

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Case No. 217-2020-CV-00152

David Binford, et al.

v.

Christopher T. Sununu, Governor

**OBJECTION TO “EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION”**

PRELIMINARY STATEMENT

This Court can, and should, take judicial notice of the fact that the Novel Coronavirus (COVID-19) outbreak has been declared a global pandemic by the World Health Organization, has been declared a national emergency by the President of the United States, has caused the Governor to declare a state of emergency, and has caused the New Hampshire Supreme Court to exercise its emergency powers under RSA 490:6-a. Its rapid spread is overwhelming public health systems in other countries and killing significant numbers of people. The plaintiffs’ assertion that COVID-19 does not present an emergency as a matter of law because no one in New Hampshire has died from it yet is irresponsible, unsubstantiated, and should be rejected as objectively baseless.

The plaintiffs’ actual claims in this case are also equally meritless. The Governor has broad power during emergencies to take critical steps to protect the public under RSA 4:45 and RSA 4:47. The exercise of these powers does not arise under RSA Chapter 141-C, as the plaintiffs appear to allege, and none of the provisions of RSA Chapter 141-C therefore apply to

this case. Executive Order 2020-04 plainly cites to RSA 4:45 and RSA 4:47 and those statutes permit the Governor to act in the decisive manner he has chosen. Emergency Order #2 arises under Executive Order 2020-04. These emergency orders are enforceable by law enforcement, including under RSA 21-P:47 and RSA 644:2. The notion that the Governor lacks the authority to issue these executive orders under these statutes is not credible.

The plaintiffs' constitutional claims are likewise without merit. An executive's decision to exercise emergency powers in the face of a rapidly evolving public health crisis is entitled to considerable deference. A court should only interfere with the exercise of those powers when the executive's actions were not taken in good faith or if there is no factual basis for the executive to believe that a restriction he imposed was necessary. The Governor's actions at issue in this case, including the restrictions imposed in Emergency Order #2, were clearly taken in good faith and supported by the factual realities of the COVID-19 pandemic, and this Court should accordingly afford them broad deference.

Yet even if such deference were not warranted, the plaintiffs' constitutional challenges fail as a matter of law. The plaintiffs' freedom of assembly challenge under Part I, Article 32 of the New Hampshire Constitution and the First Amendment to the United States Constitution fails because Emergency Order #2 is content neutral, narrowly tailored to serve a significant governmental interest, and allows for other opportunities for expression. The plaintiffs' freedom of religion claim fails because Emergency Order #2 is neutral and of general applicability and is therefore not subject to heightened scrutiny under the First Amendment or Part I, Article 5. The plaintiffs' remaining arguments are conclusory and undeveloped and accordingly cannot demonstrate a likelihood of success on the merits.

Because the plaintiffs cannot prevail on their constitutional claims as a matter of law, they cannot show immediate irreparable harm. Additionally, the public interest tips decidedly in the Governor's favor, as the plaintiffs offer no argument as to why risking the life, health, and safety of every individual in the State so they can attend an in-person gathering of more than 50 people within the next 21 days offsets or otherwise overrides the significant public interest in combatting the unmitigated spread of COVID-19. For these reasons, too, the plaintiffs are not entitled to preliminary injunctive relief.

STANDARD OF REVIEW

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

The plaintiffs do not request preliminary injunctive relief to preserve the status quo. Rather, they seek *mandatory* preliminary injunctive relief to alter the status quo. A mandatory preliminary injunction “requires affirmative action by the non-moving party in advance of trial.” *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36, 41 (1st Cir. 2010). “Because a mandatory preliminary injunction alters rather than preserves the status quo, it ‘normally should be granted only in those circumstances when the exigencies of the situation demand such

relief.” *Id.* (quoting *Mass. Coal. of Citizens with Disabilities v. Civil Def. Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981)). The plaintiffs have made no attempt to meet this heavy burden and their complaint/motion reveals no exigencies that demand the issuance of *mandatory* preliminary injunctive relief.

BACKGROUND

On March 11, 2020, the World Health Organization (“WHO”) declared COVID-19 a pandemic. *See* World Health Organization, WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020, *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited: March 19, 2020). At that time, WHO reported that there were “more than 118,000 cases in 114 countries, and 4,291 people have lost their lives. Thousands more are fighting for their lives in hospitals.” *Id.* The WHO expressed its expectation in the weeks ahead that “the number of cases, the number of deaths, and the number of affected countries” will climb higher and related that it was “deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction.” *Id.* The WHO “therefore made the assessment that COVID-19 can be characterized as a pandemic.” *Id.*

On March 12, 2020, the United States District Court for the District of New Hampshire issued an administrative order addressing “Court Operations Under The Exigent Circumstances Created By COVID-19.” United States District Court for the District of New Hampshire, Orders, Standing Orders, *available at* <http://www.nhd.uscourts.gov/pdf/ADM%201%2020-3.pdf> (last visited: March 19, 2020). The order was issued “in response to the recent outbreak of Coronavirus Disease 2019 (COVID-19).” *Id.* Among other things, the order continued all “civil

and criminal jury trials scheduled to begin before May 1, 2020” “in order to protect the public health, and in order to reduce the size of public gatherings and unnecessary travel.” *Id.*

