THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT Civil No. 216-2023-cv-31

DENNIS HIGGINS and FREEMAN TOTH

v.

CITY OF MANCHESTER

CITY OF MANCHESTER'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The City of Manchester (the "City"), by and through its attorneys, McLane Middleton, Professional Association, respectfully submits this Supplemental Memorandum. The City learned the identity of the Petitioners and the precise claims at issue a mere 90 minutes before the Friday, January 13, 2023 hearing. This memorandum provides this further information, rebuttal, and additional context for the Court's consideration:

1. The City is acting under its emergency powers to close only a very limited area of public space due to ongoing and worsening public health, fire, and safety threats to the Families in Transition ("FIT") shelter, the individuals occupying tents on the sidewalks adjacent to the FIT shelter ("the Encampment"), neighboring businesses, and the community at large.

2. The City's "care and superintendence" of city property and public spaces, and its right to close, clear, and clean such locations for health, fire, and safety reasons are well-established as a matter of law. *See* N.H. R.S.A. 47:5 (city control over city property, public squares, and streets); N.H. R.S.A. 644:2, IV (permitting a peace officer to close an area due to "a serious threat to the public health or safety is created by a flood, storm, fire, earthquake, explosion, riot, ongoing criminal activity that poses a risk of bodily injury, or other disaster"); N.H. R.S.A. 154:7, II, b (granting any duly recognized fire department the lawful authority to order any person to leave any building or place when responding to a call for service); N.H. R.S.A. 147:13 (allowing health officer to remove rubbish or waste that is injurious to the public health).

3. The Petitioners did not present evidence to refute the City's contention that the circumstances of the Encampment create an actual, on-going, adverse public health and safety risk for the Encampment residents and those of their neighbors. Nor could they,

given the Christmas morning death at this location, and the myriad social problems and crimes existing at that location.

4. The Chief of the Manchester Fire Department has stated that the Encampment poses "an extreme indifference to human life for both the encampment residents and responders alike." *See* Ex. A.[1] In addition to the 380 calls for service to the Manchester Police Department relating to the Encampment since December 1, 2022, the Manchester Fire Department has responded to 120 fire and medical calls at the Encampment since October 1, 2022.

5. Mr. Higgins, the sole unhoused Petitioner, conceded publicly to the Board of Mayor and Aldermen on January 3, 2023 that the situation at the Encampment had been worsening in recent weeks and is "becoming mayhem."

6. The factual record before this Court demonstrates that Petitioner Higgins has slept overnight at the Cashin Senior Center (on January 6, 2023—two nights before the City posted the notices at the Encampment), but has offered no record evidence that anyone has interfered with his ability to sleep there, or to sleep at the FIT location abutting his tent. Petitioner Higgins chose to remain at the Encampment the night before the January 13, 2023 hearing even though there were three beds available at FIT and thirty-one beds available at the Cashin Senior Center that night. Petitioners offered no evidence that if the Cashin Senior Center had mattresses, or closed an hour or two later in the morning, that Mr. Higgins would stay there. In fact, Mr. Higgins' public statements to the City officials and the press are to the contrary. Even if there were a legal requirement that the City provide round-the-clock services, (which there is not), Petitioners' contention that Petitioner Higgins will suffer immediate and irreparable harm because the City offers only 21 hours of shelter, including a bed during overnight hours, while Petitioner Higgins elects, instead, to remain out on the sidewalk for 24 hours, is completely without merit.

7. Further, Petitioner Higgins is not a tenant facing eviction from property to which he has a unique or exclusive right. The rights in the Encampment sidewalk are shared by FIT and the public.[2] Petitioners do not have the right to occupy, control, or own a public sidewalk, and their occupation of a public sidewalk by trespassing on FIT's private property and also rendering the sidewalk impassable by the public, is unlawful. Moreover, the City is entitled to use its emergency powers to address ongoing criminal activity, drug use, fire danger, littering (including significant quantities of used hypodermic needles), and unsanitary behaviors.

8. On the record before this Court, Petitioners have not met their heavy burden to demonstrate a likelihood of success on the merits or that they will suffer irreparable harm if the City were to close the sidewalk at the Encampment, thereby foreclosing Petitioner Higgins from residing in a tent on the City's sidewalk and public ways located on Manchester Street, between Chestnut Street and Union Street, or Pine Street, between

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[1] The situation will only get worse during the coming winter months, as streets will need to be plowed and temperatures will drop further.

[2] *See* Map showing public and private portions of sidewalks, attached hereto as Exhibit B.

Merrimack Street and Hanover Street, leaving him with the option to stay warm by sleeping and eating safely indoors, and to have his personal property stored, at no personal expense.

9. The Petitioners' claims are not saved or given force by *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). *Martin* does not apply to the City's emergency closure of this portion of the sidewalk immediately surrounding the State's largest homeless shelter (138 beds). *Martin* addressed a city-wide ban on camping and sleeping in public places without corresponding options for the homeless. *Martin*'s plain language does not offer any basis for the Petitioners to force state licensing requirements or definitions upon the City. *Martin* expressly required only that the City of Boise provide to any person subject to criminal penalty under Boise's city-wide ban against sleeping and camping a place to sleep indoors prior to enforcement. *See Martin*, 920 F.3d at 617. Contrary to Petitioners' assertions, the *Martin* court expressly rejected the suggestion that it was mandating that the City of Boise make available any shelter beyond a place to sleep indoors. Instead of *Martin,* the instant case is analogous to the circumstances addressed in *Frank v. City of St. Louis*, 458 F. Supp. 1090, 1093-96 (E.D. Mo. 2020). There, the court rejected a temporary restraining order request under *Martin*, where the City of St. Louis sought to close an encampment and limited area due to public health concerns relating to the spread of COVID-19.

10. Petitioner Toth, who is not homeless, lacks taxpayer standing under *Carrigan v. N.H. Dep't of Health and Human Servs.,* 174 N.H. 362 (2021), because removing the Encampment due to the exigent health and safety concerns it poses is part of the City's "comprehensive response" to the "complex issue" of homelessness. Even if he had standing, which he does not, conspicuously absent from Toth's professed interest in the public res is a weighing of the potential costs of inaction. The City is entirely self-insured. Having been put on notice of risks and hazards on public property which it has the legal authority to address, the City is potentially exposed to actionable liability claims if it fails to address these hazards, to the detriment of both public safety and the taxpayers of Manchester. An appropriate balancing of taxpayer interests has to include the public cost of doing nothing, which very well could be much greater than the costs of addressing the current emergency.

Simply, Petitioners have not met their heavy burden to obtain temporary relief. The City requests that this Court deny Petitioners' Motion.

ARGUMENT

I. The City is lawfully exercising its emergency powers because the Encampment poses an exigent health and safety threat to the homeless individuals residing there and to the Community at Large.

