**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.**
**NORTHERN DISTRICT**

**SUPERIOR COURT**

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

v.

Christopher Sununu, Governor of the State of New Hampshire

Docket No. 216-2020-CV-00342

# ORDER

Plaintiffs have brought this action seeking writs of mandamus and prohibition, as well as declaratory and injunctive relief. The action arises out of Governor Sununu's public declaration that, pursuant to RSA 4:45, III(e) and RSA 21-P:43, he has the authority to accept and expend funds allocated to the State of New Hampshire via the recent CARES Act without oversight from the legislative branch's Fiscal Committee. On April 22, 2020, following a hearing, the Court granted the Governor's motion to dismiss, finding that plaintiffs lacked standing. Plaintiffs now move for reconsideration of that order. In addition, plaintiffs seek to amend their complaint and further move for an expedited declaratory judgment. The Governor objects. For the reasons that follow, plaintiffs' motion for reconsideration on the issue of standing is GRANTED as to all plaintiffs except Stephen Shurtleff. The motion to reconsider the Court's finding as to the preliminary injunction is DENIED. Plaintiffs' motion to amend is GRANTED. The Court DEFERS ruling on the motion for expedited declaratory judgment pending further briefing.

## I. Motion to Amend

As an initial matter, plaintiffs move to amend their complaint for a second time, seeking to add four additional members of the Fiscal Committee as named plaintiffs. The amended complaint also adds some additional, updated facts, although the central controversy and nature of the claims remain the same. Finally, while the specific counts remain unchanged, plaintiffs add several additional references to statutory and constitutional provisions, alleging violations of RSA chapter 124 and Part II, Articles 41 and 56 of the New Hampshire Constitution. "The general rule in New Hampshire is to allow liberal amendment of pleadings . . . ." *Kravitz v. Beech Hill Hosp., LLC*, 148 N.H. 383, 392 (2002). Given the fact that these proceedings are still in the early stages, and because, as articulated below, the Court finds certain plaintiffs have articulated a basis for standing, the Court GRANTS plaintiffs' motion to amend.

## II. Motion to Reconsider

1. Standing

As the Court noted in its original order, "standing is a question of subject matter jurisdiction." *Duncan v. State*, 166 N.H. 630, 640 (2014). "Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." *Teeboom v. City of Nashua*, 172 N.H. 301, 307 (2019) (quoting *Duncan*, 166 N.H. at 642-43). "In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect." *Id*. (quoting *State v. Actavis Pharma*, 170 N.H. 211, 214 (2017)). "Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete

interest." *Id*. "Rather, the party must show that its own rights have been or will be directly affected." *Id*.

Plaintiffs have narrowed their focus and now argue they have standing because the Governor's actions are nullifying their statutory right to vote as members of the Fiscal Committee. In support of this position, plaintiffs cite *Am. Fed'n of Gov't Emps., AFL-CIO v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982). In that case, a United States congressman and member of the House Appropriations Committee sued the Secretary of Housing and Urban Development over a proposed reorganization of the department, alleging that such a reorganization required prior approval of the Appropriations Committee. *Id*. at 304. In determining whether the congressman had standing, the court conducted two separate analyses: the congressman's standing as a member of the House of Representatives, and his standing as a member of the Appropriations Committee. As to the former, the court found that his "stake as a legislator was merely an interest in having law executed properly." *Id*. at 305. "Any interest that a congressman has in the execution of laws would seem to be shared by all citizens equally." *Id*. "Injury to that interest is a generalized grievance about the conduct of government which lacks the specificity to support a claim of standing." *Id*. (citation omitted).

As to the congressman's membership on the House Appropriations Committee, however, the court reached a different conclusion. The court found:

> In the present case, the Appropriation Act gave Congressman Sabo the right, as a member of the Appropriations Committee, to participate in approval of any reorganization of HUD conducted before January 1, 1983. The Secretary's actions injure him by depriving him of that specific statutory right to participate in the legislative process. That right, unique to members of the Appropriations Committees, is not a general interest in the faithful execution of laws, but rather a particular interest in the law as it relates to their authority. Under current governing precedent, therefore, Congressman Sabo has a sufficient personal stake in the outcome of the controversy to ensure that the dispute sought to be adjudicated will be presented in a concrete factual

> context conducive to a realistic appreciation of the consequences of judicial action.

