THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

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

v.

Christopher Sununu, Governor of the State of New Hampshire

Docket No. 216-2020-CV-00342

ORDER

Plaintiffs have brought this action seeking writs of mandamus and prohibition, as well as declaratory and injunctive relief. The action arises out of Governor Sununu's public declaration that, pursuant to RSA 4:45, III(e) and RSA 21-P:43, he has the authority to accept and expend funds allocated to the State of New Hampshire via the recent CARES Act without oversight from the legislative branch's Fiscal Committee. Plaintiffs now seek a preliminary injunction, as all CARES Act funds are due to arrive in this state by April 24, 2020. Governor Sununu moves to dismiss, arguing plaintiffs lack standing. The Court held a hearing on April 20, 2020. For the reasons that follow, Governor Sununu's motion to dismiss is GRANTED.

Factual Background

On March 13, 2020, by Executive Order 2020-04, Governor Sununu declared a state of emergency in New Hampshire due to the global pandemic caused by the novel coronavirus known as COVID-19. (Pls.' Ex. A.) On March 27, 2020, the United States Congress enacted the Coronavirus Aid, Recovery, and Economic Security (CARES) Act, which will provide New

Hampshire with $1.25 billion in federal funds. On March 31, 2020, Governor Sununu sent a letter to plaintiff Mary Jane Wallner, Chairman of the Fiscal Committee, requesting the Fiscal Committee's authorization for the Office of the Governor to accept and expend the CARES Act funds. (Pls.' Ex. C.) Despite this request, Governor Sununu stated that "[p]ursuant to RSA 4:45 and RSA 21-P:43, Fiscal Committee approval is not technically required for the acceptance and expenditure of these funds." (*Id*.)

On April 3, 2020, by Executive Order 2020-05, Governor Sununu extended the state of emergency for a period of twenty-one days. (Pls.' Ex. B.) On April 7, 2020, Governor Sununu sent a letter to the Speaker of the House and the Senate President, in which he announced the creation of the Governor's Office for Emergency Relief and Recovery (GOFERR), which would "be charged with the investment and oversight of COVID-19 relief and stimulus funds provided to New Hampshire by the Federal Government." (Pls.' Ex. D.) Within GOFERR, Governor Sununu will be creating a Legislative Advisory Board, comprised of both Democrat and Republican leadership, including plaintiffs, that will "have a voice" and "make recommendations" on the process. (*Id*.) Shortly thereafter, Governor Sununu held a press conference during which he explicitly stated, "To ask the Fiscal Committee to meet in open session is not possible . . . it is not feasible and it is not going to happen."[1]

On April 10, 2020, the Fiscal Committee held a remote meeting during which it authorized the Department of Health and Human Services to accept and expend $1.2 million from the Families First Coronavirus Response Act. (Pls.' Ex. E, F.) Later that same day, the Fiscal Committee sent a letter to the Governor informing him of the successful meeting, stating that it "demonstrates that the Fiscal Committee has the ability to swiftly address,

1 Garry Rayno, Sununu, Legislative Leaders Spar Over COVID-19 Stimulus Funds, InDepthNH, April 8, 2020, http://indepthnh.org/2020/04/08/sununu-legislative-leaders-spar-over-covid-19-stimulus-funds/.

accept and expend these vital funds." (Pls.' Ex. G.) The Committee noted that it was currently scheduled to hold another meeting on April 20, 2020, and remains "willing and able to meet as often as necessary to fulfill its statutory duties." (*Id*.) Also on April 10, Governor Sununu reiterated at a press conference his intent to move forward without Fiscal Committee oversight.[2] On April 13, 2020, plaintiffs brought the present action.

Analysis

The crux of the issue before the Court is as follows. Governor Sununu reads RSA 4:45, III(e) to grant him broadly sweeping authority during a state of emergency to distribute funds without oversight from the fiscal committee. RSA 4:45, III(e) states, in its entirety, that

> [d]uring the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the following additional emergency powers: . . . [t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

Governor Sununu also specifically mentioned RSA 21-P:43 in his March 31, 2020 letter to Chairman Wallner as giving him authority to bypass Fiscal Committee oversight. That statute provides:

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

2 NH Homeland Security and Emergency Management Facebook Page, https://www.facebook.com/NH.HSEM/videos/2682548192017368/, at 16:00 to 18:30.

> acting through the governor, or such political subdivision, acting through its executive officer, city council, or board of selectmen, may accept such offer, subject to its terms.

RSA 21-P:43.