The Petitioners do not contest that the City can lawfully exercise it authority to close the Encampment on public property; they only contest whether the City simultaneously offers a

sufficient temporary option for those, like Petitioner Higgins, whose tent and belongings will be moved and stored, if he doesn't move them first. Certainly, the evidence is incontrovertible that the circumstances of the Encampment's unlawful occupation of the city sidewalks and a portion of neighboring private properties creates actual, imminent risk to both the campers and the neighborhood. For example, at the January 3, 2023 meeting of the Board of Mayor and Aldermen ("BMA"), numerous residents and businesspeople testified regarding the growing health and safety concerns posed by the Encampment. The BMA meeting lasted about two hours and twenty-one minutes and can be viewed at https://vimeo.com/channels/636382. Mindful of the Court's impending deadline, the City respectfully suggests that even watching select excerpts of the public comments would help the Court appreciate the severe health and safety issues that justify the City's emergency actions. The testimony demonstrates that this is an explosive situation, where people are being threatened and harmed, and there is great potential for violence. Neighbors speak of health and safety problems, and being unable to get urgently needed assistance. By way of example, the long-time owner of Brutus Auto Repair & Service explained that this is the first time in his 23 years in Manchester he does not feel safe or that his children or grandchildren should visit his business "because I do not know what is going to happen at any given time" (see 44:00 to 47:56 of the video). As another example, many people spoke on behalf of the neighboring Saigon Market, noting the rampant drug use at the Encampment, needles being left on both public property and Saigon Market's private property, and employees and customers being scared for their safety (see 57:00 to 1:06:55 of the video). Petitioner Higgins also spoke at that meeting, as explained *infra*. Consistent with the emergency situation described at the BMA meeting, the Chief of the Manchester Fire Department wrote a letter to the City Solicitor the following day, January 4, 2023, explaining "It is my opinion, as the

Fire Chief, that leaving the current conditions [at the Encampment] is an extreme indifference to human life for both the encampment residents and responders alike." *See* Ex. A.

Since this Court's hearing last week, news reports regarding the safety issues at the Encampment and its impact on neighbors continue. For example, on January 14, 2023, WMUR published an article in which Winona Social Club treasurer Patrick Garrity explained, "business is down 25% at least" because customers and employees simply do not feel safe. *See* https://www.wmur.com/article/business-hopes-manchester-homeless-evection-plan-moves-forward/42506547. Garrity has had people respond by throwing bottles at him when he asks people to leave the Club's private premises. A few weeks ago he had to clear blood off the club's front steps from an alleged fight. *Id.* A day care in the area has already decided to close due to the situation at the Encampment.[3] *Id.* No one is served if businesses flee the area because customers cannot access their premises and employees are persistently harassed.

This Court has previously addressed emergency circumstances, albeit at the state level, and upheld governmental actions that were justified by the facts and circumstances on the ground and the exigent nature of threat. *See Binford v. Sununu*, No. 217-2020-cv-00152 (N.H. Super. Ct. March 25, 2020) (attached as Ex. D) (dismissing challenge to Governor's order in response to COVID-19 pandemic prohibiting gatherings of more than fifty individuals based on emergency powers); *see also* https://www.wpri.com/news/local-news/providence/judge-sides-with-state-in-lawsuit-over-homeless-protest/ (reporting on decision of Rhode Island Superior Court allowing state to proceed with removing homeless encampment outside the State House).

[3] *See* Kindertree letter about its closing after twenty years due to deteriorated neighborhood conditions, attached hereto as Exhibit C.

Here, the Encampment is in a densely-settled urban area, adjoins and partially trespasses upon private property, and unlawfully renders the public sidewalks completely impassable. There have already been fires and burn injuries at this location. The residents of the FIT shelter risk injury, and all 138 beds at the FIT shelter are at serious risk of closure if any of the many propane tanks at the Encampment exploded, tents or the debris hung on the FIT fence caught fire, or a fire occurred and the debris attached to FIT's sprinkler system by Encampment residents rendered it inoperable. The City has already experienced fires endangering life and property at other encampment locations. *See* https://manchesterinklink.com/encampment-fire-closes-highway-and-road-during-morning-commute-bridge-being-inspected-for-structural-issues/ (discussing the December 14, 2022 fire under the I-293 overpass in the City); https://patch.com/new-hampshire/bedford-nh/manchester-evicts-homeless-encampment-under-amoskeag-bridge (discussing the February 5, 2021 fire at the encampment under the Amoskeag Bridge); https://wzid.com/news/042240-man-found-dead-at-homeless-camp-fire/ (discussing the 2020 death of a homeless individual due to a fire at an encampment in the City).

The City has previously exercised its emergency powers following the fire death of an individual residing in a tent, as well as explosions of propane tanks at a homeless encampment under the Amoskeag Bridge in February 2021. Then, the Fire Department lawfully cleared out the encampment by exercising its emergency authority to protect the public and government infrastructure, while offering temporary facilities to persons leaving the encampment. The Encampment in this case has experienced a fatal drug overdose, burn injury, open flame heating, unlawful drug activity, assaults, harassment of neighbors and businesses, the blocking of access to private property, and myriad other unsafe and unhealthy activities.

Granting a preliminary injunction in this matter would render the City unable to protect its citizenry from potential threats of fire, explosion, and crime, which is a core function of its emergency and police powers, thereby wrongfully and unnecessarily threatening the well-being of Encampment residents, property owners, businesses, and the public. *See* N.H. R.S.A. 47:5; N.H. R.S.A. 644:2, IV; N.H. R.S.A. 154:7, II, b; N.H. R.S.A. 147:13. The exigent situation at the Encampment justifies the action taken by the City to close the Encampment and offerwarm, safe, indoor spaces to Encampment residents, while protecting the health and safety of the residents and businesses in the area.

II. Petitioner Higgins' public statements undermine various of his arguments to the Court, and demonstrate that injunctive relief is not appropriate here.

Mr. Higgins made statements at public meetings and to the media which undermine his arguments and demonstrate why the Court should deny his Motion. For example:

- December 6, 2022: Mr. Higgins spoke twice at this BMA meeting, stating that "more shelters is not the answer." He also noted that he had a bandage on his face because he had been involved in a fight at the Encampment. *See* https://vimeo.com/channels/636382/778907680 (Mr. Higgins speaks at 18:08 and 57:20).

- December 20, 2022: Mr. Higgins spoke at the BMA meeting, reiterating his assertion that additional shelters are not the answer. *See* https://vimeo.com/channels/636382/783341521 (Mr. Higgins speaks at 13:35).

- January 3, 2023: At this BMA meeting, Mr. Higgins again spoke about the Encampment. *See* https://vimeo.com/channels/636382 (Mr. Higgins speaks at 1:15:20). Mr. Higgins praised the Police and Fire Departments for doing a great job, and reiterated the need for public bathrooms and more trash barrels. He acknowledged the problems that the Encampment is causing for surrounding businesses, and expressly admitted that the situation has been worsening over time, even since his remarks at the last BMA meeting two weeks prior: "It's gotten to the point where, it just doesn't feel right. . . . Two weeks ago I said it felt okay. It doesn't feel okay. Something's going, it's just, what's going on out there is just, *it's becoming mayhem*." (emphasis added).

