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Merrimack Superior Court
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STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT

Docket No. 217-2020-CV-00246

Mary Rivard
(d/b/a The Color Café Hair Salon)

Plaintiff

v.

Governor Christopher T. Sununu,
In his Official Capacity

Defendant

PLAINTIFF'S MOTION TO RECONSIDER JULY 22, 2020 ORDER

Plaintiff Mary Rivard, pursuant to New Hampshire Superior Court Rule 12(e), moves to reconsider the Court's July 22, 2020 Order.

A. The Court overlooks several issues concerning Count I.

The Court concluded, concerning Count I, that RSA 4:45 and 4:47 do not constitute an unconstitutional delegation of legislative power because (1) a "state of emergency" is adequately defined and can be invoked only in specific circumstances; and (2) there are "multiple checks" on the Governor's authority, including the legislature's ability to terminate a "state of emergency" through a concurrent resolution, and the fact a "state of emergency" is limited to 21 days." Order at 12-14. This conclusion overlooks several issues.

1. Neither RSA 4:45 nor RSA 4:47 contains a declared policy or purpose for either scheme.

The New Hampshire Supreme Court has held that the legislature may enact a law that delegates some subsidiary legislative power to the executive branch, but that law must articulate a ***specific policy*** and prescribed standard by which the authority it delegates may be measured, and it cannot provide broad commands that provide the executive with unfettered discretion in

the area that the law covers: "[A] law is invalid when its commands are in such broad terms as to leave the enforcement agency with unguided and unrestricted discretion in the assigned field of its activity." *Ferretti v. Jackson*, 88 N.H. 296, 302 (1936). If it is "devoid of either a ***declared policy*** or a prescribed standard laid down by the legislature, it represents an unconstitutional delegation of legislative power by the General Court in violation of N.H. CONST. pt. 1, art. 37." *Smith Ins., Inc. v. Grievance Cmte.*, 120 N.H. 856, 861 (N.H. 1980) (emphasis added); *see also Velishka v. Nashua*, 99 N.H. 161, 167 (1954) ("[I]n order to avoid the charge of unlawfully delegated legislative power, the statute must lay down basic standards and ***reasonably definite policy*** for the administration of the law.") (emphasis added).

In *Ferretti*, the Supreme Court held a series of statutes that regulated and controlled the distribution and sale of milk was unconstitutional because it was a "void attempt to delegate legislative power." *Id.* at 297, 304-05. The Court held "[t]he act . . . is regarded as defective in its insufficiency of a declared policy and of a prescribed standard by which the authority delegated may be measured." *Id.* at 302. The act's "general purpose" was "to protect and promote the public welfare and to eliminate unfair and demoralizing trade practices relative to the distribution and sale of milk." *Id.* at 297. The Court explained this language "shows no purpose of being a health measure. ***The stated purpose to protect and promote the general welfare is practically without significance. All legislation presupposes such a purpose.*** The remaining declaration of its aim to do away with 'unfair and demoralizing practices relative to the distribution and sale of milk' indicates no concern for public health." *Id.* (emphasis added) The Court also held the terms "unfair" and "demoralizing" do not specify what types of "practices" the act was supposed to eliminate, nor what connection there existed between the regulatory control of that industry and the suppression of those practices. *Id.*

Similarly, in *Guillou v. State*, 127 N.H. 579 (1986), the Court held a motor vehicle statute was "an unconstitutional delegation of legislative authority . . . because it fails to declare a general policy and prescribe standards for administrative action." *Id.* at 581. The statute stated, "The director may order any license issued to any person under the provisions of this title to be suspended or revoked, after due hearing, for any cause which he may deem sufficient." *Id.* at 580. The Court explained "the statute grants authority to an administrative officer without any express or implied qualifications," "the phrase 'for any cause which he may deem sufficient' does not provide any legislative guidance for the director in making suspension or revocation decisions," and, "[e]ven if the director stays within the bounds of the related provisions . . . , the potential for arbitrary and unprincipled decisions is great." *Id.* at 581.

