board and the Stakeholder Board, the Director and GOFERR staff shall present initial recommendations for allocation and expenditure of CARES Act emergency relief funds to the Governor.
 - d) The Governor shall review GOFERR's initial recommendations for allocation and expenditure of CARES Act emergency relief funds and authorize initial plans, with any changes the Governor deems necessary, for allocation and expenditure for CARES Act emergency relief funds.
 - e) Upon the Governor's final authorization of any plan for allocation and expenditure of portions of CARES Act emergency relief funds, such plans shall be published and publicly available on the GOFERR webpage and GOFERR shall oversee the allocation and expenditure of CARES Act emergency relief funds according to any authorized and published plans.
 - f) After publication and implementation of initial allocation and expenditure plans, the Legislative Board and the Stakeholder Board shall continue to meet and advise GOFERR and the Governor on the allocation and expenditure of CARES Act emergency relief funds and shall, as necessary, continue to submit recommendations for additional plans related to allocation and expenditure of CARES Act emergency relief funds.
 - g) The Legislative Board, Stakeholder Board, GOFERR and the Governor shall continue to work to develop additional plans for allocation and expenditure of CARES Act emergency relief funds as necessary and on timelines mutually agreed upon. Any additional plans developed for allocation and expenditure of CARES Act emergency relief funds shall be published and publicly available on the GOFERR webpage.
8. Additional processes and procedures for development of plans for allocation and expenditure of subsequent COVID-19 emergency funds, other than CARES Act emergency relief funds, that the State may receive shall be developed based on the timing of receipt and the required uses of such funds.
9. The Director shall establish administrative processes and procedures for the operation of GOFERR with approval of the Governor, consistent with existing State personnel policies. The Director shall develop a budget for the operation of GOFERR that shall be approved by the Governor and supported, to the maximum extent possible, by available Federal funding.

10. Nothing herein shall be construed to limit the Governor's authority to immediately expend COVID-19 emergency funds pursuant to RSA 4:45, RSA 4:47, and RSA 21-P:43.
11. A webpage for GOFERR shall be established on the Governor's Office website, and all meetings documents, meeting minutes, and any other public documents related to GOFERR shall be published on the GOFERR webpage.
12. Amendments to this Order shall be published as exhibits to this Order. Such exhibits shall be published separately and shall be identified as follows: "Exhibit [x] to Executive Order 2020-06, [date]" and shall be published on the Governor's Office website.

Given under my hand and seal at the Executive Chambers in Concord, this 14th day of April, in the year of Our Lord, two thousand and twenty, and the independence of the United States of America, two hundred and forty-four.



GOVERNOR OF NEW HAMPSHIRE