- January 7, 2023: Mr. Higgins spoke with WMUR about the Encampment, admitting that the businesses in the area "have taken a beating, and it's not their fault or their responsibility." https://www.wmur.com/article/manchester-emergency-center-homeless-1623/42420964

- January 13, 2023: Following this Court's hearing on Friday, January 13, Mr. Higgins spoke with the media, again undermining certain arguments made to the Court. Specifically, Mr. Higgins is not sleeping at the Encampment as a form of speech, contrary to his First Amendment arguments. Rather, according to Mr. Higgins, his conduct at the Encampment is at least partly commercial in nature, as he has collected a large number of bicycles, many of which he keeps outside his tent, and some of which he fixes and sells for income. Mr. Higgins also admitted that he may return to the Cashin Senior Center, and stated that if there were shelter space he would go (despite the fact that the FIT shelter had 3 open beds for males available the night before the hearing). Mr. Higgins further stated that the reason he remains at the Encampment is because he does not sleep well in unfamiliar places and his belongings are there. https://manchesterinklink.com/judge-hits-pause-on-citys-jan-17-vacate-order-at-homeless-encampment-to-weigh-aclu-arguments/

Moreover, as explained in his Petition, Mr. Higgins has stayed at Cashin Senior Center previously and used the free storage offered by the City. Mr. Higgins has not claimed that he is unable to use the Cashin Senior Center, the FIT shelter, or the property storage offered by the City. These public statements and factual admissions further buttress the City's assertion that Mr. Higgins is not likely to succeed on the merits of his arguments and will not suffer irreparable harm if the City proceeds with closing the Encampment.

III. The *Martin* case is inapposite and distinguishable, and does not impose State emergency shelter licensing requirements on the Cashin Senior Center; The City invites the Court to follow *Frank v. City of St. Louis* instead.

During the January 13, 2023 hearing, counsel for Petitioners repeatedly pointed to the word "shelter" in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), arguing that the City's actions are unlawful because the Cashin Senior Center does not meet *Martin*'s definition of a shelter. Not so. As the Court in *Martin* clearly and unequivocally stated:

> Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *[...]* hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *[...] That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.*

Id. at 617 (internal citations omitted) (emphasis added). By *Martin*'s plain language, the term "shelter" only requires the ability to sleep indoors and does not require the provision of a mattress, certain bedding, meals, or any of the other requirements urged upon this Court by Petitioners. *See id.*

Not only is *Martin* inapplicable here due to the lack of any criminal sanctions having been imposed, as was explained in the City's opening Memorandum. But even if *Martin* were applicable, the Cashin Senior Center is an available and appropriate "shelter," given the emergency situation posed by the Encampment and the Cashin Center's available space to shelter Petitioner Higgins each and every night (which he has utilized at least once previously).[4]

Petitioners also miss the mark citing to various state regulations in asserting that the Cashin Senior Center is not an appropriate "shelter." N.H. Code Admin R. 314 is titled Rights of Persons Using Emergency Shelters. Pursuant to N.H. Code Admin R. 314.01, the purpose of the rules is limited:

> The purpose of these rules is to define the rights of persons requesting or receiving emergency shelter or shelter services from *shelter providers that receive funding from the State of New Hampshire* and to establish the responsibilities of shelter providers relative to such rights.

N.H. Code Admin R. 314.01 (emphasis added). The Cashin Senior Center is not a shelter receiving State funds for shelter purposes, nor is the City a shelter provider which has received

[4] In criticizing the City for making shelter available for only 21 hours each day, Petitioners contend that the closing of the Cashin Senior Center at 6 a.m. precludes the City from lawfully closing the Encampment. The City's reasons for an early morning closing are *bona fide*, as the Cashin Senior Center must be thoroughly cleaned and converted back to use by seniors by the time it opens at 8:30 a.m. each day. *See* https://www.manchesternh.gov/Government/Mayor-and-Aldermen/Mayors-Office/Press-Room; https://www.manchesternh.gov/Departments/Senior-Services/William-B-Cashin-Senior-Activity-Center.

State funds to operate a shelter. Thus, there is no legal basis for Petitioners' reliance on these provisions.

Instead of *Martin,* the City invites this Court to follow the holding of the U.S. District Court for the Eastern District of Missouri denying a temporary restraining order seeking to block the City of St. Louis from closing a particular encampment due to public health concerns related to COVID-19. *See Frank v. City of St. Louis*, 458 F. Supp. 3d 1090, 1093-96 (E.D. Mo. 2020). The Court in *Frank* distinguished the act of a city closing a single encampment due to a public health issue from the city-wide ban on camping at issue in *Martin*. *See id.* This is a valid distinction that should be recognized by this Court. The *Frank* court found that in a circumstance such as this one, a temporary restraining order was not justified because the Petitioner did not meet any of the elements for obtaining such relief, especially given the availability of shelter space and the nature and limitation of the action taken by the City. *See id.*

IV. Petitioner Toth lacks taxpayer standing.

Petitioner Toth does not have taxpayer standing to bring this suit under *Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362 (2021). In *Carrigan*, the New Hampshire Supreme Court analyzed the taxpayer standing provision found in Part I, Article 8 of the New Hampshire Constitution, which provides that "any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." In *Carrigan*, the Court explained that this constitutional provision is not limitless, but rather, as Petitioner recognizes in his pleading, Part I, Article 8 does not permit a taxpayer to challenge "a governmental body's comprehensive response to a complex issue, such as child welfare, which encompasses many decisions to spend or approve spending, as well as decisions not to spend or approve spending." *Id.* at 370. That is

exactly the situation here. Homelessness is a quintessential "complex issue," and the City's actions in this case seeking to close the Encampment are simply one part of the City's developing, continuing "comprehensive response."[5]

Mr. Toth's attempt to distinguish *Carrigan* falls short when he asserts that he "is not generally challenging the City's 'comprehensive response to a complex issue,' but is rather challenging a discrete action (here, an eviction) that obviously necessitates specific expenditures." *See* Petition at n.19. In reality, the City does not have some type of specific budget earmarked for its removal of the Encampment; this action is one component of the City's overall effort to protect the health and well-being of the community as a whole and the homeless individuals themselves.

Moreover, it is notable that Petitioners Toth and Higgins seem to present contradictory positions. Petitioner Toth claims he does not want his tax dollars used to close the Encampment (despite, apparently, the extensive City resources consumed by the Police and Fire Departments in serving that location over the last several months). At the same time, Petitioner Higgins claims that the City must provide more and better facilities and services at the Cashin Senior Center, which will require spending more public funds. Further, counsel for Petitioners has conceded that the improvement of the Cashin Senior Center to their standards would permit the

[5] As the City noted during the January 13 hearing, the City continues to consider other options beyond just the Cashin Senior Center. The City is currently exploring the use of the Manchester Transportation Center as a shelter. The Transportation Center could potentially allow the City to provide shelter that closes later each morning, an hour or two longer than the Cashin Senior Center is available each day. The City hopes to have the Transportation Center available by Tuesday, January 17 or Wednesday, January 18. Although no final decisions have been made at this point, the City wanted to make the Court aware of its continuing efforts to find solution(s) to this situation. *See* https://www.wmur.com/article/manchester-resources-homeless-11323/42492132 (reporting on special meeting of Board of Mayor and Aldermen on the evening of January 13, 2023).

City to lawfully remove the Encampment. This conflict puts the Petitioners and their mutual counsel in an untenable position.

