

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

218-2021-CV-01160

Daniel Richard, et al.

v.

Christopher T. Sununu, et al.

**DEFENDANTS' MOTION TO DISMISS**

Pursuant to Super. Ct. Civ. R. 9(b) and 12(d), the twenty named Defendants, Governor Christopher T. Sununu, Attorney General John Formella, Executive Councilor Joseph D. Kenny, Executive Councilor Cinde Warmington, Executive Councilor Janet Stevens, Executive Councilor Theodore Gatsas, Executive Councilor David Wheeler, Representative Karen Umberger, Representative Keith Erf, Representative Peter Leishman, Representative Jess Edwards, Representative Tracy Emerick, Senator Gary Daniels, Senator Bob Giuda, Senator Chuck Morse, Senator Lou D'Allesandro, Senator Cindy Rosenwald, Representative Joseph Pitre, Representative Bob Lynn, and Representative Mary Jane Wallner (together the "Defendants"), by and through their attorneys, the Office of the Attorney General, hereby move to dismiss the Amended Complaint<sup>1</sup> in the above-captioned matter in its entirety. As grounds, the Defendants state that this matter should be dismissed as a matter of law, because:

1. The operative Complaint fails to state a claim for relief because the Defendants acted within the bounds of their authority under the law and in accordance with both the state

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<sup>1</sup> The Amended Complaint is the operative Complaint in this matter, referred to within this motion and memorandum as the "Plaintiff's Complaint." The motion to amend was granted on December 8, 2021. There does not appear to be an Amended Complaint, however, the motion stated that the amendment was sought "to include the

and federal constitutions;<sup>2</sup> the lack of support for the Plaintiff's claims constitutes a failure to state a claim; and the Plaintiff's pleadings are not reasonably susceptible of a construction that would permit recovery;

2. The Plaintiffs lack standing because they are unable to show that any right has been impaired or prejudiced by the factual allegations which form the basis of the operative Complaint; and
3. The factual basis for this action involves the New Hampshire executive and legislative approval to accept federal grant money from the American Rescue Plan ("ARP"), the ARP grants have been approved and thus the Plaintiffs' requested relief is moot.

In further support, the Defendants submit the attached memorandum of law, which is incorporated herein by reference.

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Attorney General John Formella, as he is involved in all aspects of this case including his actions on Nov. 19<sup>th</sup>, after the initial filing of this case on Nov. 17<sup>th</sup> of 2021." (Pl's Mot. to Amend. ¶ 2.)

<sup>2</sup>Pursuant to NH CONST. pt. I, art. 30, the Senate and House member Defendants rely on the legislative privilege as a basis for dismissing the complaint against them specifically. As they are absolutely immune from suit relating to their actions as members of the Fiscal Committee of the General Court, including their votes regarding the acceptance of federal funds pursuant to RSA 14:30-a, VI. Their past, present, or future actions cannot be made the subject of legal action, whether founded in law or equity. As such, this court should apply the legislative privilege to bar this action and dismiss the complaint as to the Senate and House member defendants. The Senate and House

WHEREFORE, the Defendants respectfully request that this Honorable Court:

- (A) Dismiss the Amended Complaint in its entirety;
- (B) Deny the Plaintiffs' request for relief in its entirety; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

GOVERNOR CHRISTOPHER T. SUNUNU,  
ATTORNEY GENERAL JOHN FORMELLA,  
EXECUTIVE COUNCILOR JOSEPH D. KENNY,  
EXECUTIVE COUNCILOR CINDE  
WARMINGTON, EXECUTIVE COUNCILOR  
JANET STEVENS, EXECUTIVE COUNCILOR  
THEODORE GATSAS, EXECUTIVE  
COUNCILOR DAVID WHEELER,  
REPRESENTATIVE KAREN UMBERGER,  
REPRESENTATIVE KEITH ERF,,  
REPRESENTATIVE PETER LEISHMAN,  
REPRESENTATIVE JESS EDWARDS,  
REPRESENTATIVE TRACY EMERICK,  
SENATOR GARY DANIELS, SENATOR BOB  
GIUDA, SENATOR CHUCK MORSE, SENATOR  
LOU D'ALLESANDRO, SENATOR CINDY  
ROSENWALD, REPRESENTATIVE JOSEPH  
PITRE, REPRESENTATIVE BOB LYNN, AND  
REPRESENTATIVE MARY JANE WALLNER,  
By their attorneys,  
NEW HAMPSHIRE OFFICE OF THE  
ATTORNEY GENERAL,  
JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: January 20, 2022

/s/ Laura D. Devine  
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member Defendants preserve their immunity and reserve the right to fully brief the court on this issue if this instant motion is denied.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via: Court's efileing system to Plaintiffs

/s/ Laura D. Devine

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Laura D. Devine

Dated: January 20, 2022

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

218-2021-CV-01160

Daniel Richard, et al.

v.