Also, in *Smith Insurance*, the Court held a statute that established a grievance committee empowered to review the termination by insurance companies of agency agreements between the companies and their agents was an unlawful delegation of legislative power, in part, because it "lacks a statement of public policy, or a purpose to protect any basic societal interest or any reasonably outlined policy for the administration of the law." *Id.* at 857-58, 861. It "is an extension of the powers of the executive branch of government with unguided and unrestricted discretion to determine when important insurance contracts mutually negotiated may be terminated. It fails to lay down any rules by which the administrative agency may be guided in the exercise of its discretion." *Id.* at 861. It "neither declares the legislative policies which underlay the enactment of the statute nor establishes standards to guide . . . the exercise of its power." *Id.* at 862.

Here, RSA 4:45 and 4:47 do not contain any general purpose. RSA 4:45 contains only a recitation of a general policy or purpose in three instances: RSA 4:45, I generally states the

Governor may declare a "state of emergency" if "the safety and welfare of the inhabitants of this state require" it. RSA 4:45, II(a) similarly permits the Governor to renew a "state of emergency" declaration if he finds it "is necessary to protect the safety and welfare of the inhabitants of this state." There is also no declared policy or purpose for the "emergency powers" the Governor may access when making this declaration: RSA 4:45, III(e) states the Governor "shall have and may exercise" "such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population." Beyond these generalized references to the "safety and welfare" of the population, RSA 4:47 contains no declared policy or purpose whatsoever. These cited purposes would provide more specific guidance if, for example, they stated these statutes were designed to protect the population from a terrorist attack (RSA 4:45 and 4:47 were enacted in the wake of the September 11, 2001 attacks) or a major hurricane. They do not. Rather, the language above is precisely what the Court rejected in *Ferretti*. *See* 88 N.H. at 302 ("The act shows no purpose of being a health measure. The stated purpose to protect and promote the general welfare is practically without significance. All legislation presupposes such a purpose.").

2. Neither RSA 4:45 nor RSA 4:47 contains any standard by which to measure its administration or implementation.

As described above, if a law is "devoid of . . . a prescribed standard laid down by the legislature, it represents an unconstitutional delegation of legislative power by the General Court in violation of N.H. CONST. pt. 1, art. 37." *Smith Ins.*, 120 N.H. at 861. The statutes here lack such a standard.

First, although the Court recites certain portions from RSA 4:45 and 4:47 that define when a "state of emergency" can be invoked, neither statute provides a standard for when or under what circumstances this can occur. RSA 4:45, I fails to define by what measure the

Governor may "find" a "natural, technological, or man-made disaster of major proportions" exists, and it fails to define a "disaster of major proportions," determine whether or not such a "disaster" is "imminent," or by what measure the "safety and welfare" of the population would require such a declaration. *See id.* Indeed, the State's own data regarding the Coronavirus – where the state never came close to reaching the capacity of its hospitals – demonstrates the confusion and potential misapplication this language poses.

Second, RSA 4:45 provides no standard for measuring whether the Governor may renew a "state of emergency" declaration. The Court acknowledges the statute "place[s] a limitation of 21 days on any executive orders issued in response to an emergency." Order at 13-14. But this Court – in a ***glaring*** omission – overlooks that RSA 4:45, II permits the Governor to "renew a declaration of a state of emergency as many times as the governor finds is ***necessary to protect the safety and welfare of the inhabitants of this state***." (Emphasis added.). This provision fails to define when it is "necessary" to protect the population or what is meant by the repetitive general reference to "the safety and welfare" of the population. It also places no time limit on these perpetual renewals of a "state of emergency" declaration. Combined, these phrases delegate to the Governor unbridled discretion to renew a "state of emergency" *indefinitely*. Indeed, the Governor has done so: he has renewed his initial March 13, 2020 declaration ***six times***, totaling 147 days (nearly five months) that New Hampshire remains under a "state of emergency."

Third, although the Court acknowledges the legislature "has the power to render any declaration of a state of emergency by the Governor invalid by 'concurrent resolution at any time," Order at 13, this statement overlooks several problems. This is not a *mandate*, however, for the legislature to terminate the declaration, or for the Governor to seek its approval. *See id.*