CONCLUSION

The Petitioners have failed to meet their burden of proof to establish a reasonable likelihood of success on the merits and irreparable harm if an injunction is not granted. The City's efforts to enhance the social safety net for unhoused people with the opening of the Cashin Senior Center, the Tirrell Center (a permanent shelter), the planned relocation of the Cashin Senior Center shelter to the bus station at the corner of Canal and Granite Streets (a location closer to the Encampment), the provision of continuous outreach by City officials and local community partners to address homelessness, substance abuse, and mental health, placement of trash receptacles and dumpsters, offers to store personal property, and constant presence of Fire and Police resources, as well as continued exploration of further options, establishes that the City has reasonably and rationally viewed this situation as an ongoing public health, safety, and fire hazard, requiring implementation of its emergency authorities to remove the Encampment immediately. For the reasons expressed above, during the January 13, 2023 offer of proof hearing, and in the City's Memorandum in Opposition to Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction, the City respectfully requests that the Court deny Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

THE CITY OF MANCHESTER

By its attorneys,

BY: /s/ Mark C. Rouvalis

Date: January 17, 2023

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City of Manchester

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I served the foregoing Supplemental Memorandum in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction on counsel for Petitioners.

/s/ Mark C. Rouvalis
Mark C. Rouvalis

EXHIBIT A

Ryan J. Cashin
Chief of Department

Matthew A. K. Lamothe
Assistant Chief

David P. Flurey
Deputy Chief

City of Manchester
Fire Department

Emily Rice, City Solicitor
One City Hall Plaza
Manchester, NH 03101

January 4, 2023

Good Afternoon Solicitor Rice,

I am writing to you today in regards to the homeless encampment in and around 199 Manchester Street. In a follow up to yesterday's department head meeting, I wanted to ensure you have had a chance to review the Fire Prevention Bureau's report and their safety recommendations. We need to address the following major life safety concerns at this location: the close proximity of tents leading to the risk of conflagration which would endanger neighboring properties, the highly combustible fuel load and unsafe use of numerous open-flame heat-producing sources.

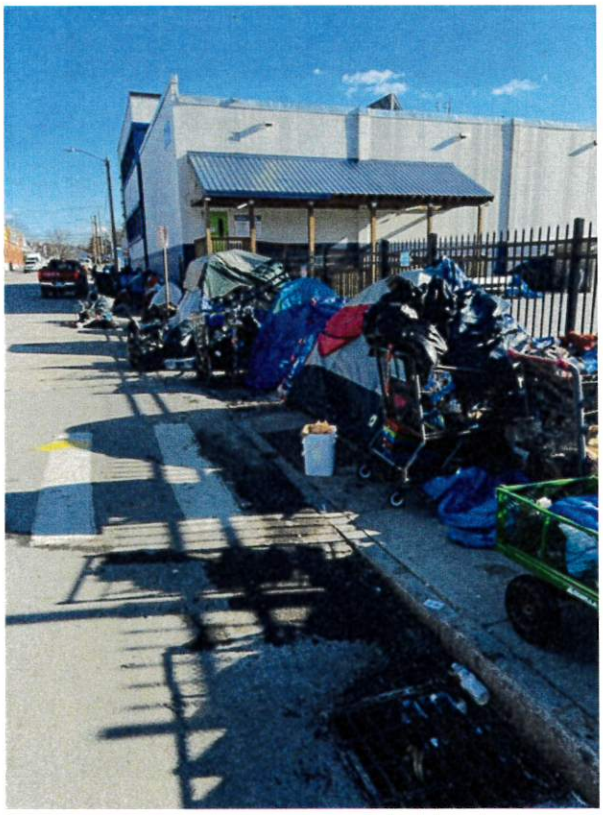
It is my opinion, as the Fire Chief, that leaving the current conditions is an extreme indifference to human life for both the encampment residents and responders alike. Thank you for your attention to this matter.

Sincerely,

Ryan Cashin
Chief of Department

On 12/27/2022, Manchester Fire, Fire Prevention Bureau conducted a walk-thru/fire safety inspection of the conditions around Manchester and Pine Street.

Pine Street



Manchester Street

Unused Sterno type can.

Recommendations:

- Manchester Fire Prevention Bureau to continue to conduct fire safety inspections.
- Provide fire safety education to occupants and provide alternative heat and light sources other than appliances using open flames.
- Remove excessive accumulation of combustible materials.
- Increase spacing between tents if possible to prevent the spread of fire.
- Removal of unclaimed/empty propane tanks and Sterno type of containers.

Nothing that was observed during the walk-thru/fire safety inspection is a direct violation of the NH Fire Code. We do recognize that there are unsafe practices going on, but with the continuation of fire safety education, the risk of fire will be reduced.

EXHIBIT B

8.0'

RIGHT OF WAY LINE

8.0'

MANCHESTER ST

FACE OF GRANITE CURB

1.9'

7.9'

1.7'

8.0'

RIGHT OF WAY LINE

10.0'

FACE OF GRANITE CURB

3.0'

STEEL FENCE

10.0'

RIGHT OF WAY LINE

3.0'

MAP 73 LOT 8A

NEW HORIZONS FOR NH, INC

199 MANCHESTER STREET

MANCHESTER, NH 03103

PINE ST

MONADNOCK LN

EXHIBIT C

KINDERTREE LEARNING CENTER

162 Manchester St. Manchester NH, 03101
603-623-7599
Kindertree162@gmail.com

January 4, 2023

Dear Families:

It is with great sadness and much regret, that I will be selling my building here at 162 Manchester St and Kindertree Learning Center will officially close in June 2023. Please understand that this was a very hard decision for me to make and one that weighed heavy on my heart, but circumstances beyond my control have made the decision for me. Over the past several years, I have watched the neighborhood progressively get worse with very little efforts from the city to control the crime or help improve the homeless population. I no longer feel safe or protected when I come to work, and your child's safety, well-being and security has always been my number one priority above anything else. It is unfortunate that I cannot continue this journey that I started 18 years ago. I am angry and disappointed that our city has failed our community and as a result, Kindertree, which has provided childcare services in the neighborhood since 2004, has no alternative but to close.

I have truly enjoyed being part of your child's early education and love each and every one of them as if they were my own.

While I hope that you stay with us until the official closing date, I completely understand if you choos to find care earlier. I know how hard it is to find quality care and I want this to be a smooth transition you and your child. All I ask is that you honor the 2 weeks' notice as stated in your contract.

As of right now, the last day will be Friday, June 16th. If you have any questions, please do not hesit to speak to me at drop off/pick up or you may call me on the school phone.

I want to thank you all for your loyalty and kindness, but most of all, thank you for entrusting me wi your child.

Love,

Miss Kristine

EXHIBIT D

The State of New Hampshire

MERRIMACK **SUPERIOR COURT**

BINFORD ET AL

v.