*Id*. Based on this language, plaintiffs argue they too have articulated a concrete injury to their statutory right to approve expenditures by the Governor sufficient to provide standing.

The Governor objects, arguing *Pierce* is "outmoded" because it was issued long before the United States Supreme Court decision in *Raines v. Byrd*, 521 U.S. 811 (1997), which the Court discussed in its prior order. However, the Court finds that *Raines* addressed an issue that is distinct from the argument raised in *Pierce* and currently advanced by plaintiffs. In *Raines*, members of Congress challenged the constitutionality of the Line Item Veto Act, which passed and was enacted over their objection. *Id*. at 814-16. Due to the nature of their claim, the Supreme Court found that the plaintiffs alleged institutional injuries, i.e., the diminution of legislative power, "which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821. On the other hand, the injury alleged here has a much narrower focus. As was the case in *Pierce*, the Governor's actions are alleged to deprive plaintiffs of a specific right that is unique to them as members of a specific committee. This injury is not shared by other members of the legislature or the public at large.

Further, there is additional support for the notion that *Pierce* remains good law after *Raines*. The court in *Pierce* relied on *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). *Raines* mentioned *Kennedy*, among others, only in a footnote with the following remark: "Over strong dissent, the Court of Appeals for the District of Columbia Circuit has held that Members of Congress may have standing when (as here) they assert injury to their institutional power as legislators." 521 U.S. at 820 n.4. The Supreme Court made no direct mention of *Pierce* or the specific factual scenario presented in that case. Moreover, it did not explicitly overrule *Kennedy* or any of the other cases mentioned in the footnote. *Id*.

Subsequent to *Raines*, the Federal District Court for the District of Columbia appeared to recognize *Pierce* as still being good law. In *Chenoweth v. Clinton*, four members of the House of Representatives sued President Clinton over an executive order creating the American Heritage Rivers Initiative, arguing that the executive order constituted legislation created without authorization by Congress. 997 F. Supp. 36, 37 (D.D.C. 1998). In determining whether the plaintiffs had standing, the first court analyzed the Supreme Court's holding in *Raines*. In doing so, the court noted that

> *Raines* distinguishes between a personal injury (the loss of a private right) and an institutional injury (the loss of political power) as the basis of a legislator's standing. While *Raines* does not categorically require that standing be based on a personal/private injury, it does suggest that a personal injury more strongly supports a finding of standing than does an institutional injury[.] . . . That said, however, *Raines* clearly upholds *Coleman v. Miller* . . . , which found that state legislators claiming an institutional injury had standing.
> . . . .
> *Raines* directs that, given the vigorous standing inquiry that applies to suits alleging unconstitutional action by the legislative or executive branch, and the relative weakness of institutional injuries compared to personal injuries, an institutional injury may support legislative standing only if the injury occurs under the same circumstances as those in *Coleman*, or in some other way matches the level and quality of vote nullification that took place in *Coleman*.

*Id*. at 38-39. "[A]n indication of a personal injury is when the plaintiffs have been singled out for specially unfavorable treatment relative to other Members of their respective bodies." *Id*. at 38 (citing *Raines*, 521 U.S. at 821).

The court then reviewed a number of opinions from the D.C. Circuit court, including *Pierce*, and observed that the injury in *Pierce* "was sufficiently specific and concrete because of the specific statutory authority given only to members of the Committees on Appropriations to pre-approve any reorganizations of the HUD department." *Id*. at 40. Although it ultimately distinguished its facts from those in *Pierce* and others, the court concluded its review of cases by noting that "[t]he defendants are correct that the D.C. Circuit case law consistently denies standing for legislators challenging executive actions unrelated to passing a specific piece of

legislation, *without some further indication of concreteness or specificity*." *Id*. at 41 (emphasis added); *see also Russell v. DeJongh*, 491 F.3d 130, 137 n.7 (3rd Cir. 2007) (distinguishing facts before it from *Pierce*, but otherwise treating it as good law).

