

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

MERRIMACK SUPERIOR COURT
217-2020-CV-00152

DAVID BINFORD, HOLLY BEENE, & ERIC COUTURE

V.

CHRIS SUNUNU
(in his official capacity as Governor of the State of New Hampshire)

PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND
PERMANENT INJUNCTION

Now comes Plaintiffs and pursuant to Rule 48 of the Rules of Superior Court, moves for an emergency injunction prohibiting the enforcement of Governor Sununu's Emergency Order #2 issued March 16, 2020. This motion has not yet been formally provided to Respondent as there has not been time to do so, and it would not likely result in vacating the order. It will be provided to Respondent and media outlets for circulation at the time of filing. Plaintiffs also seek a permanent injunction to the same effect.


PARTIES

1. Plaintiff David W Binford resides at 241 Porter Rd Bath, NH 03740.
2. Plaintiff Eric Couture resides at 111 Fremont St Manchester NH 03103.
3. Plaintiff Holly Rae Beene resides at 557 S Commercial St # 510 Manchester, NH 03101.
4. Defendant, Chris Sununu, is Governor of New Hampshire and is being sued in his official capacity. The address of the Governor's office is: Office of the Governor State House 107 North Main Street Concord, NH 03301.

JURISDICTION AND VENUE

The request for immediate injunctive relief is DENIED. An expedited hearing shall be scheduled. Pending further court order, the Emergency Order issued by the Governor remains in effect. See RSA 141-C:16-b. So ordered.

Clerk's Notice of Decision
Document Sent to Parties
on 03/18/2020


Honorable John C. Kissinger, Jr.
March 18, 2020

5. The court has jurisdiction under N.H. RSA 141-C; N.H. RSA 491:7 and jurisdiction to grant declaratory relief RSA 491:22.

6. The court has personal jurisdiction over defendant as the Governor's office is located in Concord.

7. The court has venue under N.H. RSA 507:9. Venue is proper as defendant is located in Concord (Merrimack County).

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STANDING

8. Plaintiffs are residents of New Hampshire.

9. Plaintiffs Beene, Binford, and Couture will be attending events in the next couple of weeks that will have more than 50 people in attendance. Those events include political events and religious events.

10. Plaintiffs have standing under RSA 141-C "Any person who is aggrieved by an order pursuant to this section may request a hearing in the superior court to contest that order..."

11. Plaintiffs also have standing under Part I Art. 8 of the New Hampshire Constitution which was approved as a constitutional amendment by the voters in 2018.

STATEMENT OF FACTS

12. On March 16, 2020, the Governor issued an order effectively shutting down restaurants and prohibiting people from assembling in crowds of 50 people or more (See attached order¹). The only exception was the State House.

13. The Governor lacks the authority for such an order.

¹ <https://www.governor.nh.gov/news-media/orders-2020/documents/emergency-order-2.pdf>

14. The State and Federal Constitutions prohibit such an order.

15. There is no “emergency” that allows such an order.

16. Plaintiff David Binford will be attending numerous political events in the upcoming weeks that will be attended by more than 50 people. Including Grafton county Republican meeting the last week of March and North Grafton county Republican committee meeting the first week of April. Those events are specifically protected under the constitution. Further, they relate to core political speech which is provided the upmost protection.

The decree by the governor of New Hampshire prohibits him being able to attend religious services and right to practice his religion due to the fact that more than 50 people attend. Furthermore, restricting gathering of 50 or more people deprives his ability to attend political meetings in which we discuss important issues pertain to our state and the freedom we are supposed to enjoy.

17. Plaintiff Eric Couture attends services 3 times a week at Bible Baptist church in Nashua and teaches Sunday school apologetics to the teens at his church. The order in question violates his right to peacefully attend and worship God with other church members and violates his conscience to do so.

18. Plaintiff Holly Rae Beene will be attending numerous events holding more than 50 people during the timeframe of the order. Those events include going to market(s). Those markets include buying food. Without attending the market, plaintiff is prohibited/unduly burdened from buying food.

Plaintiff Beene attends restaurants in Merrimack county that she dines-in. The restaurant ban is now prohibiting her from doing so.

Plaintiff Beene also will be attending various Meetup groups. Topics of discussion at the Meetup groups are often political and involve discussing government involvement which includes petitioning the government for redress of grievances.