GOVERNOR SUNUNU

DOCKET NO. 217-2020-CV-00152

ORDER ON PLAINTIFFS' PETITION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION TO DISMISS

The plaintiffs, David W. Binford, Eric Couture, and Holly Rae Beene (collectively "Plaintiffs") have filed an Emergency Motion for Preliminary Injunction and Permanent Injunction against Governor Christopher Sununu in his official capacity as Governor of the State of New Hampshire (hereinafter the "State") on March 18, 2020. See Compl. (Doc. 1). Plaintiffs request an immediate preliminary injunction prohibiting the enforcement of Governor Sununu's Emergency Order # 2 (the "Emergency Order #2 ") issued on March 16, 2020 pursuant to Executive Order 2020-04 ("EO 2020-04). Id. at Prayer A–B. In the alternative, Plaintiffs request a declaratory judgment rendering the Emergency Order advisory as opposed to mandatory. Id. at ¶ 46. The Court held an emergency hearing on the matter on March 20, 2020 ("March 20 Hearing"). Immediately prior to the hearing, the State filed an objection to Plaintiff's request for preliminary and permanent injunction and a motion to dismiss. See State's Obj. (Doc. 5) and State's Mot. Dis. (Doc. 6). For the following reasons, Plaintiffs' petition for preliminary injunction is **DENIED,** and the State's motion to dismiss is **GRANTED**.

FACTS

The following facts are derived from the undisputed offers of proof at the March 20 Hearing and the undisputed facts contained within EO 2020-04 declaring a State of Emergency[1].

The Novel Coronavirus ("COVID-19") first appeared in Wuhan, China in December of 2019. Doc.5, Ex. A at 1. On January 23, 2020, the Centers for Disease Control and Prevention (the "CDC") activated its emergency response system to provide ongoing support in the United States in response to the growing number of cases of COVID-19 across the United States. Id. On January 30, 2020, the World Health Organization (the "WHO") declared a public health emergency "of International Concern" related to COVID-19. Id. The following day, the United States Department of Health and Human Services ("USDHHS") declared a national public health emergency concerning COVID-19. Id. On March 11, 2020, the WHO declared COVID-19 a global pandemic, expressing that in the coming weeks the number of cases, hospitalizations, and deaths would substantially increase. Id.

On March 12, 2020, the Division of Public Health ("DPH") and the Division of Homeland Security and Emergency Management ("DHS") announced that "211 NH" had been mobilized to handle all COVID-19 related calls in New Hampshire. Id. By March 13, 2020, various world health organizations reported over 124,000 confirmed cases of COVID-19 with 4,163 deaths worldwide. Id. Of those cases, 1,663 were confirmed in the United States, including six in New Hampshire. Id. at 2. On March 13, 2020, the President of the United States declared a National Emergency under the

[1] The Court notes that although Plaintiffs' complaint argues that the factual basis contained within EO 2020-04 are insufficient to give rise to a state of emergency, Plaintiffs do not challenge the truth of the facts contained therein.

Stafford Act due to the global pandemic and national spread of COVID-19. Id. At the same time, DHS and the Department of Safety activated State Emergency Operations Centers to provide support to New Hampshire state and local authorities dealing with the crisis. Id.

The same day, Governor Sununu issued EO 2020-04, declaring a State of Emergency due to COVID-19. Id. Governor Sununu set forth seventeen recitations of fact upon which the EO was issued, including details about the threats to the health and safety of New Hampshire residents posed by the outbreak and the response necessary to combat the spread. Id. In EO 2020-04, Governor Sununu acknowledged that, although the majority of cases of COVID-19 will result in mild symptoms, many will require hospitalization and may lead to death. Id. As a result, Governor Sununu noted:

> [I]f COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other 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

Id. Consequently, Governor Sununu articulated the need for New Hampshire to "implement measures to mitigate the spread of COVID-19, and to prepare and respond to an increasing number of individuals requiring medical care and hospitalization." Id.

Pursuant to EO 2020-04, Governor Sununu invoked his powers under RSA 4:45 and 4:47. He further noted in EO 2020-04 that "additional temporary orders, directives, rules, and regulations may be issued either by the Governor or by designated state officials within the written approval of the Governor." See id. at 6. Thereafter, on March 16, 2020, he issued Emergency Order #2, which provides:

1. In accordance with CDC guidelines, the following activities are prohibited within the State of New Hampshire:

   Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition does not apply to the General Court or to the day-to-day operations of businesses.

2. Food and beverage sales are restricted to carry-out, delivery, curbside pick up, and drive through only, to the extent permitted by current law. No onsite consumption is permitted, and all onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.

3. Section 2 of this order shall not apply to food and beverage service in (a) healthcare facilities, (b) airports, or (c) cafeterias located within a private business which are primarily intended to serve the employees of that business.

4. The Division of Public Health shall enforce this Order and if necessary may do so with the assistance of State or local police.

5. This Order shall remain in effect until Monday, April 6, 2020.

Doc. 5, Ex. B.

As of March 19, 2020, there were 44 confirmed cases of COVID-19 within the State of New Hampshire. In addition, there were 630 tests pending in the New Hampshire Public Health Laboratories, and 575 people were being monitored.

ANALYSIS

In response to Emergency Order #2, Plaintiffs brought this action on March 17, 2020. See Doc. 1. Plaintiffs seek an emergency and permanent injunction on Emergency Order #2 or, in the alternative, a declaratory judgment rendering Emergency Order #2 advisory rather than mandatory. Id. Plaintiffs argue that the governor does not have the authority to issue Emergency Order #2, the spread of COVID-19 does not

amount to an emergency under RSA 21-P:35, and Emergency Order #2 is unconstitutional. Id. The State objects arguing that the governor has the authority pursuant to RSA 4:45, Emergency Order #2 is enforceable, and it is constitutional. See Doc. 5. For the same reasons, the State also moves to dismiss. See Doc. 6

I. Motion for Preliminary Injunction

"A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015) (quotation omitted). It is the moving party's burden to "show among other things that it would likely succeed on the merits." Id. (quotation and brackets omitted). In addition to success on the merits, "[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, [and] there is no adequate remedy at law." Pike v. Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 45 (2015) (quotation omitted). "The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id.

Plaintiffs have the burden to demonstrate that all three factors are met in order for the Court to order the extraordinary relief of a preliminary injunction. As the Court finds that Plaintiffs are unlikely to succeed on the merits, it need not consider whether there is irreparable harm or an adequate remedy at law. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that courts need not consider the party's remaining arguments where one or more is dispositive of the case). Accordingly, the Court will limit its analysis to whether Plaintiffs are likely to succeed on the merits of the case.

In support of their position that they are likely to succeed on the merits, Plaintiffs argue: (1) Governor Sununu does not have the authority to issue Emergency Order #2; (2) Emergency Order #2 has no enforcement mechanism; and (3) Emergency Order #2 is unconstitutional under the State and Federal Constitutions. See Doc. 1 ¶¶ 23–45. The State asserts that Governor Sununu: (1) properly declared a state of emergency pursuant to RSA 4:45; (2) may use his emergency powers to temporarily suspend or limit fundamental rights if he does so in good faith and with a sufficient factual basis; and (3) Emergency Order #2 is a permissible time, place, and manner restriction on Plaintiffs' fundamental rights. See Doc. 5 a 10–20.

