

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

Docket No.: 216-2020-CV-00342

Mary Jane Wallner, et al.

v.

Christopher Sununu

**SECOND AMENDED COMPLAINT FOR MANDAMUS, PROHIBITION,
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by and through counsel, bring this Second Amended Complaint for Mandamus, Prohibition, Declaratory, and Injunctive Relief.

INTRODUCTION

Governor Sununu asserts that RSA 4:45, III(e) gives him unfettered discretion to spend public funds in this state of emergency – including \$1.25 billion in federal funds which have already been deposited into the state treasury – without the oversight of and prior appropriation from the legislative branch’s Fiscal Committee. Adopting this view would grant a governor unconditional authority to spend taxpayer dollars simply because he or she declared a state of emergency. The plain language of the relevant statutes, read together, unambiguously demonstrates that the legislature never delegated its core constitutional function of approving government spending during an emergency. It is critical for government stability in this public health crisis that more than one billion dollars are spent in conformity with the rule of law. The Fiscal Committee has demonstrated it can meet as often as necessary to ensure economic relief is properly and swiftly provided to New Hampshire.

PARTIES

1. Mary Jane Wallner is a state and federal taxpayer, eligible voter and resides at 24 Samuel Drive Concord, NH 03301. She serves as a Representative for Merrimack - District 10, and is Chair of the Joint Legislative Fiscal Committee for the General Court.

2. Lou D'Allesandro is a state and federal taxpayer, eligible voter and resides at 332 St. James Ave., Manchester, NH 03102. He serves as the State Senator for District 20, and is Vice Chair of the Joint Legislative Fiscal Committee for the General Court.

3. Stephen Shurtleff is a state and federal taxpayer, eligible voter and resides at 11 Vinton Drive Penacook, NH 03303. He serves as a Representative for Merrimack - District 11, and is Speaker of the House of Representatives.

4. Donna Soucy is a state and federal taxpayer, eligible voter and resides at 91 Alexander Street, Manchester, NH 03109. She serves as the State Senator for District 18, and is President of the Senate. She is also a member of the Fiscal Committee.

5. Cindy Rosenwald is a state and federal taxpayer, eligible voter and resides at 101 Wellington Street, Nashua, NH 03064. She serves as the State Senator for District 13, and is a member of the Fiscal Committee.

6. Peter Leishman is a state and federal taxpayer, eligible voter and resides at 39 Birch Road, Peterborough, NH. He serves as a Representative for Hillsborough - District 24, and is a member of the Fiscal Committee.

7. Susan Ford is a state and federal taxpayer, eligible voter and resides at 557 Sugar Hill Road, Easton, NH 03580. She serves as a Representative for Grafton - District 3, and is a member of the Fiscal Committee.

8. Jay Kahn is a state and federal taxpayer, eligible voter and resides at 135 Darling Road, Keene, NH 03431. He serves as the State Senator for District 10, and is a member of the Fiscal Committee.

9. Christopher Sununu serves as Governor of the State of New Hampshire

JURISDICTION AND VENUE

10. This Court has jurisdiction as the court of general jurisdiction in New Hampshire, RSA 491:7, and has jurisdiction to grant declaratory relief, RSA 491:22.

11. This Court has personal jurisdiction over Christopher Sununu in his official capacity as Governor of the state of New Hampshire. RSA 510:2.

12. Venue is proper in the judicial district. Plaintiffs Lou D’Allesandro and Donna Soucy reside in Manchester. RSA 507:9. Further, a dispute between the General Court and the Governor implicates every county.

FACTUAL BACKGROUND

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

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

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

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

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

16. Governor Sununu informed the Fiscal Committee that part of the CARES Act would provide New Hampshire with \$1.25 billion in largely unrestricted funds. *See* Affidavit of Rep. Wallner (Wallner Aff.), ¶ 4 (Exh. C). He also noted his position that Fiscal Committee approval to spend over one billion dollars in CARES Act funds was “not technically required” under RSA 4:45. *See id.*

17. \$1.25 billion is about 10% of the state’s \$12.9 billion budget. *See* House Bill 4-FN-A-L, Session Year 2019.