Here, the Court agrees with the Governor that as members of the New Hampshire legislature generally, plaintiffs lack standing to assert the present claims, absent some authorization from the legislative bodies that they represent. However, the membership of a majority of plaintiffs on the Fiscal Committee provides an additional concreteness to the harm alleged.[1] As in *Pierce*, plaintiffs here have a specific statutory right to approve the expenditure of certain types of funds. *See, e.g.*, RSA 14:30-a; RSA 9:13-d. The alleged harm suffered by members of the Fiscal Committee is felt only by the committee's members, and thus is more particularized and concrete than a general allegation of diminution in the power of the legislature. As a result, plaintiffs claim to have been singled out for specially unfavorable treatment relative to their peers in the legislature, and the proposed circumvention of their specific statutory right is akin to the vote nullification in *Coleman*. Therefore, the Court is persuaded by the reasoning in *Pierce* that the members of the Fiscal Committee have standing to address the alleged injury to their specific statutory right to approve expenditures by the Governor. Accordingly, with respect to members of the Fiscal Committee, plaintiffs' motion for reconsideration as to standing is GRANTED.

That being said, plaintiff Stephen Shurtleff is not a member of the Fiscal Committee. Therefore, he must articulate some separate basis for standing, and he attempts to do so in two ways. First, he argues that as the Speaker of the House of Representatives he has the authority to represent the House, without the need for any authorization from the members of that legislative body. Plaintiffs continue to insist that the procedure by which the legislature

1 Plaintiffs argue that a single member of the Fiscal Committee would have standing to bring this action. Because a majority of the Fiscal Committee is present in this case, the Court need not address this argument.

chooses to authorize its constitutional officers to institute lawsuits on behalf of the institutions they represent is a nonjusticiable issue, citing *Hughes v. Speaker of the N.H. House of Reps.*, 152 N.H. 276, 284 (2005) ("The legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure."). Even accepting this as true, however, plaintiffs again fail to identify *any* specific provision in the constitution or the House or Senate rules that grants the Speaker of the House or President of the Senate unilateral authority to initiate a lawsuit on behalf of either legislative body. The only rule plaintiffs cite to is House Rule 64, which states, in pertinent part, that "[t]he procedures of the New Hampshire House shall be derived from . . . [c]ustom, usage and precedent." Plaintiffs argue that a handful of cases in which the Speaker of the House and/or President of the Senate, among others, were plaintiffs establish the necessary "custom, usage and precedent." *See, e.g., Monier v. Gallen*, 120 N.H. 333 (1980), *O'Neil v. Thomson*, 114 N.H. 155 (1974). However, as the Court noted in its prior order, the cases plaintiffs rely on either do not mention standing at all or address it only in passing. As a result, there is no indication whether the plaintiffs in those cases had authorization or not from their respective bodies. Therefore, the Court does not find that these cases alone are sufficient to establish a custom or precedent that the Speaker of the House can file suit on behalf of the House of Representatives without any input from the other members of that body.

Speaker Shurtleff also relies on taxpayer standing. Plaintiffs argue the Court erred in its finding that they lack taxpayer standing, maintaining that the 2018 amendment to Part I, Article 8 of the New Hampshire Constitution fully overruled *Duncan* and reinstated the taxpayer standing doctrine as it existed prior to that decision. The Court disagrees. The taxpayer standing language in RSA 491:22 that *Duncan* declared unconstitutional reads as follows:

> The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any 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 agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

RSA 491:22, I. Despite claiming an intent to fully revive this standard, the authors of the constitutional amendment did not utilize the same language set forth above. Instead, the constitutional amendment states, in pertinent part:

> 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.

NH CONST. Pt. I, Art. 8. Of note is the addition of the phrase "beyond his or her status as a taxpayer" in the last sentence. A plain reading of this construction indicates that the taxpayer must demonstrate that his rights as a taxpayer were impaired or prejudiced. *See Bd. of Trustees of N.H. Judicial Retirement Plan v. Secretary of State*, 161 N.H. 49, 53 (2010) (finding that in interpreting constitutional provisions, the Court "will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast"). If the authors of the amendment had intended to adopt taxpayer standing as it existed prior to *Duncan*, it could have omitted this phrase entirely.