A. Executive Authority

Plaintiffs first argue that Governor Sununu lacks the authority to declare a state of emergency because he cannot meet the burden of showing that an emergency exists under RSA 141-C:14-a or RSA 4:45. Doc. 1 ¶ 27. As an initial matter, the governor's authority is not derived from RSA 141-C:14-a, which contemplates the power of the Commissioner of the Department of Health and Human Services. See RSA 141-C:2, IX. Rather, the governor's power to declare a state of emergency is derived from RSA 4:45 and RSA 4:47. As a result, the Court will consider the parties arguments under the aegis of RSA 4:45 and 4:47.

RSA 4:45, I provides:

> The governor shall have 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.

Once the governor has declared a state of emergency, he has "[t]he power 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." RSA 4:47, III. As the governor's powers under a state of emergency are broad, invocation of the provisions in RSA 4:45 and RSA 4:47 requires the governor to specify the factual conditions that have brought about the emergency and the nature of the emergency itself. RSA 4:45, I(a)–(c). These factual assertions must establish that a state of emergency exists as defined in RSA 21-P:35, VIII, which states:

> "State of emergency" means 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.

Here, Plaintiffs contend that Governor Sununu lacks the authority to declare a state of emergency because the circumstances surrounding the COVID-19 outbreak do not amount to an emergency under the definition of emergency in RSA 21-P:35. Doc. 1 ¶¶ 27–31. Plaintiffs argue that "New Hampshire has had just 17 people diagnosed with [COVID-19], and ZERO deaths. In a state of over 1 million people, those numbers alone make it clear this is not an 'emergency.'" Id. ¶ 28 (emphasis in original). This argument is without merit.

It would be irrational to find that the governor must wait for the health care system of New Hampshire to be overwhelmed with patients suffering from COVID-19 before he is authorized to declare a state of emergency and take preventative measures to slow the spread of a highly contagious and potentially deadly disease. Indeed, RSA 4:45 contemplates the need to take preemptive action and explicitly authorizes the

governor to do so. Specifically, RSA 4:45, I permits the governor to declare a state of emergency where a disaster is "imminent or has occurred within this state." (Emphasis added). As a result, Governor Sununu is expressly authorized to declare a state of emergency and order measures designed to address an imminent threat to New Hampshire public health and safety. That said, RSA 4:45 requires the governor to assert the factual basis or bases upon which the declaration rests. EO 2020-04 more than satisfies this requirement.

As stated in EO 2020-04, at the time of the March 20 Hearing, COVID-19 had infected roughly 124,000 people globally, of which nearly 5,000 have died. The WHO declared that COVID-19 is a global pandemic and warned the world to take precautions to slow the spread of the disease. The world's experts on infectious diseases, including the WHO, CDC, and USDHHS, agree that these numbers will increase exponentially over the coming weeks and months, particularly if no measures are taken to stop the spread of COVID-19. This presents an enormous risk to the residents of New Hampshire, as the state only has limited local medical resources to combat the outbreak. As a result, "if COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources." Doc. 5, Ex. A at 2. Correspondingly, "controlling outbreaks minimizes the risk to the public" and minimizes the strain on the state's limited resources. Id. With this in mind, the Court finds that there is overwhelming factual and legal support evincing Governor Sununu's authority to declare a state of emergency. Accordingly, the Court finds that EO 2020-04 sets out a sufficient factual basis to conclude that "a natural, technological, or man-made disaster of major

proportions is imminent" such that the governor is authorized to declare a state of emergency pursuant to RSA 4:45 and to issue executive orders designed to address the spread of COVID-19 pursuant to RSA 4:47, III.

Plaintiffs next argue that, even if the governor is authorized to declare a state of emergency and to issue executive orders related thereto, Emergency Order #2 lacks any legal enforcement mechanism and should therefore be declared advisory. Doc. 1 ¶¶ 44–46. Plaintiffs specifically point to RSA 21-P:47, which states "[i]f any person violates or attempts to violate any order, rule, or regulation made pursuant to this subdivision, such person shall be guilty of a misdemeanor." Plaintiffs assert that the language "pursuant to this subdivision" expressly limits the governor's enforcement power to orders issued pursuant to RSA 21-P. Plaintiffs argue that the legislature would have included express language indicating the governor's power to enforce orders issued pursuant to RSA 4:45 if it had intended him to have the enforcement authority pursuant to that chapter.

This argument ignores the rest of the subdivision contained within RSA 21-P. RSA 21-P:45, titled "Enforcement," expressly includes language authorizing enforcement of executive orders issued under RSA 4:45:

> It shall be the duty of every organization for emergency management established under this subdivision and of the officers of such organization to execute and enforce such orders, rules, and regulations as may be made by the governor under authority of this subdivision or RSA 4:45.

(Emphasis added). RSA 21-P:45 expressly authorizes the governor to enforce emergency orders, while RSA 21-P:47 sets forth the penalty for failure to comply with emergency orders issued pursuant to RSA 4:45. Accordingly, the Court finds that not only does Governor Sununu have the authority to declare a state of emergency, but the

legislature has also imbued the executive with the authority to enforce emergency orders made pursuant to RSA 4:45. As a result of this clear legislative authority, the Court declines the request that Emergency Order #2 be declared advisory as opposed to mandatory.

B. Constitutionality of Emergency Order #2

Plaintiffs argue that Emergency Order #2 is unconstitutional because: (1) it violates their right to assemble under the First Amendment of the U.S. Constitution and Part I, art. 32 of the New Hampshire Constitution; (2) it violates their right to religious freedom under the First Amendment of the U.S. Constitution and Part I, art. 5 of the New Hampshire Constitution; (3) it violates the Part I, art. 34 New Hampshire Constitution prohibition on Martial Law: (4) it constitutes an unconstitutional taking under the U.S. Constitution; and (5) it violates their privilege of Habeas Corpus under Part 2, art. 91 of the New Hampshire Constitution. See Doc. 1. In response, the State contends: (1) during a state of emergency, executives are granted broad latitude to suspend civil liberties in order to address the emergency; and (2) even if the governor does not have broad latitude to suspend civil liberties during the state of emergency, Emergency Order #2 is a permissible time, place, and manner restriction on assembly and religion. Doc. 5 at 13–18. The State further maintains that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped, conclusory statements of the law that are without merit and do not warrant judicial review. Id. at 18–19.

As an initial matter, the Court agrees with the State that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped

and without merit. Plaintiffs do not assert any facts that would lead the Court to conclude that Governor Sununu has declared martial law, has taken any property from Plaintiffs without just compensation, or has exercised impermissible control over Plaintiffs' bodies. See Doc. 1. Accordingly, the Court will only consider Plaintiffs' developed arguments concerning freedom of assembly and freedom of religion.

i. Governor's Authority to Suspend Civil Liberties

As the State points out, there is not a wealth of case law in New Hampshire concerning the governor's authority to enact emergency orders during a state of emergency. As a result, the Court looks to other jurisdictions for guidance regarding the limit of the governor's authority under these circumstances.

