

STATE OF NEW HAMPSHIRE
MERRIMACK COUNTY SUPERIOR COURT
217-2020-CV-00246
Docket No. _____

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

Plaintiff

v.

Governor Christopher T. Sununu,
In his Official Capacity

Defendant

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF AND DAMAGES¹**

Plaintiff Mary Rivard (d/b/a The Color Café Hair Salon) brings this Verified Complaint for Declaratory Judgment and Injunctive Relief and Damages against Defendant Governor Christopher T. Sununu, in his official capacity, to challenge two recent orders – Executive Order 2020-08 and Emergency Order #40 – that prolonged the shutdown of many businesses in New Hampshire because they exceed the Governor’s emergency powers under applicable statutes and violate Ms. Rivard’s rights under the New Hampshire Constitution.

INTRODUCTION

1. On May 5, 2020, the Supreme Court of Texas denied a petition for writ of mandamus filed by several businesses challenging various Coronavirus-related emergency orders, but only because the petition should first have been presented to an appropriate district court. *In re Salon a la Mode, et al.*, No. 20-0340, at *3 (Tex. May 5, 2020) (Blacklock, J.,

¹ Ms. Rivard is filing contemporaneously with this Complaint an Emergency *Ex Parte* Motion for Preliminary Injunction.

concurring) (slip op.) (attached as Exhibit A). In denying the petition, however, Texas Supreme Court Justice James D. Blacklock, in a brief concurring opinion, provided critical advice concerning the ongoing conflict between states' various executive orders shutting down their respective economies and American citizens' Constitutional rights:

2. **“The Constitution is not suspended when the government declares a state of disaster.”** *Id.* (quoting *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020)) (emphasis added). “All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions. Government power cannot be exercised in conflict with these constitutions, even in a pandemic. In the weeks since American governments began taking emergency measures in response to the coronavirus, the sovereign people of this country have graciously and peacefully endured a suspension of their civil liberties without precedent in our nation’s history. . . . **Tens of millions can no longer earn a living because the government has declared their employers or their businesses ‘non-essential.’**” *Id.* (emphasis added)

3. While “those who object to these restrictions should remember they were imposed by duly elected officials, vested by statute with broad emergency powers, who must make difficult decisions under difficult circumstances,” **“all of us – the judiciary, the other branches of government, and our fellow citizens – must insist that every action our governments take complies with the Constitution, especially now.** If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.” *Id.* (emphasis added)

4. “Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should welcome the opportunity to demonstrate – both to

its citizens and to the courts – that its chosen measures are absolutely necessary to combat a threat of overwhelming severity. The government should also be expected to demonstrate that less restrictive measures cannot adequately address the threat. . . . [C]ourts must identify and apply a legal standard by which to judge the constitutional validity of the government’s anti-virus actions. **When the present crisis began, perhaps not enough was known about the virus to second-guess the worst-case projections motivating the lockdowns. As more becomes known about the threat and about the less restrictive, more targeted ways to respond to it, continued burdens on constitutional liberties may not survive judicial scrutiny.**” *Id.* (emphasis added)

5. “No court should relish being asked to question the judgment of government officials who were elected to make difficult decisions in times such as these. However, **when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.**” *Id.* (emphasis added)

6. These latter statements are significant. New Hampshire, like many states, is being confronted with this same question. While Governor Sununu’s orders in March 2020 responded to an emerging pandemic about which we had limited information, the landscape has changed. New Hampshire does not have an “emergency” that justifies the continued shutdown of its businesses. “Emergency” measures that appeared to be Constitutionally appropriate in March are less appropriate now, given the wealth of information available that demonstrates New Hampshire’s healthcare system never came close to reaching capacity, and the Coronavirus is not

as deadly as previously thought. Moreover, these measures may be *increasing* transmission rates and *prolonging* the epidemic.

7. Accordingly, Ms. Rivard seeks a declaratory judgment that the Governor's orders exceed statutory emergency powers and a finding that they continue to violate Ms. Rivard's Constitutional rights. She is also seeking damages for losses to her business stemming from these orders.

PARTIES

8. Plaintiff Mary Rivard is an individual who owns a hair salon under the trade name "The Color Café Hair Salon" has a principal place of business at 75 Newport Road, New London, New Hampshire 03257.

9. Defendant Christopher T. Sununu is the Governor of New Hampshire and is being sued in his official capacity. The address of the Governor's address is 107 North Main Street, Concord, New Hampshire 03301.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this Complaint pursuant to RSA 141-C, RSA 491:7, and RSA 491:22. Specifically, RSA 141-C:16-a, III states, "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. The Court has personal jurisdiction over Governor Sununu because the Governor's office is located in New Hampshire, and the Governor's conduct occurred in New Hampshire.

