The State of New Hampshire

MERRIMACK **SUPERIOR COURT**

BINFORD ET AL

v.

GOVERNOR SUNUNU

DOCKET NO. 217-2020-CV-00152

ORDER ON PLAINTIFFS' PETITION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION TO DISMISS

The plaintiffs, David W. Binford, Eric Couture, and Holly Rae Beene (collectively "Plaintiffs") have filed an Emergency Motion for Preliminary Injunction and Permanent Injunction against Governor Christopher Sununu in his official capacity as Governor of the State of New Hampshire (hereinafter the "State") on March 18, 2020. See Compl. (Doc. 1). Plaintiffs request an immediate preliminary injunction prohibiting the enforcement of Governor Sununu's Emergency Order # 2 (the "Emergency Order #2 ") issued on March 16, 2020 pursuant to Executive Order 2020-04 ("EO 2020-04). Id. at Prayer A–B. In the alternative, Plaintiffs request a declaratory judgment rendering the Emergency Order advisory as opposed to mandatory. Id. at ¶ 46. The Court held an emergency hearing on the matter on March 20, 2020 ("March 20 Hearing"). Immediately prior to the hearing, the State filed an objection to Plaintiff's request for preliminary and permanent injunction and a motion to dismiss. See State's Obj. (Doc. 5) and State's Mot. Dis. (Doc. 6). For the following reasons, Plaintiffs' petition for preliminary injunction is **DENIED,** and the State's motion to dismiss is **GRANTED**.

FACTS

The following facts are derived from the undisputed offers of proof at the March 20 Hearing and the undisputed facts contained within EO 2020-04 declaring a State of Emergency[1].

The Novel Coronavirus ("COVID-19") first appeared in Wuhan, China in December of 2019. Doc.5, Ex. A at 1. On January 23, 2020, the Centers for Disease Control and Prevention (the "CDC") activated its emergency response system to provide ongoing support in the United States in response to the growing number of cases of COVID-19 across the United States. Id. On January 30, 2020, the World Health Organization (the "WHO") declared a public health emergency "of International Concern" related to COVID-19. Id. The following day, the United States Department of Health and Human Services ("USDHHS") declared a national public health emergency concerning COVID-19. Id. On March 11, 2020, the WHO declared COVID-19 a global pandemic, expressing that in the coming weeks the number of cases, hospitalizations, and deaths would substantially increase. Id.

On March 12, 2020, the Division of Public Health ("DPH") and the Division of Homeland Security and Emergency Management ("DHS") announced that "211 NH" had been mobilized to handle all COVID-19 related calls in New Hampshire. Id. By March 13, 2020, various world health organizations reported over 124,000 confirmed cases of COVID-19 with 4,163 deaths worldwide. Id. Of those cases, 1,663 were confirmed in the United States, including six in New Hampshire. Id. at 2. On March 13, 2020, the President of the United States declared a National Emergency under the

[1] The Court notes that although Plaintiffs' complaint argues that the factual basis contained within EO 2020-04 are insufficient to give rise to a state of emergency, Plaintiffs do not challenge the truth of the facts contained therein.

Stafford Act due to the global pandemic and national spread of COVID-19. Id. At the same time, DHS and the Department of Safety activated State Emergency Operations Centers to provide support to New Hampshire state and local authorities dealing with the crisis. Id.

The same day, Governor Sununu issued EO 2020-04, declaring a State of Emergency due to COVID-19. Id. Governor Sununu set forth seventeen recitations of fact upon which the EO was issued, including details about the threats to the health and safety of New Hampshire residents posed by the outbreak and the response necessary to combat the spread. Id. In EO 2020-04, Governor Sununu acknowledged that, although the majority of cases of COVID-19 will result in mild symptoms, many will require hospitalization and may lead to death. Id. As a result, Governor Sununu noted:

> [I]f COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources, and controlling outbreaks minimizes the risk to the public, maintains the health and safety of the people of New Hampshire, and limits the spread of infection in our communities and within the healthcare delivery system

Id. Consequently, Governor Sununu articulated the need for New Hampshire to "implement measures to mitigate the spread of COVID-19, and to prepare and respond to an increasing number of individuals requiring medical care and hospitalization." Id.