Multiple jurisdictions have contemplated the executive's authority to suspend or infringe upon certain civil liberties during states of emergency. See e.g. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."); United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971) ("The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected."); In re Juan C., 33 Cal. Rptr.2d 919, 922 (Ct. App. 1994) ("An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction."); ACLU of W. Tenn., Inc. v. Chandler, 458 F. Supp 456, 460 (W.D. Tenn. 1978) (explaining that the governor has the authority to impose "limitation on the exercise of [First Amendment rights] only in very unusual

circumstances were extreme action is necessary to protect the public from immediate and grave danger").

The 11th Circuit has articulated a two-prong test to determine whether an executive order passes constitutional muster during a state of emergency. See Avino, 91 F.3d 105. In Avino, the Governor of the State of Florida issued an executive order declaring a state of emergency in the wake of Hurricane Andrew. Id. at 108. This executive order provided that Miami city and Metropolitan Dade County officials could impose curfews from August 24, 1992 through December 21, 1992. Id. The Miami Dade county manager set the curfew from 7:00 pm to 7:00 am and called in the National Guard and other law enforcement officials to aid local police. Id. By October 2, 1992, the curfew was in effect from 10:00 pm through 5:00 am. Id. County residents were required to stay in their homes during the curfew hours unless otherwise authorized. Id. The curfew was ultimately lifted on November 16, 1992. Id. The plaintiffs, residents of Dade County, filed suit against Metropolitan Dade County and the county manager, arguing that the curfew ordinance was unconstitutional. Id. at 107.

The Avino court began its analysis by establishing that the curfew ordinance must be considered "in the circumstances under which the curfew was instituted." Id. at 108. The Avino court noted that the State of Florida was devastated by Hurricane Andrew and that all parties agreed that "[p]olice action was clearly required." Id. at 109. The court went on to note that "[c]ases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction." Id. (citing Chalk, 441 F.2d 1277; In re Juan C., 33 Cal. Rptr.2d 919; and Moorhead v.

Farrelly, 727 F. Supp. 193 (D.V.I. 1989)). The Avino court articulated that in a state of emergency, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." Id. Accordingly, the court held that "when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality is limited to a determination whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order." Id. The Avino court went on to hold that there was no suggestion that the Dade County officials acted in bad faith. Id. The Avino court further found that a factual emergency existed necessitating emergency intervention. Id. The court ultimately concluded that under extreme emergency circumstances, "fundamental rights such as the right of travel and free speech may be temporarily limited or suspended." Id.

The case currently before the Court concerns a ban on gatherings in excess of 50 people and a ban on dining in at food and beverage service establishments in order to prevent the spread of a highly infectious and deadly disease. The Court finds that this type of ban is sufficiently analogous to a curfew in response to a riot or natural disaster such that the 11th Circuit's two-prong test established in Avino would apply. The Court is also sufficiently persuaded by the 11th Circuit's reasoning in Avino, and adopts that two-prong test here. Accordingly, the Court will review the constitutionality of Emergency Order #2 by examining whether: (1) the Governor has acted in good faith; and (2) whether the Governor has asserted a sufficient factual basis showing that the restrictions imposed were necessary.

Here, there is no allegation that Governor Sununu has acted in bad faith. Indeed, at the March 20 Hearing, Plaintiffs conceded that Governor Sununu acted in good faith in issuing Emergency Order #2. As a result, the Court need only consider whether the Governor has articulated a sufficient factual basis demonstrating that the restrictions imposed were necessary. Plaintiffs challenge Emergency Order #2's ban on gatherings of 50 or more people and ban on dine in services in public restaurants, alleging that there is no sufficient factual basis to conclude that these measures are necessary to combat COVID-19. The Court disagrees.

As stated above, EO 2020-04 set out ample factual bases to conclude that the Governor had the authority to declare a state of emergency concerning the global pandemic caused by COVID-19. These facts establish a strong need for immediate intervention. By March 16, 2020, both the United States District Court for the District of New Hampshire and the New Hampshire Supreme Court had issued orders suspending hearings and jury trials and restricting the number of people that had access to the courts. On March 16, 2020, the CDC and the White House put forth social distancing guidelines, recommending that events of ten or more people should be cancelled or held virtually. That day, Governor Sununu issued the ban on gatherings in excess of 50 people and suspended dine-in services at restaurants. These actions are consistent with similar actions taken by New Hampshire courts and are clearly supported by the recommendations put forth by the CDC and the White House. In issuing Emergency Order #2, the Governor acknowledged the ongoing emergency presented by the spread of COVID-19 and articulated the relationship between a ban on large gatherings and

dine-in services and addressing the emergency. Accordingly, the Court finds that there is a sufficient factual basis for the prohibitions contained within Emergency Order #2.

Further buttressing the Court's finding that the Governor's actions are constitutional is the fact that there are multiple checks on Governor Sununu's authority to enforce Emergency Orders pursuant to EO 2020-04. Absent a renewed factual finding by the Governor, EO 2020-04 will be in effect for only 21 days. RSA 4:45, I(d). In addition, the legislature has the authority "by concurrent resolution" to end the state of emergency at any time and can block the governor from renewing the state of emergency at the expiration of 21 days. RSA 4:45, II(c). Furthermore, Emergency Order #2 is in effect for a limited duration, beginning on March 16, 2020 and ending April 6, 2020. See State's Ex. B. During that time, should the factual bases for enforcing the Emergency Order change, it is subject to review by the Court. See Moorhead, 727 F. Supp. 193 ("A court's role in the aftermath of an emergency...is to review, with deference, the decision of the executive.").

In sum, because Governor Sununu has acted in good faith, and because there is a sufficient factual basis on which to conclude that the prohibitions contained within Emergency Order #2 are necessary, and because there are sufficient checks and balances on executive orders during a state of emergency, the Court finds that Emergency Order #2 passes constitutional muster.

ii. Time/Place/Manner Restrictions on Freedom of Speech and Freedom of Assembly

Although the Court finds that the Governor may suspend or limit constitutional rights during a state of emergency, for the purpose of establishing a complete record, the Court will also analyze the facial constitutionality of Emergency Order #2.

Part I, art. 32 of the New Hampshire Constitution provides: "The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good." "This provision guarantees the same right to free speech and association as does the First Amendment to the Federal Constitution." Opinion of the Justices (Voting Age in Primary Elections II), 158 N.H. 661, 667 (2009). "In interpreting Part I, Article 32, therefore, [the Court] rel[ies] upon federal cases interpreting the First Amendment to the Federal Constitution for guidance." Id.

"The State constitutional right of free speech, N.H. CONST. pt. I, arts. 22 & 32, is not absolute, but may be subject to reasonable time, place and manner regulations." State v. Comely, 130 N.H. 688, 691 (1988). "Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000). "Where ... a law regulates speech only incidentally, as a consequences of expressly regulating conduct, it will withstand first amendment scrutiny if, in its application to incidental speech, it is no more restrictive than a time, place, and manner regulation." Comely, 130 N.H. at 691 (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968)). Determining whether a time, place, and manner regulation comports with the Constitution, requires the Court to

employ a three-prong test. Comely, 130 N.H. at 691. The Court must determine whether the regulation: (1) is content-neutral; (2) narrowly serves a significant governmental interest; and (3) allows for other opportunities for expression. Id. Although these cases consider laws rather than emergency orders, the effect of the emergency order is functionally the same. As a result, the Court concludes that the same standard is generally applicable to emergency orders enacted pursuant to RSA 4:45.