12. Venue is appropriate in Merrimack County pursuant to RSA 507:9 because all the parties are located in this county.

FACTUAL ALLEGATIONS

A. Ms. Rivard's Business

13. Ms. Rivard owns and operates a hair salon and skin care center in New London, New Hampshire. She obtained a cosmetology license from the New Hampshire Board of Barbering, Cosmetology and Esthetics in October 2013, and she has operated her business for several years. 90% of the customers that frequent her salon obtain hair color treatments.

B. Governor Sununu's Emergency Powers

14. RSA 4:45, I states, “[t]he governor shall have the power to declare a state of emergency . . . 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.”

15. A “state of emergency” is defined as a “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.” RSA 21-P:35, VIII.

16. “A state of emergency shall terminate automatically 21 days after its declaration unless it is renewed under the same procedures set forth in paragraph I of this section.” RSA 4:45, II. “The governor may, by executive order, 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.” *Id.*

17. “During 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: . . . To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.” RSA 4:45, III(e).

18. In addition, “[t]he governor shall have emergency management authority as defined in RSA 21-P:35, V, and pursuant to such authority may exercise emergency management powers including: . . . The 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. “Emergency management” is defined as “the preparation for and the carrying out of all emergency functions, including but not limited to emergency response and training functions, 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 any natural or human cause, 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.

19. “If the governor finds that maintaining the state of emergency is no longer justified, the governor shall issue an executive order terminating the state of emergency.” RSA 4:45, II(b).

C. Governor Sununu’s Executive and Emergency Orders

20. Pursuant to the powers in the statutes above, Governor Sununu issued a series of executive orders and emergency orders in March, April, and May 2020 to address the outbreak of the Novel Coronavirus (COVID-19).

21. On March 16, 2020, Governor Sununu issued Executive Order 2020-04 (“An order declaring a state of emergency due to Novel Coronavirus (COVID-19”), which declared a state of emergency for the entire state of New Hampshire. N.H. Exec. Order No. 2020-04 (Mar. 16, 2020).² That Order stated, “Pursuant to RSA 4:45 and RSA 4:47, while this Order is in effect, additional temporary orders, directive, rules and regulations may be issued either by the Governor or by designated State officials with written approval of the Governor.” *Id.* ¶ 18.

22. On March 26, 2020, Governor Sununu issued Emergency Order #17 Pursuant to Executive Order 2020-04. N.H. Emer. Order No. 17 (Mar. 26, 2020).³ That Order directed “[a]ll businesses and other organizations that do not provide Essential Services” to “close their physical workplaces and facilities to workers, customers, and the public and cease all in person operations as of 11:59 p.m. on March 27, 2020 and shall not re-open to workers, customers or the public or resume in person operations before 12:01 a.m. on May 4, 2020.” *Id.* ¶ 2.

23. Exhibit A to Emergency Order #17 contained a list of those services deemed “Essential” by the New Hampshire state government. *Id.* Ex. A.⁴ Hair salons were not included among the industries listed in that Exhibit. *See id.*

24. On April 3, 2020, Governor Sununu issued Executive Order 2020-05 (“Extension of State of Emergency Declared in Executive Order 2020-04”), which “renew[ed] the Declaration of a State of Emergency due to Novel Coronavirus (COVID-19) and extend[ed] the State of Emergency declared in Executive Order 2020-04 for a period of 21 days,” or through May 25, 2020. N.H. Exec. Order No. 2020-05 (Apr. 3, 2020).⁵ That Order extended “[a]ll

² <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-04.pdf>

³ <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-17-1.pdf>

⁴ <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-17.pdf>

⁵ <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-05.pdf>

provisions of Executive Order 2020-04, and all Emergency Orders issued pursuant thereto, . . . through” May 25. *Id.* ¶ 1.

25. On April 24, 2020, Governor Sununu issued Executive Order 2020-08 (“Second Extension of State of Emergency Declared in Executive Order 2020-04”), which again “renew[ed] the Declaration of a State of Emergency due to Novel Coronavirus (COVID-19) and extend[ed] the State of Emergency declared in Executive Order 2020-04 for a period of 21 days,” or until June 15, 2020. N.H. Exec. Order 2020-08 (Apr. 24, 2020).⁶ That Order extended “[a]ll provisions of Executive Order 2020-04 as extended by Executive Order 2020-05, and all Emergency Orders issued pursuant thereto, . . . through” June 15. *Id.* ¶ 1.