The fact that voters revived a modified and restricted standard for taxpayer standing is reflected in the reduced scope of government action that gives right to a claim. Under RSA 491:22, taxpayers were authorized to bring suit if the "taxing district or agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized." In contrast, under Part I, Article 8, taxpayers can only seek a declaration that the State or a

political subdivision has unlawfully spent, or approved spending, public funds. Therefore, regardless of their intent, the plain language of the amendment indicates that the authors of the amendment, and the voters that enacted it, did not revive taxpayer standing as it existed prior to *Duncan*.

Plaintiffs further argue the Court erred in considering cases from outside New Hampshire, as those jurisdictions rely only upon case law that is ultimately narrower than New Hampshire's constitutional provision. *See Hotaling v. Hickenlooper*, 275 P.3d 723, 727 (Colo. Ct. App. 2011); *Broxton v. Siegelman*, 861 So. 2d 376 (Ala. 2003). However, in making this argument, plaintiffs rely upon outdated New Hampshire cases discussing taxpayer standing under the standard that has been superseded by the constitutional amendment. As the Court has articulated, the amendment is narrower than plaintiffs appear to believe. Moreover, the New Hampshire Supreme Court in *Duncan* relied heavily on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which addressed standing under Article III of the United States Constitution, in articulating standing under the New Hampshire constitution. *See* 166 N.H. at 642-44. Therefore, there is precedent for looking to foreign jurisdictions for assistance in interpreting taxpayer standing. Given the Court's interpretation of the Part I, Article 8 taxpayer standing language, the Court finds plaintiffs have failed to establish that the Court erred by relying on these foreign cases in its prior order.

As a final note, the Court finds that notwithstanding the 2018 constitutional amendment, *Duncan* remains good law on the topic of standing generally. This finding is supported by the New Hampshire Supreme Court's citation to *Duncan* in *Teeboom* subsequent to the constitutional amendment. Although the Supreme Court in *Teeboom* assumed, without deciding, that the 2018 constitutional amendment did not apply to the case, the Court nevertheless went into detail on the issue of taxpayer standing, citing *Duncan* and *Lujan* numerous times. It would be unreasonable to suggest that an extensive discussion of

taxpayer standing in a case that post-dates a constitutional amendment is not a substantive commentary on the current state of the doctrine. Moreover, plaintiffs have not cited any law indicating that a constitutional amendment that overturns a *portion* of the holding of a case renders all other findings and discussion in said case obsolete. Such a result would be inconsistent with established practice. *See, e.g.*, *State v. Hebert*, 158 N.H. 306, 314 (2009) ("Accordingly, we overrule *that portion of [State v.] Skidmore* that creates an exception to the contemporaneous objection requirement.") (emphasis added).

In light of the foregoing, the Court finds plaintiffs have failed to identify any facts or law the Court overlooked or misapprehended in finding that they lack standing as taxpayers. As a result, on the issue of taxpayer standing, and specifically with respect to plaintiff Stephen Shurtleff, plaintiffs' motion to reconsider as to standing is DENIED.

2. Preliminary Injunction

Having determined that a majority of plaintiffs have standing, the Court will now address plaintiffs' entitlement to a preliminary injunction.[2] In its prior order, the Court held that a preliminary injunction would not be in the public interest, and that plaintiffs had failed to demonstrate that they would personally be harmed by the Governor's actions. However, the Court at that time analyzed the issue through the prism of taxpayer standing. Because the Court now finds that plaintiffs have standing on other grounds, it revisits the issue of plaintiffs' right to a preliminary injunction anew.

"The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015). "The issuance of injunctions, either temporary or permanent, has long been considered an

2 Because the Court has found plaintiffs have standing on grounds other than as taxpayers, the Court need not address the availability of preliminary injunctive relief in cases brought pursuant to Part I, Article 8 of the New Hampshire Constitution. Accordingly, the Court offers no opinion on that topic.

extraordinary remedy." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case." *Id*. (citing *Kukene v. Genualdo*, 145 N.H. 1, 4 (2000)). "[A] party seeking an injunction must show that it would likely succeed on the merits." *Id*. Significantly, "[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." *Id*. Federal courts have pointed out that the likelihood of success is the "touchstone of the preliminary injunction inquiry." *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012). "If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Id*. The logic behind this emphasis is obvious. If the moving party cannot show that he is likely to prevail at the end of the case, it makes little sense to change the status quo on the assumption that the moving party will win.