Pursuant to EO 2020-04, Governor Sununu invoked his powers under RSA 4:45 and 4:47. He further noted in EO 2020-04 that "additional temporary orders, directives, rules, and regulations may be issued either by the Governor or by designated state officials within the written approval of the Governor." See id. at 6. Thereafter, on March 16, 2020, he issued Emergency Order #2, which provides:

1. In accordance with CDC guidelines, the following activities are 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.

Doc. 5, Ex. B.

As of March 19, 2020, there were 44 confirmed cases of COVID-19 within the State of New Hampshire. In addition, there were 630 tests pending in the New Hampshire Public Health Laboratories, and 575 people were being monitored.

ANALYSIS

In response to Emergency Order #2, Plaintiffs brought this action on March 17, 2020. See Doc. 1. Plaintiffs seek an emergency and permanent injunction on Emergency Order #2 or, in the alternative, a declaratory judgment rendering Emergency Order #2 advisory rather than mandatory. Id. Plaintiffs argue that the governor does not have the authority to issue Emergency Order #2, the spread of COVID-19 does not

amount to an emergency under RSA 21-P:35, and Emergency Order #2 is unconstitutional. Id. The State objects arguing that the governor has the authority pursuant to RSA 4:45, Emergency Order #2 is enforceable, and it is constitutional. See Doc. 5. For the same reasons, the State also moves to dismiss. See Doc. 6

I. Motion for Preliminary Injunction

"A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015) (quotation omitted). It is the moving party's burden to "show among other things that it would likely succeed on the merits." Id. (quotation and brackets omitted). In addition to success on the merits, "[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." Pike v. Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 45 (2015) (quotation omitted). "The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id.

Plaintiffs have the burden to demonstrate that all three factors are met in order for the Court to order the extraordinary relief of a preliminary injunction. As the Court finds that Plaintiffs are unlikely to succeed on the merits, it need not consider whether there is irreparable harm or an adequate remedy at law. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that courts need not consider the party's remaining arguments where one or more is dispositive of the case). Accordingly, the Court will limit its analysis to whether Plaintiffs are likely to succeed on the merits of the case.

In support of their position that they are likely to succeed on the merits, Plaintiffs argue: (1) Governor Sununu does not have the authority to issue Emergency Order #2; (2) Emergency Order #2 has no enforcement mechanism; and (3) Emergency Order #2 is unconstitutional under the State and Federal Constitutions. See Doc. 1 ¶¶ 23–45. The State asserts that Governor Sununu: (1) properly declared a state of emergency pursuant to RSA 4:45; (2) may use his emergency powers to temporarily suspend or limit fundamental rights if he does so in good faith and with a sufficient factual basis; and (3) Emergency Order #2 is a permissible time, place, and manner restriction on Plaintiffs' fundamental rights. See Doc. 5 a 10–20.

A. Executive Authority

Plaintiffs first argue that Governor Sununu lacks the authority to declare a state of emergency because he cannot meet the burden of showing that an emergency exists under RSA 141-C:14-a or RSA 4:45. Doc. 1 ¶ 27. As an initial matter, the governor's authority is not derived from RSA 141-C:14-a, which contemplates the power of the Commissioner of the Department of Health and Human Services. See RSA 141-C:2, IX. Rather, the governor's power to declare a state of emergency is derived from RSA 4:45 and RSA 4:47. As a result, the Court will consider the parties arguments under the aegis of RSA 4:45 and 4:47.

RSA 4:45, I provides:

> The governor shall have the power to declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that 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.

Once the governor has declared a state of emergency, he has "[t]he power to make, amend, suspend, and rescind necessary orders, rules and regulations to carry out the provisions of this subdivision in the event of a disaster beyond local control." RSA 4:47, III. As the governor's powers under a state of emergency are broad, invocation of the provisions in RSA 4:45 and RSA 4:47 requires the governor to specify the factual conditions that have brought about the emergency and the nature of the emergency itself. RSA 4:45, I(a)–(c). These factual assertions must establish that a state of emergency exists as defined in RSA 21-P:35, VIII, which states:

> "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.

