

HB 440 - AS AMENDED BY THE HOUSE

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2021 SESSION

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05/04

HOUSE BILL **440**

AN ACT prohibiting the suspension of civil liberties during a state of emergency.

SPONSORS: Rep. Kofalt, Hills. 4; Rep. Ammon, Hills. 40; Rep. Nunez, Hills. 37; Sen. Avard, Dist 12; Rep. Homola, Hills. 27

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill prohibits the suspension of civil liberties during a state of emergency.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT prohibiting the suspension of civil liberties during a state of emergency.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Title. This act may be known and cited as the “Civil Liberties Defense Act.”

2 2 Legislative Findings.

3 I. RSA 4:45 and 4:47, together known as the emergency powers statutes, allow the governor
4 of New Hampshire to declare a state of emergency and thereby activate emergency powers. The
5 emergency powers statutes were passed by the general court in order to give the governor flexible,
6 enumerated powers in a time of public disaster.

7 II. On Friday, March 13, 2020, the governor issued Executive Order 2020-04, declaring a
8 state of emergency due to the novel coronavirus, or Covid-19. This order formed the basis for several
9 emergency orders.

10 III. On Tuesday, March 17, 2020, *Binford, et. al. v. Sununu* became the first legal challenge
11 to these emergency orders. The lawsuit claimed that aspects of the orders violated the plaintiffs’
12 civil liberties.

13 IV. In response to this lawsuit, the state, rather than arguing simply that the orders in
14 question were constitutional, disturbingly asked the New Hampshire superior court to hold that civil
15 liberties are suspended due to the state of emergency. See *Binford, et. al. v. Sununu, Merrimack*
16 *Cty. Super. Ct., 217-2020-CV-00152* at 10 (March 25, 2020) (Kissinger, J.) (“...the State contends
17 [that] during a state of emergency, executives are granted broad latitude to suspend civil liberties”).

18 V. The superior court agreed with the state and concluded that civil liberties in New
19 Hampshire are suspended during the Covid-19 emergency. *Id.* at 11 (affirming that “[i]n an
20 emergency situation, fundamental rights such as the right of travel and free speech may be...
21 suspended”) (quoting *Smith v. Avino, 91 F. 3d 105, 109 (11th Cir. 1996)*; *id.* at 16 (“the Court finds
22 that the Governor may suspend... constitutional rights during a state of emergency...”). Although
23 the superior court then proceeded to find that the governor’s orders were constitutional, it noted that
24 it was doing so only “for the purpose of establishing a complete record.” *Id.*

25 VI. In subsequent emergency orders, the governor has cited the superior court’s opinion
26 letter in *Binford* as a legal authority. See e.g. Emergency Order No. 74 at 1 (Nov. 19, 2020) (citing
27 *Binford, et. al. v. Sununu, Merrimack Cty. Super. Ct., 217-2020-CV-00152*).

28 VII. In enacting RSA 4:45 and 4:47, the general court intended to give the governor flexible
29 enumerated powers during a time of disaster. It did not intend to allow the governor to suspend or
30 otherwise infringe upon the New Hampshire bill of rights or the United States Constitution.

1 VIII. The general court makes no comment on the specific outcome of the Binford decision,
2 recognizing that case-by-case applications of legal rights are within the province of the judicial
3 branch. Yet the superior court exceeded its authority to the extent that it purported to authorize the
4 governor to suspend or infringe upon the New Hampshire bill of rights or the United States
5 Constitution.

6 IX. Civil liberties are a codification of the inherent and binding duties of governments to
7 their citizens. The rule of law in a free society must therefore be permanent and inviolable. The
8 New Hampshire bill of rights and the United States Constitution may never be suspended, set aside,
9 or otherwise nullified by the governor, the judiciary, this general court, or any other official
10 authority. “Government is not free to disregard the First Amendment in times of crisis.” Roman
11 Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ____ (2020) (Gorsuch, J., concurring in the
12 judgment).

13 X. Since the Binford decision was issued, the United States Supreme Court has correctly
14 reaffirmed that “even in a pandemic, the Constitution cannot be put away and forgotten.” Roman
15 Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ____ (2020).

16 XI. The United States Supreme Court has never held that constitutional rights may be
17 suspended due to a pandemic. Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ____ (2020)
18 (Gorsuch, J., concurring in the judgment) (“Jacobson didn’t seek to depart from normal legal rules
19 during a pandemic, and it supplies no precedent for doing so... Instead, Jacobson applied what would
20 become the traditional legal test associated with the right at issue—exactly what the Court does
21 today.”) (citing Jacobson v. Massachusetts, 197 U. S. 11 (1905)); Id. (“Nor does any [dissenting
22 Justice in the Cuomo decision] seek to explain why anything other than our usual constitutional
23 standards should apply during the current pandemic.”).