Christopher T. Sununu, et al.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO  
DISMISS**

NOW COME the twenty named Defendants, Governor Christopher T. Sununu, Attorney General John Formella, Executive Councilor Joseph D. Kenny, Executive Councilor Cinde Warmington, Executive Councilor Janet Stevens, Executive Councilor Theodore Gatsas, Executive Councilor David Wheeler, Representative Karen Umberger, Representative Keith Erf, Representative Peter Leishman, Representative Jess Edwards, Representative Tracy Emerick, Senator Gary Daniels, Senator Bob Giuda, Senator Chuck Morse, Senator Lou D'Allesandro, Senator Cindy Rosenwald, Representative Joseph Pitre, Representative Bob Lynn, and Representative Mary Jane Wallner (together the "Defendants"), by and through their attorneys, the Office of the Attorney General, hereby submit this Memorandum of Law in Support of their Motion to Dismiss the Plaintiffs' Complaint<sup>1</sup> in the above-captioned matter in its entirety.

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<sup>1</sup> The Amended Complaint is the operative Complaint in this matter, however, it will be referred to herein as (the "Plaintiffs' Complaint"). The Plaintiffs' motion to amend was granted on December 8, 2021. There does not appear to be an Amended Complaint, however, the motion stated that the amendment was sought "to include the Attorney General John Formella, as he is involved in all aspects of this case including his actions on Nov. 19<sup>th</sup>, after the initial filing of this case on Nov. 17<sup>th</sup> of 2021." (Pl's Mot. to Amend. ¶ 2.)

## **I. INTRODUCTION**

The Plaintiffs filed this action against the Defendants, Governor, Attorney General, Executive Counsel, and the Joint Legislative Fiscal Committee regarding accepting emergency grants under the American Rescue Plan (“ARP”). Specifically, the Plaintiffs claim that by accepting the emergency grants, the Defendants violated the constitutional rights of the people of New Hampshire and the sovereignty of the state. The Plaintiffs requested the following declaratory relief: (1) to prohibit the Defendants from accepting the ARP grants; (2) to issue a declaratory judgment ruling that RSA 124 is repugnant and contrary to both the state and federal constitutions; and (3) to issue a declaratory judgment ruling that RSA 14:30-a, VI is repugnant and contrary to both the state constitution and therefore null and void.

The Defendants submit that this matter should be dismissed as a matter of law because (1) the Plaintiffs’ Complaint fails to state a claim for relief because the Defendants acted within the bounds of their authority under the law and in accordance with both the state and federal constitutions;<sup>2</sup> (2) the Plaintiffs lack standing; and (2) the ARP grants have been approved and thus the requested relief is moot.

## **II. ALLEGATIONS OF THE COMPLAINT**

The Plaintiffs, Daniel Richard, Kelley L. Potenza, Thomas W. Chapmon (together “Plaintiffs”), filed a Complaint against all Defendants except for Attorney General John Formella on November 18, 2021. On December 2, 2021, the Plaintiffs filed a motion to amend the Complaint for the sole purpose of including Attorney General John Formella as a party. To support the Motion

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<sup>2</sup>Pursuant to NH CONST. pt. I, art. 30, the Senate and House member Defendants rely on the legislative privilege as a basis for dismissing the complaint against them specifically. As they are absolutely immune from suit relating to their actions as members of the Fiscal Committee of the General Court, including their votes regarding the acceptance of federal funds pursuant to RSA 14:30-a, VI. Their past, present, or future actions cannot be made the subject of legal action, whether founded in law or equity. As such, this court should apply the legislative privilege to bar this action and dismiss the complaint as to the Senate and House member defendants. The Senate and House member Defendants preserve their immunity and reserve the right to fully brief the court on this issue if this instant motion is denied.

to Amend, the Plaintiffs appended a Memorandum dated October 8, 2021, to Governor Christopher Sununu, from John Formella, Attorney General, regarding “Federal COVID-19 Grant Award Fund Requirements.” The Motion to Amend the Complaint was granted by this Honorable Court on December 8, 2021, however, there does not appear to be a new document entitled “Amended Complaint.” Thus, we assume that all allegations in the Complaint are the same as the allegations in the Amended Complaint, except that the Amended Complaint also includes the Defendant Attorney General John Formella. Therefore, we refer to the operative complaint as the “Plaintiffs’ Complaint.”