18. In lieu of the Fiscal Committee, the Governor declared he would unilaterally establish an eight-member Legislative Advisory Board to provide non-binding recommendations on how his office might spend CARES Act funds. *See* Affidavit of Speaker Shurtleff, ¶ 4 (Exh. D).

19. At a press conference, Governor Sununu confirmed that he would not involve the Fiscal Committee during this state of emergency: “The state of emergency allows me to draw down the [federal] funds and release them almost as soon as they become available.”¹ “[T]o ask the Fiscal Committee to meet in open session is not possible. It is not feasible and it is not going to happen.”² (Emphasis added.)

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

20. The Fiscal Committee held a telephonic meeting on April 10, 2020. *See* Wallner Aff. ¶ 5 (Exh. E)

¹ John DiStaso, *NH Primary Source: Sununu, Democratic lawmakers at odds over COVID-19 spending procedure*, WMUR, April 9, 2020, <https://www.wmur.com/article/nh-primary-source-sununu-democratic-lawmakers-at-odds-over-covid-19-spending-procedure/32088498>.

² Garry Rayno, *Sununu, Legislative Leaders Spar Over COVID-19 Stimulus Funds*, InDepthNH, April 8, 2020, <http://indepthnh.org/2020/04/08/sununu-legislative-leaders-spar-over-covid-19-stimulus-funds/>.

21. There it acted on eleven separate spending requests from the executive branch, including approving DHHS' request to spend \$1.2 million in federal money New Hampshire received from the Families First Coronavirus Response Act (Item 20-066). *See id.* ¶¶ 5-6 (Exhs. E and F).

22. DHHS also informed the Fiscal Committee that it had reallocated \$18 million within certain accounting units without seeking the consent of the committee's members pursuant to the Governor's assumed emergency powers under RSA 4:45. *See id.* ¶ 5 (Exh. E, Items 20-065, 67); *see also* Pls.' Stmt. Undisp. Facts, ¶¶ 12f, 12g (Exhs. 6E and 6F, which fully detail Items 20-065 and 20-067).

23. These funds were transferred to different accounting units for "cash flow" purposes related to COVID-19 expenditures.

24. Plaintiffs who are Fiscal Committee members later voted to adopt a motion to restore these reallocations during its April 20, 2020 meeting. *See id.* ¶ 7. The Fiscal Committee adopted the following motion:

In light of the Governor's Office statement that the \$26M in transfers from various programs in the Department of Health and Human Services (DHHS) were for "cash flow" purposes to pay COVID-19 expenses, and the fact that the State has since received \$625M in CARES Funds on Friday, April 17, 2020, to the extent U.S. Treasury guidance permits, the Fiscal Committee moves to reverse the following transfers made by DHHS:

- \$8M from substance use disorder rate increases;
- \$4M from the state loan repayment program for health care workers;
- \$1.7M from homeless shelter and re-housing;
- \$8.75M from the new secure psychiatric unit;
- \$2M from low income senior prescription drug assistance;
- \$750K from congregate housing;
- \$750K in additional transfers for the secure psychiatric unit, and
- \$100K from the foster grandparents program.

See Fiscal Committee Quick Results, April 20, 2020 meeting.³

³ Available at: https://www.gencourt.state.nh.us/LBA/Budget/fiscalQuick/Fiscal_Quick_Results_2020-04-20.pdf.

25. U.S. Treasury guidance on CARES Act aid permits reimbursement for any COVID-19 expenditures sourced from these transferred funds.⁴ But no action to reverse the transfers has been promised or yet occurred.

26. Upon information and belief, the New Hampshire State Treasurer communicated with the U.S. Treasury for purposes of receiving \$1.25 billion in federal funds from the CARES Act, which was deposited in the state treasury at the end of April.

27. To prepare for fulfilling its constitutional and statutory duties, at the April 10, 2020 meeting the Chair and Vice Chair of the Fiscal Committee, respectively Plaintiffs Rep. Wallner and Sen. D'Allesandro, reiterated their commitment to meeting as quickly and as often as necessary to accept and expend emergency appropriations under the CARES Act. *See id.* ¶¶ 9, 10 (Exh. G).