Here, Plaintiffs contend that Governor Sununu lacks the authority to declare a state of emergency because the circumstances surrounding the COVID-19 outbreak do not amount to an emergency under the definition of emergency in RSA 21-P:35. Doc. 1 ¶¶ 27–31. Plaintiffs argue that "New Hampshire has had just 17 people diagnosed with [COVID-19], and ZERO deaths. In a state of over 1 million people, those numbers alone make it clear this is not an 'emergency.'" Id. ¶ 28 (emphasis in original). This argument is without merit.

It would be irrational to find that the governor must wait for the health care system of New Hampshire to be overwhelmed with patients suffering from COVID-19 before he is authorized to declare a state of emergency and take preventative measures to slow the spread of a highly contagious and potentially deadly disease. Indeed, RSA 4:45 contemplates the need to take preemptive action and explicitly authorizes the

governor to do so. Specifically, RSA 4:45, I permits the governor to declare a state of emergency where a disaster is "imminent or has occurred within this state." (Emphasis added). As a result, Governor Sununu is expressly authorized to declare a state of emergency and order measures designed to address an imminent threat to New Hampshire public health and safety. That said, RSA 4:45 requires the governor to assert the factual basis or bases upon which the declaration rests. EO 2020-04 more than satisfies this requirement.

As stated in EO 2020-04, at the time of the March 20 Hearing, COVID-19 had infected roughly 124,000 people globally, of which nearly 5,000 have died. The WHO declared that COVID-19 is a global pandemic and warned the world to take precautions to slow the spread of the disease. The world's experts on infectious diseases, including the WHO, CDC, and USDHHS, agree that these numbers will increase exponentially over the coming weeks and months, particularly if no measures are taken to stop the spread of COVID-19. This presents an enormous risk to the residents of New Hampshire, as the state only has limited local medical resources to combat the outbreak. As a result, "if COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources." Doc. 5, Ex. A at 2. Correspondingly, "controlling outbreaks minimizes the risk to the public" and minimizes the strain on the state's limited resources. Id. With this in mind, the Court finds that there is overwhelming factual and legal support evincing Governor Sununu's authority to declare a state of emergency. Accordingly, the Court finds that EO 2020-04 sets out a sufficient factual basis to conclude that "a natural, technological, or man-made disaster of major

proportions is imminent" such that the governor is authorized to declare a state of emergency pursuant to RSA 4:45 and to issue executive orders designed to address the spread of COVID-19 pursuant to RSA 4:47, III.

Plaintiffs next argue that, even if the governor is authorized to declare a state of emergency and to issue executive orders related thereto, Emergency Order #2 lacks any legal enforcement mechanism and should therefore be declared advisory. Doc. 1 ¶¶ 44–46. Plaintiffs specifically point to RSA 21-P:47, which states "[i]f any person violates or attempts to violate any order, rule, or regulation made pursuant to this subdivision, such person shall be guilty of a misdemeanor." Plaintiffs assert that the language "pursuant to this subdivision" expressly limits the governor's enforcement power to orders issued pursuant to RSA 21-P. Plaintiffs argue that the legislature would have included express language indicating the governor's power to enforce orders issued pursuant to RSA 4:45 if it had intended him to have the enforcement authority pursuant to that chapter.

This argument ignores the rest of the subdivision contained within RSA 21-P. RSA 21-P:45, titled "Enforcement," expressly includes language authorizing enforcement of executive orders issued under RSA 4:45:

> It shall be the duty of every organization for emergency management established under this subdivision and of the officers of such organization to execute and enforce such orders, rules, and regulations as may be made by the governor under authority of this subdivision or RSA 4:45.

(Emphasis added). RSA 21-P:45 expressly authorizes the governor to enforce emergency orders, while RSA 21-P:47 sets forth the penalty for failure to comply with emergency orders issued pursuant to RSA 4:45. Accordingly, the Court finds that not only does Governor Sununu have the authority to declare a state of emergency, but the

legislature has also imbued the executive with the authority to enforce emergency orders made pursuant to RSA 4:45. As a result of this clear legislative authority, the Court declines the request that Emergency Order #2 be declared advisory as opposed to mandatory.