The operative Complaint identifies the following things that happened in order:

1. “Exparte [sic.] Motion and Motion Interim Emergency Relief For [sic.] Temporary Stay and an Order to Show Cause”; (Compl. ¶ 3.)
2. “The Court Shall Take Judicial Notice of the Governor’s Testimony and Motion for a Permanent Injunctive Relief, Motion for Declaratory Judgment”; (Compl. ¶ 4.)
3. “Plaintiffs bring this Motion for a Temporary Stay, Motion for Injunctive Relief, and Motion for Declaratory Judgement [sic.] against Christopher T. Sununu the Governor of the state of New Hampshire, the Executive Council, and the Joint Legislative Fiscal Committee in their official capacity.” (Compl. ¶ 5.)

The Plaintiffs described the orders they want the court to make as follows within the operative Complaint:

4. “An expedited emergency stay order to preliminarily and permanently enjoin Governor Sununu, his respective agents, officers, employees, and all other persons acting on behalf of the executive branch from enforcing any undelegated powers by colorable

- state or federal, statutes, rules, or regulations written pursuant to any colorable state or federal acts.” (Compl. ¶ A.)
5. “Issue a writ of prohibition on all forms of government of the “state” from accepting or spending any unappropriated state or Federal Funds without approval from the General Court (the Legislature) as required and authorized by the Constitution.” (Compl. ¶ B.)
  6. “Issue a Declaratory Judgment ruling that Chapter RSA 124 is repugnant and contrary to the Constitution of New Hampshire and therefore null and void.” (Compl. ¶ C.)
  7. “Issue a Declaratory Judgment ruling that Chapter RSA 124 is repugnant and contrary to the Constitution of the United States of America.” (Compl. ¶ D.)
  8. Issue a Declaratory Judgment ruling that RSA 14:30-a, VI, is repugnant and contrary to the Constitution of New Hampshire and therefor null and void.” (Compl. ¶ E.)

The operative Complaint does not state how the Plaintiffs have been injured. However, to understand the claimed injury the Plaintiffs’ *Ex Parte Motion and Motion Interm Emergency Relief for Temporary Stay and an Order to Show Cause*, filed on November 18, 2021, (denied Nov. 19, 2021, Ruoff, J.), provided more explanation regarding claimed injury. It described the sustained injury as violations of certain Constitutional Amendments (Fourth, Ninth, Tenth, and Thirteenth), and by requiring New Hampshire to follow certain “Biden mandates.” Described within the motion as follows:

9. “Strings attached to federal grants,” “including but not limited to, the terms and conditions and obligations of the recipients by accepting the Federal Aid (Grants), thereby establishing unconstitutional Federal Jurisdiction over issues reserved to the

State or the people, in direct violation of the Constitution of New Hampshire and the Sovereignty of the State.” (PI’s Ex Parte Mot., Nov. 18, 2021, pp. 4.)

10. “Violation of the Thirteenth Amendment,” (Involuntary Servitude), “as the people of the State our now subject to two forms of taxation without representation in the form of repayment of Federal Grants by federal income tax, and the hidden tax called inflation. . .” (PI’s Ex Parte Mot., Nov. 18, 2021, pp. 10, ¶ 39.)

11. “Violation of the Fourth Amendment (vaccine registry),” “the Defendants' acceptance and spending of the previous Federal Grants establishes a vaccine registry in direct violation of Part I, Article 2-b and to the IV Amendment . . .” (PI’s Ex Parte Mot., Nov. 18, 2021, pp. 11-12, ¶ 42.)

12. “Due process violations,” “The Defendants' acceptance and spending of Federal Grants establishes laws and taxes upon the inhabitants in direct violation of the due process required by both the Constitutions, State and Federal, to establish laws and taxes upon the inhabitants of this State. Due process of law is protected by Part I, Article 15;” (PI’s Ex Parte Mot., Nov. 18, 2021, pp. 12, ¶ 43.)

13. “Violations of the Ninth and Tenth Amendments,” (PI’s Ex Parte Mot., Nov. 18, 2021, pp. 13, ¶ ¶ 47-49.)

The Plaintiffs’ Exhibits attached to their *Ex Parte* Mot., dated November 18, 2021, identify the specific funds with which Plaintiffs take issue. (PI’s Ex Parte Mot., Nov. 18, 2021, Ex. A; B; C; E.)

### **III. STANDARD OF REVIEW**

In considering a motion to dismiss, the court must determine “whether the plaintiff’s allegations are reasonably susceptible of a construction that would permit recovery.” *Konefal v.*

*Hollis/Brookline Co-op. School Dist.*, 143 N.H. 256, 258 (1998) (internal quotations and citations omitted). In doing so, the court assumes all material facts in the plaintiff's complaint are true "and construe[s] all reasonable inferences drawn therefrom most favorably to" the plaintiff. *Karch v. BayBank FSB*, 147 N.H. 525, 529 (2002) (internal quotations and citations omitted). "The court will not, however, assume the truth and accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993). The question of whether a claim can be sustained is a threshold issue, which requires "the court to test the facts in the complaint against the applicable law." *Provencal v. Vermont Mut. Ins. Co.*, 132 N.H. 742, 745 (1990). The court does not assume the truth of statements in the plaintiff's complaint, "which are merely conclusions of law." *Karch*, 147 N.H. at 529, citing *Thompson v. Forest*, 136 N.H. 215, 216 (1992) (quotation omitted).

