STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
NOTHERN DISTRICT

Docket No.: 216-2020-CV-00342

Mary Jane Wallner, et al.

v.

Christopher Sununu

PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs, by and through counsel, respectfully move under Superior Court Rule 12(e) for reconsideration of the Court's April 22, 2020 Order dismissing Plaintiffs' Complaint.

I. Introduction.

Plaintiffs appreciate the Court's prioritization of this mater and expedited order on their request to preliminarily enjoin the Governor from spending money without a corresponding appropriation from the legislative branch. The "points of law or fact that the court has overlooked or misapprehended and [other] argument in support" set forth below is largely the result of a hurried period of less than two days between when the Governor first raised the issue of standing and the preliminary injunction hearing. This prompted a flurry of crossing filings which made an orderly and complete exposition of the issues virtually impossible. Further, critical guidance from the U.S. Treasury relating to the breadth of New Hampshire's authority to allocate and spend federal CARES Act aid was not issued until the day of the Court's Order.

Plaintiffs request reconsideration because they have standing to assert their claims. The Governor's actions have deprived Fiscal Committee members their statutory right to vote on appropriations and nullified their votes, causing personalized injuries. Plaintiffs Soucy and Shurtleff, as the lone constitutional officers of the legislative branch, may represent its

institutional interests during this pandemic. Also, a preliminary injunction should have been ordered to preserve the status quo of executive branch observance to RSA 9:13-d, RSA 9:16-a, and RSA 14:30-a. The Governor's expenditures in violation of the law have caused, and will cause further irreparable harm to the public interest, which strongly favors adherence to the rule of law, especially during times of crisis. Notwithstanding and alternatively, accompanying this motion is Plaintiff's Motion for an Expedited Declaratory Judgment.

II. Plaintiffs Each Maintain Standing to Allege a Personal, Concrete Harm in Their Capacity As Fiscal Committee Members.

A. Fiscal Committee members have been deprived of their statutory right to vote.

The Governor's unilateral control over how public funds are spent will cause a personal, concrete injury to the statutorily enumerated voting rights of Plaintiffs who are Fiscal Committee members.[1] The Governor's conduct already has and will continue to unlawfully deprive them of their right to provide advice and consent on how money in the state treasury should be appropriated for later expenditure by the executive branch. To establish standing outside of Part I, Article 8, a party must allege "it suffered or will suffer an injury in fact" directly affecting personal rights. *Appeal of N.H. Right to Life*, 166 N.H. 308, 314 (2014).

The Court recognized that an individual legislator suffers an injury in fact sufficient to maintain standing with: "(1) allegations that the legislator has been deprived of his or her right to vote or that his or her legislative votes have been nullified and (2) allegations that the legislator has been deprived of his or her constitutional right to advise and consent on executive appointments or other matters upon which a legislator has a right to act." *See* Order, at 7 (*citing Morrow v. Bentley*, 261 So. 3d 278, 288 (Ala. 2017)).

[1] This includes Plaintiffs Wallner, D'Allesandro, Soucy, and pursuant to Second Amended Complaint, Plaintiffs Rosenwald, Leishman, Ford, and Kahn.

It is undisputed that the Governor seeks to deprive Fiscal Committee members of their right to vote. Such deprivations have already occurred with the Department of Health and Human Services' (DHHS) transferring funds within its different accounting units contrary to their appropriations in the state budget.[2] He has pledged to deny Plaintiffs from voting on how federal aid should be allocated during this emergency. These deprivations are concrete harms to each Fiscal Committee member's statutory right to provide advice and consent on how taxpayer dollars should be appropriated. *See* RSA 9:13-a; 9:16-a; 14:30-a, IV; 124:4.