B. Constitutionality of Emergency Order #2

Plaintiffs argue that Emergency Order #2 is unconstitutional because: (1) it violates their right to assemble under the First Amendment of the U.S. Constitution and Part I, art. 32 of the New Hampshire Constitution; (2) it violates their right to religious freedom under the First Amendment of the U.S. Constitution and Part I, art. 5 of the New Hampshire Constitution; (3) it violates the Part I, art. 34 New Hampshire Constitution prohibition on Martial Law: (4) it constitutes an unconstitutional taking under the U.S. Constitution; and (5) it violates their privilege of Habeas Corpus under Part 2, art. 91 of the New Hampshire Constitution. See Doc. 1. In response, the State contends: (1) during a state of emergency, executives are granted broad latitude to suspend civil liberties in order to address the emergency; and (2) even if the governor does not have broad latitude to suspend civil liberties during the state of emergency, Emergency Order #2 is a permissible time, place, and manner restriction on assembly and religion. Doc. 5 at 13–18. The State further maintains that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped, conclusory statements of the law that are without merit and do not warrant judicial review. Id. at 18–19.

As an initial matter, the Court agrees with the State that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped

and without merit. Plaintiffs do not assert any facts that would lead the Court to conclude that Governor Sununu has declared martial law, has taken any property from Plaintiffs without just compensation, or has exercised impermissible control over Plaintiffs' bodies. See Doc. 1. Accordingly, the Court will only consider Plaintiffs' developed arguments concerning freedom of assembly and freedom of religion.

i. Governor's Authority to Suspend Civil Liberties

As the State points out, there is not a wealth of case law in New Hampshire concerning the governor's authority to enact emergency orders during a state of emergency. As a result, the Court looks to other jurisdictions for guidance regarding the limit of the governor's authority under these circumstances.

Multiple jurisdictions have contemplated the executive's authority to suspend or infringe upon certain civil liberties during states of emergency. See e.g. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."); United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971) ("The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected."); In re Juan C., 33 Cal. Rptr.2d 919, 922 (Ct. App. 1994) ("An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction."); ACLU of W. Tenn., Inc. v. Chandler, 458 F. Supp 456, 460 (W.D. Tenn. 1978) (explaining that the governor has the authority to impose "limitation on the exercise of [First Amendment rights] only in very unusual

circumstances were extreme action is necessary to protect the public from immediate and grave danger").

The 11th Circuit has articulated a two-prong test to determine whether an executive order passes constitutional muster during a state of emergency. See Avino, 91 F.3d 105. In Avino, the Governor of the State of Florida issued an executive order declaring a state of emergency in the wake of Hurricane Andrew. Id. at 108. This executive order provided that Miami city and Metropolitan Dade County officials could impose curfews from August 24, 1992 through December 21, 1992. Id. The Miami Dade county manager set the curfew from 7:00 pm to 7:00 am and called in the National Guard and other law enforcement officials to aid local police. Id. By October 2, 1992, the curfew was in effect from 10:00 pm through 5:00 am. Id. County residents were required to stay in their homes during the curfew hours unless otherwise authorized. Id. The curfew was ultimately lifted on November 16, 1992. Id. The plaintiffs, residents of Dade County, filed suit against Metropolitan Dade County and the county manager, arguing that the curfew ordinance was unconstitutional. Id. at 107.

The Avino court began its analysis by establishing that the curfew ordinance must be considered "in the circumstances under which the curfew was instituted." Id. at 108. The Avino court noted that the State of Florida was devastated by Hurricane Andrew and that all parties agreed that "[p]olice action was clearly required." Id. at 109. The court went on to note that "[c]ases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction." Id. (citing Chalk, 441 F.2d 1277; In re Juan C., 33 Cal. Rptr.2d 919; and Moorhead v.

Farrelly, 727 F. Supp. 193 (D.V.I. 1989)). The Avino court articulated that in a state of emergency, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." Id. Accordingly, the court held that "when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality is limited to a determination whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order." Id. The Avino court went on to hold that there was no suggestion that the Dade County officials acted in bad faith. Id. The Avino court further found that a factual emergency existed necessitating emergency intervention. Id. The court ultimately concluded that under extreme emergency circumstances, "fundamental rights such as the right of travel and free speech may be temporarily limited or suspended." Id.

