INTRODUCTION

The legislature first granted the governor additional powers during a state of emergency (SOE) – not after the national tragedy of September 11\textsuperscript{th} – but in 1953. Since then, the language of RSA 4:45, III(e) and RSA 21-P:43 has changed statutory homes, but remained constant. Likewise, RSA 4:18 has endured as the “Emergency Fund” into which the legislature may appropriate money for the executive branch to pay emergency expenses. The Attorney General’s Office (AGO) opined that, constitutionally, the executive branch can only use RSA 4:18’s funds as a “temporary expedient pending” future legislative action. The full legislature indeed acted in 1977 to appropriate funds to pay the National Guard for its involvement with protests at the Seabrook nuclear plant. The next session it enacted RSA 9:13-d (“Civil Emergency”), which at that time referred to the governor’s declaration of a “state of civil defense emergency.”

The legislature dropped “civil defense” in 1987. That year it also considered expanding the governor’s emergency spending authority from money in RSA 4:18’s “emergency fund,” to “funds from the treasury not otherwise appropriated.” The legislature rejected this extension of power because there were already “adequate emergency funds appropriated.” Ten years later, the Office of Emergency Management (OEM) requested that the legislature create an alternative
fund from which to pay emergency expenses, “as opposed to having to seek a special appropriation for individual disaster events.”

When RSA 4:45, III(e) and RSA 21-P:43 were first enacted in 2002, they included no new language than what had previously existed. The purpose was to move OEM from the Governor’s Office to the Department of Safety. Just one year later, Governor Benson did not believe he had unilateral control over the state’s emergency spending. After declaring a SOE, he sought a related appropriation from the Fiscal Committee. In 2008, the legislature recodified its intent that the executive branch must seek Fiscal Committee approval to spend money not otherwise appropriated during a SOE. RSA 21-P:53 allows the Health and Human Services (HHS) Commissioner to “purchase” medicine “during the existence of a [SOE] under this chapter” “notwithstanding…RSA 9:13-d…[or] any other law to the contrary.”

It is well-settled law that without an “appropriation, or equivalent direction for payment” for a certain purpose by the legislative branch, the New Hampshire Constitution precludes the executive branch from spending the state’s money. Unlike other statutes within the same statutory scheme, RSA 4:45, III(e) and RSA 21-P:43 contain no such direction for payment. Put differently, these statutes confer the governor with no authority to appropriate money the state receives, or to spend money the legislative branch has yet to appropriate. Governor Sununu may not spend money the legislature has not authorized during this current SOE.

**BACKGROUND OF THE DISPUTE**

Governor Sununu has extended the first SOE he declared on March 13, 2020 five consecutive times. See Pls.’ Statement of Material Facts (“SMF”) ¶¶ 25, 26. He expects to continually declare a SOE into the “indefinite future.” *Id.* at ¶ 27.
With the exception of remote meetings, the Fiscal Committee has operated as designed during this SOE. When the pandemic first began in March, the Fiscal Committee approved HHS’s request to “accept and expend Federal Funds in an amount up to an estimated $5,000,000 from the [CDC] for purposes of addressing the Covid-19 virus” Id. at ¶ 31-33. Afterwards Governor Sununu declared that he would spend federal CARES Act funds without first requesting a legislative appropriation because “the urgency and timing of this crisis does not allow for “legislative input.” Id. at ¶¶ 23, 28, 29; see also id. at ¶ 34 (“To ask the Fiscal Committee to meet in open session is not possible; it is not feasible and it is not going to happen.”). Just days later, the Fiscal Committee approved HHS’s request to “accept and expend [federal] Families First Coronavirus Response Act” funds. Id. at ¶¶ 35-37. The Governor also provided written notification that he alone had authorized the re-appropriation of $18 million. Id. at ¶ 38-39. Since then, the Fiscal Committee has regularly met to review and approve various executive branch appropriation requests, while also receiving notices that the Governor alone is authorizing expenditures of the state’s money without prior legislative approval. Id. at ¶¶ 40-46.

As of last month, the Governor had appropriated all but “$250 to $300 million” of New Hampshire’s CARES Act funds. Id. at ¶ 24, 30. Since he took over the legislature’s role, Governor Sununu has not missed an opportunity to publicize his appropriations. Id. at ¶¶ 47-85.

LEGAL BACKGROUND

I. NEW HAMPSHIRE’S LAWS REAFFIRM THE CONSTITUTIONAL MANDATE THAT THE POWER OF APPROPRIATION LIE EXCLUSIVELY WITHIN THE LEGISLATIVE BRANCH

A. The Framers of the U.S. Constitution Ensured the Power of Appropriation Would Exclusively Lie in the Most Representative and Accountable Branch.

The drafters of the nation’s constitution “were unanimous that Congress, as the representatives of the people, should be in control of public funds - not the President or executive

The framers deemed the legislative branch best suited to exercise fiscal policy because: “In making laws regard should be had to the sense of the people who are to be bound by them, and it is more probable that a single man should mistake or betray this sense than the legislature.” Hon. Abner J. Mikva, The Purse, the Purpose, and the Power, 21 Ga. L. Rev. 1, 3–4 (1986) (quoting The Records of the Federal Convention of 1787, at 585 (1911)). “The justice, the reasonableness, even the efficacy of fiscal decisions depend upon the government's having taken into account the diverse interests of its citizens. No institution is more willing—no institution is better able—to consider and accommodate these interests than the legislative branch.” Id.2

The power of appropriation provides “a crucial means by which the Legislature exercises its lawmaking power to accomplish social purposes.” Opinion of the Justices to the Senate, 375 Mass. 827, 832 (1978).3 It is defined as “the authority to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other.” Id.