Courts have recognized these allegations are sufficient to constitute an injury-in-fact for individual legislators. For example, in *Turner v. Shumlin*, the Vermont Supreme Court granted standing to the lone litigating senator of the 30-member body based on his allegation that the governor's intention to appoint a justice without involving the senate would deprive him of his right to provide "advice and consent" on such a nominee. 163 A.3d 1173, 1180 (Vt. 2017); *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009) (six legislators had standing to allege the city improperly issued a license because the 253-member legislature had the sole authority to vote whether to grant the license); *Russell v. DeJongh*, 491 F.3d 130, 135 (3d Cir. 2007) ("depriving a legislator of an opportunity to vote [] is an injury in fact.") (collecting cases).[3]

B. Fiscal Committee members' votes have been nullified.

The DHHS recently transferred money into different accounting units for "cash flow" purposes related to COVID-19 expenditures pursuant to the Governor's Executive Order 2020-04. *See* Pls.' Second Am. Compl. ¶¶ 22, 23. At an April 20, 2020 meeting, Fiscal Committee

[2] *See* Pls.' Compl. ¶ 18 (Exh. E, Items 20-065, 67); *see also* Pls.' Stmt. of Undip. Facts, ¶12f, 12g (Exhs. 6E and 6F, which fully detail Items 20-065 and 20-067).

[3] *See also Dennis v. Luis*, 741 F.2d 628, 631 (3rd Cir.1984) (legislators had standing to allege the governor's unilateral executive appointment deprived them of their "unique statutory right to advise the Governor on executive appointments and to confer their approval")

members adopted a motion by a 7-3[4] vote to reverse those transfers and replenish the original legislative appropriation to the extent permitted by U.S. Treasury guidance on CARES Act aid. *Id.* at ¶ 24. The guidance does permit reimbursement for any COVID-19 expenditures sourced from these transferred funds. *Id.* at ¶ 25. But no action on the committee's action to reverse the transfers has been promised or yet occurred. This failure to act constitutes a nullification of Plaintiffs' votes, a concrete injury for which they have standing. *See, e.g., State ex rel. Ohio Gen. Assembly v. Brunner*, 872 N.E.2d 912, 919 (Ohio 2007) (senate president and speaker had standing to bring mandamus action against executive officials' refusal to treat a bill as validly enacted law "to prevent nullification of their individual votes").[5]

Legislators are injured in a manner that warrants standing when their votes have been nullified, or they are denied the opportunity to exercise power in the jobs they were elected to. We expect state legislators to promote the well-being of our state. Fiscal Committee members should be permitted to seek judicial relief from alleged illegal acts that prevent them from performing their duties with which they have been entrusted by the people of New Hampshire.

III. Plaintiffs Soucy and Shurtleff May Represent the Institutional Interests of the Legislative Branch During this Pandemic.

The Court has recognized that the Governor's alleged usurpation of the core legislative power of appropriation constitutes an injury to the legislature as an institution. *See* Order, at 8.[6] There is no dispute that the legislative branch has standing in this actual dispute which is capable of judicial redress. *See id.* at 5. The issue is whether Plaintiffs Soucy and Shurtleff, as the lone

[4] All Fiscal Committee members voting in favor are named Plaintiffs in the Second Amended Complaint. As a majority of the committee, these Plaintiffs also have standing to represent the committee's institutional injury.
[5] *See also McDermott v. Ige*, 349 P.3d 382, 394 (Haw. 2015) ("a legislator may indeed have standing to challenge a law if his or her vote was nullified or if he or she was unlawfully deprived of the right to vote").
[6] "This is an institutional injury…."

constitutional officers of the House and Senate, may represent the institutional interests of their respective chambers in state court during this public health epidemic.

One purpose of standing "is to protect against improper plaintiffs." *Appeal of Richards*, 134 N.H. 148, 154 (1991) (*also citing* 59 Am. Jur. 2d Parties § 30 ("State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.")); *see also Duncan*, 166 N.H. at 642 (the State "Constitution does not contain a provision similar to Article III") (*citing Wyman v. De Gregory*, 101 N.H. 171, 176 (1957) (nowhere "is the function of our Courts specifically limited to 'cases' and 'controversies.'")).