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

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

RSA 14:30-a, VI. The Fiscal Committee retains its oversight authority during civil emergencies. RSA 9:13-d provides:

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

The ultimate question before the Court is whether and to what extent Governor Sununu is required to seek Fiscal Committee approval for expenditures of the CARES Act funds. Answering this question will require a careful examination of the interplay between the

aforementioned statutory provisions, the extent to which constitutional separation of powers issues are implicated, and the relevant legislative history.

Before addressing the merits of plaintiffs' requested relief, Governor Sununu has challenged plaintiffs' standing to bring the present claims. "[S]tanding is a question of subject matter jurisdiction." *Duncan v. State*, 166 N.H. 630, 640 (2014). "Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." *Teeboom v. City of Nashua*, 172 N.H. 301, 307 (2019) (quoting *Duncan*, 166 N.H. at 642-43). "In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect." *Id*. (quoting *State v. Actavis Pharma*, 170 N.H. 211, 214 (2017)). "Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest." *Id*. "Rather, the party must show that its own rights have been or will be directly affected." *Id*.

The foregoing standard represents a relatively recent shift in New Hampshire's focus on standing occasioned by the Supreme Court's decision in *Duncan*. In that case, the Supreme Court looked to federal law in emphasizing the importance of plaintiffs establishing concrete, personal injuries in order to have standing to bring suit, finding that this requirement has "separation-of-powers significance." *Duncan*, 166 N.H. at 643 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)). In maintaining that they have standing by suing in their official capacities as leaders of the Senate and House of Representatives, plaintiffs rely on several cases in which members of the legislature were plaintiffs: *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276 (2005); *Warburton v.*

Thomas, 136 N.H. 383 (1992); *Monier v. Gallen*, 120 N.H. 333 (1980); and *O'Neil v. Thomson*, 114 N.H. 155 (1974). However, with the exception of *O'Neil*, none of those cases addressed the matter of standing, and *O'Neil* only stated that "[t]he plaintiffs in their several capacities have sufficient right and interest in the 'performance by public officers of their public duties' and in 'the preservation of an orderly and lawful government' to entitle them to maintain these proceedings." 114 N.H. at 158-59. Moreover, each of those cases, particularly *O'Neil*, predates *Duncan*, and therefore has limited value in addressing the modern standing standard. Looking at the issue of standing through the prism of *Duncan* and more recent cases like *Teeboom*, the Court finds plaintiffs' status as members or leaders of the General Court does not inherently impart them with standing. Rather, they must allege a concrete, personal injury.

Governor Sununu argues that plaintiffs, as members of the legislature, have not alleged personal injuries but rather injuries against the institution of the General Court. "Institutional injuries are those that do not zero in on any individual Member" of a legislature, but are "widely dispersed" and "necessarily impact all members of a legislature equally." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) (quoting *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 135 S.Ct. 2652, 2664 (2015)). In other words, "an institutional injury constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator." *Id*. "An individual legislator cannot 'tenably claim a personal stake' in a suit based on such an institutional injury." *Id*. (citing *Arizona*, 135 S.Ct. At 2664.

"Courts that have addressed the issue of legislator standing have held that a legislator suffers an injury in fact in his or her capacity as a legislator only in limited circumstance, which typically include (1) allegations that the legislator has been deprived of his or her right to vote

or that his or her legislative votes have been nullified and (2) allegations that the legislator has been deprived of his or her constitutional right to advice and consent on executive appointments or other matters upon which a legislator has a right to act." *Morrow v. Bentley*, 261 So. 3d 278, 288 (Ala. 2017) (citing cases). "However, when legislators have attempted to challenge executive action on the grounds that it failed to comply with previously enacted legislation or amounted to a usurpation of the legislature's appropriation power, courts have generally determined that the alleged injury is too attenuated and, thus, have been reluctant to conclude that the legislators had suffered an actual, concrete and particularized injury in fact in their capacity as legislators sufficient to establish standing to sue in that capacity." *Id*. at 289 (citation omitted).

Both *Kerr* and *Morrow* discussed a United States Supreme Court case also relied upon by Governor Sununu here: *Raines v. Byrd*, 521 U.S. 811 (1997). In that case, members of Congress challenged the constitutionality of the Line Item Veto Act, which passed and was enacted over their objection. *Id*. at 814-16. The plaintiffs claimed that the Act injured them in three ways:

> The Act . . . (a) alter[s] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divest[s] the [appellees] of their constitutional role in the repeal of legislation, and (c) alter[s] the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Id. at 816. The Supreme Court found that the plaintiffs alleged institutional injuries, i.e., the diminution of legislative power, "which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821. As a result, the Supreme Court found that the plaintiffs did have a sufficient personal stake in the dispute and had not alleged a sufficiently concrete injury to have established Article III standing. *Id*. at 830.