B. The New Hampshire Constitution Precludes Executive Branch Expenditures Without a Legislative Appropriation or Other Direction For Payment.

“Supreme legislative power,” N.H. CONST. Pt. II, Art. 2, includes the power to make laws and appropriations for the operation of state government. O'Neil v. Thomson, 114 N.H. 155,

1 Available at: https://history.house.gov/institution/origins-development/power-of-the-purse/
2 The “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” The Federalist No. 58 (James Madison).
3 See also The Federalist No. 30 (Alexander Hamilton) (“Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions.”)
160 (1974) (citing N.H. CONST. Pt. II, Art. 5). The legislature’s constitutional power to make appropriations is exclusive under Part II, Article 56. It reads:

No moneys shall be issued out of the treasury of this state, and disposed of….but by warrant under the hand of the governor for the time being, by and with the advice and consent of the 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.

(Emphasis added.) “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.” N.H. Health Care Ass'n v. Governor, 161 N.H. 378, 387 (2011); see also Petition of Strandell, 132 N.H. 110, 115 (1989) (same); In re Opinion of Justices, 75 N.H. 624 (1910) (“the Governor has no authority to draw his warrant upon the treasury in a particular case, unless there is some existing act or resolve of the Legislature authorizing such payment.”); Opinion of the Justices, 72 N.H. 601 (1903) (“no money can be paid [] except by direction of the Legislature”).

C. The Legislature’s Fundamental Control Over Appropriations Extends to All Federal Funds the State Receives.

Part II, Article 56’s requirements are practically enforced by RSA 6:11. It requires all state revenues of any source be first deposited in the state treasury. Paragraph III states in relevant part: “All state departments and institutions…receiving money for the state shall deposit the full amount of all such moneys into a state treasurer's bank account….” (Emphasis added.)

Further, the Supreme Court has unequivocally held that, regardless of who a federal act may designate as the recipient of federal funds, the New Hampshire Legislature maintains exclusive control over state appropriations of federal funds. In Opinion of the Justices, 118 N.H. 7, 14 (1978), the court was faced with the “separation of powers tension between the legislature and the executive for control of federal funds and the designation of State agencies for accepting and expending those funds.” The Supreme Court held that even though the terms of the federal
grant statute provided that the governor would designate the state agency to receive the funds, the legislative branch had “the authority to direct the manner in which federal funds available to the State…are to be expended in this State.” 118 N.H. 7, 15 (1978). It reasoned that:

Unless proper regard is given to the respective roles of the policy-making legislature and the administrative Governor, the legislative branch of our State government would have little or no role to play with respect to Federal aid programs with the corollary result that the executive branch in the name of supreme executive power would not be faithfully executing the laws of this [State] but rather, as it saw fit, seeking and administering Federal aid programs free of any checks or balances and with little political accountability for such actions.

Id. (citing Shapp v. Sloan, 367 A.2d 791, 797 (Pa. 1976)). Further, the court importantly rejected the governor’s argument that the legislature was beholden to his allocation because the federal act provided that the governor would designate the funds’ recipients. Id. at 18. “The federal act does not confer on the Governor the right to disregard the State's constitutional processes in selecting the agency for the administration of the State health plan.” Id. It explained that:

If this federal act precludes the legislature from creating the State health planning agency, the words [in the federal appropriation stating] “selected by the Governor,” must be read as, “selected by the Governor notwithstanding State constitutional restrictions on his authority and to the exclusion of any legislative involvement in the process.”

Id. at 17; see also Monier v. Gallen, 120 N.H. 333, 334 (1980) (the governor’s expenditure of federal funds awarded to the governor’s office without a prior appropriation from the Fiscal Committee illegally circumvented “the power of the legislature to oversee federal funds.”).


The quintessential example of the Legislature’s power of the purse is the biennial passage of a state budget which appropriates dollars into distinct accounting units for each executive branch department. See RSA 9:2, 9:8-a, b. After the passage of the budget, the Legislature wields its power of the purse through its Fiscal Committee. Established as the Legislature’s
“administrative arm for purposes of ensuring its role in policy-making,” the Fiscal Committee acts as a “legislative watchdog.” *Monier*, 120 N.H. at 339.4

A bipartisan group of five Senators and five Representatives exercise the Fiscal Committee’s authority, which includes broad powers “to investigate and consider any matter relative to the appropriations, expenditures, finances, revenues or any of the fiscal matters of the state.” See RSA 14:30-a, I, II.5 For funds already appropriated, the executive branch may transfer them to different accounting units only with prior approval of the Fiscal Committee. RSA 9:16-a, I.6 The legislature’s constitutional right to appropriate all federal funds, *see Opinion of the Justices*, 118 N.H. at 16, is embodied by two separate but parallel statutes. RSA 14:30-a, VI requires a Fiscal Committee appropriation before the executive branch spends “any non-state funds,” including “federal aid.”7 This mandate is paralleled by RSA 124:4. Its requirements are prefaced by noting their superiority: “Notwithstanding any other provision of law,” Fiscal Committee approval is required before the executive branch spends “any” federal appropriations.

**E. The Executive Maintains Exclusive Control Over Spending Funds in Accordance with the Legislature’s Appropriation.**

After the Legislature appropriates money, its role ends, and the executive branch’s exclusive management duties begin. The act of appropriating funds is distinct from the “administration of appropriations [which] is the function of the executive” branch. *In re Opinion of the Justices*, 129 N.H. 714, 718 (1987). There the court held that “the legislature may not

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4 *See also Opinion of the Justices*, 110 N.H. 359, 364 (1970) (the Fiscal Committee is properly “charged with administrative duties in connection with the fiscal policies of the state.”).