Plaintiffs Soucy and Shurtleff are elected by their fellow members to serve as the constitutional officers of their respective chambers. *See* N.H. CONST. Pt. II, Arts. 22 and 33. They sign all passed bills. RSA 14:9. No person may use the Senate or House chambers without their approval. RSA 14:14-a. They approve all legislative expenses when the legislature is not in session. RSA 14:27-b. They make all committee appointments and define employee duties. Senate Rules 4-6, 6-1;[7] House Rules 28, 59.[8]

The Court denied the Senate President and Speaker the ability to represent the legislative branch's institutional interests because no written rule authorizes it. *See* Order at 9. Plaintiffs continue to assert that any legislative procedure for these constitutional officers to institute a lawsuit on behalf of the institution is not justiciable. *See Hughes v. Speaker of the N.H. House of Reps.*, 152 N.H. 276, 284 (2005) ("The legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.").[9]

[7] Available at: http://gencourt.state.nh.us/Senate/about_Senate/senate_rules.pdf
[8] Available at: http://gencourt.state.nh.us/house/abouthouse/houserules.htm
[9] *See also Brown v. Lamprey*, 106 N.H. 121, 124 (1965) (separation of powers concerns required judiciary to defer to the State Senate in its decisions concerning whom to seat in cases of election contests or disputes); *cf. State v.*

But even assuming it was justiciable, there is a legislative rule. House Rule 64 states:

> Sources of Authority. The procedures of the New Hampshire House shall be derived from the following sources in the order of precedence listed:
> (a) Constitutional provisions
> (b) Rules of the New Hampshire House
> **(c) Custom, usage and precedent**
> (d) Adopted parliamentary manual (Mason's Manual of Legislative Procedure)
> (e) Statutory provisions.

(Emphasis added.) Past practice includes a history where the constitutional officers of both chambers have appeared as plaintiffs to assert the interests of their bodies. *See Monier v. Gallen*, 120 N.H. 333, 334 (1980) (plaintiffs brought claims "in their capacity as president of the senate, speaker of the house, chairman and vice-chairman of the legislative fiscal committee"); *O'Neil v. Thomson*, 114 N.H. 155, 157 (1974) ("in their capacity as president and vice president of the senate and as speaker and deputy speaker of the house").

In addition to ensuring proper plaintiffs, the doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *O'Brien v. N.H. Democratic Party*, 166 N.H. 138, 144 (2014) (*citing Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). But judicial restraint for separation of powers purposes is inconsistent with the doctrine here. Convening the full 424-member legislature currently violates public health protocols. Not acknowledging the past practice of the legislature's constitutional officers representing its institutional interests in court would effectively immunize one branch from accountability after usurping the core power of another branch during these unprecedented times. Part I, Article 37 demands "amity" between the three coequal, mutually reliant branches of government to permit the legislature standing in its attempt to defend its primary function of appropriation.

LaFrance, 124 N.H. 171, 182 (1983) (statute denying judge his or her inherit authority to limit the wearing of firearms in the courtroom violated the separation of powers clause, which "compels limits to encroachments by one branch into the inherent and internal affairs of another branch.").

For "more than half a century pleading and procedure in this jurisdiction has been a means to an end and it should never become more important than the purpose which it seeks to accomplish." *Grinnell*, 121 N.H. at 825; *see also King v. Thomson*, 116 N.H. 838, 839 (1976) ("The superior court is a court of general jurisdiction, which includes suits in equity involving actions against State officials who are allegedly acting beyond their constitutional authority."); 59 Am. Jur. 2d Parties § 29 (standing in state courts "should be construed liberally. It is not a rigid or dogmatic rule but is one that must be applied with some view to realities, as well as practicalities."). A core difference exists between our state courts of general jurisdiction, which operate with a presumption of greater openness, and federal courts of limited jurisdiction.

Denying the Legislature's lone constitutional officers the ability to assert the rights of the institution they represent now would practically deny this coequal branch relief for an alleged violation of its core powers. Plaintiffs Soucy and Shurtleff have standing as the proper plaintiffs to represent the institutional interests of the Legislature.