The case currently before the Court concerns a ban on gatherings in excess of 50 people and a ban on dining in at food and beverage service establishments in order to prevent the spread of a highly infectious and deadly disease. The Court finds that this type of ban is sufficiently analogous to a curfew in response to a riot or natural disaster such that the 11th Circuit's two-prong test established in Avino would apply. The Court is also sufficiently persuaded by the 11th Circuit's reasoning in Avino, and adopts that two-prong test here. Accordingly, the Court will review the constitutionality of Emergency Order #2 by examining whether: (1) the Governor has acted in good faith; and (2) whether the Governor has asserted a sufficient factual basis showing that the restrictions imposed were necessary.

Here, there is no allegation that Governor Sununu has acted in bad faith. Indeed, at the March 20 Hearing, Plaintiffs conceded that Governor Sununu acted in good faith in issuing Emergency Order #2. As a result, the Court need only consider whether the Governor has articulated a sufficient factual basis demonstrating that the restrictions imposed were necessary. Plaintiffs challenge Emergency Order #2's ban on gatherings of 50 or more people and ban on dine in services in public restaurants, alleging that there is no sufficient factual basis to conclude that these measures are necessary to combat COVID-19. The Court disagrees.

As stated above, EO 2020-04 set out ample factual bases to conclude that the Governor had the authority to declare a state of emergency concerning the global pandemic caused by COVID-19. These facts establish a strong need for immediate intervention. By March 16, 2020, both the United States District Court for the District of New Hampshire and the New Hampshire Supreme Court had issued orders suspending hearings and jury trials and restricting the number of people that had access to the courts. On March 16, 2020, the CDC and the White House put forth social distancing guidelines, recommending that events of ten or more people should be cancelled or held virtually. That day, Governor Sununu issued the ban on gatherings in excess of 50 people and suspended dine-in services at restaurants. These actions are consistent with similar actions taken by New Hampshire courts and are clearly supported by the recommendations put forth by the CDC and the White House. In issuing Emergency Order #2, the Governor acknowledged the ongoing emergency presented by the spread of COVID-19 and articulated the relationship between a ban on large gatherings and

dine-in services and addressing the emergency. Accordingly, the Court finds that there is a sufficient factual basis for the prohibitions contained within Emergency Order #2.

Further buttressing the Court's finding that the Governor's actions are constitutional is the fact that there are multiple checks on Governor Sununu's authority to enforce Emergency Orders pursuant to EO 2020-04. Absent a renewed factual finding by the Governor, EO 2020-04 will be in effect for only 21 days. RSA 4:45, I(d). In addition, the legislature has the authority "by concurrent resolution" to end the state of emergency at any time and can block the governor from renewing the state of emergency at the expiration of 21 days. RSA 4:45, II(c). Furthermore, Emergency Order #2 is in effect for a limited duration, beginning on March 16, 2020 and ending April 6, 2020. See State's Ex. B. During that time, should the factual bases for enforcing the Emergency Order change, it is subject to review by the Court. See Moorhead, 727 F. Supp. 193 ("A court's role in the aftermath of an emergency...is to review, with deference, the decision of the executive.").

In sum, because Governor Sununu has acted in good faith, and because there is a sufficient factual basis on which to conclude that the prohibitions contained within Emergency Order #2 are necessary, and because there are sufficient checks and balances on executive orders during a state of emergency, the Court finds that Emergency Order #2 passes constitutional muster.

ii. Time/Place/Manner Restrictions on Freedom of Speech and Freedom of Assembly

Although the Court finds that the Governor may suspend or limit constitutional rights during a state of emergency, for the purpose of establishing a complete record, the Court will also analyze the facial constitutionality of Emergency Order #2.

Part I, art. 32 of the New Hampshire Constitution provides: "The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good." "This provision guarantees the same right to free speech and association as does the First Amendment to the Federal Constitution." Opinion of the Justices (Voting Age in Primary Elections II), 158 N.H. 661, 667 (2009). "In interpreting Part I, Article 32, therefore, [the Court] rel[ies] upon federal cases interpreting the First Amendment to the Federal Constitution for guidance." Id.