5 The Fiscal Committee also supervises the work of the Legislative Budget Assistant who is charged with overseeing the work preparing the biennial budget, RSA 14:31-b, and auditing executive branch spending. RSA 14:31-a.

6 For example, “within the department of health and human services, funds appropriated for use by the division of mental health and developmental services might be transferred to the division for children and youth services to fill a particular need.” *Petition of Strandell*, 132 N.H. at 121.

7 The statute’s reference to “non-state funds…which under state law require the approval of governor and council for acceptance and expenditure” is a reference to Part II, Article 56’s requirement that the governor and “consent of the council” are necessary to withdraw funds from the treasury. *See also* RSA 6:11.
invade the province of the executive by requiring the approval of the fiscal committee for contracts entered into by the executive.” *Id.* at 719. The court reasoned that even assuming the executive branch was incompetent to “substantiate [the legislature’s] appropriation,” such frustrations were “no justification for encroachment on executive branch authority.” *Id.* “Under the State Constitution, as elsewhere in life, two wrongs do not make a right.” *Id.*

**CAUSES OF ACTION**

I. **COUNT III: DECLARATORY JUDGMENT**

“Any person claiming a present legal equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive.” RSA 491:22.

**RSA 9:13-d Applies During a SOE.**

A. **Legislative History Shows The Legislature Intended RSA 9:13-d to Apply During a SOE Declared Under RSA 4:45.**

1. **The language of RSA 4:45 and RSA 21-P:43 has not materially changed over seven decades.**

   a. RSA 4:45, III(e).

   RSA 4:45’s origin story begins seven decades ago with the passage of now-repealed RSA 107:8. *See* SMF ¶ 2 (Ex. 2), RSA 107 (1977). Under the auspices of the “Civil Defense Act,” the governor was authorized to proclaim a “state of civil defense emergency.” *Id.* at RSA 107:8 Afterwards, the governor’s “additional emergency powers” included exercising “other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.” *Id.* at RSA 107:8(e). This language is unchanged today in RSA 4:45, III(e).

   Before moving to RSA 4:45, RSA 107:8’s provisions found an intermediate home in RSA 107-C:5. *See* SMF ¶ 5 (Ex. 5), Laws 1987, ch. 162:1. The term “civil defense” was deleted
so a governor would simply declare a “state of emergency” under RSA 107-C:5. *Id.* HB 37, which relocated the provisions in RSA 107 to RSA 107-C, contained “no striking changes”; “civil defense” was swapped out for “emergency management” to be “in line with other states, and the Federal Emergency Management Agency.” *See SMF ¶ 4 (Ex. 4), N.H.H.R. Jour. 132 (Feb. 17, 1987).* The governor’s “additional emergency powers” in RSA 107-C:5, I-VI were transferred *unaltered* into RSA 4:45, III in 2002. *Compare SMF ¶ 6 (Ex. 6) with RSA 4:45, III.*

b. **RSA 21-P:43.**

The same story rings true for RSA 21-P:43. It was first located in RSA 107:14, *see SMF ¶ 2 (Ex. 2), then found a new home under RSA 107-C:12 with the term “civil defense” replaced with “emergency management.” *See SMF ¶ 6 (Ex. 6), RSA 107-C (2001).* Today, RSA 21-P:43 remains virtually identical to its previous iterations in RSA 107-C:12 and RSA 107:14.

c. The provisions of RSA 107-C were moved into RSA 4:45 and RSA 21-P:43 for purposes of transferring the OEM from the Governor’s Office to the Department of Safety. RSA 107-C:5 and :12 found new statutory homes in RSA 4:45, III and RSA 21-P:43 via HB 1461. Its purpose was to transfer the OEM from the Governor’s Office to the Department of Safety. *See SMF ¶ 7 (House Record at 2).*8 This organizational change expanded none of the governor’s emergency powers in RSA 4:45, III or RSA 21-P:43. The House Committee clarified that the bill “retains the Governor’s powers relative to the declaration of a [SOE] as well as the Governor’s general emergency management authority.” *Id.* (House Records, at 64) (emphasis added). The unchanged nature of the governor’s emergency powers was reported to the Senate

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8 *See also SMF ¶ 8 (Ex. 8), N.H.S. Jour. 971 (Apr. 18, 2002) (“Due to the events of September 11, streamlining the state’s response to disasters in emergency situations is the best way to accomplish this. The Department of Safety is the center of law enforcement and fire safety for the state, therefore, it makes sense for the Emergency Management to be housed under the agency as well.”)*
Committee, see id. (Senate Record at 4), and reiterated twice to the full Senate body. See id. ¶ 8 (Ex. 8), N.H.S. Jour. 724 (Apr. 11, 2002), 971 (Apr. 18, 2002). 9

2. RSA 9:13-d was enacted in 1978 when the governor declared a “state of civil defense emergency” under RSA 107:8.

RSA 9:13-d, entitled “Civil Emergency,” was first enacted in 1978 when RSA 107:8 required a governor to declare a “state of civil defense emergency.” See SMF ¶¶ 2, 11 (Exs. 2, 11). The year before, in 1977, demonstrators staged protests against the Seabrook nuclear plant; the state responded by sending in the National Guard, which was estimated to cost at least $35,000 per day. See SMF ¶ 9 (Ex. 9). In response, the full legislature suspended the rules to fast-track an appropriation bill in the amount of $124,000 to “pay the national guardsmen for the duties at Seabrook.” See SMF ¶ 10 (Ex. 10), N.H.S. Jour. 2844 (June 16, 1977).