IV. Plaintiffs Maintain Standing Under Part I, Article 8.

A. The people of New Hampshire chose to adopt a broad interpretation of taxpayer standing under an older line of cases.

i. *Baer* and *Duncan* rejected long-standing New Hampshire decisional law conferring taxpayer standing without having to prove a concrete injury.

In *Baer v. N.H. Dept. of Educ.*, the Supreme Court recognized that "case law contain[ed] two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action." 160 N.H. 727, 730 (2010). Under an older line of cases, the court had permitted all "taxpayers to maintain an equity action seeking redress for the unlawful acts of their public officials." *Id.* (*citing Green v. Shaw*, 114 N.H. 289, 291–92 (1974)). This general standing was recognized because every taxpayer had "a right to the preservation of an orderly and lawful

government regardless of whether his purse is immediately touched." *Id*. (*citing, e.g., Grinnell v. State*, 121 N.H. 823, 825 (1981)).

The second, more recent line of cases, required taxpayers to demonstrate that their personal rights were prejudiced. *Id*. The *Baer* Court ultimately reasoned that the second, more recent, line of cases was more consistent with the then-language of RSA 491:22. *Id.* It held that taxpayer status alone, without a concrete injury, could not confer standing under RSA 491:22. *Id*.

ii. Broad taxpayer standing was constitutionally restored in 2018.

In response to the *Baer* decision, the legislature amended RSA 491:22 with the intent "to restore taxpayer standing as it had been interpreted in the older line of cases." *Duncan v. State*, 166 N.H. 630, 638 (2014). The *Duncan* Court ultimately struck down this amendment to RSA 491:22 as violating the Constitution's prohibition of providing advisory opinions. *Id.* at 639. In response, the people of New Hampshire amended Part 1, Article 8 with the intent to overturn *Duncan* and endorse what "the New Hampshire Supreme Court noted several decades ago, every taxpayer has a vital interest in proper government, regardless of whether his or her purse is specifically affected." *See* N.H. House Cal., Vol. 40, No. 9, at 43 (Mar. 2, 2018).[10]

This amendment to Part I, Article 8 effectively resurrected the validity of the "older line of cases" on taxpayer standing. Under this decisional law, a taxpayer need not articulate how state spending in violation of the law will cause them or others harm. *See* Order at 12. The allegation that public funds are being spent illegally is sufficient, by itself, to show an injury for possible judicial redress. *See Green*, 114 N.H. at 292-93 (taxpayers had right to bring action alleging that city officials "expended public funds without authority" because it "is the policy of the law to subject all persons acting in a trust capacity to the control of the court."); *see also*

[10] Available at: http://www.gencourt.state.nh.us/house/caljourns/calendars/2018/HC_9.pdf.

Grinnell, 121 N.H. at 825 (RSA 491:22 had "long been construed to permit challenges to the constitutionality of actions by our government or its branches").

The Court's interpretation of the 2018 amendment to Part I, Article 8 would improperly reduce the actions of an overwhelming majority of the legislators and over 80 percent of New Hampshire voters who chose to confer broad taxpayer standing to challenge illegal state action and annul the holding in *Duncan*. The Supreme Court that issued the *Duncan* decision fully appreciated the breadth of the 2018 amendment, as it sent its legal counsel to the House Judiciary hearings to inform the legislators that passage of the amendment would result in "unlimited and unbridled judicial review."[11] This Court's parsimonious reading of the amendment is inconsistent with the views of the authors of the *Duncan* decision that was annulled by the people.

B. Taxpayers have standing to assert the government is spending federal funds in violation of the state law.

i. The New Hampshire Constitution and decisional law provide taxpayer standing to claim illegal state expenditures of federal funds.