24 XII. The general court does not seek to obstruct lawful efforts by the governor or the
25 governor’s officials to manage public disasters. Yet New Hampshire courts may not depart from the
26 federal or state constitutions during a crisis. Given the alarming nature of the state’s argument in
27 Binford, and the superior court’s resulting findings, the general court concludes that it would be
28 negligent to wait for action by the New Hampshire supreme court before enacting this legislation.

29 3 Purpose. The purposes of this act are:

30 I. To clarify that the general court never intended that emergency powers granted to the
31 governor would be used to suspend civil liberties, and to amend the emergency powers statutes to
32 expressly prohibit the suspension of civil liberties.

33 II. To reject as ultra vires and to preclude any judicial decision purporting to suspend civil
34 liberties in New Hampshire, whether reached under the emergency powers statutes or any other law
35 or legal principle.

36 III. To ensure that “even in a pandemic, the Constitution cannot be put away and forgotten.”
37 Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ____ (2020). Legal challenges brought

1 under the state or federal constitution must accordingly be subject to meaningful constitutional
2 analysis.

3 4 Definitions. In this act:

4 I. "Civil liberties" encompasses any guarantee against, protection against, or remedy for an
5 imposition, intrusion, fine, punishment, or penalty by a governmental entity or agent enumerated in
6 the New Hampshire bill of rights, in the United States Constitution, or in any binding legal decision
7 construing any part of the same.

8 II. "Suspension" refers to a time period or condition in which courts of law do not or are not
9 required to subject impositions, intrusions, fines, punishments, or penalties by governmental entities
10 or agents to constitutional analysis, instead subjecting such challenges to a "good faith" requirement
11 or other extraordinary standard.

12 III. "New Hampshire bill of rights" means part I of the New Hampshire constitution and any
13 legal precedent applying any article therein so as to invalidate, prohibit, punish, or remedy an
14 imposition, intrusion, fine, punishment, or penalty by a governmental entity or agent.

15 5 Civil Liberties Protected. No power delegated or otherwise granted by any statute or act of
16 this general court to the governor or any of the governor's subordinates, whether before or after the
17 date of this act, shall be construed to suspend or permit the suspension of civil liberties.

18 6 New Paragraph; State of Emergency; Powers of the Governor. Amend RSA 4:45 by inserting
19 after paragraph III the following new paragraph:

20 IV. Notwithstanding the foregoing enumerated powers, civil liberties shall on no account be
21 suspended. Nor shall the United States Constitution or the New Hampshire bill of rights be
22 suspended, set aside, or otherwise infringed.

23 7 Emergency Management Powers. Amend RSA 4:47, III to read as follows:

24 III. The power to make, amend, suspend and rescind necessary orders, rules and regulations
25 to carry out the provisions of this subdivision in the event of a disaster beyond local control;
26 ***provided that civil liberties shall on no account be suspended, nor shall the United States***
27 ***Constitution or the New Hampshire bill of rights be suspended, set aside, or otherwise***
28 ***infringed.***

29 8 Rules of Construction.

30 I. This act and the amendments affected thereby shall be construed in favor of substantive
31 protections for civil liberties.

32 II. The protections afforded by this act are in addition to any further protections provided
33 under federal law, state law, and the state and federal constitutions.

34 III. This act shall not be construed to impede the application of any duly enacted
35 amendment to the New Hampshire constitution.

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1 IV. This act shall not be construed to imply that civil liberties are conferred upon the
2 citizens of New Hampshire by the general court or that the general court has or claims for itself the
3 power to suspend civil liberties.

4 V. Nothing in this act shall be construed to preempt or repeal any state or local law that is
5 equally or more protective of civil liberties. Nothing in this act shall be construed to narrow the
6 meaning or application of any state or local law protecting civil liberties.

7 VI. This act applies to, and in cases of conflict supersedes, each statute of the state that
8 impinges upon civil liberties unless a conflicting statute is expressly made exempt from the
9 application of this act. This act also applies to, and in cases of conflict supersedes, any ordinance,
10 rule, regulation, order, opinion, decision, practice, or other exercise of the government's authority
11 that impinges upon civil liberties.

12 VII. If any provision of this act or any application of such provision to any particular person
13 or circumstance is held to be invalid under law, the remainder of this act and the application of its
14 provisions to any other person or circumstance shall not be affected.

15 9 Effective Date. This act shall take effect upon its passage.