19. No adequate remedy at law exists for the real and imminent constitutional deprivations.

20. Plaintiff is likely to succeed on the merits of the complaint.

21. The plain language of the statutes and the New Hampshire Constitution prohibit this order.

ARGUMENT

The New Hampshire Constitution specifically allows people to assemble.

23. Part I [Art.] 32. [Rights of Assembly, Instruction, and Petition.] The People have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their Representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.

24. The same right to assembly is further protected under the 1st Amendment of the federal constitution.

25. These rights are fundamental and subject to the highest form of scrutiny. Especially when they involve core political speech as is the case here.

The New Hampshire and Federal Constitutions specifically protect religious freedom.

26. The Governor's order specifically bans faith-based gatherings of more than 50 people. A majority of churches hold services where more than 50 people attend. Shutting down Churches is a clear violation of the right to religious freedom. See 1st Amendment to U.S. Constitution and Part I Art. 5 of the N.H. Constitution "[Art.] 5. [Religious

Freedom Recognized.] Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.”. Plaintiffs are denied their religious rights under this order as they cannot attend church services as they typically do.

The Governor lacks the authority for such an order

27. The Governor cannot meet the burden of showing an “emergency”. Under N.H. RSA 141-C:14-a Due Process, the State must show “V. At the hearing the burden of proof shall be on the commissioner to prove by clear and convincing evidence that the person poses a threat to public health, or that the information to be produced or inspection of a building or conveyance is necessary to protect against a serious threat to the public health, and the order issued by the commissioner is thereby warranted to alleviate such threat.”

28. The State is unable to meet this very high burden. Presently, many more people die from, are diagnosed with, or hospitalized with the flu, etc. than Covid 19. The numbers aren’t even close. New Hampshire has had just 17 people diagnosed with Covid, and ZERO deaths². In a state of over 1 million people, those numbers alone make it clear this is not an “emergency”.

29. Further, RSA 21-P:35 VIII declares: "State of emergency" means 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. (emphasis added)”

² <https://www.nh.gov/covid19/>

30. When ZERO people have died, and only 17 people have been diagnosed, there is no “emergency” as a matter of law. If the State is going by statistics, again, the CDC numbers for the flu greatly surpass Covid, and there would be an “emergency” every winter (it is still flu season).

31. Further, the fact that a majority of the country dealing with even more cases of Covid have not acted in such a manner shows it is not an “emergency” requiring the extreme measures the Governor has mandated.

32. Interestingly, when the New Hampshire Supreme Court just issued an order to limit courts, it specifically said the Courts must abide by the constitution in doing so (presumably emphasizing due process and a right to speedy trial). Just as the Courts must act in a Constitutional manner, so must the governor.

33. N.H. RSA 4:45 does not grant the authority that the governor is presumably relying on.

34. RSA 4:45 sets out numerous requirements and limits on a state of emergency. The governor’s present order fails to meet those requirements.

35. To the extent it is broadly construed to encompass the governor’s order, it is unconstitutional as previously argued.

36. The order is further illegal under RSA 4:46 as it does not have consent of the executive council. “I. Whenever a state of emergency is declared or invoked and the taking of real or personal property is required, the governor with the advice and consent of the executive council may, by warrant specifying the particular real property and the personal property by specification of the types, quantities, and general location, together with the names of the owners, when known, authorize the commissioner of safety, by his or her agents, to:...”

The Order is prohibited under the State Constitutional ban on martial-law

37. “Part I [Art.] 34. [Martial Law Limited.] No person can, in any case, be subjected to law martial, or to any pains or penalties by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the Legislature.”

38. The governor lacks the authority to institute Martial law as the authority rests solely with the legislature. While his order does not use that specific language, the effect is the same. Particularly, when combined with the other actions taken by the governor as it relates to Covid. This is further evidence as the order has no lawful (or even stated) enforcement mechanism. It just tells state agencies to “enforce this provision”.

39. Further, just today, at a press conference, the governor announced he could involve the national guard. He also said “anything is on the table” specifically referencing San Francisco and their full lockdown.

40. Interestingly, the order is akin to a “shelter in place” “order”. Those “orders” are not valid in New Hampshire, and are actually advisories. If the Governor amends his “order” to be advisory, or a recommendation, plaintiffs will drop the lawsuit as moot.

41. Further under Part I [Art.] **29. [Suspension of Laws by Legislature Only.]** The power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for.