On March 13, 2020, the President of the United States issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. *See* Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited: March 19, 2020). The proclamation states that “[t]he spread of COVID-19 within our Nation’s communities threatens to strain our Nation’s healthcare systems” and “[a]s of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19.” *Id.*

On March 13, 2020, New Hampshire Governor Christopher T. Sununu issued Executive Order 2020-04, “[a]n order declaring a state of emergency due to Novel Coronavirus (COVID-19).” **Exhibit A** at 1. Executive Order 2020-04 sets forth seventeen (17) recitals of fact detailing: (a) those threats to health and life posed by “an outbreak of respiratory illness due to a novel coronavirus (a disease now known as COVID-19) [that] has impacted more than 117 countries, including the United States[.]”; and (b) the consequences of doing nothing. *Id.* at 1-3. The Executive Order states that the “conditions of ... RSA 4:45, relating to the declaration of a State of Emergency, have been met[.]” *id.* at 3, and that, with the broad powers enumerated above, Governor Sununu is directing, among other things,

- that agencies of state government mobilize for the COVID-19 response, as directed by the Governor’s Office, the Division of Homeland Security and Emergency Management and the Division of Public Health, including “the repurposing of state employees for tasks necessary to address the impacts of COVID-19[.]”

- that “residents and visitors ... heed the advice of health and emergency officials...[,]”
- that visitor access to “facilities providing residential care to elderly or infirm patients ... [be] prohibit[ed],”
- that state-owned properties deemed suitable to address the COVID-19 outbreak “be made available to the Division of Public Health and/or the Division of Homeland Security and Emergency Management ..., notwithstanding any state or local law that would restrict, delay or otherwise inhibit such use[,]”
- that “non-essential out-of-state travel by State and municipal employees for official business [be] suspended[,]” and
- that “school sponsored out-of-state travel for students and teachers in New Hampshire public schools [be] suspended.”

Id. at 4-5.

Under RSA 4:45, I, which incorporates into it RSA 21-P:35, VIII by reference, a “state of emergency” is defined as “that condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm.” RSA 21-P:35, VIII. The governor is empowered, via executive order, to “to declare a state of emergency ... if [he] finds that the safety and welfare of the inhabitants of this state require an invocation” thereof. RSA 4:45, I. Upon such a declaration, the governor may “exercise such ... powers ... as are necessary to promote and secure the safety and protection of the civilian population,” RSA 4:45, III(e), and is vested with “[t]he power to make ... necessary orders, rules and regulations to carry out” such “emergency management” measures as are aimed at, among other things, “minimiz[ing] ...loss of life....” RSA 4:47, III; RSA 21-P:35, V.

“If the governor [should] find[] that maintaining the state of emergency is no longer justified,” he may terminate it by executive order. RSA 4:45, II(b). Further, “[t]he legislature

may terminate a state of emergency by concurrent resolution adopted by a majority vote of each chamber.” RSA 4:45, II(c). “A state of emergency ... terminate[s] automatically 21 days after its declaration unless [the governor] renew[s]” it via the very same procedure specified for its initial issuance.

Paragraph 18 of Executive Order 2020-04 states that “additional temporary orders, directives, rules, and regulations may be issued either by the Governor or by designated state officials with the written approval of the Governor.” **Exhibit A** at 6. Thus, on March 16, 2020, Governor Sununu issued “Emergency Order #1 Pursuant to Executive Order 2020-04,” styled as “[t]emporary remote instruction and support for public K-12 school districts,” which directed that schools undertake “remote instruction and support for the three week period beginning Monday, March 16, 2020 and ending Friday, April 3, 2020.” Emergency Order #1 Pursuant to Executive Order 2020-04, Temporary remote instruction and support for public K-12 school districts, *available at* <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-1.pdf>. “Emergency Order #2 Pursuant to Executive Order 2020-04,” styled as “[t]emporary prohibition on scheduled gatherings of 50 or more attendees and onsite food and beverage consumption,” issued the same day and is the subject of this lawsuit.

Exhibit B.

Emergency Order #2 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 pickup, 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.

Id.

On March 15, 2020, the United States District Court for the District of New Hampshire issued a further administrative order addressing “Court Operations Under The Exigent Circumstances Created By COVID-19.” United States District Court for the District of New Hampshire, Orders, Standing Orders, *available at* <http://www.nhd.uscourts.gov/pdf/ADM%201%2020-4.pdf> (last visited: March 19, 2020). That administrative court order found that: “The World Health Organization and the Centers for Disease Control and Prevention (CDC) have officially declared COVID-19 to be a pandemic. In response to the spread of COVID-19, President Trump declared a national emergency, and Governor Sununu declared a state of emergency.” *Id.* This court order took stronger steps to protect the public health, including closing the courthouse for a week. *Id.*

On March 16, 2020, the New Hampshire Supreme Court issued an “Order Suspending In-Person Court Proceedings.” State of New Hampshire, Supreme Court of New Hampshire, Order Suspending In-Person Court Proceedings, *available at* <https://www.courts.state.nh.us/supreme/orders/3-16-20-order.pdf> (last visited: March 19, 2020). That order recognized COVID-19 as a

pandemic and, following the Governor's March 13, 2020 declaration of a State of Emergency under RSA 4:45, invoked the judicial branch's emergency powers pursuant to RSA 490:6-a to enter appropriate emergency relief. On that same day, both the CDC and the White House issued guidance recommending that for the following 15 days, all United States events of 10 or more people be cancelled or held virtually. *See* Resources for Large Community Events & Mass Gatherings, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html> (last visited: March 19, 2020); 15 Days to Slow the Spread, The President's Coronavirus Guidelines for America, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited: March 19, 2020).