The very next year the legislature enacted RSA 9:13-d. It required the now defunct “advisory budget control committee” 10 to review appropriation requests from the executive branch related to emergency situations. See SMF ¶ 11 (Ex. 11). The same year the term “civil defense” was replaced by “emergency management” in RSA 107-C, RSA 9:13-d was amended to clarify that Fiscal Committee “advice and consent” was required for appropriations requests seeking to “effectively deal with said civil emergency.” See SMF ¶ 13 (Ex. 13).

3. In 1999 the Legislature acknowledged that the Fiscal Committee is responsible for appropriating funds during a SOE.

The OEM requested a bill in 1999 because the state had no: dedicated funding source for the initial response to a disaster or emergency of any kind. Each state agency or municipality currently must find funds to address these events as they arise, which leaves the state in a precarious position when funds are limited or nonexistent. To remedy this situation, the general court finds it is in the

9 Sen. Francoeur: “The bill retains the governor's powers relative to the declaration of the [SOE] as well as the governor's General Emergency Management Authority.”
10 RSA 9:13-d's provisions are located there because the powers and composition of the advisory budget control committee were once set forth in RSA 9:13-a, b, and c. See SMF ¶ 12 (Ex. 12).
public interest to establish a dedicated emergency response and recovery fund for use by the emergency management director, with the consent of the governor, under emergency powers delineated in RSA 107-C, when responding to states of emergency or disaster declared by the governor.

See SMF ¶ 14 (Ex. 14 at 1:1-7). As introduced, HB 608 would have appropriated $3 million into a new fund for the executive branch to spend on emergency “payroll,” costs of “vital supplies,” and to provide a “source for matching [FEMA] funds.” Id. at 1:10-19. When the fund was low, the OEM director would inform the governor, and the governor would request another appropriation from the legislature. Id. at 1:23-30.

The OEM Director testified that this proposed fund would allow “orderly and timely payment of [emergency] expenses, as opposed to having to seek a special appropriation for individual disaster events.” See SMF ¶ 15 (Ex. 15 at 50). Later, the House Finance Committee discussed “the process by which the Fiscal Committee can grant funding in emergencies, though the OEM director had not felt this route would be speedy enough….Rep. MacGillivray pointed out that the Fiscal committee could always transfer into this account if necessary....” Id. at 32.

After the House limited the fund’s eligible uses, the OED Director told the Senate Committee he proposed the fund out of concerns about not having an ability to pay for emergency obligations “if for some reason the legislature fails to commit” the funds to pay. See SMF ¶ 16 (Ex. 16 at 11). HB 608 was enacted as RSA 107-C:15 in 1999. See SMF ¶ 6 (Ex. 6). Today its language remains substantially the same in RSA 21-P:46.

4. Conclusion: legislative history shows the legislature intended RSA 9:13-d to apply when the governor declares a SOE under RSA 4:45.

The full legislature appropriated funds on an expedited basis to pay national guardsmen assigned to the Seabrook nuclear demonstrations in 1977. The next year the legislature enacted RSA 9:13-d when its title, “Civil Emergency,” then referred to a “state of civil defense
emergency” declared by the governor under RSA 107:8. The vernacular is immaterial to the Fiscal Committee’s continuing role during a “state of emergency.” The OEM Director and House Finance Committee mutually agreed in 1999.


B. The Legislature Codified RSA 9:13-d’s Applicability During a SOE Six Years After RSA 4:45’s Enactment.

RSA 9:13-d also applies during a SOE because other laws say so. Six years after the provisions of RSA 107-C were relocated into RSA 4:45 and RSA 21-P, the legislature passed RSA 21-P:53 in 2008. Put simply, it allows the HHS commissioner to “purchase” medicine during “the existence of a [SOE] under this chapter” “without the approval of the governor’s council or the legislative fiscal committee, and notwithstanding the provisions of RSA 4:45, 9:13-d, and 9:19, and any other law to the contrary….” Id. (emphasis added).

Statutes are interpreted in the context of the overall statutory scheme and not in isolation. Liam Hooksett, LLC v. Boynton, 157 N.H. 625, 628, 956 A.2d 304 (2008). By codifying RSA 9:13-d as “contrary” to a grant of unfettered executive branch discretion to “purchase” medicine during a SOE, the legislature crystalized RSA 9:13-d’s applicability during a SOE. See, e.g., King v. Sununu, 126 N.H. 302, 306–07 (1985) (“notwithstanding” in statute pertaining to distribution of sweepstakes revenue expressed legislature's intent that statute “take precedence” over “conflicting” statute also pertaining to distribution of sweepstakes revenue); State v. Payne, 115 N.H. 595, 596 (1975) (penalty provision of criminal statute stating “notwithstanding the provisions of Title LXII” prevented its fines from being limited by Title LXII).
C. The Plain Language of RSA 9:13-d Applies During a SOE.

Even if the legislature had not codified that RSA 9:13-d applies during a SOE, its plain language reaffirms the legislature’s exclusive constitutional role in appropriating funds for subsequent expenditure during a SOE.

When interpreting a statute, the plain and ordinary meaning are ascribed to its words. *Grand China v. United Nat. Ins. Co.*, 156 N.H. 429, 431 (2007). RSA 9:13-d allows a governor to spend unappropriated funds to “deal with a civil emergency” only with an appropriation from the Fiscal Committee. The statute’s definition of “civil emergency” is more expansive than the findings required for the governor to declare a SOE under RSA 4:45, I. Compare RSA 9:13-d (“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”) (emphasis added), with RSA 4:45, I (“a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section”) (emphasis added), and RSA 21-P:43 (a governor may “accept” offers of federal funds for purposes of “emergency management,” defined in RSA 21-P:35, V as “emergency functions” to prevent “damage, injury, or loss of life or property”).