28. Later that same day, after hearing that the Fiscal Committee had just approved DHHS' request to spend federal funds designed for the coronavirus, Governor Sununu reiterated his intention to ignore and deprive members of the Fiscal Committee their right to vote on executive branch expenditures of funds unappropriated in the state budget or by the Fiscal Committee during this emergency.⁵

29. There is no barrier to the Fiscal Committee meeting at the call of the chair. It has begun receiving public input on possible uses of the funds with a dedicated email address. *See id.* ¶ 11.

⁴ U.S. Treasury, *Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments* (April 22, 2020), available at: <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>.

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

30. The Fiscal Committee's May 8, 2020 meeting agenda paradoxically shows certain executive branch departments requesting Fiscal Committee approval to spend federal funds under RSA 14:30-a, VI, well other departments spent federal funds under the Governor's assumed emergency authority.⁶

CAUSES OF ACTION

COUNT I Writ of Mandamus

13. All factual allegations in this Complaint are incorporated here.

14. A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform. *Petition of CIGNA Healthcare*, 146 N.H. 683, 687 (2001). The court may issue a writ of mandamus where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief. *Id.*

15. Governor Sununu has claimed he may unconditionally and unilaterally authorize the expenditures of state and federal funds unappropriated by the legislative branch during this state of emergency pursuant to RSA 4:45, III(e). The executive branch has already spent unappropriated funds under this purported emergency authority.

16. The governor and executive branch are required to obtain approval from the legislative branch's Fiscal Committee before spending any state or federal funds unappropriated in the budget, including during an emergency as required by RSA 9:13-d. *See also* RSA 9:16-a; 14:30-a; 124.

17. Plaintiffs request an order compelling Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch to obtain approval from the Joint Legislative Fiscal Committee before spending any state or federal funds not

⁶ http://www.gencourt.state.nh.us/LBA/budget/FiscalAgenda/FISCAL_COMMITTEE_Agenda_2020-05-08.pdf

otherwise appropriated during the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b).

COUNT II
Writ of Prohibition

18. All factual allegations in this Complaint are incorporated here.

19. A Writ of Prohibition prevents “officers or persons from usurping or exercising jurisdiction with which they are not vested.” *Petition of CIGNA Healthcare*, 146 N.H. at 687. A Writ of Prohibition will lie “when the necessity to act is clear.” *American Fed'n of State, County and Municipal Employees Local 572 v. City of Dover*, 115 N.H. 491, 492 (1975); *see also New Hampshire Retail Grocers Ass'n v. State Tax Comm'n*, 113 N.H. 511, 516 (1973) (prohibition issued to prevent state agency from enforcing an erroneous interpretation of the law).

20. Governor Sununu has claimed he may unconditionally and unilaterally authorize the expenditures of state and federal funds unappropriated by the legislative branch during this state of emergency pursuant to RSA 4:45, III(e). The executive branch has already spent unappropriated funds under this purported emergency authority.

21. The governor and executive branch are required to obtain approval from the legislative branch’s Fiscal Committee before spending any state or federal funds unappropriated in the budget, including during an emergency as required by RSA 9:13-d. *See also* RSA 9:16-a; RSA 14:30-a; RSA 124.

22. Plaintiffs request an order prohibiting Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch from spending any state or federal funds not otherwise appropriated by the Joint Legislative Fiscal Committee during the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b).

COUNT III
Declaratory Judgment
Violations of RSA 9:13-d, RSA 9:16-a, 14:30-a, and 124

23. All factual allegations in this Complaint are incorporated here.

24. “Any person claiming a present legal equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive.” RSA 491:22. “The remedy of declaratory judgment affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties.” *Radkay v. Confalone*, 133 N.H. 294, 296 (1990). “The justiciability of a declaratory judgment action is not dependent upon proof of a wrong committed by one party against the other.” *Id.* Requests for declaratory relief “must be liberally construed so as to effectuate the evident purpose of the law.” *Id.*

25. Governor Sununu has claimed he may unconditionally and unilaterally authorize the expenditures of state and federal funds unappropriated by the legislative branch during this state of emergency pursuant to RSA 4:45, III(e). The executive branch has already spent unappropriated funds under this purported emergency authority.