Part I, Article 8 now provides for taxpayer standing to enforce the right to an "orderly, lawful, and accountable government" with no need "to demonstrate that his or her personal rights were impaired or prejudice beyond his or her status as a taxpayer." This substantive right is far broader than that recognized in the out-of-state cases which deny taxpayer standing on state expenditures of federal funds. *See* Order at 11. These cases relied solely on their state's judicial precedent to conclude that standing was inextricably linked with harm an individual who paid state taxes would suffer.[12]

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[11] *See* legislative history on CACR 15 (2018), available at: http://gencourt.state.nh.us/SofS_Archives/2018/house/CACR15H.pdf, at 12.

[12] *See Broxton v. Siegelman*, 861 So. 2d 376, 385 (Ala. 2003) ("As we view the holdings of our cases, it is this liability to replenish the public treasury through the payment of taxes that gives a plaintiff in a taxpayer's action standing."); *Hotaling v. Hickenlooper*, 275 P.3d 723, 726 (Colo. App. 2011) (the injury allowing standing "occurred by virtue of an expenditure of funds to which the taxpayers had contributed").

Unlike in Alabama or Colorado, New Hampshire decisional law soundly rejects any distinction between government spending of state or federal revenues. In *Monier v. Gallen*, the court ruled that the governor's creation of "federally funded positions" in his office without "legislative fiscal committee approval" was illegal. 120 N.H. 333, 334 (1980). The court reasoned that without the legislature's consent, the "executive branch in the name of supreme executive power would not be faithfully executing the laws of this [state] but rather, as it saw fit, seeking and administering Federal aid programs free of any check or balances and with little political accountability for such actions." *Id.* (emphasis added). Similarly, in *Opinion of the Justices* the court ruled that the Fiscal Committee "has the authority to direct the manner in which federal funds available to the State for health planning and development are to be expended in this State." 118 N.H. 7, 15 (1978). It reasoned that Part II, Article 56 provides that "monies coming into the treasury shall not be disbursed by Governor and Council except as agreeably to the acts and resolves of the general court." *Id*. (emphasis added).

Further, the text of Part I, Article 8 makes no such distinction between state or federal funds deposited into the state treasury. They are plainly "public funds." It is unworkable to continually distinguish whether a state or a municipality's illegal expenditures drew from local, state, or federal revenues. For example, federal funds constituted about one-third of total revenues the legislature appropriated in the current budget. *See* HB 3, Session Year 2019, at 708. Whether the Governor "has spent, or has approved spending [of] public funds in violation of a law, ordinance, or constitutional provision" includes the expenditure of federal aid.

ii. New Hampshire law requires that federal funds may only be spent after appropriations are approved by the Fiscal Committee.

A lawful government is one that adheres to RSA 124. Along with RSA 14:30-a, it also provides that federal funds may be spent only with the prior approval of the Fiscal Committee.

RSA 124:1, entitled "Authority for Seeking Aid," states in relevant part that: "The governor, with the approval of the council, is authorized to apply for financial or any other aid which the United States government has authorized or may authorize to be given to the several states for emergency industrial or unemployment relief…or for any other purpose intended to relieve distress." (emphasis added). Once federal funds are deposited into the state treasury, they may be spent only as appropriated by the Fiscal Committee:

> the governor and council are hereby authorized to designate from time to time… the proper persons or agencies in the state government to take all necessary action to apply for, receive, and administer any federal benefits, facilities, grants-in-aid, or other federal appropriations or services made available to assist state activities, for which the state is, or may become eligible. All such moneys in excess of $50,000 made available, after designation by the governor and council, may be expended by the proper persons or agencies in the state government only with the prior approval of the joint legislative fiscal committee.

RSA 124:4 (emphasis added).[13] RSA 124 dovetails with RSA 14:30-a to require Fiscal Committee approval before any federal aid is spent by the executive branch. During a civil emergency, like the one occurring now which "require[s] immediate action to remedy the situation," RSA 9:13-d reaffirms this core legislative function. These statutes must be followed if the state's CARES Act federal aid is to be lawfully distributed.

iii. Even assuming individual harm must be shown, decisions on CARES Act appropriations will affect all state residents.