Put a different way, a governor who declares a SOE under RSA 4:45 has made the necessary findings to determine that there is “imminent peril to the public health, safety and welfare” which requires “immediate action to remedy the situation” under RSA 9:13-d. Its plain text applies during a SOE under RSA 4:45.


The Governor claims that the general language of RSA 4:45, III(e) and RSA 21-P:43 – without any affirmative requirement that he seek Fiscal Committee approval before spending any
unappropriated money during a SOE – supersedes RSA 9:13-d. But the rules of statutory construction are otherwise: When interpreting two statutes that deal with a similar subject matter, they are construed so that they do not contradict each other, will lead to reasonable results, and will effectuate their respective legislative purposes. *Grand China*, 156 N.H. at 431. “It is a well-settled rule that to the extent two statutes conflict, the more specific statute…controls over the general statute.” *Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 294 (2012).

RSA 4:45, III(e) and RSA 21-P:43 are silent about any “appropriation, or equivalent direction for payment” which could constitutionally permit expenditure of previously unappropriated funds from the treasury. *See Opinion of the Justices*, 118 N.H. at 16. A generous interpretation of each could imply unilateral spending power during a SOE. But such a construction is precluded by RSA 9:13-d. Its precise requirement can be reasonably read not to conflict with the governor’s emergency management authority. It is plausible for a governor to both act to “secure the safety and protection of the civilian population,” RSA 4:45, III(e), and “accept” offers of federal funds, RSA 21-P:43, while still adhering to RSA 9:13-d’s prerequisites of obtaining Fiscal Committee approval before spending unappropriated funds. Reasonable, non-contradictory interpretations of these statutes are not only possible, but proper.

RSA 9:13-d’s specificity controls over any implied spending power that could be read into RSA 4:45, III(e) and RSA 21-P:43.

E. RSA 9:13-d Was Not Implicitly Repealed by RSA 4:45 and RSA 21-P:43.

Interpreting RSA 4:45, III(e) and RSA 21-P:43 as allowing a governor to spend unappropriated funds during a SOE would effectively repeal RSA 9:13-d. “Repeal by implication occurs when the natural weight of all competent evidence demonstrates that the purpose of a new statute was to supersede a former statute, but the legislature nonetheless failed
to expressly repeal the former statute.” *In re Regan*, 164 N.H. 1, 7 (2012). “Because repeal by implication is disfavored, if any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed.” *Id.; see also Weare Land Use Ass'n v. Town of Weare*, 153 N.H. 510, 511–12 (2006) (“The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.”); *Appeal of Town of Hampton Falls*, 126 N.H. 805, 809 (1985) (it is assumed that the legislature “has in mind previous statutes relating to the same subject matter.”).

As shown above, a reasonable construction of these statutes can be found. If RSA 4:45, III(e) and RSA 21-P:43 were interpreted to authorize a governor to appropriate and spend funds from the treasury during a SOE, such a construction would “nullify [ ], to an appreciable extent, the purpose of” RSA 9:13-d. *See Weare*, 153 N.H. at 512. RSA 9:13-d applies during a SOE.

**F. Governor Benson’s 2003 Interpretation That Fiscal Committee Approval is Necessary Before Spending Unappropriated Funds During a SOE Deserves “Great Weight.”**

Only one year after RSA 4:45 was enacted, Governor Craig Benson declared a SOE due to flooding. *See SMF ¶ 21*. Days later he requested Fiscal Committee approval to appropriate $1 million to the OEM, which was granted. *See SMF ¶ 22.*

The governor is constitutionally obligated to ensure faithful execution of the laws. N.H. CONST. Pt. II, Art. 41. “When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution.” *Wyatt v. State Bd. of Equalization*, 74 N.H. 552 (1908); *see also 2B Singer, Sutherland Statutory Construction*, § 49:7 (7th ed.) (courts give “special consideration” to “contemporaneous interpretations [] made at, or soon after, the time of enactment” “because they derive from a familiarity with the very
circumstances which engendered the underlying enactment.”). Governor Sununu’s interpretation that RSA 4:45 was intended to confer sweeping powers after September 11th was directly contradicted by his predecessor only one year after the statute’s enactment. Governor Benson’s interpretation that Fiscal Committee maintains its customary role during a SOE should be afforded “great weight.” See Wyatt, 74 N.H. at 552.

G. The Doctrine Of Constitutional Avoidance Weighs Against Allowing the Governor to Ignore RSA 9:13-d During a SOE.

The Governor’s interpretations of RSA 4:45 and RSA 21-P:43 should also be avoided because they contain no “appropriation, or equivalent direction for payment” which would allow money to be issued out of the state treasury pursuant to Part II, Article 56. See Opinion of the Justices, 118 N.H. at 16. Under the well-established doctrine of constitutional avoidance, a statute is construed whenever reasonably possible “to avoid bringing it into conflict with the constitution.” State v. Paul, 167 N.H. 39, 44 (2014). Interpretations that raise “a significant question as to its constitutionality” are to be avoided. Id.; see also Polonsky v. Town of Bedford, 171 N.H. 89, 96 (2018) (the doctrine is “useful when the language is ambiguous and a construction of the statute is fairly possible by which the question may be avoided”).