26. A week later, Governor Sununu issued Emergency Order #40 Pursuant to Executive Order 2020-04 as extended by Executive Orders 2020-05 and 2020-08. N.H. Emer. Order No. 40 (May 1, 2020).⁷ That Order “extend[ed] and modif[ied] Emergency Order #17 (Closure of non-essential businesses and requiring Granite Staters to stay at home).” *Id.* That Order directed “[a]ll businesses and other organizations not addressed in paragraph 5 of this Order and that do not provide Essential Services shall continue to close their physical workplaces and facilities to workers, customers and the public and shall continue to cease all in person operations until 12:01 a.m. on May 31, 2020.” *Id.* ¶ 2.

27. Exhibit A to Emergency Order #40 contains a list of those services deemed “Essential” by the New Hampshire state government. *Id.* ¶ 2. & Ex. A. Hair salons are not included among the industries listed in that Exhibit. *See id.*

28. Paragraph 5 of the Order states, “In order to begin the gradual re-opening of New Hampshire’s economy in a safe manner that places an emphasis on the needs of public health,

⁶ <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-08.pdf>

⁷ <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-40.pdf>

certain businesses and organizations may resume operations (or select portions of their operations) according to the schedule and guidelines attached to this Order as Exhibit D.” *Id.* ¶

5.

29. Section B of Exhibit D addresses barbershops and salons. *See id.*, Ex. D, § B. It states, “Effective May 11, 2020, barbers, hair salons, and other cosmetology businesses may open their physical facilities to workers, customers, and the public and resume in person operations if they operate in accordance with the following guidelines.” *Id.*

30. The “General Guidelines” for these businesses are nonsensical, illogical, and inefficient. The following is just a sampling of some of these “Guidelines” for hair salons:

- “No blow-drying of hair;”
- All staff *and* clients must wear “at a minimum a cloth face covering that covers the nose and mouth at all times;”
- “Staff and clients wearing face coverings must not touch their eyes, nose, mouth, or face, or adjust their face mask without first sanitizing hands;”
- “Staff and clients should maintain a distance of at least 6 feet from others in the salon except for when staff are attending to client’s hair.”
- Appointments must be “stagger[ed] . . . so only one person is arriving at a time.”
- “A maximum of no more than 10 total people at any one time (staff and clients combined) are allowed in the facility at any time (possibly fewer depending on the size of the salon and ability to maintain 6 feet distance between clients at all times), plus the number of clients should not exceed the number of staff. For example, in a small salon with one staff member, the maximum number of people allowed in the salon at any one time is two.”
- “Staff and clients should be screened (questioned about) symptoms of COVID-19 before each shift (for staff), and before the appointment (for clients).”
- “Workstations must be routinely and frequently cleaned, especially between client use.”
- “Clean and disinfect all electrical implements before and after use on a client.”

- “Clean and disinfect chairs and headrests before and after each client,” but “[r]emember that porous materials cannot be disinfected and ongoing use of disinfectants on materials covering chairs, can damage the material.”
- “Clean and disinfect station, rolling carts drawers and any containers used for storage.”
- “Clean all bowls, handles, hoses, spray nozzles and shampoo chairs before and after client use.”
- “Disinfect all bowls, handles, hoses, spray nozzles and shampoo chairs before and after client use, observing full contact time with a properly concentrated disinfectant or wipe.”
- “Disinfectant must be EPA-registered and labeled as bactericidal, virucidal and fungicidal,” and “[o]bserve full contact time on manufacturers label.”
- “Immersed items should be removed at the end of contact time, rinsed and dried with a paper towel or clean, freshly laundered towel.”

D. The Purpose of the Shutdown and the Current State of the Coronavirus in New Hampshire

31. The purpose and rationale for Governor Sununu’s orders shutting down the New Hampshire economy were to “slow the spread of COVID-19.”⁸ Slowing the spread of the Coronavirus would avoid overwhelming New Hampshire’s healthcare system and allowing COVID-19-infected Granite Staters to die, untreated and uncared for, at home or in some hospital hallway. Indeed, a group of New Hampshire academics wrote to Governor Sununu on March 23, 2020, that “New Hampshire currently has just over 3,000 hospital beds,” and “[b]ased on our projections and those prepared by Harvard, our hospital system will be overwhelmed within three weeks.”⁹ Two New Hampshire mayors publicly demanded Governor Sununu issue

⁸ <https://www.wmur.com/article/live-at-3-sununu-gives-update-on-covid-19/31941704>

⁹ <https://www.concordmonitor.com/Shelter-in-place-33500097>

a stay-at-home order because, “the sooner everyone stays home, avoids unnecessary travel and non-essential activities, the better chance we have to flatten the curve and save lives.”¹⁰

32. Thus, this strategy’s purpose was not to *prevent* people from contracting the Coronavirus. After all, there is no vaccine. Rather, it was to delay their contracting it so New Hampshire’s healthcare system would not receive a large influx of Coronavirus cases they were not equipped to address.