When a motion to dismiss does not contest the sufficiency of the plaintiff's claim, but instead challenges the plaintiff's standing to sue, the trial court must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff has demonstrated a right to claim relief. *Carrigan v. New Hampshire Dep't of Health & Hum. Servs.*, 174 N.H. 362 (2021) citing *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 606-07 (2011).

#### **IV. LEGAL ARGUMENT**

The Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted; lack of standing; and mootness.

##### **A. The Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted**

The Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted because (a) their Complaint lacks a developed legal argument; (b) the Defendants

acted within the scope of their broad authority; and (c) the Plaintiffs have not alleged particularized harm.

**a. The Plaintiffs' Complaint lacks a developed legal argument**

Here, the Plaintiffs' Complaint lacks a developed legal argument and makes nothing but off-hand unsubstantiated claims regarding their constitutional rights. In New Hampshire, this lack of developed argument constitutes a failure to state a claim upon which relief may be granted. *See Lennartz v. Oak Point Assocs., P.A.*, 167 N.H. 459, 464 (2015) (“Judicial review is not warranted for complaints regarding adverse rulings without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration.”); *Keenan v. Fearon*, 130 N.H. 494, 499 (1988) (stating that “off-hand invocations” of constitutional rights supported by neither argument nor authority warrant no extended consideration).

Therefore, the Defendants' motion to dismiss should be granted and the Plaintiffs' Complaint should be dismissed in its entirety.

**b. The Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted because the executive branch and legislature acted within the scope of their broad authority**

The Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted because the executive branch and legislature acted within the scope of their authority under the New Hampshire Constitution and state law and application of vigorous scrutiny of the Complaint does not assert a cause of action, even when all properly plead factual allegations are construed to be true. Applying the well-accepted standard relating to a motion to dismiss, this matter should be dismissed in its entirety.

Specifically, “[i]n reviewing a motion to dismiss, [a Court’s] standard of review is whether the allegations in the plaintiff’s pleadings are reasonably susceptible of a construction that would permit recovery.” *Tessier v. Rockefeller*, 162 N.H. 324, 329–30 (2011)(quoting *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611 (2010)). “The court must vigorously scrutinize the complaint to determine whether, on its face, it asserts a cause of action.” *Id.* (quoting *Williams v. O’Brien*, 140 N.H. 595, 597 (1995) (emphasis and quotation omitted). The Court will, “assume the [plaintiff’s] pleadings to be true and construe all reasonable inferences in the light most favorable to [him].” *Id.* The Court “need not assume the truth of statements in the [plaintiff’s] pleadings, however, that are merely conclusions of law.” *Id.* The Court will then, “engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, [the Court] must hold that it was improper to grant the motion to dismiss.” *Id.* (quoting *Eckman Constr.*, 159 N.H. at 611 (citations omitted).

Here, the Plaintiffs’ pleadings are simply not reasonably susceptible of a construction that would permit recovery and thus, dismissal is appropriate.

The Plaintiffs’ Complaint appears to challenge the constitutional powers of the legislative and executive branches. However, “[t]he panoply of powers granted to the Governor and Council by the Constitution ... of this state is extensive.” *Barry v. King*, 106 N.H. 279, 281 (1965). NH CONST. pt. II, art. 41 provides that the Governor is the “supreme executive magistrate.”[] The constitution makes the Governor “responsible for the faithful execution of the laws.” N.H. CONST. pt. II, art. 41. The power to execute laws, therefore, is one of the executive branch’s “essential powers.” *In re Opinion Of Justs.*, 162 N.H. 160, 166, 27 A.3d 859, 865-66 (2011) (footnote omitted). NH. CONST. pt. II, art. 2., vests the legislature with the “supreme legislative power,” which specifically comprises the power to make laws, name certain civil officers and

define their duties, assess taxes, and make appropriations. *New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 386–87 (2011) citing *O'Neil v. Thomson*, 114 N.H. 155, 160, 316 A.2d 168 (1974); see N.H. CONST. pt. II, arts. 2, 55, 18, 56. Part II, Article 41 of the New Hampshire Constitution vests the Governor with “[t]he executive power of the state.” *New Hampshire Health Care Ass'n*, 161 N.H. at 386–87. Under Part II, Article 41, the Governor is “responsible for the faithful execution of the laws.” The intent of Part II, Article 41 of the State Constitution “is to impose a duty upon the Governor to carry out the legislative mandates and to enforce constitutional requirements.” *New Hampshire Health Care Ass'n*, 161 N.H. at 386–87 citing *Opinion of the Justices*, 116 N.H. 406, 412, 360 A.2d 116 (1976). The Governor is also responsible for governmental expenditures:

No moneys shall be issued out of the treasury of this state, and disposed of ... but by warrant under the hand of the governor ... by and with the advice and consent of council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

N.H. CONST. pt. II, art. 56. The purpose of Part II, Article 56 is to grant the Governor the power to ensure “that no payments ... be made from the public treasury except for public purposes and in accordance with the law.” *State v. Kimball*, 96 N.H. 377, 380, 77 A.2d 115 (1950) (quotation omitted). Pursuant to Part II, Article 56, the executive branch may expend public funds only to the extent, and for such purposes, as they may have been appropriated by the legislature. See *Petition of Strandell*, 132 N.H. 110, 115, 562 A.2d 173 (1989).

*New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 386–87 (2011)

Here, the Plaintiffs challenge the validity and constitutionality of two specific statutes: RSA 14:30-a, VI (amended 2012) and RSA 124. In support, they state no reasons or legal basis as to their request that these statutes be declared, “repugnant and contrary to the Constitution of New Hampshire [and/or the Constitution of the United States of America] and therefor null and void.”

Instead, they simply allege without particularized harm or substantiation that the statutes violate their constitutional rights. It is evident that the Plaintiffs are not pleased with the Defendants' acceptance of the ARP funds, however, they supply no articulable factual or legal basis to support their claims. Therefore, the Plaintiffs' Complaint should be dismissed in its entirety.

The statutes in question provide as follows:

RSA 14:30-a, VI (amended 2012), provides:

Any non-state funds in excess of \$100,000, whether public or private, including refunds of expenditures, federal aid, local funds, gifts, bequests, grants, and funds from any other non-state source, which under state law require the approval of governor and council for acceptance and expenditure, may be accepted and expended by the proper persons or agencies in the state government only with the prior approval of the fiscal committee of the general court.

RSA 14:30-a, VI (amended 2012).

RSA 124:1 provides:

124:1 Authority for Seeking Aid. – 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, for public works and highway construction, for the creation of employment agencies, or for any other purpose intended to relieve distress. Any officer of the state who may be designated in any act passed by the congress of the United States, or in any regulation or requirement of any agency of the United States, is authorized in the name of the state to make all applications and sign all documents which may be necessary to obtain such aid, provided that such applications have the approval of the governor and council. The state treasurer is directed to receive all money so granted by the United States, or by any agency thereof, to the state and to hold all such funds separate from all other funds of the state. Such funds shall be disbursed by the treasurer upon warrants drawn by the governor for the purposes for which such relief or aid is granted.

RSA 124:1.

The Plaintiffs state no factual reasons or legal basis as to their request for a declaration that RSA 14:30-a, VI or RSA 124, be declared “repugnant and contrary to the Constitutions of New Hampshire and the United States of America and therefor null and void.” Further, a generous reading of their Complaint yields no cognizable legal theory. Thus, as a matter of law, the Plaintiffs’ Complaint should be dismissed in its entirety.

**c. The Plaintiffs’ Complaint should be dismissed for failure to state a claim upon which relief may be granted because the Plaintiffs have not alleged particularized harm**

Here, the Plaintiffs have not alleged particularized harm that they have suffered because of the Defendants’ alleged actions.

Notably, a review of the operative Complaint does not set forth an injury suffered by the Plaintiffs; instead, it asserts legal conclusions and seeks the following:

1. “[A]n expedited emergency stay order to preliminarily and permanently enjoin Governor Sununu, his respective agents, officers, employees, and all other persons acting on behalf of the executive branch from enforcing any undelegated powers by colorable state or federal, statutes, rules, or regulations written pursuant to any colorable state or federal acts.” (Compl. ¶ A.)
2. “Issue a writ of prohibition on all forms of government of the “state” from accepting or spending any unappropriated state or Federal Funds without approval from the General Court (the Legislature) as required and authorized by the Constitution.” (Compl. ¶ B.)
3. “Issue a Declaratory Judgment ruling that Chapter RSA 124 is repugnant and contrary to the Constitution of New Hampshire [and of the United States of America] and therefore null and void.” (Compl. ¶¶ C-D.); and

4. Issue a Declaratory Judgment ruling that RSA 14:30-a, VI, is repugnant and contrary to the Constitution of New Hampshire and therefor null and void.” (Compl. ¶ E.)