26. The governor and executive branch are required to obtain approval from the legislative branch’s Fiscal Committee before spending any state or federal funds unappropriated in the budget, including during an emergency as required by RSA 9:13-d. *See also* RSA 9:16-a; RSA 14:30-a; RSA 124.

27. Plaintiffs request an order declaring that expenditures of unappropriated state or federal funds by Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch, without approval from the Fiscal Committee during the

remainder of the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b), violates RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, and RSA 124.

COUNT IV
Declaratory Judgment
Violations of Part I, Article 37, Part II, Article 41, and Part II, Article 56 of the New Hampshire Constitution

28. All factual allegations in this Complaint are incorporated here.

29. The State Constitution provides that the three branches of government should be “kept as separate from, and independent of, each other, as the nature of a free government will admit...” N.H.CONST. pt. I, art. 37. A “general delegation of power with uncontrolled discretion even in a narrow field exceeds constitutional limits.” *Smith Ins., Inc. v. Grievance Comm.*, 120 N.H. 856, 861 (1980). The legislative branch’s exclusive power to make appropriations is a nondelegable duty.

30. Governor Sununu has claimed he may unconditionally and unilaterally authorize the expenditures of state and federal funds unappropriated by the legislative branch during this state of emergency pursuant to RSA 4:45, III(e). The executive branch has already spent unappropriated funds under this purported emergency authority.

31. Plaintiffs request an order declaring that expenditures of unappropriated state or federal funds by Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch, without approval from the Fiscal Committee during the remainder of the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b), violates Part I, Article 37, Part II, Article 41, and Part II, Article 56 of the New Hampshire Constitution.

COUNT V
Expedited Preliminary Injunctive Relief

32. All factual allegations in this Complaint are incorporated herein.

33. As set forth in Plaintiffs' Memorandum of Law in support of their Motion for an Expedited Preliminary Injunction, the elements required for the issuance of a preliminary injunction are met here.

34. Plaintiffs seek an expedited order enjoining Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch from spending unappropriated state or federal funds without approval from the Joint Legislative Fiscal Committee during this state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b), pending the final resolution of this case.

REQUESTS FOR RELIEF

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

- A. An expedited order preliminarily and permanently enjoining Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch from spending unappropriated state or federal funds without approval from the Joint Legislative Fiscal Committee during this state of emergency, with the exception of the circumstances under RSA 21-P:53, II and RSA 4:45, III(b).
- B. An order compelling Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch to obtain approval from the Joint Legislative Fiscal Committee before spending any unappropriated state or federal funds during the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b).
- C. An expedited order declaring that expenditures of unappropriated state or federal funds by Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch, without approval from the Fiscal Committee during the remainder of the state of emergency, with the exception of the specific circumstances under RSA 21-P:53, II and RSA 4:45, III(b), violates RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, RSA 124, and Part I, Article 37, Part II, Article 41, and Part II, Article 56 of the New Hampshire Constitution.
- D. Such other relief as the Court deems just and proper.

Respectfully submitted,

SENATE PRSIDENT DONNA SOUCY
SENATOR LOU D'ALLESANDRO
SENATOR CINDY ROSENWALD
SENATOR JAY KAHN

By their attorneys,

SENATE LEGAL COUNSEL

Dated: May 1, 2020

By: /s/ Gregory L. Silverman
Gregory L. Silverman (NH Bar #265237)
107 N. Main Street
Concord, NH 03301
(603) 724-8089
greg.silverman@leg.state.nh.us

AND

STEPHEN SHURTLEFF, SPEAKER OF THE
HOUSE OF REPRESENTATIVES,
REPRESENTATIVE MARY JANE WALLNER
REPRESENTATIVE PETER LEISHMAN
REPRESENTATIVE SUSAN FORD

By their attorneys,

TWOMEY LAW OFFICE

Dated: May 1, 2020

By: /s/ Paul Twomey
Paul Twomey (NH Bar #2589)
P.O. Box 623
Epsom, NH 03234
(603) 568-3254
paultwomey@comcast.net

CERTIFICATE OF SERVICE

I certify that the foregoing was provided to the electronic service list for this docket.

Dated: May 1, 2020

By: /s/ Gregory L. Silverman
Gregory L. Silverman (NH Bar #265237)