Part I, Article 8 places no burden on taxpayers to demonstrate personal harm to maintain standing alleging illegal government spending. *See* Order, at 12-13. But even assuming it did, decisions about how CARES Act funds are allocated will affect New Hampshire's taxpayers.

[13] Upon information and belief, the State Treasurer or her agent communicated with the U.S. Treasury to receive deposits of CARES Act funds in the state treasury. *See* Pls.' Second Am. Compl., ¶ 25.

Only after the preliminary injunction hearing did the U.S. Treasury issue guidance giving states wide latitude to choose how these dollars may be spent.[14] This includes a wide range of "nonexclusive examples," within the broad categories of public health measures, education costs, salaries, general economic support, and "any other COVID-19-related expenses reasonably necessary to the function of government that satisfy the Fund's eligibility criteria." States may also choose to transfer funds to local governments.[15] Each of these permitted categories presents an occasion for classic legislative appropriation decision making. The state must decide how much money each category will receive, and within each category how much will be directed to any of hundreds of potential recipients, including municipalities, educational entities, non-profits, and businesses. Our Constitution and statutes entrust such evaluations to a majority of diverse legislators, who together delegate appropriations in any degree of detail they so choose.

The Inspector General's remote possibility of recouping expenditures further enhances the standing of taxpayers. The Court distinguished the oversight of CARES Act funds with those of *Taylor v. Town of Cabot*, 178 A.3d 313 (Vt. 2017). But in *Taylor* permissible uses of federal funds, "consistent with applicable HUD guidelines and the federal Housing and Community Development (HCD) Act of 1974" had far more restrictive limitations than those recently released for CARES Act funds.[16] Any possible recoupment for CARES Act aid is restricted to an unreasonable exercise of discretion standard: "The statute also specifies that expenditures using Fund payments must be 'necessary.' The U.S. Treasury understands this term broadly to mean

[14] U.S. Treasury Dept., *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.
[15] U.S. Treasury Dept., *Coronavirus Relief Fund Frequently Asked Questions* (April 22, 2020), available at: https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf.
[16] Compare the virtually limitless range of possible uses in the *Coronavirus Relief Fund Guidance*, *supra* note 14, with the nine specific uses for the funds in *Taylor*, all related to housing and community development. *See* https://www.hud.gov/sites/documents/CDBG_HCD_CAT_1974.pdf, at 2-3.

that the expenditure is reasonably necessary for its intended use in the reasonable judgment of the government officials responsible for spending Fund payments." (emphasis added).[17]

If the state is forced to repay CARES Act funds, any restitution will be from purely state revenues raised by taxes. To the extent that federal funds are properly spent, they will largely fill a gap that would otherwise have to be met with money raised through state and local taxes. CARES Act funds are now subject to virtually limitless state control, with minimum functional oversight, and replace money that would otherwise need to be raised from state taxpayers.

Plaintiffs have standing to allege illegal state expenditures of federal money. State law requires that final decisions about allocations of federal aid among competing interests must be made by the legislature, not a governor. *Compare* RSA 14:30, VI and RSA 124:4 *with* Executive Order 2020-06, at 6 ¶7(d).[18] Allowing the Governor sole discretion to distribute CARES Act funds will undoubtedly affect New Hampshire taxpayers in some aspect. Denying them standing to ensure that public officials spend federal dollars in conformity with state law would deny their constitutional right to an "orderly, lawful, and accountable government."

V. The Court Erred in its Evaluation of the Merits of a Preliminary Injunction.

A. Part I, Article 8 in no way precludes a court from exercising its equitable powers to preliminarily enjoin illegal public spending.