Here, plaintiffs seek to enjoin the Governor from further spending CARES Act funds without seeking the approval of the Fiscal Committee. The Governor argues that he is not obligated to seek the Fiscal Committee's approval during a state of emergency. Both parties rely on a number of statutes as set forth below.

Plaintiffs first look to RSA 14:30-a, which established the Fiscal Committee. The stated purpose of the committee is to "consult with, assist, advise, and supervise the work of the legislative budget assistant, and may at its discretion investigate and consider any matter relative to the appropriations, expenditures, finances, revenues or any of the fiscal matters of the state." RSA 14:30-a, II. Significantly, for purposes of the instant matter, the statute also provides that:

> 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. Plaintiffs also rely on RSA 9:13-d, which provides:

> Should it be determined by the governor that a civil emergency exists, the governor may, with the advice and consent of the fiscal committee, authorize such expenditures, by any department or agency, as may be necessary to effectively deal with said civil emergency and may draw his warrants in payment for the same from any money in the treasury not otherwise appropriated. In determining whether a civil emergency exists, the governor shall consider whether there is such imminent peril to the public health, safety and welfare of the inhabitants of this state so as to require immediate action to remedy the situation. This section shall not be construed to enlarge any of the powers which the governor may possess under the constitution or other statutes.

In their motion for reconsideration, as well as their motion to amend their complaint, plaintiffs now additionally point to RSA chapter 124 as providing insight on this point, referring to two specific sections. RSA 124:1 provides:

> 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.

RSA 124:4 provides:

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

The Governor looks to RSA 4:45 and RSA 21-P:43 for support. RSA 4:45, III(e) states, in its entirety, that

> [d]uring the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the

> following additional emergency powers: . . . [t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

RSA 21-P:43 provides:

> Each political subdivision may make appropriations in the manner provided by law for making appropriations for the ordinary expenses of such political subdivision for the payment of expenses of its local organization for emergency management. Whenever the federal government or any federal agency or officer offers to the state, or through the state to any of its political subdivisions, services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of emergency management the state, acting through the governor, commissioner, or such political subdivision, acting with the consent of the governor and through its executive officer, city council, or board of selectmen, may accept such offer, subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer. Whenever any person, firm or corporation offers to the state or to any of its political subdivisions services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of emergency management the state, acting through the governor, or such political subdivision, acting through its executive officer, city council, or board of selectmen, may accept such offer, subject to its terms.

"When reasonably possible, statutes should be construed as consistent with each other." *EnergyNorth Nat. Gas, Inc. v. City of Concord*, 164 N.H. 14, 16 (2012). "When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." *Id*. "To the extent two statutes conflict, the more specific statute controls over the general statute." *Id*. This is a well-recognized and longstanding rule of statutory construction. *See Appeal of Plantier*, 126 N.H. 500, 510 (1985) ("It is a well settled rule of statutory construction that in the case of conflicting statutory provisions, the specific statute controls over the general statute."); *Matter of Gamble*, 118 N.H. 771, 777 (1978) ("We recognize the rule that a specific law controls in a specific case over a general law.").

Comparing the statutes reveals that the statutes relied upon by plaintiffs and defendant either irreconcilably conflict or simply apply to different situations. As an

initial matter, with respect to RSA chapter 124, the Court questions its applicability to this dispute. First, RSA 124:1 makes no mention of the Fiscal Committee, and gives the Governor the authority to *apply for* federal aid for use in certain situations, including "emergency industrial or unemployment relief, for public works and highway construction, . . . or for any other purpose intended to relieve distress." Here, there was no need to apply for the CARES Act funds. Pursuant to the Act itself, "not later than 30 days after March 27, 2020, the Secretary *shall pay* each State . . . the amount determined for the State . . . for fiscal year 2020 under subsection (c)." 42 U.S.C. § 801(b)(1) (emphasis added). Moreover, while RSA 124:4 was amended in 2005 to include reference to the Fiscal Committee, it makes no mention of emergency situations.