Simply put, the Plaintiffs do not claim an injury. However, review of contemporaneously filed documents (the Plaintiffs’ *Ex Parte Motion and Motion Interm Emergency Relief for Temporary Stay and an Order to Show Cause*, filed on November 18, 2021) (denied Nov. 19, 2021, Ruoff, J.), provided more explanation regarding claimed injuries. It described the sustained injury as violations of certain Constitutional Amendments (Fourth, Ninth, Tenth, and Thirteenth), and by requiring New Hampshire to follow certain “Biden mandates.” *See* Section II, *supra*. However, these claimed injuries, similarly, are legal conclusions and devoid of fact.

Therefore, they lack standing to challenge the claims within her Complaint, discussed further at Section IV (B), *infra*. *See also Clayton Cangelosi v. Jefferson Parish President Cynthia Lee Sheng*, No. CV 20-1989, 2020 WL 5960682, at \*3 (E.D. La. Oct. 8, 2020) (dismissing complaint for lack of standing where plaintiff had “engaged in his chosen form of protest—appearing in public without a mask—on multiple occasions, and he has done so without being subjected to government reprisal”); *see also Noreen Bechade v. Governor Charles Baker et al.*, No. 20-11122-RGS, 2020 WL 5665554 (D. Mass. Sept. 23, 2020) (dismissing challenge to mask requirement for lack of standing where plaintiff failed to allege any concrete and particularized harm; plaintiff failed to allege that she had personally been forced to wear a mask, and the general threat of enforcement was insufficient to establish standing as every Massachusetts resident faced the same general threat of enforcement).

Accordingly, the Plaintiffs lack standing because they have not alleged a particularized harm and this Court should dismiss the Plaintiffs’ Complaint for failure to state a claim upon which relief may be granted.

**B. The Plaintiffs' Complaint must be dismissed because they lack standing to bring the suit**

Here, the Plaintiffs' Complaint should be dismissed because they lack the requisite standing. As noted in Section IV (A)(c) *supra*, the Plaintiffs have not set forth an injury within their Complaint. The Plaintiffs seek declaratory and injunctive relief regarding the acceptance of federal grants under the American Rescue Plan ("ARP").<sup>3</sup> "[S]tanding is a question of subject matter jurisdiction," which can be raised at any time. *Duncan v. State*, 166 N.H. 630, 640 (2014).

Here, the basis of the Plaintiffs' standing was not alleged as part of the operative Complaint; however, taxpayer standing for the relief asserted by the Plaintiffs in New Hampshire derives from statute, RSA 491:22 (amended 2012), and the New Hampshire Constitution, Part I, Article 8.<sup>4</sup>

The doctrine of standing "limits the judicial role, consistent with a system of separated powers, to addressing those matters that are traditionally thought to be capable of resolution through the judicial process." *Carrigan v. New Hampshire Dep't of Health & Hum. Servs.*, 174 N.H. 362 (2021) quoting *Duncan*, 166 N.H. at 643 (quotation omitted); see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). In New Hampshire, standing in the traditional sense is grounded in Part II, Article 74 of the State Constitution, which provides: "Each branch of the

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<sup>3</sup> By way of background, in March 2020 the World Health Organization declared a global pandemic after COVID-19 spread worldwide. The President of the United States declared a national emergency on March 13, 2020 and the Governor subsequently declared a statewide State of Emergency in New Hampshire on that same date. N.H. Exec. Order No. 2020-04 (Mar. 16, 2020) pursuant to authority granted to the Governor under RSA 4:45. This State of Emergency was extended through Executive Orders twenty-one times, including its last extension through Executive Order 2021-10 signed on May 28, 2021, which expired on June 11, 2021. (See N.H. Exec. Order Nos. 2020-05; 2020-08; 2020-09; 2020-10; 2020-14; 2020-15; 2020-16; 2020-17; 2020-18; 2020-20; 2020-21; 2020-23; 2020-24; 2020-25; 2021-01; 2021-02; 2021-04; 2021-05; 2021-06; 2021-08; 2021-10 (May 28, 2021)). As a result of the COVID-19 Pandemic, federal legislation resulted, including the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") (March 27, 2020) and as relevant in this action, the American Rescue Plan Act ("ARP") (March 11, 2021).

<sup>4</sup> Solely for the purposes of this motion, the Defendants do not dispute that the Plaintiffs are "taxpayer[s] and eligible voter[s]." Even so, their reliance on Part I, Article 8 is unavailing.

legislature as well as the governor and council shall have authority to require the opinions of the justices of the Supreme Court upon important questions of law and upon solemn occasions.” N.H. CONST. pt. II, art. 74; *Carrigan*, 174 N.H. 362 citing *Duncan*, 166 N.H. at 642-43. Thus, while the respective branches of the legislature, the governor, and the executive council may request our advisory opinion on important questions of law, other parties may not. *Carrigan*, 174 N.H. 362, citing N.H. CONST. pt. I, art.8, and citing *Duncan*, 166 N.H. at 640; and *Piper v. Meredith*, 109 N.H. 328, 330 (1969). The New Hampshire Supreme Court has held that those “other parties” must present claims for judicial resolution through an adversarial process in which their actual interests are at stake. *Carrigan*, 174 N.H. 362 citing *Teeboom v. City of Nashua*, 172 N.H. 301, 307 (2019); and *Duncan*, 166 N.H. at 642-43.