1. Unlike other emergency statutes, RSA 4:45 and RSA 21-P:43 contain no “direction for payment.”

When the legislature wishes to enact a “direction for payment” apart from a monetary appropriation, it unambiguously grants the executive branch authority to make particular payments from the treasury under specified circumstances. The most relevant example in the

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11 See also N.H. Retail Grocers Ass'n v. State Tax Comm'n, 113 N.H. 511, 514, 309 A.2d 890, 892 (1973) (invalidating tax commission’s new interpretation of statute because it “is a well-established principle of statutory construction that a longstanding practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the legislature is evidence that such a construction conforms to legislative intent.”).
same emergency management statutory scheme is RSA 21-P:53: it defines what exactly the HHS Commissioner may “purchase” without a prior appropriation from the legislative branch. Another example is RSA 21-P:37-b, which provides that any “obligation of the general fund as the result of” the executive’s agreement with the “federal government or another entity for assistance” during a SOE “shall be transmitted to the president of the senate and the speaker of the house of representatives for prompt payment.” See also RSA 21-P:37-c (the governor and council may “approve a loan in the amount up to the anticipated assistance from FEMA from funds not otherwise appropriated.”) Id. (emphasis added); see also RSA 4:46, IV (allowing the governor and council to pay a judgement “from any money in the general fund of the treasury not otherwise appropriated.”) (emphasis added); RSA 21-P:39, III (a political subdivision may incur obligations necessary to combat disasters without regard to “formalities prescribed by law” pertaining to “the appropriation and expenditure of public funds.”).12

RSA 4:45, III(e) and RSA 21-P:43 contain no “direction for payment” which could authorize the executive branch to spend funds the legislative branch has yet to appropriate. See Opinion of the Justices, 118 N.H. at 16.

2. The legislature already rejected authorizing the governor to spend “any money in the treasury not otherwise appropriated.”

Most importantly, the legislature considered, then refused the opportunity to grant the governor authority to spend “money in the treasury not otherwise appropriated” during a SOE. HB 37 (1987) relocated the provisions in RSA 107 to RSA 107-C. See SMF ¶¶ 3-6. As introduced, HB 37 fundamentally altered the governor’s spending powers during a SOE. Since

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12 Countless other statutes outside of the emergency context explicitly authorize the governor “to draw a warrant for said sum out of any money in the treasury not otherwise appropriated” for specified purchases. See, e.g., RSA 189-A:1 (“Death Benefit for School Employee Killed in Line of Duty”); RSA 4:16 (“Incidental Expenses”); RSA 4:17; RSA 212-B:6, II; RSA 17-I:5; RSA 1:4; RSA 82-A:14; RSA 331-A:31; RSA 115-A:4; RSA 207:23-a.
1949, the governor’s spending authorization during a SOE was limited to funds appropriated to RSA 4:18’s “emergency fund” referenced in RSA 170:20 (1977). See SMF ¶ 2 (Ex. 2). HB 37 proposed enlarging the governor’s spending power to “any money in the treasury not otherwise appropriated.” See SMF ¶ 3 (Ex. 3), HB 37, as introduced (emphasis added).

The House Appropriations Committee overwhelmingly rejected this potentially boundless executive authority to spend during a SOE. By a 16-1 vote, it amended the bill to revert the governor’s spending power back to its previous limitations in RSA 107:20. See SMF ¶ 5 (Ex. 5), N.H.H.R. Jour. 371 (Mar. 13, 1987). The reasoning was direct: “There are presently adequate emergency funds appropriated.” Id. As enacted, HB 37 limited the governor’s authorization to “draw such sums of money as may be necessary from the emergency fund.” See SMF ¶ 5 (Ex. 5), Laws 1987, ch. 162:1 (RSA 107-C:15) (emphasis added).

3. The “emergency fund” is where the legislature may appropriate money for the executive branch to spend during a SOE.

The “emergency funds appropriated” the House Appropriations Committee referenced in 1987 were found in RSA 4:18’s “Emergency Fund.” It is the historical basis by which the executive branch uses legislatively appropriated funds to “carry[] on the essential functions of state government and in protecting the interests of the state which have been impaired by said emergency.” RSA 4:18. More importantly, the AGO itself opined that using funds from RSA 4:18 for a “long term” emergency would be unconstitutional:

If an emergency is long term in nature, the emergency fund should be used as a temporary expedient pending an opportunity for the legislature to convene and enact measures of a permanent nature to combat or eliminate the emergency. To hold otherwise, would be to permit Governor and Council to legislate.

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13 Between 1927 and 1949, this statute provided for an annual appropriation of $75,000. See SMF ¶ 17 (Ex. 17). In the same year RSA 107 was enacted, RSA 4:18 was amended to create an “emergency fund consisting of such sums as may be appropriated for that purpose by the general court.” See SMF ¶ 18 (Ex. 18), Laws 1949, ch. 321:2. In 1953, RSA 4:18 was amended to its current version. See SMF ¶ 19 (Ex. 19), Laws 1953, ch. 17:1.

4. Governor Sununu’s interpretation that RSA 4:45 and RSA 21-P:43 supersede RSA 9:13-d should be declined as constitutionally suspect.

Unlike other statutes within the same statutory scheme, RSA 4:45, III(e) and RSA 21-P:43 plainly contain no authority to spend, purchase, pay, or use “any money in the treasury not otherwise appropriated.” The legislature expressly rejected giving the governor this expansive authority in 1987. Accounts already exist where the legislature may appropriate funds for immediate use during a SOE. See RSA 4:18; RSA 21-P:46 (the “Emergency Response and Recovery Fund”). A court “will not consider what the legislature might have said or add language that [it] did not see fit to include.” In re Liquidation of Home Ins. Co., 154 N.H. 472, 479 (2006); see also In re Plaisted, 149 N.H. 522, 526 (2003) (courts should “not undertake the extraordinary step of creating legislation where none exists”); Conrad v. Hazen, 140 N.H. 249, 251 (1995) (“The legislature's choice of language is deemed to be meaningful.”).

