

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY  
NORTHERN DISTRICT

SUPERIOR COURT

Docket No.: \_\_\_\_\_

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

v.

Christopher Sununu, Governor of the State of New Hampshire

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

Plaintiffs, Joint Legislative Fiscal Committee Chair Representative Mary Jane Wallner,  
Fiscal Committee Vice Chair Senator Lou D'Allesandro, Speaker of the House of  
Representatives Stephen Shurtleff, and Senate President Donna Soucy, by and through counsel,  
bring this 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 set to arrive in late April – without the oversight of 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 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 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 serves as a Representative for Merrimack - District 11, and is Speaker of the House of Representatives.
4. Donna Soucy serves as the State Senator for District 18, and is President of the Senate.
5. Christopher Sununu serves as Governor of the State of New Hampshire

## **JURISDICTION AND VENUE**

6. 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.
7. This Court has personal jurisdiction over Christopher Sununu in his official capacity as Governor of the state of New Hampshire. RSA 510:2.
8. 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.**

9. 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.

10. 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.

11. 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)

12. 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.*

13. \$1.25 billion is about 10% of the state’s \$12.9 billion budget. *See* House Bill 4-FN-A-L, Session Year 2019.

14. 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).

15. 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.”<sup>1</sup> “[T]o ask

---

<sup>1</sup> 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>.

the Fiscal Committee to meet in open session is not possible. It is not feasible and it is not going to happen."<sup>2</sup> (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.**

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

17. 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).

18. DHHS also informed the Fiscal Committee that it had reallocated \$18 million without seeking its consent pursuant to the Governor's assumed emergency powers under RSA 4:45. *See id.* ¶ 5 (Exh. E, Items 20-065, 67).

19. The Fiscal Committee's is scheduled to meet next week on April 20, 2020. *See id.* ¶ 7.

20. New Hampshire is expected to begin receiving about \$1.25 billion in federal funds from the CARES Act at the end of April. *See id.* ¶ 8.

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

---

<sup>2</sup> 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/>.

22. Later that same day, after hearing that the Fiscal Committee had just approved DHHS' request to spend federal funds designed for the coronavirus, Governor Sununu reiterated his intention to ignore the Fiscal Committee when spending unappropriated funds during this emergency.<sup>3</sup>

23. 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.

## **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

---

<sup>3</sup> NH Homeland Security and Emergency Management Facebook Page, <https://www.facebook.com/NH.HSEM/videos/2682548192017368/>, at 16:00 to 18:30.

in the budget, including during an emergency as required by RSA 9:13-d. *See also* RSA 9:16-a; 14:30-a.

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 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; 14:30-a.

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, and 14:30-a**

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; 14:30-a.

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, and RSA 14:30-a.

**COUNT IV**  
**Declaratory Judgment**  
**Violation of Part I, Article 37 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 the separation of powers clause.

**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 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 Part I, Article 37 of the New Hampshire Constitution.
- D. Such other relief as the Court deems just and proper.

Respectfully submitted,

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

By their attorneys,

SENATE LEGAL COUNSEL

Dated: April 13, 2020

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