"The State constitutional right of free speech, N.H. CONST. pt. I, arts. 22 & 32, is not absolute, but may be subject to reasonable time, place and manner regulations." State v. Comely, 130 N.H. 688, 691 (1988). "Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000). "Where ... a law regulates speech only incidentally, as a consequences of expressly regulating conduct, it will withstand first amendment scrutiny if, in its application to incidental speech, it is no more restrictive than a time, place, and manner regulation." Comely, 130 N.H. at 691 (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968)). Determining whether a time, place, and manner regulation comports with the Constitution, requires the Court to

employ a three-prong test. Comely, 130 N.H. at 691. The Court must determine whether the regulation: (1) is content-neutral; (2) narrowly serves a significant governmental interest; and (3) allows for other opportunities for expression. Id. Although these cases consider laws rather than emergency orders, the effect of the emergency order is functionally the same. As a result, the Court concludes that the same standard is generally applicable to emergency orders enacted pursuant to RSA 4:45.

The first step of the analysis is to determine whether the restrictions contained within Emergency Order #2 are content neutral. Comely, 130 N.H. at 691. Plaintiffs contend that Emergency Order #2 is expressly content based because of the language in paragraph 1 banning "[s]cheduled gatherings of 50 people or more for social, spiritual and recreational activities." See Doc. 1, Ex. A. Plaintiffs argue that inclusion of the word "spiritual" expressly targets religious activities and is therefore not content neutral. This argument ignores the remainder of paragraph one which includes an illustrative list detailing the types of events to which Emergency Order #2 applies. Id. (banning gatherings in excess of 50 people for events "including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities"). Based on the inclusion of this illustrative list, Emergency Order #2 is clearly content neutral in that it prohibits any gathering in excess of 50 people, regardless of the content of the event. Accordingly, the Court finds that Emergency Order #2 is content neutral and thereby satisfies the first prong of the time, place, and manner test.

The second step of the analysis is to determine whether the restriction is narrowly tailored to serve a significant government interest. Comely, 130 N.H. at 691. Courts have long held that public health, safety, and welfare constitute a significant government interest. See e.g. Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995). EO 2020-04 clearly declared a state of emergency as the result of an impending public health crisis in the State of New Hampshire, and Emergency Order #2 was issued by Governor Sununu to address the public health crisis established in that executive order. See Doc. 5, Ex. A. As a result, the State has established that it has a significant interest in promoting public health and safety as related to the spread of COVID-19.

The CDC and the White House have put forth guidelines recommending that gatherings be limited to ten people or fewer in order to slow the spread of COVID-19. Emergency Order #2 follows these guidelines, but is not so restrictive, allowing for gatherings of fewer than 50 people. Doc. 5 at 17. Emergency Order #2 also prohibits the onsite consumption of food or beverages in "restaurants, diners, bars, saloons, private clubs, or any other establishment." Doc. 1, Ex. A ¶ 2. However, it does not completely prevent the sale of food and beverages, expressly authorizing "carry-out, delivery, curbside pick up, and drive through" services. Id. Thus, the only two restrictions imposed on public assembly are that scheduled gatherings cannot have in excess of 50 people, and dine-in services at public restaurants are suspended. The restrictions contained within Emergency Order #2 paragraphs 1 and 2 were specifically designed to comport with relevant CDC guidelines to slow the spread of COVID-19. See Doc. 1, Ex. A; see also Doc. 5, Ex. A at 3. In addition, Emergency Order #2 is not a permanent ban on all gatherings in excess of 50 people or dining-in at restaurants.

Rather, Emergency Order #2 has a fixed expiration date, April 6, 2020. Doc. 1, Ex. A ¶ 5. Should Governor Sununu determine that a sufficient factual basis exists to extend the state of emergency and thereafter extends the duration of Emergency Order #2, that expansion must only last for the duration necessary to respond to the public health emergency.