The Supreme Court contrasted the circumstances in *Raines* with those presented in *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, "20 of Kansas' 40 State Senators voted not to ratify the proposed 'Child Labor Amendment' to the Federal Constitution." *Raines*, 521 U.S. at 822. Although this would have resulted in the measure being defeated, the State's Lieutenant Governor broke the tie and voted in favor of the amendment and it was thereafter deemed ratified. *Id*. The Senators who voted against the amendment filed suit to compel state officials to find that the amendment had not been ratified. *Id*. The Supreme Court found that the Senators had standing, in that they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id*. at 822-23 (quoting *Coleman*, 307 U.S. at 438)). The Supreme Court in *Raines* notes that its holding in *Coleman* "stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id*. at 823.

The Court finds these cases persuasive and applicable to the present circumstances. As in the cases above, plaintiffs here do not allege an injury to themselves individually, either as private citizens or as members of the New Hampshire legislature. Instead, they allege an injury to the institution of which they are members, namely, the usurpation of the joint legislative fiscal committee's authority to approve the governor's spending, and by extension the legislature's power of the purse. This is an institutional injury and is not the type of injury recognized in *Coleman*. Additionally, this Court notes that the Supreme Court in *Raines* "attach[ed] some importance to the fact that the plaintiffs ha[d] not been authorized to represent their respective Houses of Congress." *Id*. at 829. Plaintiffs here apparently lack approval of their respective legislative bodies to pursue this action on the institutions' behalf.

Plaintiffs argue that the issue of whether they may represent their respective bodies as presiding officers is nonjusticiable pursuant to Part II, Articles 22 and 37 of the New Hampshire Constitution, which "contain textually demonstrable commitments to the House and Senate to adopt their own 'rules of proceedings.'" *Hughes*, 152 N.H. at 284. Plaintiffs argue that the question of how the legislature authorizes its entry into lawsuits and the legislature's decision of how to organize decision making are issues for the legislature itself to decide. (Pls.' Obj. Mot. Dismiss ¶ 14.) "This means that each branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature." *Hughes*, 152 N.H. at 284. While this may be true, plaintiffs have failed to identify any rule of the House of Representatives or the Senate that gives their respective leaders automatic authority to file actions on behalf of the institutions. Absent such a showing, plaintiffs have failed to meet their burden of proving their standing to pursue this action. Plaintiffs cannot sidestep the critical issue of standing by claiming the existence of a political question in the abstract. For the foregoing reasons, the Court finds that the individual plaintiffs lack standing to bring this suit, even if brought in their professional capacities as members of the legislature.

Plaintiffs have recently sought to amend their complaint to allege in the alternative that they have standing to sue as taxpayers. In 2018, Part I, Article 8 of the New Hampshire Constitution was amended to include the following provision for taxpayer standing: "[A]ny individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or

her rights were impaired or prejudiced beyond his or her status as a taxpayer." As an initial matter, Governor Sununu argues that the language used in the constitution, specifically that a taxpayer can seek a declaration that the State "has spent or has approved spending" unlawfully, contemplates a legal action occurring *after* such spending or approval has taken place. Because the constitution employs the perfect tense in describing what a taxpayer may challenge, the Governor argues one should infer that Part I, Article 8 is not intended to offer prospective relief in the form of a declaration that planned spending in the future is unlawful.

However, in interpreting constitutional provisions, the Court "will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." *Bd. of Trustees of N.H. Judicial Retirement Plan v. Secretary of State*, 161 N.H. 49, 53 (2010). This constitutional provision was enacted following the ruling in *Duncan* that the taxpayer standing language in the declaratory judgment statute, RSA 491:22, was unconstitutional. By returning to the taxpayer the ability to seek a declaration as to unlawful spending, it can be presumed that the electorate meant to provide the right to seek declaratory judgment that was removed by *Duncan*. It is a longstanding rule that "[t]he distinguishing characteristic of the [declaratory] action is that it can be brought before an actual invasion of rights has occurred." *Portsmouth Hosp. v. Indemnity Ins. Co. of North America*, 109 N.H. 53, 55 (1968). "It is intended to permit a determination of a controversy before obligations are repudiated and rights invaded." *Id*. Therefore, notwithstanding the tense used, the Court finds that Part I, Article 8 intended to provide taxpayers the ability to seek declaratory judgment relief in the ordinary course, but limited to issues of State spending. Accordingly, plaintiffs may properly seek declaratory judgment before the allegedly unlawful spending has occurred.