On March 17, 2020, Plaintiffs David Binford, Holly Beene and Eric Couture commenced this lawsuit, asserting, in the first instance, that the Governor "lacks authority" for Emergency Order #2 and, presumably, for the enabling State of Emergency declaration #2020-04 (to which no reference is made in the plaintiffs' complaint/motion), because:

- ¶30. "[w]hen ZERO people have died [thus far in New Hampshire] and only 17 people have been diagnosed, there is no 'emergency' as a matter of law[,]"
- ¶33. "RSA 4:45 does not grant the authority that the governor is presumably relying on[,]" and
- ¶34. "RSA 4:45 sets out numerous requirements and limits on a state of emergency [that] the governor's present order fails to meet...."

The plaintiffs' complaint/motion is noteworthy for the absence of *any* explanation, creditable or otherwise, for these bald, baseless assertions.

The Centers for Disease Control and Prevention ("CDC") report that "[t]he United States nationally is currently in the initiation phase [of COVID-19], but states where community spread is occurring are in the acceleration phase." Centers for Disease Control and Prevention,

Coronavirus Disease 2019 (COVID-19), Situation Summary, available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last visited: March 19, 2020). The CDC further reports that “[t]he duration and severity of each phase can vary depending on the characteristics of the virus and the public health response.” *Id.*

As of March 19, 2020 at 9:00 a.m., forty-four (44) persons within New Hampshire have tested positive for COVID-19. *See* N.H. Dept. of Health & Human Servs., COVID-19, Novel Coronavirus 2019 (COVID-19), available at <https://www.nh.gov/covid19/> (last visited: March 19, 2020). Eighteen cases have been reported in Rockingham County. *Id.* Eight cases have been reported in Hillsborough County (with four in Manchester and one in Nashua). *Id.* Nine cases have been reported in Grafton County. *Id.* Four cases have been reported in Carroll County. *Id.* Three cases have been reported in Belknap County. *Id.* One case has been reported in Merrimack County. *Id.* Six-hundred-and-thirty persons have tests pending at the New Hampshire Public Health Laboratories. *Id.* Approximately 575 persons are being monitored for COVID-19. *Id.* In light of these numbers, it is all but certain that the number of confirmed cases in New Hampshire will increase at the days progress.

ARGUMENT

I. The plaintiffs have no likelihood of success on the merits.

A. The Governor had authority under RSA 4:45 and 4:47 to issue Executive Order 2020-04 and Emergency Order #2; no provision of RSA Chapter 141-C controls this proceeding.

As an initial matter, the plaintiffs implicitly contend that RSA Chapter 141-C controls this proceeding. It does not. By its plain terms, the provisions of RSA Chapter 141-C, including RSA 141-C:16-b, apply to orders of the “commissioner” only, meaning the “commissioner of [the] department of health and human services, or h[er] designee,” RSA 141-C:2, IX. *See, e.g.,*

RSA 141-C:14-a, I (“Any person subject to an order for submission of a specimen, or for examination, immunization, treatment, isolation, quarantine, provision of information, inspection of a building or conveyance, *or any other order of the commissioner under this chapter or RSA 21-P:53*, may request a hearing in the superior court to contest such order.”) (emphasis added); RSA 141-C:16-b, I (authorizing “the commissioner, with the written approval of the governor,” to “order the cancellation of public gatherings and events within the state, or in specific geographic areas of the state, as is deemed necessary to prevent an imminent danger to the public health” and authorizing “[a]ny person who is aggrieved by an order pursuant to this section” to request a superior court hearing to contest the order).

Executive Order 2020-04 is an order of the Governor, issued pursuant to RSA 4:45 and RSA 4:47, not an order of the “commissioner” issued pursuant RSA 141-C:16-b or any other provision of RSA Chapter 141-C, including RSA 141-C:14-a, I. Accordingly, no provision of RSA Chapter 141-C controls this proceeding.

The plaintiffs then contend explicitly that the Governor lacked the authority to issue Emergency Order #2. In support of this argument, they assert that: (1) RSA 4:45 does not grant the Governor the authority to issue Emergency Order #2; (2) Emergency Order #2 is illegal under RSA 4:46 because the Governor did not obtain the consent of the Executive Council before issuing it; (3) the COVID-19 pandemic is not an “emergency” as a matter of law; (4) Emergency Order #2 violates Part I, Article 34’s limitation on martial law; and (5) Emergency Order #2 impermissibly suspends the law in violation of Part I, Article 29.