RSA 491:22 (amended 2012), permits declaratory judgments and defines standing related thereto. In *Duncan*, the New Hampshire Supreme Court held that the 2012 amendment to RSA 491:22, which provided for taxpayer standing, violated Part II, Article 74 of the New Hampshire Constitution because it authorized courts to issue advisory opinions to private individuals. *Duncan*, 166 N.H. at 642–45. The provision of RSA 491:22 (amended 2012), at issue in *Duncan* provided:

[A]ny taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in any such case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

*Duncan*, 166 N.H. at 637, quoting RSA 491:22 (amended 2012).

In 2018, New Hampshire voters adopted an amendment to Part I, Article 8 of the New Hampshire Constitution. *Carrigan*, 174 N.H. 362 (citations omitted). As amended, Part I, Article 8 provides:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

*Carrigan*, 174 N.H. 362 quoting N.H. CONST. pt. I, art. 8.

This language, by its express terms, does not authorize equitable remedies against the State beyond a *declaration*. For this reason alone, the Plaintiffs' requests for *injunctive* relief fail.

The Plaintiffs also lack standing under Part I, Article 8 to obtain the *declaratory* relief they seek. This, too, is clear from the plain language of Part I, Article 8. *See State Employees' Ass'n of N.H. v. State*, 161 N.H. 730, 740–41 (2011) [noting that a court, when interpreting a constitutional provision, must “first look at the natural significance of the words used by the framers” and that “[t]he simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption” (citation and quotation marks omitted)].

Part I, Article 8 allows a qualifying taxpayer to seek a declaration that the State “has spent or has approved spending” in violation of the law. This language, by its common usage, authorizes taxpayer standing only to challenge the legality of an *expenditure* by the State. *See Merriam-Webster, Spend*, available at <https://www.merriam-webster.com/dictionary/spend> (defining “spend” as “to use up or pay out: expend”); Merriam-Webster, Approve, available at

<https://www.merriam-webster.com/dictionary/approve> (defining “approve” as “to give formal or official sanction”). Expenditure, as defined by Black’s Law Dictionary, involves spending: “1. The act or process of spending or using money, time, energy, etc.; esp., the disbursement of funds . . . 2. A sum paid out . . .” EXPENDITURE, Black's Law Dictionary (11th ed. 2019). Thus, an operative threshold question in any case brought under Part I, Article 8 must be whether the plaintiff challenges the lawfulness of a particular, identifiable *expenditure* or the approval of a particular, identifiable *expenditure*.

Further, Part I, Article 8 in direct conflict with Part II, Article 74 [Judges to Give Opinion, When] of the New Hampshire Constitution. That provision restricts the power to issue *advisory* opinions to the New Hampshire Supreme Court and indicates that the only entities that may ask for such opinions are “[e]ach branch of the legislature [and] the governor and council....” Part I, Article 8 is, by its express terms, far narrower than the language struck down in *Duncan*. Whereas Part I, Article 8 accords taxpayers standing to “petition the Superior Court to declare whether the State ... has spent, or has approved spending, public funds” unlawfully, the language at issue in *Duncan* authorized a taxpayer to seek a declaration that the “conduct” of government was “unlawful or unauthorized” – that is, without any requirement that such “conduct” involve the expenditure of public funds. A proper reading of Part I, Article 8 preserves Part I, Article 74’s limit on advisory opinions by restricting taxpayer challenges to discrete, identifiable expenditures.

The underlying factual basis of the Plaintiffs’ Complaint involves the Defendants’ acts as members of the executive and legislative branches of government in the acceptance of ARP grants. This is similar to the language struck down in *Duncan*, which if permitted would allow the judiciary to generally opine, in the context of a private lawsuit, about the lawfulness of the State’s “conduct.” In addition to finding no support in the plain language of Part I, Article 8, this reading

also places that provision into conflict with Part II, Article 74. For this reason, too, the Court should find that the Plaintiffs' lack standing.

Here, the factual basis of the claims underlying the Plaintiffs' Complaint is the acceptance of federal grant monies under the ARP. The Plaintiffs assert that this will subject them to "Biden mandates," further, it is asserted that accepting such monies violates their Constitutional rights under the (Fourth, Ninth, Tenth, and Thirteenth Amendments). *See* Section II, *supra*. These allegations are legal conclusions, further, there is no factual basis supplied to support these contentions.