The "older line of cases" rejected by the *Duncan* Court, then conversely affirmed by the 2018 amendment, allow taxpayers to obtain preliminary injunctive relief to prevent the illegal spending of public funds. Taxpayers' "right to the preservation of an orderly and lawful government at the municipal level has been recognized as one which they may protect by

[17] *See Coronavirus Relief Fund Guidance*, *supra* note 14, at 1. This unreasonable exercise of discretion standard lies in stark contrast to the scores of firm, non-discretionary conditions that had to be met in *Tylor*, and the multiple powers invested in the HUD Secretary to ensure compliance. *See supra*, note 16.
[18] This was released the day after Plaintiffs filed their Complaint. *See* Pls.' Stmt. of Undip. Facts, ¶15 (Exh. 9).

injunctive relief….No good reason appears why taxpayers should not possess a like right as to acts of public officers at the state level." *N.H. Wholesale Beverage Ass'n v. N.H. State Liquor Comm'n*, 100 N.H. 5, 6 (1955)[19] (emphasis added) (*citing Conway v. N.H. Water Res. Bd.*, 89 N.H. 346 (1938) (a taxpayers' right to injunctive relief extends "to state appropriations and expenditures," because "What is forbidden by the Constitution is outside the field of state activity; restraint of forbidden action is not imposed by the courts upon the state, but upon those asserting the right to take the action as though it were the state's"); *Claremont School Dist. v. Governor*, 144 N.H. 590, 593 (1999) (the claim that funding of "public education was unconstitutional" allowed equitable relief, the purpose of which is to "secure complete justice, and courts are able to adjust the remedies so as to grant the necessary relief.").

Part I, Article 8 includes no limit on what remedies may be available to enforce one's right to an "orderly, lawful, and accountable government." Restricting relief to a declaratory judgment only would allow the public interest to suffer irreparable harm flowing from illegal expenditures of public funds, effectively allowing an ongoing violation of each taxpayer's constitutional right to a lawful and accountable government. This would be inconsistent to the Court's inherent equitable powers "to shape and adjust the precise relief to the requirements of the particular situation." *See Claremont School Dist.*, 144 N.H. at 594. Part I, Article 8 in no way precludes enjoining a public official from illegal conduct over taxpayer dollars.

B. A preliminary injunction would preserve the status quo as unambiguously set forth in RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, and RSA 124.

"A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). New Hampshire law consistently and unequivocally requires that the executive branch may

[19] Cited favorably by *Green*, 114 N.H. at 291.

spend money in the state treasury, regardless of its source, that the legislature has yet to allocate only after an appropriation by the Fiscal Committee. *See* RSA 9:16-a, RSA 14:30-a, and RSA 124. It reaffirmed this prerequisite during civil emergencies. RSA 9:13-d. No state official may use public funds "for any other purpose than that for which they were appropriated." RSA 9:19.

Past governors of both parties have followed these statutory mandates during civil emergencies.[20] Governor Sununu is the first to authorize the expenditures of taxpayer dollars without a corresponding appropriation from the legislative branch in the name of an "emergency." But even though CARES Act funds have been deposited into the state treasury, the executive branch's actions are inconsistent with their argument that there is no time to seek Fiscal Committee consent: the "hope [is to] begin discussions on specific recommendations [during the week of May 4] and begin distributing [CARES Act] money in May."[21] Voting on those appropriation recommendations is the quintessential role of the Fiscal Committee. To preserve the status quo, the Governor's unprecedented conduct must stop.

C. Plaintiffs and the public interest will suffer irreparable harm if the Governor does not adhere to the rule of law.

The choices of how New Hampshire spends its CARES Act aid will affect every citizen in the state, as set forth above. Not only will no harm be done to the public interest by maintaining the status quo, it will be well-served through vindication of the rule of law during this public health emergency. A preliminary injunction furthers the public interest by "preserving the trust in the rule of law" because "[i]n a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." *Wal-Mart Stores, Inc. v. Rodriguez*, 238

[20] *See* Pls.' Stmt. of Undisp. Facts, ¶¶ 16, 17.
[21] Garry Rayno, *N.H. Executive Councilors seek details from Sununu on COVID-19 spending*, Nashua Telegraph (Apr. 29, 2020), available at: https://www.nashuatelegraph.com/news/coronavirus/2020/04/29/n-h-executive-councilors-seek-details-from-sununu-on-covid-19-spending/.