None of these arguments has merit. RSA 4:45 grants the Governor the authority to “declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is

imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.” RSA 21-P:35, VIII defines a “state of emergency” as a “condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm.” Executive Order 2020-04 plainly sets forth sufficient recitals and findings to demonstrate the existence of a “state of emergency” under these statutory authorities, and, because Emergency Order #2 was entered pursuant to Executive Order 2020-04, it too is adequately supported by the requisite findings required by RSA 4:45, I.

RSA 4:46 concerns the taking of real or personal property. The plaintiffs’ complaint/motion marshals no facts suggesting that any one of the plaintiffs owns *any* real or personal property or that such property was seized, re-titled or otherwise “taken” under Emergency Order #2 or, for that matter, under the enabling Executive Order 2020-04. RSA 4:46 therefore does not apply, and the Governor was not required to get the consent of the Executive Council before issuing Emergency Order #2.

Emergency Order #2 also does not violate Part I, Article 34’s limitation on martial law. “Martial law has been defined as the will of the commanding officer which in time of war supersedes all laws.” *State ex re. O’Connor v. District Court in and for Shelby County*, 219 Iowa 1165, 260 N.W. 73, 84 (1935). It is “[t]he law by which during wartime the army, instead of civil authority, governs the country because of a perceived need for military security or public safety.” Black’s Law Dictionary 1063 (West 9th Ed. 2009). Where, as here, a civilian government has plainly not ceded civil authority to a military officer or commander, there can be

no rational or responsible suggestion that Emergency Order #2 or its predicate, Executive Order 2020-04, amounts to the imposition of martial law in the State of New Hampshire.

Likewise, there is no basis for the plaintiffs' assertion, in paragraph 41 of the Complaint, that Emergency Order #2 unlawfully intrudes on the exclusive prerogative of the legislature to suspend its own laws. *See* N.H. CONST. part I, art. 29 [Suspension of Laws by Legislature Only]. Indeed, the plaintiffs point to no law, duly enacted by the legislature, (a) that confers a benefit on any one of the plaintiffs and (b) that the Governor, under Emergency Order #2, has suspended. Their undeveloped assertion to the contrary is therefore also meritless.

In sum, RSA 4:45 and RSA 4:47 authorize the Governor to put in place Executive Order 2020-04 and Emergency Order #2. The plaintiffs' suggestion that the Governor lacked authority to issue those orders are therefore without merit.

B. Emergency Order #2 does not violate that plaintiffs' constitutional rights to free assembly or religious freedom.

The plaintiffs contend that Emergency Order #2 violates several rights guaranteed under the State and Federal Constitutions. The plaintiffs advance only two developed arguments in this regard: that Emergency Order #2 (1) violates their rights to assemble under Part I, Article 32 and the First Amendment; and (2) violates their rights to "religious freedom" under Part I, Article 5 and the First Amendment. These arguments both fail.

1. The plaintiffs' constitutional challenges fail because the Governor issued Emergency Order #2 in good faith and there is a factual basis for the restrictions imposed thereunder.

An executive's decision to invoke emergency police powers in the face of an emergency "is not conclusive or free from judicial review." *United States v. Chalk*, 442 F.2d 1277, 1281 (4th Cir. 1971). Nevertheless, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." *Smith v. Avino*, 91 F.3d 105, 109 (11th

Cir. 1996) (citations, quotation marks, brackets, and ellipsis omitted), *abrogated on other grounds by Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). In keeping with this deference, courts limit their review of constitutional challenges to restrictions imposed under an executive’s emergency powers “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.* (citations, quotation marks, ellipsis, and brackets omitted); *see also Chalk*, 442 F.2d at 1281 (same standard); *Moorhead v. Farrelly*, 727 F. Supp. 193, 200 (D. V.I. 1989) (“*Moorhead II*”) (same standard); *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1112–14 (D.V.I. 1989) (“*Moorhead I*”) (same standard). State courts have employed a similarly deferential standard. *See, e.g., In re Juan C.*, 33 Cal. Rptr. 2d 919, 922–23 (Cal. Ct. App. 1994); *State v. Allred*, 204 S.E.2d 214, 219 (N.C. Ct. App. 1974).

This deference makes sense. After all, “[f]lexibility in any such [emergency order] is a key ingredient to provide the enforcing authorities with the practical ability to carry out the purposes for which it was instituted.” *Smith*, 91 F.3d at 109. “A court’s role in the aftermath of an emergency . . . is to review, with deference, the decision of the executive; at all times, however, under such conditions, the executive must be permitted to make the decision in the first instance.” *Moorhead II*, 727 F. Supp. at 201. Thus, courts should resist “defin[ing] precisely what specific conditions justify continued imposition of [an emergency order], because doing so will destroy the broad discretion necessary for the executive to deal with an emergency situation.” *Moorhead I*, 723 F. Supp. at 1114.