The first step of the analysis is to determine whether the restrictions contained within Emergency Order #2 are content neutral. Comely, 130 N.H. at 691. Plaintiffs contend that Emergency Order #2 is expressly content based because of the language in paragraph 1 banning "[s]cheduled gatherings of 50 people or more for social, spiritual and recreational activities." See Doc. 1, Ex. A. Plaintiffs argue that inclusion of the word "spiritual" expressly targets religious activities and is therefore not content neutral. This argument ignores the remainder of paragraph one which includes an illustrative list detailing the types of events to which Emergency Order #2 applies. Id. (banning gatherings in excess of 50 people for events "including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities"). Based on the inclusion of this illustrative list, Emergency Order #2 is clearly content neutral in that it prohibits any gathering in excess of 50 people, regardless of the content of the event. Accordingly, the Court finds that Emergency Order #2 is content neutral and thereby satisfies the first prong of the time, place, and manner test.

The second step of the analysis is to determine whether the restriction is narrowly tailored to serve a significant government interest. Comely, 130 N.H. at 691. Courts have long held that public health, safety, and welfare constitute a significant government interest. See e.g. Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995). EO 2020-04 clearly declared a state of emergency as the result of an impending public health crisis in the State of New Hampshire, and Emergency Order #2 was issued by Governor Sununu to address the public health crisis established in that executive order. See Doc. 5, Ex. A. As a result, the State has established that it has a significant interest in promoting public health and safety as related to the spread of COVID-19.

The CDC and the White House have put forth guidelines recommending that gatherings be limited to ten people or fewer in order to slow the spread of COVID-19. Emergency Order #2 follows these guidelines, but is not so restrictive, allowing for gatherings of fewer than 50 people. Doc. 5 at 17. Emergency Order #2 also prohibits the onsite consumption of food or beverages in "restaurants, diners, bars, saloons, private clubs, or any other establishment." Doc. 1, Ex. A ¶ 2. However, it does not completely prevent the sale of food and beverages, expressly authorizing "carry-out, delivery, curbside pick up, and drive through" services. Id. Thus, the only two restrictions imposed on public assembly are that scheduled gatherings cannot have in excess of 50 people, and dine-in services at public restaurants are suspended. The restrictions contained within Emergency Order #2 paragraphs 1 and 2 were specifically designed to comport with relevant CDC guidelines to slow the spread of COVID-19. See Doc. 1, Ex. A; see also Doc. 5, Ex. A at 3. In addition, Emergency Order #2 is not a permanent ban on all gatherings in excess of 50 people or dining-in at restaurants.

Rather, Emergency Order #2 has a fixed expiration date, April 6, 2020. Doc. 1, Ex. A ¶ 5. Should Governor Sununu determine that a sufficient factual basis exists to extend the state of emergency and thereafter extends the duration of Emergency Order #2, that expansion must only last for the duration necessary to respond to the public health emergency.

Accordingly, because Emergency Order #2 limits its restrictions to those suggested by the CDC to slow the spread of COVID-19, and because the effects of Emergency Order #2 have a limited duration, the Court finds that Emergency Order #2 is narrowly tailored to serve the government's significant interest.

The final step of the analysis is to determine whether Emergency Order #2 allows for alternative opportunities for expression. Comely, 130 N.H. at 691. This prong of the test is clearly satisfied. As stated above, Emergency Order #2 only bans scheduled gatherings of 50 or more people and dine-in restaurant services. People are free to attend scheduled gatherings with fewer people. They can attend impromptu gatherings of any kind. They are free to communicate via the internet or telephone. They may tune into televised events. They can continue to dine together in their homes or outdoors. There are a wealth of opportunities for individuals to exercise their right to freely assemble and associate that do not require them to gather in large groups or eat at a restaurant during a public health emergency. Accordingly, the Court finds that Emergency Order #2 allows for alternative opportunities of expression.

Because Emergency Order #2 is content neutral, narrowly tailored to serve the government's interest in slowing the spread of COVID-19, of a limited duration, and allows for alternative methods of speech, assembly, and association, the Court

concludes that it constitutes a reasonable time, place, and manner restriction, comporting with the precepts of the First Amendment and Part I, art. 32 of the New Hampshire Constitution.

iii. Restrictions of Freedom of Religion

The Free Exercise clause of the First Amendment prohibits the government from seeking "to ban such acts or abstentions only when they are engaged in for religious reasons." Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (superseded by statute on different grounds as stated in Holt v. Hobbs, 574 U.S. 352 (2015)). That said, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

As established above, Emergency Order #2 is content neutral. Nothing in Emergency Order #2 suggests that it is intended to target any religion or specific religious practice. While a ban on scheduled gatherings of 50 or more people may have an impact on the ability for a congregation to assemble at church, the Court concludes that such an impact is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and public health threat facing the citizens of this State. Accordingly, for all the reasons set forth in the section above, the Court finds that Emergency Order #2 does not unconstitutionally infringe upon Plaintiffs' freedom of religion.

Because the Court finds that Governor Sununu has the authority to suspend or limit fundamental rights during a state of emergency, and because Emergency Order #2

constitutes a reasonable time, place, and manner restriction, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim. Consequently, Plaintiffs' motion for preliminary injunction is **DENIED**.

II. Motion to Dismiss

In ruling on a motion to dismiss, the Court considers whether the allegations in the plaintiff's "pleadings are reasonably susceptible of a construction that would permit recovery." Riso v. Dwyer, 168 N.H. 652, 654 (2016) (quotation omitted). The Court must assume the truth of the factual allegations outlined in the complaint, and construe all reasonable inferences in the light most favorable to the plaintiff. Id. The Court does not, however, "assume the truth of the statements in the [third-party] complaint that are conclusions of law." Id. (quotation omitted). In other words, because the Court is only required to accept "well-pleaded facts," it is not required to accept conclusory allegations which contain no articulable facts that can be tested. See Snierson v. Scruton, 145 N.H. 73, 76 (2000); Baxter Int'l Inc. v. State, 140 N.H. 214, 218–19 (1995). The pertinent inquiry is whether the facts alleged constitute a basis for relief. Riso, 168 N.H. at 654. If they do not, the Court shall grant the State's motion to dismiss. Id.

Plaintiffs have challenged the constitutionality of EO 2020-04 and Emergency Order #2 on their face, rather than as applied. A result, the Court is presented with a question of law rather than fact, which can be appropriately decided on a motion to dismiss. The Court has already considered the merits of Plaintiffs' arguments, supra at 5–20, and has found that Plaintiffs cannot succeed on the merits of their claim as the governor's emergency declarations pass constitutional muster. It logically follows that,

for the same reasons stated above, Plaintiffs have failed to state a claim for which relief may be granted. Consequently, the State's motion to dismiss is **GRANTED**.

CONCLUSION

For the forgoing reasons, Plaintiffs petition for preliminary injunctive relief is **DENIED**, and the State's motion to dismiss is **GRANTED**.

SO ORDERED.

3/25/2020
DATE

John C. Kissinger
Presiding Justice