Accordingly, because Emergency Order #2 limits its restrictions to those suggested by the CDC to slow the spread of COVID-19, and because the effects of Emergency Order #2 have a limited duration, the Court finds that Emergency Order #2 is narrowly tailored to serve the government's significant interest.

The final step of the analysis is to determine whether Emergency Order #2 allows for alternative opportunities for expression. Comely, 130 N.H. at 691. This prong of the test is clearly satisfied. As stated above, Emergency Order #2 only bans scheduled gatherings of 50 or more people and dine-in restaurant services. People are free to attend scheduled gatherings with fewer people. They can attend impromptu gatherings of any kind. They are free to communicate via the internet or telephone. They may tune into televised events. They can continue to dine together in their homes or outdoors. There are a wealth of opportunities for individuals to exercise their right to freely assemble and associate that do not require them to gather in large groups or eat at a restaurant during a public health emergency. Accordingly, the Court finds that Emergency Order #2 allows for alternative opportunities of expression.

Because Emergency Order #2 is content neutral, narrowly tailored to serve the government's interest in slowing the spread of COVID-19, of a limited duration, and allows for alternative methods of speech, assembly, and association, the Court

concludes that it constitutes a reasonable time, place, and manner restriction, comporting with the precepts of the First Amendment and Part I, art. 32 of the New Hampshire Constitution.

iii. Restrictions of Freedom of Religion

The Free Exercise clause of the First Amendment prohibits the government from seeking "to ban such acts or abstentions only when they are engaged in for religious reasons." Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (superseded by statute on different grounds as stated in Holt v. Hobbs, 574 U.S. 352 (2015)). That said, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

As established above, Emergency Order #2 is content neutral. Nothing in Emergency Order #2 suggests that it is intended to target any religion or specific religious practice. While a ban on scheduled gatherings of 50 or more people may have an impact on the ability for a congregation to assemble at church, the Court concludes that such an impact is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and public health threat facing the citizens of this State. Accordingly, for all the reasons set forth in the section above, the Court finds that Emergency Order #2 does not unconstitutionally infringe upon Plaintiffs' freedom of religion.

Because the Court finds that Governor Sununu has the authority to suspend or limit fundamental rights during a state of emergency, and because Emergency Order #2

constitutes a reasonable time, place, and manner restriction, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim. Consequently, Plaintiffs' motion for preliminary injunction is **DENIED**.

II. Motion to Dismiss

In ruling on a motion to dismiss, the Court considers whether the allegations in the plaintiff's "pleadings are reasonably susceptible of a construction that would permit recovery." Riso v. Dwyer, 168 N.H. 652, 654 (2016) (quotation omitted). The Court must assume the truth of the factual allegations outlined in the complaint, and construe all reasonable inferences in the light most favorable to the plaintiff. Id. The Court does not, however, "assume the truth of the statements in the [third-party] complaint that are conclusions of law." Id. (quotation omitted). In other words, because the Court is only required to accept "well-pleaded facts," it is not required to accept conclusory allegations which contain no articulable facts that can be tested. See Snierson v. Scruton, 145 N.H. 73, 76 (2000); Baxter Int'l Inc. v. State, 140 N.H. 214, 218–19 (1995). The pertinent inquiry is whether the facts alleged constitute a basis for relief. Riso, 168 N.H. at 654. If they do not, the Court shall grant the State's motion to dismiss. Id.

Plaintiffs have challenged the constitutionality of EO 2020-04 and Emergency Order #2 on their face, rather than as applied. A result, the Court is presented with a question of law rather than fact, which can be appropriately decided on a motion to dismiss. The Court has already considered the merits of Plaintiffs' arguments, supra at 5–20, and has found that Plaintiffs cannot succeed on the merits of their claim as the governor's emergency declarations pass constitutional muster. It logically follows that,

for the same reasons stated above, Plaintiffs have failed to state a claim for which relief may be granted. Consequently, the State's motion to dismiss is **GRANTED**.

CONCLUSION

For the forgoing reasons, Plaintiffs petition for preliminary injunctive relief is **DENIED**, and the State's motion to dismiss is **GRANTED**.

SO ORDERED.

3/25/2020
DATE

John C. Kissinger
Presiding Justice