The plaintiffs neither allege nor suggest that the Governor did not issue Emergency Order #2 in good faith. Nor could they reasonably contend as much, given, among other things, the detailed recitals set forth in Executive Order 2020-04 and the fact the Governor issued

Emergency Order #2 in accordance with CDC guidelines. Those recitals and guidelines also demonstrate that there was ample factual basis for the Governor's decision to impose the restrictions set forth in Emergency Order #2. So, too, do the orders issued by the United States District Court for the District of New Hampshire and the New Hampshire Supreme Court severely restricting court access in an effort to protect the public health. Moreover, as of March 16, 2020, the date Emergency Order #2 was issued, both the CDC and the White House recommended that for the next 15 days all United States events of **10 or more people** be cancelled or held virtually. *See Resources for Large Community Events & Mass Gatherings*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html> (last visited March 19, 2020); *15 Days to Slow the Spread*, The President's Coronavirus Guidelines for America, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited March 19, 2020). The Governor's decision to issue Emergency Order #2 was accordingly made in good faith and with ample public support, and, as such, the plaintiffs cannot prevail on their constitutional claims.

2. Emergency Order #2 does not violate the plaintiffs' right to assemble.

Even if the Governor's exercise of emergency powers under RSA 4:45 were not entitled to broad deference, Emergency Order #2 still survives the plaintiffs' challenge under Part I, Article 32 and the First Amendment as a matter of law. Part I, Article 32 provides: "The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and the grievances they suffer." "This provision guarantees the same right of free speech and association as does the First

Amendment,” and the New Hampshire Supreme Court accordingly “relies upon federal cases interpreting the First Amendment . . . for guidance.” *Opinion of the Justices (Voting Age in Primary Elections II)*, 158 N.H. 661, 667 (2009) (citations and internal quotation marks omitted).

The rights guaranteed under Part I, Article 32 are “not absolute, but may be subject to reasonable time, place and manner regulations that are [1] content-neutral, [2] narrowly serve a significant governmental interest, and [3] allow other opportunities for expression.” *State v. Comley*, 130 N.H. 688, 691 (1988) (citation omitted). A law that “regulates conduct generally, without addressing speech in particular” survives a Part I, Article 32 challenge “if it does not exceed the bounds of the limited, content-neutral time, place and manner standard.” *Id.* (citations omitted). Similarly, where “a law regulates speech only incidentally, as a consequence 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.” *Id.* at 692 (citing *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968)).

The restrictions on the right to assemble imposed under Emergency Order #2 are content neutral, narrowly tailored to serve a significant governmental interest, and allow for other opportunities for expression. Emergency Order #2 is content neutral because it prohibits *all* “[s]cheduled gatherings of 50 people or more for social, spiritual and recreational activities,” regardless of their purpose. **Exhibit B** at 1.¹ It at most incidentally impacts rights protected under Part I, Article 32 and the First Amendment. *Accord In re Juan C.*, 33 Cal. Rptr. 2d at 922 (“A curfew primarily regulates conduct or, more specifically, movement. Its effect on speech is

¹ While the order sets forth certain categories of gatherings to which this prohibition applies, the use of the phrase “including but not limited to” demonstrates that these categories are merely examples and that the list is not exhaustive. *In re Search Warrant for 1832 Candia Rd., Manchester*, 171 N.H. 53, 59 (2018) (“[T]he use of the word ‘including’ means that the list is not exhaustive.” (citation and quotation marks omitted)).

incidental. A curfew does not purport to regulate the content of speech, but rather imposes restrictions on the time, place and manner in which speech may be exercised. Discretionary determinations by a public official of which viewpoints will be heard and which will not be heard encourage censorship and discrimination, and are constitutionally suspect.”). Emergency Order #2 promotes and protects public health, safety, and welfare, which are well-recognized as a significant governmental interests. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995). It is narrowly tailored, as it prohibits only large, scheduled, in-person gatherings, consistent with CDC guidance in the face of a rapidly evolving public health crisis. *See State v. Smith*, 132 N.H. 756, 758 (1990) (noting that a statute “need not be perfectly tailored, simply narrowly tailored”). And it allows for other forms of assembly and expression, as it does not prohibit gatherings of fewer than 50 people, impromptu (as opposed to scheduled) gatherings, or gatherings occurring in a virtual (as opposed to in-person) setting. *Accord Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that the internet has become a quintessential forum for the exercise of First Amendment rights).

Accordingly, Emergency Order #2 imposes only reasonable time, place, and manner restrictions on the right to assemble that do not run afoul of Part I, Article 32 or the First Amendment. As such, the plaintiffs cannot prevail on their claim under those provisions even if the Governor’s exercise of emergency powers were not entitled to considerable deference.

3. Emergency Order #2 does not violate the plaintiffs’ rights to “freedom of religion.”

Emergency Order #2 similarly does not violate either the Free Exercise Clause of the First Amendment or Part I, Article 5. Under the Free Exercise Clause, “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.” *See Knights of*

Columbus, Council No. 94 v. Town of Lexington, 272 F.3d 25, 35 (1st Cir. 2001) (citations and quotation marks omitted). The New Hampshire Supreme Court has likewise recognized that neutral laws of general applicability generally do not violate the “right to worship” under Part I, Article 5. See *State v. Cox*, 16 A.2d 508, 513–16 (1940), *aff’d sub nom. Cox v. State of New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941).