Likewise, while RSA 14:30-a provides that the Fiscal Committee has the right to approve expenditures over a certain amount, it does not, by its plain terms, apply in emergency situations. Significantly, as with RSA 124:4, the key section of RSA 14:30-a was enacted in 2005, three years after RSA 4:45 and 21-P:43, and was amended in 2007. Therefore, the legislature was well aware of the broad emergency powers it had granted to the Governor at the time it sought to expand the Fiscal Committee's authority. Had it desired to give the Fiscal Committee specific oversight in states of emergency, either under RSA 14:30-a or RSA 124:4, it could have done so.

By comparison, RSA 21-P:43 explicitly applies to federal gifts, grants, or loans given for purposes of emergency management, but makes no mention of the Fiscal Committee. Plaintiffs argue that the language of that statute only refers to acceptance of these funds, but not expenditure. However, the Court finds the ability of the Governor to spend funds accepted pursuant to RSA 21-P:43 is implicit in the following language: "[T]he state, acting through the governor . . . , may accept such offer, *subject to the*

*terms of the offer and the rules and regulations, if any, of the agency making the offer.*" (emphasis added). Here, the CARES Act expressly provides rules and regulations for the expenditure of its funds, as noted in the Court's prior order. The Court finds that RSA 21-P:43 authorizes the Governor to expend CARES Act funds consistent with those rules and regulations.

It is important to note that RSA 21-P:43 and RSA 4:45, along with several other statutes, were enacted as part of the same piece of legislation in 2002, which was passed in response to the September 11, 2001 terrorist attacks. Additional guidance can be drawn from the language in these statutes, which strongly suggests that the 2002 legislation intended to expand the Governor's authority in emergency scenarios. First, RSA 21-P:35, defines "state of emergency" 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. Further, RSA 4:45 specifies a number of emergency powers that the Governor may exercise in a state of emergency. In contrast, for example, the concluding sentence in RSA 9:13-d states: "This section shall not be construed to enlarge any of the powers which the governor may possess under the constitution or other statutes." No such limiting or clarifying language is included in RSA 4:45 or 21-P:43.

When it comes to emergencies, the Fiscal Committee's authority appears to be addressed by RSA 9:13-d. However, RSA 9:13-d applies where the Governor determines that a "civil emergency" exists. That statute was enacted in 1987, long before the passage of RSA 4:45 and the definition of "state of emergency" in RSA 21-P:35, VIII. Because the legislature specifically defined "state of emergency" and set forth a process by which the Governor may declare one in 2002, it is reasonable to

presume that a "state of emergency" and a "civil emergency" refer and apply to different situations. Therefore, it appears that RSA 9:13-d, by its plain language, does not apply in states of emergency.

But, to the extent RSA 9:13-d does apply to the present state of emergency, it clearly conflicts with RSA 21-P:43, in that the former requires expenditures to be approved by the Fiscal Committee while the latter does not. In these circumstances, the more specific statute controls. RSA 21-P:43 is part of an overall statutory scheme designed to address states of emergency. It is one of a number of statutes under the heading "Homeland Security and Emergency Management." RSA 9:13-d, whose key term—"civil emergency"—is not even defined, is a standalone provision consisting of two sentences contained within a series of statutes under Chapter 9, which is entitled "Budget and Appropriations; Revolving Funds," that do not address states of emergency.

While the Court finds that the identified statutes do not provide a clear picture of the process for expending the CARES Act funds at issue,[3] the Court concludes that the 2002 legislation is the most specific statement by the legislature on the power of the Governor to expend funds during an emergency. It is also the legislature's most current *comprehensive* statement on the Governor's authority during an emergency. While there have been more recent enactments or amendments relating to the Fiscal Committee, none of them touch on the committee's powers during an emergency. On balance, having carefully considered all of the statutes relied on by the parties, the Court finds that the expenditure of the CARES Act funds appears to be governed by

[3] A review of the relevant statutes indicates that the various statutes at issue have been enacted at different times without express direction of how each provision interacts with others. References to the Fiscal Committee appear in several statutory provisions governing a number of separate subject matters, and no one statute or set of statutes clearly delineates how the Fiscal Committee's oversight operates, if at all, during a state of emergency.

RSA 4:45 and 21-P:43. As a result, plaintiffs have failed to meet their burden of showing a likelihood of success on the merits of their claim.