It only *permits* the legislature to terminate it if it can forge a concurrent resolution adopted by both the Senate and House of Representatives, but it does not require the Governor to seek any approval, from *anyone*, for his renewals of a "state of emergency" declaration. Unlike other states, RSA 4:45 and 4:47 contain no true "check" on the Governor's declaration, or renewal of a declaration, of a "state of emergency." For example, in Illinois, the Governor may declare a state of emergency, and may exercise certain emergency powers (as in New Hampshire), but only for 30 days (without renewing it). 20 ILCS 3305/7. Several other states provide similar strict time limits on a governor's state of emergency declaration or require he or she seek legislative or other approval for an extension beyond that time limit. *See*, *e.g.*, Alaska Stat. Ann. § 26.20.040 (30 day limit); Kan. Stat. Ann. § 48-924 (15 day limit); Minn. Stat. § 12.31 (30 day limit, subject to extension by executive council up to 30 days); Utah Code Ann. § 53-2a-206 (30 days, subject to extension by legislative approval); 23 V.I.C. § 1005 (30 day limit, subject to one 30-day extension by governor, and then approval by legislature for additional extension); Wash. Rev. Code Ann. § 43.06.220 (30 day limit, subject to extension by legislative approval); Wis. Stat. Ann. § 323.10 (60 day limit, subject to extension by legislative approval). In New Hampshire, if the legislature takes no action, only the Governor can terminate a "state of emergency" declaration. *See* RSA 4:45, II(b).

RSA 4:45 also contains no provision that restricts the Governor's power to ***veto*** a concurrent resolution adopted by the legislature terminating a "state of emergency" declaration. In other words, the legislature could terminate a declaration, and nothing prohibits the Governor from vetoing it if he disagrees.

Fourth, neither statute provides a standard for what kinds of "emergency powers" may be exercised or under what circumstances they may be exercised. There is no standard concerning

the Governor's exercise of the "emergency powers" he may access under this framework. RSA 4:45, III(e) states the Governor "shall have and may exercise" "such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population," and RSA 4:47, III states the Governor "may exercise emergency management powers including [among other broad powers]: . . . [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 21-P:35, V provides no guidance on what these powers entail or how they are limited: "Emergency management" is defined as "the preparation for and the carrying out of ***<u>all emergency functions</u>***, including but not limited to ***<u>emergency response and training functions</u>***, to prevent, minimize, and repair injury or damage resulting from the occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from ***<u>any natural or human cause</u>***, including but not limited to fire, flood, earthquake, windstorm, wave actions, technological incidents, oil or chemical spill, or water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, drought, infestation, explosion, terrorist act, or riot." RSA 21-P:35, V (emphases added). This Court focuses exclusively on the language "to prevent, minimize, and repair injury or damage resulting from," insinuating it represents an adequate limit on the Governor's emergency powers, but it neglects to address the many other undefined, broad phrases above: The statute does not define or explain what is meant by "emergency response and training functions," "emergency functions," or "any natural or human cause." *See id.* It also provides no limit on what kinds of "orders, rules and regulations" the Governor may "make, amend, suspend and rescind," and the general proscription to undertake such action "to carry out

the provisions of the this subdivision in the event of a disaster beyond local control" suffers from the same lack of significance inherent in the prescribed purpose of RSA 4:45.

Under these statutes, the Governor may declare a "state of emergency" if he can cite a "disaster" of some kind, no matter how remote, and renew it indefinitely, which, in turn, grants him access to a broad array of powers that enable him to make, amend, rescind, or suspend any law he wants, without limit. These statutes constitute an unconstitutional delegation of legislative power.

B. The Court overlooks several issues concerning Count II.

1. The Governor deserves no deference in his exercise of RSA 4:45 and 4:47.

The Court concludes "the Governor's decision to exercise emergency powers in the face of a rapidly evolving public health crisis is entitled to considerable deference from the Court." Order at 15. This is incorrect and contradicts this Court's own holding in *Binford et al. v. Governor Sununu*, Docket No. 217-2020-CV-00152 (Merrimack Super. Ct. Mar. 25, 2020). Indeed, the State's and the Court's continued adherence to this phantom principle is alarming because it does not apply in this setting, and their reliance on it cloaks the Governor's unauthorized actions with a perceived air of legitimacy.