As discussed above, Emergency Order #2 imposes neutral and generally applicable restrictions on 50-or-more-person group gatherings statewide. It is accordingly not subject to heightened scrutiny under either the Free Exercise Clause or Part I, Article 5, and the plaintiffs cannot prevail under those provisions even if the Governor’s exercise of emergency powers were not entitled to deference.

C. The Plaintiffs Cannot Succeed On The Merits Of Their Conclusory, Undeveloped Legal Theories.

Finally, the plaintiffs advance several legal theories in conclusory, undeveloped fashion. They allege that Emergency Order #2 effects an uncompensated taking of property in violation of the Fifth Amendment, violates Part II, Article 91[Habeas Corpus] of the New Hampshire Constitution, and lacks an enforcement mechanism. None of these arguments is sufficiently developed to state a claim upon which relief may be granted, let alone provide sufficient support for the issuance of a mandatory preliminary injunction. The takings claim fails for at least two reasons. First, the complaint/motion contains no allegations that the plaintiffs own any property whatsoever, let alone property that the government, through Emergency Order #2, has taken without compensation. Second, the plaintiffs do not suggest, let alone make any attempt to demonstrate, that just compensation remedies are unavailable to them, and accordingly are not entitled to equitable relief. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2176 (2019) (“As long as an adequate provision for obtaining just compensation exists, there is no basis to

enjoin the government's action effecting a taking.”). Additionally, the complaint/motion fails to explain how Emergency Order #2 removes or otherwise suspends the privilege and benefit of Habeas Corpus, N.H. Const. Part II, Article 91, or how the presence or absence of an enforcement mechanism renders Emergency Order #2 somehow invalid. Accordingly, the plaintiffs have failed to demonstrate a likelihood of success on the merits of these claims.

II. The plaintiffs cannot show immediate irreparable harm.

The only conceivable irreparable harm the plaintiffs have alleged is that Emergency Order #2 violates their constitutional rights. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Turley v. Giuliani*, 86 F.Supp.2d 291, 295 (S.D.N.Y.2000) (“Because the violation of a constitutional right is the irreparable harm asserted here, the two prongs of the preliminary injunction threshold merge into one: in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.”) (citation omitted). As set forth above, Emergency Order #2 plainly does not violate plaintiffs’ constitutional rights. The plaintiffs’ complaint/motion advances no other allegations suggesting that any other type of irreparable harm recognized in law exists in this case. Accordingly, the plaintiffs have failed to show immediate irreparable harm and their request for a preliminary injunction must be denied.

III. Emergency Order #2 serves the public interest; plaintiffs’ position seeks to put the public at significant risk.

In this case, the public interest factor tips decidedly in the Governor’s favor. The COVID-19 outbreak is widely recognized as a pandemic and a national health emergency. Its unmitigated spread threatens to overload the country’s public health system and controlling its spread through incremental, time-limited measures like Executive Order 2020-04 and Emergency Order #2 is an appropriate and responsible way to manage it. The plaintiffs offer no

argument as to why risking the life, health, and safety of every individual in the State so they can attend an in-person gathering of more than 50 people within the next 21 days offsets or otherwise overrides the significant public interest in combatting the unmitigated spread of COVID-19. *See, e.g., Rubin*, 514 U.S. at 485 (noting that a government has a significant interest in promoting and protecting the health, safety, and welfare of its citizens); *N.Y. v. U.S. Dept. of Homeland Security*, 408 F. Supp. 334, 351 (S.D. N.Y. 2019) (acknowledging that “preventing . . . public health harms provides a significant public benefit”). This factor therefore also weighs strongly against issuing the plaintiffs the mandatory injunction they seek.

CONCLUSION

The plaintiffs’ complaint/motion is meritless. The Governor has the authority to issue Executive Order 2020-04 and Emergency Order #2 pursuant to RSA 4:45 and RSA 4:47. Executive Order 2020-04 and Emergency Order #2 are also constitutional. Accordingly, the plaintiffs’ request for a mandatory preliminary injunction should be denied, and this case should be dismissed consistent with the Governor’s Motion to Dismiss filed concurrently with this objection.

Respectfully submitted,

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

By his attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: March 19, 2020

/s/ Daniel E. Will

Daniel E. Will, Bar #12176

Solicitor General

Anthony J. Galdieri, Bar #18594

Senior Assistant Attorney General

Samuel RV. Garland, Bar #266273

Attorney

Civil Bureau

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3650

daniel.e.will@doj.nh.gov

anthony.j.galdieri@doj.nh.gov

samuel.garland@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's e-filing system to all counsel of record.