With no such “appropriation, or equivalent direction for payment,” see Opinion of the Justices, 118 N.H. at 16, interpreting RSA 4:45, III(e) and RSA 21-P:43 to allow a governor unlimited discretion to spend unappropriated money during a SOE would – at minimum – raise “a significant question” that such a construction would violate Part II, Article 56. See Paul, 167 N.H. at 44. The doctrine of constitutional avoidance precludes adopting Governor Sununu’s interpretations that RSA 4:45, III(e) and RSA 21-P:43 supersede RSA 9:13-d. 15

Overall, rules of statutory construction – and most importantly legislative intent – demonstrate that RSA 9:13-d applies during a SOE declared under RSA 4:45.

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14 See also Singer, supra, § 49:4 (an AGO “interpretation may have an important bearing upon statutory meaning particularly where his office is required to issue opinions to assist governmental departments administer the law.”).

15 Further, the Governor’s statutory constructive conflicts with every provision of the Constitution that addresses the question of the continuity of government in times of crises. See N.H. CONST. Pt. 1, Art. 29 (suspension of laws by legislature only), Pts. II, Arts. 5-a (enemy attack), 49 (when legislative offers act as governor).
RSA 14:30-a and RSA 124:4 Apply During a SOE.

A. A Reasonable Construction of Each Statute is Possible to Effectuate Their Respective Purposes and Avoid Implicit Repeal.

RSA 14:30-a, VI and RSA 124:4 plainly prohibit the executive branch from spending “any” federal funds without the Fiscal Committee’s approval. RSA 14:30-a, VI requires Fiscal Committee approval before state government spends “any non-state funds,” including “federal aid.” RSA 124:4 is even broader. Through its use of “notwithstanding any other provision of law,” it supersedes all other laws to the contrary, and requires Fiscal Committee approval to administer any “federal appropriations made available” for the state. RSA 124:4.

A reasonable construction of these statutes is possible so they do not contradict each other, and which effectuates their respective legislative intent. A governor may protect the civilian population during a SOE, RSA 4:45, III(e), and “accept” offers of federal funds, RSA 21-P:43, while still obtaining Fiscal Committee approval to spend federal funds. The mandates of RSA 14:30-a, VI and RSA 124:4 control over any potential interpretation that RSA 4:45, III and RSA 21-P:43 could allow the governor unfettered discretion to both appropriate and spend federal funds without a legislative involvement. See Ford, 163 N.H. at 294 (specific statutes control over general statutes); In re Regan, 164 N.H. at 7 (no repeal by implication); Polonsky, 171 N.H. at 96 (constitutional avoidance); Opinion of the Justices, 118 N.H. at 16 (neither RSA 4:45, III and RSA 21-P:43 contain an “appropriation, or equivalent direction for payment”).

B. The Administration’s Initial Practice of Seeking Fiscal Committee Approval Before Spending Federal COVID-19 Funds Deserves “Great Weight.”

“[G]reat weight should be given to the construction placed upon it by the department charged with [a statute’s] execution.” Wyatt, 74 N.H. at 552. Before and after the Governor

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16 See, e.g., King, 126 N.H. at 306 (“notwithstanding” means “without prevention or obstruction from or by”).
declared a SOE, his administration sought Fiscal Committee approval under RSA 14:30-a, VI specifically for COVID-19-related expenditures.

On March 5, 2020, HHS preemptively sought approval under RSA 14:30-a, VI for “an estimated $5,000,000 from the Centers for Disease Control for purposes of addressing the Covid-19 virus.” See SMF ¶ 32. On April 8, Governor Sununu stated that he would spend federal CARES Act funds without seeking Fiscal Committee approval to do so, in part because “To ask the Fiscal Committee to meet in open session is not possible; it is not feasible and it is not going to happen.” Id. at ¶ 34. Just two days later, the Fiscal Committee approved HHS’ request to spend federal Families First Coronavirus Response Act funds of $1.2 million. Id. at ¶¶ 36-37.

Governor Sununu’s Administration’s initial practice of obtaining a legislative appropriation under RSA 14:30-a, VI during this SOE should be afforded great weight.

**RSA 9:16-a Applies During a SOE.**

Governor Sununu claims that his authority after declaring a SOE allows him to reappropriate funds among executive branch accounting units. See SMF ¶¶ 38-39.

RSA 9:16-a, I states in relevant part: “Notwithstanding any other provision of law, every department as defined in RSA 9:1 is hereby authorized to transfer funds within and among all accounting units within said department, provided that any transfer of $100,000 or more shall require prior approval of the fiscal committee of the general court and the governor and council….” (emphasis added).

Use of the phrase “notwithstanding any other provision of law” elevates RSA 9:16-a, I to supersede any potentially contrary law, including RSA 4:45, III(e). Further, a reasonable construction of RSA 9:16-a and RSA 4:45, III(e) may be had: a governor may protect the civilian population during in emergency, while also obtaining Fiscal Committee approval before
reappropriating funds. RSA 9:16-a controls over any potentially opposing interpretation. See Ford, 163 N.H. at 294 (specific statutes control); In re Regan, 164 N.H. at 7 (no repeal by implication). Finally, to interpret RSA 4:45, III(e) to supersede RSA 9:16-a without a clear “direction for payment” would raise a significant question as to its constitutionality. See Paul, 167 N.H. at 44; Opinion of the Justices, 118 N.H. at 16. RSA 9:16-a applies during a SOE.

II. COUNT IV: DECLARATORY JUDGMENT

Governor Sununu’s expenditure of funds the legislature has yet to appropriate during a SOE violates three separate provisions of the New Hampshire Constitution.