The Court next considers whether Part I, Article 8 provides plaintiffs with standing to challenge the expenditure of purely federal funds. Several state courts have addressed this question directly and come to different conclusions. For example, the Colorado Court of Appeals held that a state taxpayer lacked standing to challenge a federal grant of funds to the Colorado Department of Public Health and Environment on the grounds that the "award of federal funds . . . has not had and will not have any effect, even incidental or indirect, on [the plaintiff] as a Colorado taxpayer." *Hotaling v. Hickenlooper*, 275 P.3d 723, 727 (Colo. Ct. App. 2011). The Supreme Court of Alabama likewise found a plaintiff lacked standing to challenge the expenditure of state funds that were subsequently reimbursed by federal funds. *Broxton v. Siegelman*, 861 So. 2d 376 (Ala. 2003). The *Broxton* court found that under Alabama law, "the requirement for standing in a taxpayer lawsuit is the expenditure of state funds." *Id*. at 386. The court reasoned that "the right of a taxpayer to sue is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Id*. at 385. As federal funds were used to replenish the state funds temporarily spent, "the taxpayer will not face the liability of replenishing the state funds," and therefore he lacked standing. *Id*.

On the other hand, the Supreme Court of Vermont recently found a state taxpayer did have standing to challenge a town's use of federal funds. "Notwithstanding the federal origin of the monies at issue . . . , [the court] conclude[d] that plaintiffs can assert municipal taxpayer standing to challenge the Town's use of the funds." *Taylor v. Town of Cabot*, 178 A.3d 313, 317 (Vt. 2017). However, the court "base[d] this conclusion on the language of the HUD authorization, the extensive control the Town has over the funds, the absence of meaningful federal oversight of the Town's use of the funds, and the fact that the funds would otherwise be available for potential municipal expenditures." *Id*. In contrast to the circumstances in

Taylor, the CARES Act funds here must be used for specific, if broadly stated, purposes, and the federal Inspector General is granted specific oversight over the use of the funds. *See* H.R. 748, the CARES Act, https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf, at 223-24. If the Inspector General determines that the expenditure of funds is not in compliance with the Act, the improperly spent funds "shall be booked as a debt" owed to the Federal Government. *Id*. at 224. Therefore, the Court finds the instant case to be distinguishable from *Taylor*.

Like the language in our own constitutional provision, both Colorado and Alabama provide taxpayer standing to challenge unlawful expenditures of "public funds." *See Hotaling*, 275 P.3d at 726 ("Taxpayers have standing to seek to enjoin an unlawful expenditure of public funds."); *Broxton*, 861 So.2d at 383 ("[A] taxpayer may maintain a suit to enjoin the state treasurer from diverting public funds . . . ."). Those jurisdictions interpreted that term to refer to funds generated from state taxes or that otherwise implicated a burden on the state taxpayer. As the Maryland Court of Appeals stated:

> The special damage which the taxpayer of the political division sustains in a public wrong is the prospective pecuniary loss incident to the increase in the amount of taxes he will be constrained to pay by reason of the illegal or *ultra vires* act of the municipality or other political unit.

State Center, LLC v. Lexington Charles Ltd. P'ship, 92 A.3d 400, 463 (Md. 2014) (quoting *Ruark v. International Union of Operating Engineers, Local Union No. 37*, 146 A. 797, 802 (Md. 1929)). Our own constitutional provision states that "the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced *beyond his or her status as a taxpayer*." N.H. CONST. Pt. I, Art. 8 (emphasis added). The CARES Act funds are entirely federal, and plaintiffs have not articulated how their expenditure by Governor Sununu, lawful or not, will cause any harm, direct or indirect, to any individual who pays state

taxes. Because they have failed to establish that their rights as taxpayers will be impaired or prejudiced by Governor Sununu's expenditure of federal funds, the Court finds that Part I, Article 8 does not provide plaintiffs standing to pursue this action. Accordingly, plaintiffs' motion to amend is DENIED as the proposed amendment would be futile. *See Hatch v. Dept. for Children, Youth and Families*, 274 F.3d 12, 19 (1st Cir. 2001) ("[F]utility is fully sufficient to justify the denial of a motion to amend.").