The Order is Unconstitutional/ Illegal as an uncompensated taking.

42 The 5th amendment through the 14th amendment of the federal constitution prohibits uncompensated takings.

43. See also N.H. RSA 4:46 and 141-C.

The Order has no lawful enforcement mechanism

44. The order lacks a lawful enforcement mechanism under law. While the governor gives authority to the Division of Public Health and State & local police to enforce, they lack that authority to do so. No criminal proceedings can be instigated, no fines can be levied, and the Governor lacks the authority to have the government arbitrarily decide on how they wish to enforce this. Under the plain overbroad language of the order, police would be authorized to summarily execute someone to enforce it.

45. Further “Part 2 [Art.] 91. [Habeas Corpus.] The privilege and benefit of the Habeas Corpus, shall be enjoyed in this State, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the Legislature, except upon most urgent and pressing occasions, and for a time not exceeding three months.”

The governor does not have the authority to just authorize state actors to “enforce this provision”.

46. Accordingly, plaintiffs seek to have the court immediately declare the order as advisory/recommendation/ or otherwise state there can be no penalty for violating it and that government entities are prohibited from enforcing it.

47 Plaintiffs seek this court to issue a permanent injunction finding the order unlawful.

WHEREFORE, Plaintiffs requests that this Court:

- A) Issue an immediate injunction prohibiting the enforcement of Emergency Order #2.
- B) Issue a permanent injunction declaring the order unlawful, prohibiting it from having effect, or declaring it cannot be enforced.
- C) Any other relief this court finds just.

/s/ Dan Hynes _____
Dan Hynes #17708
212 Commercial St
Manchester, NH 03101
(603) 674 - 5183

EXHIBIT – GOVERNOR’S ORDER



CHRISTOPHER T. SUNUNU
Governor

STATE OF NEW HAMPSHIRE
OFFICE OF THE GOVERNOR

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

Emergency Order #2 Pursuant to Executive Order 2020-04

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

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

1. In accordance with CDC guidelines, the following activities are hereby prohibited within the State of New Hampshire:

Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition does not apply to the General Court or to the day-to-day operations of businesses.
2. Food and beverage sales are restricted to carry-out, delivery, curbside pick up, and drive through only, to the extent permitted by current law. No onsite consumption is permitted, and all onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.
3. Section 2 of this order shall not apply to food and beverage service in (a) healthcare facilities, (b) airports, or (c) cafeterias located within a private business which are primarily intended to serve the employees of that business.
4. The Division of Public Health shall enforce this Order and if necessary may do so with the assistance of State or local police.
5. This Order shall remain in effect until Monday, April 6, 2020.

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


GOVERNOR OF NEW HAMPSHIRE

107 North Main Street, State House - Rm 208, Concord, New Hampshire 03301
Telephone (603) 271-2121 • FAX (603) 271-7640
Website: <http://www.governor.nh.gov/> • Email: governorsununu@nh.gov
TDD Access: Relay NH 1-800-735-2964

AFFIDAVIT OF

I, Holly Beene, do state under the pains and penalties of perjury that the facts alleged in the motion are true and accurate to the best of my information, belief, and personal knowledge.

Dated: 3-17-20

H Beene

STATE OF NEW HAMPSHIRE
COUNTY OF

Subscribed and sworn before me on March 17th 2020

Kasey E Coleman
Justice of the Peace/Notary Public

My commission expires: 11/14/23

KASEY E COLEMAN
Notary Public - New Hampshire
My Commission Expires Nov 14, 2023

AFFIDAVIT OF

I, ERIC COYNE, do state under the pains and penalties of perjury that the facts alleged in the motion are true and accurate to the best of my information, belief, and personal knowledge.

Dated: 3/17/2020 Eric Coyne

MASSACHUSETTS
STATE OF ~~NEW HAMPSHIRE~~ MA
COUNTY OF ~~KEENE~~ WINDHAM

Subscribed and sworn before me on MARCH 17, 2020

Justice of the Peace/Notary Public
My commission expires: 6-24-2022


JOSEPH A. CARA
Notary Public
Commonwealth of Massachusetts
My Commission Expires
June 24, 2022

AFFIDAVIT I, David Binford, do state under the pains and penalties of perjury that the facts relied on in this motion are true and accurate to the best of my information and belief.

/s/ David W Binford

March 17, 2020