/s/ Daniel E. Will

Daniel E. Will

EXHIBIT A



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

CHRISTOPHER T. SUNUNU
Governor

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

Executive Order 2020-04

An order declaring a state of emergency due to Novel Coronavirus (COVID-19)

WHEREAS, after beginning in December 2019, an outbreak of respiratory illness due to a novel coronavirus (a disease now known as COVID-19) has impacted more than 117 countries, including the United States; and

WHEREAS, on January 23, 2020, the national Centers for Disease Control and Prevention (CDC) activated its Emergency Response System to provide ongoing support for the response to COVID-19 across the country; and

WHEREAS, the World Health Organization declared a Public Health Emergency of International Concern on January 30, 2020, and the United States Department of Health and Human Services declared a Public Health Emergency related to the COVID-19 outbreak on January 31, 2020; and

WHEREAS, the State of New Hampshire has been working in close collaboration with the CDC, with the United States Department of Health and Human Services, and with local health departments since December 2019 to monitor and plan for the potential spread of COVID-19 to the United States and the State of New Hampshire; and

WHEREAS, the Division of Public Health has been in regular communication with hospitals, clinics and other health providers and has provided guidance to health facilities and providers regarding COVID-19; and

WHEREAS, on or about March 11, 2020 the World Health Organization declared COVID-19 a pandemic; and

WHEREAS, on March 12, 2020 the Division of Public Health and the Division of Homeland Security and Emergency Management announced that 211NH has been mobilized to handle all COVID-19 related calls from New Hampshire residents; and

WHEREAS, as of March 13, 2020, across the globe, there are more than 124,048 confirmed cases of COVID-19, resulting in more than 4613 deaths worldwide; and

WHEREAS, as of March 13, 2020, there are 1,663 confirmed cases of COVID-19 in the United States, including 6 in New Hampshire, and more than 275 New Hampshire residents being monitored based on potential exposure to the virus, and officials expect the number of cases in New Hampshire, the United States, and worldwide to increase; and

WHEREAS, New Hampshire has a strong federal, state and local public health and health care delivery system that has effectively responded to prior events including the H1 N1 influenza virus in 2009; and

WHEREAS, on March 13, 2020, the Department of Safety, Division of Homeland Security and Emergency Management activated the State Emergency Operations Center to support and guide state and local actions to preserve public health; and

WHEREAS, on March 13, 2020, the President of the United States declared a National Emergency under the federal Stafford Act due to the spread of COVID-19; and

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

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

WHEREAS, 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, and controlling outbreaks minimizes the risk to the public, maintains the health and safety of the people of New Hampshire, and limits the spread of infection in our communities and within the healthcare delivery system; and

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

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

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

WHEREAS, state and local officials, working with the federal government and the for profit and not for profit private sector, must take all necessary and feasible steps to assist citizens who are affected by the outbreak of COVID-19, including those unable to work because of illness or the need to care for a family member, those out of work because their employers have temporarily closed or reduced their hours, those unable to access necessary resources because of shortages, or any other individuals suffering hardship because of the outbreak of COVID-19; and

WHEREAS, I find that conditions of New Hampshire Revised Statutes Annotated (RSA) 4:45, relating to the declaration of a State of Emergency, have been met; and

WHEREAS, under RSA 4:45, III(e), in addition to specifically enumerated powers, during a State of Emergency the Governor has the authority to “perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population;” and

WHEREAS, under RSA 4:47, III, the Governor has “power to make, amend, suspend and rescind necessary orders, rules and regulations” to carry out emergency management functions in the event of a disaster beyond local control; and

WHEREAS, I find that the conditions caused by COVID-19 now require the combined forces of the State, local government, the federal government, private business and private citizens to appropriately respond; and

NOW, THEREFORE, I, Christopher T. Sununu, Governor of the State of New Hampshire, by the authority vested in me pursuant to part II, article 41 of the New Hampshire Constitution and New Hampshire RSA 4:45, I do hereby declare a state of emergency to exist in the entire State of New Hampshire as of 5:15 p.m. on March 13, 2020.

IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT:

1. In preparing for and responding to COVID-19, all agencies of the state government use and employ state personnel, equipment, and facilities or perform any and all activities consistent with the direction of the Governor’s Office, the Division of Homeland Security and Emergency Management, and the Division of Public Health. This shall include, if necessary, the repurposing of state employees for tasks necessary to address the impacts of COVID-19.
2. All residents and visitors of the state are to heed the advice of health and emergency officials with regard to this emergency in order to protect their safety.
3. Beginning at 11:59 p.m. on Sunday, March 15th, all assisted living facilities, long term care facilities, nursing facilities, residential care facilities, as those terms are defined in RSAs 151-151-H, or any other similar facilities providing residential care to elderly or infirm patients, shall prohibit visitor access to reduce facility based transmission of COVID-19. This prohibition shall not apply to medically necessary personnel, visitors for residents receiving end of life care, or visitors necessary to provide for a residents psychosocial needs as determined by a licensed medical care provider.