In the alternative, even assuming plaintiffs did have taxpayer standing, the Court finds that plaintiffs as taxpayers are not entitled to the immediate relief they are seeking. At the hearing, Governor Sununu argued that by its plain language, Article 8 is limited and does not provide taxpayers with the ability to obtain preliminary injunctive relief; rather, it only authorizes plaintiffs to seek a *declaration* from the court that certain conduct by the State is unlawful. The Court agrees with this interpretation of the language in Article 8. While plaintiffs could be entitled to permanent injunctive relief after a final ruling on the merits of their complaint, if they had standing as taxpayers, they would not be entitled to a preliminary injunction.

Moreover, even assuming taxpayer standing exists in this case and would ordinarily afford plaintiffs preliminary injunctive relief as an available remedy, the Court finds that the facts and circumstances of this case require a finding that such relief is inappropriate. "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015). "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination

of the case." *Id*. (citing *Kukene v. Genualdo*, 145 N.H. 1, 4 (2000)). "[A] party seeking an injunction must show that it would likely succeed on the merits." *Id*. Significantly, "[a]n injunction should not issue unless there is an immediate danger of irreparable harm *to the party seeking injunctive relief*, and there is no adequate remedy at law." *Id*. (emphasis added). Even giving plaintiffs credit as speaking on behalf of all taxpayers in this state and assuming a likelihood of success on the merits, the money at issue is not sourced from state taxes. Plaintiffs have made no allegation that taxpayers generally will be harmed by Governor Sununu's planned expenditures of the CARES Act funds. Instead, as noted above, the harm alleged is to the institution of the legislature, by diminishing or usurping the authority of the Fiscal Committee. Accordingly, plaintiffs have not established irreparable harm in their capacity as taxpayers.

Finally, the public interest must not be adversely affected by the granting of the preliminary injunction. *Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 108 (1998). Per their complaint, plaintiffs in this case seek to preliminarily enjoin Governor Sununu and his agents "from spending unappropriated state or federal funds without approval from the Joint Legislative Fiscal Committee during this state of emergency, with the exception of the circumstances under RSA 21-P:53, II and RSA 4:45, III(b)." (Compl. at 10.) Although plaintiffs represented at the hearing that the Fiscal Committee was not necessarily seeking to approve each and every expenditure on a granular level, implicit in the complaint's language is a request to stop the Governor from spending *any* funds under the CARES Act without oversight from the Fiscal Committee.[3]

3 In addition, as Governor Sununu argued at the hearing, the Court notes that the CARES Act funds *have* been appropriated by the federal government. In that sense, the funds at issue are not unappropriated.

The Court concludes that the public interest would not favor the issuance of a preliminary injunction. Although plaintiffs are all members of the legislature, for purposes of taxpayer standing they are no different than any taxpaying resident of New Hampshire. Being mindful of the extraordinary nature of preliminary injunctive relief, even in an ordinary case, the court must be cautious in granting a request from any individual or group of individuals to stop the governor from acting, as it presents a scenario rife with complications that directly impacts the orderly operation of the government. To go even further and allow an individual state taxpayer to stop or even delay the governor from distributing purely federal funds intended for the benefit of the public in the midst of a global pandemic would be contrary to the public interest. "Equitable relief is not granted as a matter of course, and a court should be particularly cautious when contemplating relief that implicates public interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.")). Therefore, given the circumstances, the Court finds that preliminary injunctive relief would not be available to plaintiffs even if they had standing as taxpayers.[4]

Conclusion

Although the Court recognizes the gravity of plaintiffs' allegations and the need for them to be addressed swiftly, it cannot abdicate its responsibility to ensure that it has jurisdiction over the subject matter of proceedings before it. "In light of the overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, [the Court] must put aside the natural urge to proceed directly to the merits of an

4 Based on the language of the constitution limiting taxpayers to declaratory relief, there would be a question as to whether plaintiffs would be entitled to proceed on their claims for writs of mandamus and prohibition. However, given its finding on standing, the Court need not address this matter.

important dispute and to 'settle' it for the sake of convenience and efficiency." *Duncan*, 166 N.H. at 648. Therefore, in light of the foregoing, plaintiffs lack standing to pursue the present action. In the alternative, even assuming plaintiffs had taxpayer standing, they are not entitled to preliminary injunctive relief.[5]

Accordingly, Governor Sununu's motion to dismiss is GRANTED.

SO ORDERED.

April 22, 2020
Date

Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 04/22/2020

5 All of the foregoing analysis is limited to the current complaint or proposed amended complaint, with plaintiffs filing suit in their capacity as taxpayers pursuant to Part I, Article 8 of the New Hampshire Constitution and/or individual members of the New Hampshire legislature, and does not address the standing of plaintiffs to officially bring the same claims on behalf of the legislature, should they seek to do so.