The Court cites two sources of authority for the deferential standard referenced above. *See id.* Neither one applies. First, the Court cites its decision in *Binford et al. v. Governor Sununu*, Docket No. 217-2020-CV-00152 (Merrimack Super. Ct. Mar. 25, 2020), and relies on what it labels "a longstanding recognition by the judiciary of the executive's prerogative to exercise its emergency powers to respond to an emergency." Order at 15. This is incorrect. That portion of the *Binford* decision relies on *State v. Avino*, 91 F.3d 105 (11th Cir. 1996). *Avino* does not apply here: it involved a *constitutional* challenge to a police measure (a curfew)

imposed by Dade County, Florida, and its manager after Hurricane Andrew devastated the area. 91 F.3d at 107. Here, Count II alleges the Governor misapplied a *statute* (RSA 4:45), not that his renewal of the "state of emergency" declaration is unconstitutional.[1] Indeed, this Court in *Binford* did not apply the *Avino* standard to the plaintiffs' statutory challenge to the Governor's "state of emergency" declaration; rather, it applied that standard to the plaintiffs' *constitutional* challenge to *Emergency Order #2*, which limited public gatherings to 50 people. *Binford*, *supra* at 10-15. When reviewing the plaintiffs' challenge to the Governor's "state of emergency" declaration in Executive Order 2020-04, this Court applied *RSA 4:45* and determined whether the Governor's declaration was appropriate under the statute, without applying the deferential standard identified in *Avino*. *Id*. at 6-10.

Second, the Court cites *MedellÍn v. Texas*, 552 U.S. 491 (2008), to state "[t]he Court is particularly deferential in recognizing executive authority when the Governor acts pursuant to statute." Order at 15. This is also incorrect: *MedellÍn* contains no such principle of law (and mentions the word "deference" only once, approximately 40 pages later). Rather, the language this Court cites from *MedellÍn* is prefaced with the following: "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Id.* at 524 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). *MedellÍn* does not say an executive is entitled to deference when exercising his or her statutory authority; it identifies the ***limits*** of that authority states that such authority "is at its maximum" when, and cautions that it "includes" only what, "he possesses in

[1] Even if Count II contained a constitutional challenge to the Governor's declaration, the *Avino* court's application of the standard of review above contains no indication it should be applied here; rather, it is limited to instances where a measure is taken after a "natural disaster" in order to "maintain order." The courts in *Avino* and another case on which *Avino* relied, *Moorhead v. Farrelly*, 727 F. Supp. 193 (D.V.I. 1989), applied that standard to constitutional challenges to curfews imposed after hurricanes hit those regions.

his own right plus all that Congress can delegate." *Id.* (quoting *Youngstown*, 343 U.S. at 536 (Jackson, J., concurring)). *MedellÍn* does not support the Court's decision to accord Governor Sununu deference in exercising his authority under RSA 4:45 and 4:47.

2. Governor Sununu lacked the authority under RSA 4:45 and 4:47 to continue renewing the "state of emergency" declaration.

The Court's conclusion that the Governor acted appropriately under RSA 4:45 and 4:47 addresses only the total accumulated statistics concerning COVID-19 in this state and fails to address the most relevant information in this dispute: the declining trend in the number of new cases and deaths per day and current hospitalizations of those cases. Order at 16. Those statistics demonstrate several incontrovertible facts: as of this filing, there are just 365 current COVID-19 cases in New Hampshire and 23 current hospitalizations. That equates to an absurdly low 6.3% current hospitalization rate. The rolling seven-day average for new deaths per day has also dropped to just ***<u>ONE</u>***. These numbers have declined, and continue to decline, rapidly; and this resulting situation does not come close to meeting the dire set of circumstances in RSA 4:45 that must exist for the Governor to declare, and continue declaring, a "state of emergency." The Court overlooks, and has obviously misapprehended, these facts in the Order.

The Court also concludes "[t]he outbreak and death toll would likely have been higher without the Governor's initial Order." Order at 16. This is incorrect for the reasons stated in the Ms. Rivard's Memorandum: It is not supported by any factual evidence, and it is illogical because it elevates a mere correlation between two facts to causation. *See* Rivard Memo at 14-15.

WHEREFORE, Ms. Rivard respectfully requests that this Court (a) reconsider its Order; (b) Ms. Rivard's Motion for Preliminary Injunction; and (c) grant any other relief deemed just and necessary.

Respectfully submitted,

MARY RIVARD,

By Her Attorneys,

FOJO LAW, P.L.L.C.

Dated: August 7, 2020

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CERTIFICATE OF SERVICE

I certify that, on the above date, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the Court's electronic filing system, which will send notice of the filing to all parties.

/s/ Robert M. Fojo
Robert M. Fojo