With respect to irreparable harm, plaintiffs argue that violations of constitutional rights—here, the legislature's constitutional power of the purse—creates a presumption of such injury. *See Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012). However, "the assertion of a constitutional injury is insufficient to automatically trigger a finding of irreparable harm." *Donohue*, 886 F. Supp. 2d at 150. Instead, "where . . . the constitutional deprivation is convincingly shown and that violation carries noncompensable damages, a finding of irreparable harm is warranted." *Id*. In light of plaintiffs' failure to establish a likelihood of success on the merits, the Court cannot conclude that the constitutional deprivation is convincingly shown, and will not presume irreparable harm. That being said, once the CARES Act funds have been spent, there is no means by which the alleged violation of plaintiffs' rights as members of the Fiscal Committee can be undone. The Court finds this is sufficient to establish irreparable harm under the current circumstances.

However, the existence of irreparable harm is mitigated by the fact that plaintiffs have an adequate remedy. As noted in the facts of the Court's prior order, a number of plaintiffs are members of the Legislative Advisory Board created as a part of GOFERR, through which they have the opportunity to provide advice to the Governor on CARES Act expenditures. Moreover, because the current conflict is due to the Governor's reliance on a pair of statutory provisions, the legislature possesses the ability to clarify the existing state of the law and resolve the conflict through the passage of legislation. In the alternative, the legislature could enact legislation specifically governing the appropriation and spending of CARES Act and/or other coronavirus relief funds.

Two states have already taken steps to do this very thing. In Mississippi, the legislature has enacted legislation specifically governing the appropriation and expenditure of CARES Act funds. *See* S.B. 2772, 2020 Assemb. Reg. Sess. (Miss. 2020). The Minnesota Senate passed legislation that requires CARES Act funds to be placed in a special account, and prevents expenditure of those funds except pursuant to direct appropriation by law. S.F. 4486, 91st Leg. (MN 2020). While the Governor may veto such legislation, the legislature possesses the ability to override should it gather sufficient support for such a measure.

Ultimately, the decision to grant an injunction is within the Court's discretion. Due to the lack of a likelihood of success on the merits and the primacy of this element in any preliminary injunction analysis, as well as the existence of an adequate legislative remedy, the Court finds that a preliminary injunction is not warranted at this time. Accordingly, for the foregoing reasons, plaintiffs' motion for reconsideration with respect to its entitlement to a preliminary injunction is DENIED.

**III. Motion for Expedited Declaratory Judgment**

In their final motion, plaintiffs seek an expedited declaratory judgment on the ultimate issue of the Governor's ability to disperse CARES Act funds without approval of the Fiscal Committee. However, this motion appears to have been filed with the intent that it serve the same function as a preliminary injunction in response to the Court's original order finding plaintiffs were not entitled to a preliminary injunction in the event they had taxpayer standing. Given that the Court has now found plaintiffs have standing on other grounds and has addressed the merits of plaintiffs' request for a preliminary injunction, the Court considers this motion moot. Even assuming this motion is distinct from plaintiffs' motion for preliminary injunction, the Court would not be inclined to grant it for the reasons set forth above. Accordingly, plaintiffs' motion for an expedited declaratory judgment is DENIED.

Nevertheless, the Court agrees that the final issue is ripe for consideration, as it is a legal determination that does not require development of a further record. That being said, the Court finds it would benefit from further briefing on this point. The parties' original pleadings on this issue were drafted under significant time constraints, and the most recent round of pleadings understandably focused almost exclusively on addressing the issues of standing underlying the Court's prior order. The Court believes it and the parties would benefit from a final round of briefing centered on the merits of plaintiffs' claims.

**Conclusion**

Plaintiffs' second motion to amend is GRANTED. Plaintiffs' motion for reconsideration is GRANTED in part and DENIED in part. The motion to reconsider the Court's finding as to the preliminary injunction is DENIED. Finally, plaintiffs' motion for expedited declaratory judgment is DENIED. The parties shall propose a schedule for further briefing on the merits of plaintiffs' claims, after which the Court shall enter a final judgment.

**SO ORDERED.**

June 5, 2020
Date

Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 06/05/2020