**Part II, Article 56, “Disbursements From Treasury”**

Constitutional provisions “concerning the issue of money out of the state treasury…are not lightly to be disregarded.” State v. Kimball, 96 N.H. 377, 380 (1950). Unlike other statutes in the same emergency scheme, RSA 4:45, III(e) and RSA 21-P:43 include no “appropriation, or equivalent direction for payment” which grants Governor Sununu unilateral discretion to appropriate and spend money during a SOE. See id. The other statutes referenced above require the Fiscal Committee to continue its role even during a SOE. RSA 9:16-d; RSA 9:16-a; RSA 14:30-a, VI; RSA 124:4. Executive branch expenditures during a SOE without a legislative appropriation, or contrary to a legislative appropriation, violate Part II, Article 56.

**Part II, Article 41, “Governor, Supreme Executive Magistrate”**

Part II, Article 41 makes the Governor the “supreme executive magistrate.” This “implies such power as will secure an efficient execution of the laws.” In re Opinion of Justices, 162 N.H. 160, 168 (2011). Part II, Article 41 was amended in 1966 to add that the governor is responsible for “the faithful execution of the laws.” Id. This amendment was intended “to impose a duty upon the executive to carry out the legislative mandates as well as to enforce constitutional
requirements.” *Id.* Specifically, the amendments sought to “enforce respect for legislative mandates, powers, rights and duties,” *id.*, and to “stem the progressive decline of legislative power.” *Opinion of the Justices*, 118 N.H. at 14 (citing *N.H. Jour. of Const. Conv.* 288-89 (1964)). By acting contrary to the requirements of RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, VI, RSA 124:4, and Part II, Article 56, Governor Sununu has violated Part II, Article 41.

**Part I, Article 37, “Separation of Powers”**

By unilaterally deciding how the state’s money should be spent, Governor Sununu has usurped the legislature’s constitutional power of appropriation in violation of the separation of powers clause. The three branches of government should be “kept as separate from, and independent of, each other, as the nature of a free government will admit....” N.H.CONST. pt. I, art. 37. “When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable.” *In re Petition of Judicial Conduct Comm.*, 151 N.H. 123, 125 (2004).

The purpose of Part I, Article 37 is “to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people.” *In re Petition of Governor*, 151 N.H. 1, 9 (2004). Separation of powers was “designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government.” *Opinion of the Justices*, 121 N.H. 552, 556 (1981). Specifically:

> [if] the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

Governor Sununu has subjected the state’s fiscal policymaking to his personal prerogatives during this SOE. He first claimed that the serious and unpredictable nature of this pandemic necessitated a unification of separated constitutional powers within himself. See SMF ¶¶ 28, 34. Since then, he has consistently publicized the benefactors of his personal appropriations, id. at ¶¶ 47-85, and amplified those who thank him for his funding decisions. Id. at 76. His unilateral control over the state’s purse strings during this SOE have raised questions about the accumulation of unbounded power in one man to reward “political allies.” 18

RSA 4:45, III(e) and RSA 21-P:43 unambiguously contain no “appropriation, or equivalent direction for payment,” which could allow a governor to constitutionally spend money under Part II, Article 56. See Opinion of the Justices, 118 N.H. at 16. The legislature has reinforced its constitutional role of appropriation throughout New Hampshire’s statutes, including during a SOE. By spending money without a prior legislative appropriation, Governor Sununu has usurped the legislature’s power of the purse in violation of Part I, Article 37.

III. Counts I and II: Writ of Mandamus and Writ of Prohibition

Governor Sununu has previously informed this Court that he will abide by its declaration of whether his actions under RSA 4:45, III(e) and RSA 21-P:43 during this SOE are congruent with what the law requires. Accordingly, Plaintiffs do not seek summary judgment on Counts I and II at the present time, but reserve their right to do so.

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17 See also The Federalist No. 47 (James Madison) (“‘When the legislative and executive powers are united in the same person or body,’ says he, ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.’”).

IV.  CONCLUSION

This pandemic has been an unprecedented event. Since Governor Sununu first declared a SOE four months ago, the state’s businesses, communities, and government have gradually adjusted and found ways to function as normally as possible. They will continue to do so while this SOE continues for the indefinite future. With the exception of remote meetings, the Fiscal Committee has operated just as it always has. It stands ready to exercise the legislature’s core constitutional power of appropriation during this SOE as required by New Hampshire law.

REQUESTS FOR RELIEF

Plaintiffs respectfully request that this Court:

A. Enter summary judgment in Plaintiffs’ favor on Count III their Second Amended Complaint by declaring that RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, VI, and RSA 124:4 remain operative during a state of emergency declared under RSA 4:45;

B. Enter summary judgment in Plaintiffs’ favor on Count IV of their Second Amended Complaint by declaring that Part I, Article 37, Part II, Article 41, and Part II, Article 56 of the New Hampshire Constitution require a prior appropriation from the legislative branch (or its Fiscal Committee) before the executive branch may spend money from the state treasury during a state of emergency declared under RSA 4:45;

C. Declare that Governor Sununu, his respective agents, officers, employees, and all persons acting on behalf of the executive branch, may not spend money from the state treasury without a prior appropriation from the legislative branch (or its Fiscal Committee) during this current state of emergency; and

D. Such other relief as the Court deems just and proper.
Respectfully submitted,

SENATE PRESIDENT DONNA SOUCY
SENATOR LOU D’ALLESANDRO
SENATORS CINDY ROSENWALD
SENATOR JAY KAHN

By their attorneys,

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CERTIFICATE OF SERVICE

I certify that the foregoing was provided to the electronic service list for this docket.

Dated: July 10, 2020

By: /s/ Gregory L. Silverman
Gregory L. Silverman (NH Bar #265237)