Simply put, Part I, Art. 8 does not confer standing on a taxpayer to challenge the executive and legislature's acceptance of federal grants, such as the ARP grants at issue here. *N.Y. State Ass'n of Small City Sch. Districts, Inc. v. State*, 840 N.Y.S.2d 179, 182 (N.Y. App. Div. 2007) (holding that New York's taxpayer standing statute "offers a means for citizens to challenge illegal or improper disposition of state funds or property, but *provides no avenue for taxpayers seeking the allocation of additional funds.*") (Emphasis added)].

Both RSA 491:22 (amended 2012) and Part I, Article 8's plain language foreclose the Plaintiffs' attempt to invoke taxpayer standing in this case. That attempt is further incompatible with Part II, Article 74 and creates profound separation-of-powers concerns. For all of these reasons, the Plaintiffs' Complaint should be dismissed for lack of standing.

**C. The Plaintiffs' Complaint should be dismissed because it is moot, as the executive branch and legislature has accepted the funds in question**

A matter is moot if it no longer presents a justiciable controversy because the issues involved in the case have become academic or dead. *Londonderry Sch. Dist. v. State*, 157 N.H. 734, 736 (2008). This Court has held that a statutory challenge, seeking prospective or declaratory relief only, is rendered moot when the statute has been amended so that it is no longer applicable.

*Id.* The Court has also recognized, however, that mootness is ultimately a question of judicial discretion and convenience, and that a decision on the merits may be warranted in circumstances involving a “pressing public interest,” or where a decision may avoid future litigation. *See Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253, 255–56 (2010).

The Defendants through their executive and legislative authority accepted the ARP funds in question and thus, this act rendered the Plaintiff’s Complaint moot, and no exception to the mootness doctrine justifies proceeding to the merits of this claim. Further, granting the requested relief would have profound New Hampshire Constitutional concerns with respect to separation of powers, as discussed in Section IV, A, *supra*.

The New Hampshire Supreme Court has stated that “[t]he public interest exception to the mootness doctrine should be invoked cautiously, for a case should not be heard when the parties’ interests are not sufficiently adverse to ensure proper and effective presentation of the arguments for each side.” *Proctor v. Butler*, 117 N.H. 927, 931 (1977), *overruled on other grounds by In re Sanborn*, 130 N.H. 430 (1988) (quotation marks and citation omitted).

The New Hampshire Supreme Court has applied the public interest exception sparingly, generally in circumstances where a decision on the merits will have an impact beyond the parties to the litigation. *See, e.g., State v. Hill*, 172 N.H. 711, 712 (2019) (finding issue raised on appeal—whether under RSA 597:2, a trial court may set bail at an amount the defendant cannot meet, on the sole basis that the defendant is a flight risk—presented legal issues that were of pressing public interest and capable of repetition yet evading review); *Bleiler v. Chief, Dover Police Dep’t*, 155 N.H. 693, 695 (2007) (finding “sufficient public interest in the outcome of this controversy to justify an exception to the doctrine of mootness” where petitioner challenged constitutionality of statute governing suspension or revocation of licenses to carry concealed weapons); *Proctor*, 117

N.H. at 930 (finding “pressing public interest in a decision on the merits” where probate judges hearing involuntary commitment petitions were applying varying standards of proof in such proceedings).

Here, no important and pressing concerns warrant a decision on the merits, nor would a decision on the merits avoid future litigation or address a question capable of repetition but evading review. The face of the Complaint leaves the Court with only guesses relative to the factual bases of the claim, other than the claim that private parties, through the judiciary, should be able to interfere with the executive and legislative acts with respect to federal grant money.

## **V. CONCLUSION**

In sum, for the aforementioned reasons, the Defendants state that this action should be dismissed in its entirety because (1) the Plaintiffs’ Complaint fails to state a claim for relief because the Defendants acted within the bounds of their authority under the law and in accordance with both the state and federal constitutions; (2) the Plaintiffs lack standing; and (2) the ARP grants have been approved and thus the requested relief is moot.

WHEREFORE, the twenty named Defendants respectfully request that this Honorable Court:

- (A) Dismiss the Plaintiffs’ Amended Complaint in its entirety;
- (B) Deny the Plaintiffs’ requested relief in its entirety; and
- (C) Grant such further relief as may be deemed just and proper.

The Court has carefully reviewed the Complaint and all related filings in this case. While the Court understands the factual complaints of the plaintiffs, the Court cannot discern any legally viable claims. The Court concurs with the several and alternative arguments raised by the Defendants and adopts them. Thus, upon thorough review of the briefings, the Motion to Dismiss is DENIED.



Honorable David W. Ruoff

February 28, 2022

**Clerk's Notice of Decision  
Document Sent to Parties**

on 03/01/2022

Respectfully submitted,

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