4. As necessary to assist local governments and for the protection of public health, state agencies shall enter into contracts to arrange for the procurement of materials, goods, and services needed to assist in preparing for, containing, responding to, mitigating the effects of, and recovering from the spread of COVID-19. Applicable provisions of the Governor and Council Manual of Procedure and the Department of Administrative Services (DAS), Administrative Rules, Adm 600, including but not limited to travel, advertising, and competitive bidding requirements, may be suspended with approval of the Governor to the extent necessary to address the effects of COVID-19.
5. Any out-of-state personnel, including, but not limited to, medical personnel, entering New Hampshire to assist in preparing for, responding to, mitigating the effects of, and recovering from COVID-19 shall be permitted to provide services in the same manner as prescribed in RSA 21-P:41 and any other applicable statutory authority with respect to licensing and certification regarding mutual aid during emergencies for a period of time not to exceed the duration of this emergency.
6. Any state-owned properties that DAS, in consultation with the Division of Public Health and the Division of Homeland Security and Emergency Management, determines are suitable for use to assist in preparing for, responding to, mitigating the effects of, or recovering from COVID-19 shall be made available to the Division of Public Health and/or the Division of Homeland Security and Emergency Management for this purpose, notwithstanding any state or local law that would restrict, delay, or otherwise inhibit such use.
7. All non-essential out-of-state travel by State and municipal employees for official business is hereby suspended. The Department of Administrative Services, in consultation with the Division of Public Health, shall develop procedures and protocols for employees returning from out-of-state travel. No out-of-state travel for State Employees for State business may be deemed essential without the prior written approval of the Governor.
8. State and local government bodies are permitted and encouraged to utilize the emergency meeting provisions of RSA 91-A to conduct meetings through electronic means while preserving, to the extent feasible, the public's right to notice of such meetings and ability to observe and listen contemporaneously.
9. The Division of Homeland Security and Emergency Management shall provide assistance to local governments to address impacts from COVID-19, if appropriate and necessary.
10. To ensure hospitals and other health facilities are able to adequately treat patients who may be infected with COVID-19 or who are legally isolated as a result of COVID-19, and to prevent overburdening of existing resources of hospitals and health facilities, the Commissioner of the Department of Health and Human Services may waive any of the licensing or credentialing requirements of RSA Chapter 151 and accompanying regulations with respect to any hospital or health facility. Any waiver shall include alternative measures that, under the circumstances, will allow the facilities to treat legally isolated patients while

protecting public health and safety. Any waivers granted pursuant to this paragraph shall be posted with the hospital or health facility's existing license.

11. The Commissioner of Health and Human services, in consultation with the State Fire Marshall, shall have the authority, on a case by case basis, to waive licensing requirements for day care facilities to allow for temporary provision of child care by (1) employers for children of their employees; (2) licensed day care facilities in situations where temporary exceedance of maximum enrollment may be necessary; and (3) any other circumstance in which the Commissioner determines that waiver of licensing requirements is necessary and will not adversely impact child safety. The State Fire Marshall shall have the authority to waive, on a case by case basis, the requirements of the provisions of the fire code related to child centers, consistent with the provisions of this paragraph.
12. Healthcare providers shall report persons they decide to rest COVID-19 to the Department of Health and Human Services by phone or by completion of a case report form. Instructions for reporting will be made available on the State's COVID-19 website.
13. To support consistent practices across New Hampshire, the Department of Education, the Department of Labor and the Department of Safety, in coordination with the Division of Public Health, shall continue to provide updated and specific guidance relating to preventing and mitigating COVID-19 to schools, employers, employees, first responders and community care facilities.
14. All school sponsored out-of-state travel for students and teachers in New Hampshire public schools is suspended.
15. To promptly respond for the protection of public health, state entities are, notwithstanding any other state or local law, authorized to share relevant medical information, limited to the patient's underlying health conditions, age, current condition, date of exposure, and possible contact tracing, as necessary to address the effect of the COVID-19 outbreak with state, local, federal, and nongovernmental partners, for the limited purposes of investigation and control, and treatment and coordination of care.
16. The Department of Business and Economic Affairs shall survey businesses within New Hampshire to determine the economic impact of losses for the emergency period as compared to the same period of the preceding year for the purposes of applying to the U.S. Small Business Administration (SBA) for SBA Economic Injury Disaster Loans.
17. The Department of Employment Security is directed to develop recommendations for specific actions the State can take to ensure that individuals unable to work in the following situations related COVID-19 are able to access state unemployment benefits: (1) individuals quarantined due to confirmed or potential exposure; (2) individuals needing to care for themselves due to related illness; (3) individuals needing to care for an ill family member; and (4) individuals needing to care for a dependent. These recommendations shall be submitted to the Governor's Office for follow up directives.

18. Pursuant to RSA 4:45 and RSA 4:47, while this Order is in effect, additional temporary orders, directives, rules and regulations may be issued either by the Governor or by designated State officials with written approval of the Governor. All further temporary orders, directives, rules and regulations issued pursuant to this Order shall be in writing and published on the Governor's Office website.

Given under my hand and seal at the Executive Chambers in Concord, this 13th day of March, in the year of Our Lord, two thousand and twenty, and the independence of the United States of America, two hundred and forty-four.


GOVERNOR OF NEW HAMPSHIRE

EXHIBIT B



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

CHRISTOPHER T. SUNUNU
Governor

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

Emergency Order #2 Pursuant to Executive Order 2020-04

Temporary prohibition on scheduled gatherings of 50 or more attendees and onsite food and beverage consumption

Pursuant to section 18 of Executive order 2020-04, it is hereby ordered, effective immediately, that:

1. In accordance with CDC guidelines, the following activities are hereby 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.

Given under my hand and seal at the Executive Chambers in Concord, this 16th day of March, in the year of Our Lord, two thousand and twenty, and the independence of the United States of America, two hundred and forty-four.


GOVERNOR OF NEW HAMPSHIRE