F. Supp. 2d 395, 421 (D.P.R. 2002) (*citing Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)); *see also Star Fuel Marts, LLC. v. Murphy Oil USA, Inc*., No.CIV-02-202-F, 2003 WL 742191, at *14 (W.D. Okla. Jan. 29, 2003) (a preliminary injunction "will not be adverse to the public interest. To the contrary…the Oklahoma legislature, by enacting the Unfair Sales Act, has *defined* the only relevant public interest.") (emphasis in original).[22]

VI. Conclusion.

Our state's seasoned budget writers and members of the Fiscal Committee have been deprived of their statutory right to vote on how monies in the state treasury should be appropriated for the executive branch to spend. Not only have they each suffered a personal injury, the institutional power of their committee has been harmed. So has the entire legislative branch, for which the Senate President and Speaker, duly elected by their respective bodies, are uniquely positioned to represent. In any event, each Plaintiff has standing as taxpayers to enforce their constitutional right to an accountable and lawful government, and enjoin the illegal expenditure of public funds. Taxpayer dollars which have already been spent in violation of the law cannot be recovered. The public interest is best served by observance of the law, especially in this public health emergency.

[22] *See also City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *4-5 (N.D. Ill., Oct. 13, 2017) ("The rule of law is undermined where a court holds that the Attorney General is likely engaging in legally unauthorized conduct, but nevertheless allows that conduct in other jurisdictions across the country."); *Kinney v. Cook Cty. Sch. Bus, Inc*., No. 00 C 2042, 2000 WL 748121, at *11 (N.D. Ill. June 1, 2000) ("An injunction is in the public interest when the provisions of the Act are enforced."); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994) ("it is always in the public interest to prevent the violation of a party's Constitutional rights."); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 735 F. Supp. 753, 760 (M.D. Tenn. 1990) ("The public interest lies in enjoining [defendants'] defiance of the rule of law."); *Ramos v. Lamm*, 485 F. Supp. 122, 179 (D. Col. 1980) (the "public interest is best served by dedicated observance to the rule of law on the part of government as well as individuals.").

REQUESTS FOR RELIEF

Plaintiffs respectfully request that the Court reconsider its April 22, 2020 Order and:

A. Grant Plaintiffs' Assented-to Motion for Leave to exceed the 10-page limit in Rule 12(e);

B. Rule that all Plaintiffs maintain standing to seek the full relief requested under Counts I-V of the Complaint, specifically that:

   i. Plaintiffs Wallner, D'Alessandro, and Soucy[23] maintain standing in their capacity as elected officials and members of the Fiscal Committee;

   ii. Plaintiffs Soucy and Shurtleff maintain standing in their capacity as constitutional officers of the Senate and House of Representatives to represent the institutional interests of the Legislature;

   iii. Each Plaintiff maintains standing as taxpayers under Part I, Article 8 of the New Hampshire Constitution;

C. Grant Plaintiffs' Motion for a Preliminary Injunction;

D. Deny Defendant's Motion to Dismiss; and

E. Such other relief as the Court deems just and proper.

[23] And Cindy Rosenwald, Jay Kahn, Peter Leishman, and Susan Ford, pursuant to Plaintiffs' proposed Second Am. Compl.

Respectfully submitted,

SENATE PRSIDENT DONNA SOUCY
SENATOR LOU D'ALLESANDRO[24]

By their attorneys,

SENATE LEGAL COUNSEL

Dated: May 1, 2020

By: */s/ Gregory L. Silverman*
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AND

STEPHEN SHURTLEFF, SPEAKER OF THE HOUSE OF REPRESENTATIVES,
REPRESENTATIVE MARY JANE WALLNER[25]

By their attorneys,

TWOMEY LAW OFFICE

Dated: May 1, 2020

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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)

[24] And Senators Cindy Rosenwald and Jay Kahn, pursuant to Plaintiffs' proposed Second Am. Compl.
[25] And Representatives Peter Leishman and Susan Ford, pursuant to Plaintiffs' proposed Second Am. Compl.