33. After over a month of applying this strategy, Governor Sununu acknowledged on April 29, 2020, that it was wildly successful. In a news conference that day, he noted New Hampshire has “flattened the curve.”¹¹ He cited the number of hospitalizations as “one of the definitive markers of how close you are to hitting capacity on your health care system,” and then reported, “[t]oday’s census [of the number of hospitalized Coronavirus patients] is about 100, and we have a little over 1000 beds of capacity.” He continued: “We have multiple times available [hospital bed] capacity. You know, we could literally have 10 times – God forbid – 10 times the number of hospitalizations, and we could still very easily be able to handle that capacity.”

34. Governor Sununu was correct. The New Hampshire Department of Health and Human Services reported a total of 1,019 COVID-19 beds. As of April 30, 2020, there were 112 hospitalizations. (All statistics were obtained from the New Hampshire Department of Health and Human Services website.¹² In addition, a spreadsheet compiling all of these statistics is attached hereto as Exhibit B.) Three of those hospitalizations were new. At the time, there were

¹⁰ <https://manchesterinklink.com/craig-and-donchess-urge-sununu-for-stronger-measures-against-covid-19/>

¹¹ <https://www.insidesources.com/opinion-if-weve-flattened-the-curve-why-is-new-hampshire-still-closed/>

¹² <https://www.nh.gov/covid19/news/updates.htm>

also 84 ICU beds for the seriously-ill Coronavirus patients, and New Hampshire was using fewer than 30.¹³

35. New Hampshire never got close to breaking the curve. Its curve remained flat, and the goal of the Governor’s initial shutdown orders was successfully achieved. There is no longer an “emergency” in New Hampshire.

36. Despite the success of that goal, several days beforehand, Governor Sununu issued Executive Order 2020-08, extending the declaration of a “state of emergency,” as well as all Emergency Orders, another 21 days, from May 25 to June 15. *See* N.H. Exec. Order 2020-08 (Apr. 24, 2020).¹⁴

37. As of May 1, 2020, the number of hospitalizations dropped from 112 to 103, despite eight new hospitalizations, and the hospitalization rate had steadily dropped to 12% (from 15% 30 days prior). Also, at the time, there were just 1,249 current cases of Coronavirus in New Hampshire (with 980 recovered), and just 81 total deaths.

38. Despite that continued progress, the same day, Governor Sununu issued Emergency Order #40, which extended the shutdown of “non-essential” businesses until May 31, and allowed certain businesses (such as Ms. Rivard’s hair salon) to re-open but only subject to following certain “guidelines.” N.H. Emer. Order No. 40 (May 1, 2020).

39. As of Friday, May 8, 2020, the number of hospitalizations was 112 (the same number of hospitalizations the day after Governor Sununu’s April 29 press conference); there was just one new hospitalization (and just one new one the day before), and the hospitalization rate dropped to 10% (from 12% seven days earlier, on May 1). Also, at the time, there were 1,616 current cases of Coronavirus in New Hampshire (with 1,210 recovered); just 104 new

¹³ <https://covid19.healthdata.org/united-states-of-america/new-hampshire>

¹⁴ <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-08.pdf>

cases (the same as the day before, and far fewer than the 164 new cases reported on May 1, and just a few more than the 96 new cases the day after Governor Sununu's press conference); and 121 total deaths (including seven new deaths, compared to nine new deaths on May 1, and six new deaths on April 30, the day after Governor Sununu's press conference).

40. New Hampshire's hospitals are so **underwhelmed** that they are **furloughing and laying off employees**. For example, on April 15, 2020, Solution Health, which owns and operates Elliot Hospital System and Southern New Hampshire Health, furloughed 650 employees and cut the pay or hours of another 750 employees, affecting nearly 20% of its workforce.¹⁵ The company will lose more than \$24 million per month in revenue after canceling elective surgeries and services to prepare for an anticipated surge in Coronavirus patients that never arrived. On April 3, 2020, the ownership group that owns Lakes Region General Hospital and Franklin Regional Hospital announced it was furloughing more than 600 employees, also in part due to the cancellation of elective and non-urgent surgeries, procedures, and outpatient visits, which resulted in more than a 50% loss of revenue.¹⁶

41. Apart from the fact New Hampshire's healthcare system is not even close to capacity, the mortality rate for Coronavirus is far lower than initially projected. The mortality rate (number of total deaths divided by the total population) in New Hampshire is 0.008% and 0.024% in the United States, far below the 0.1% mortality rate for the seasonal flu. The case fatality rate (number of total deaths divided by the total confirmed cases) in New Hampshire is 4.1% and 5.9% in the United States.

¹⁵ https://www.unionleader.com/news/health/coronavirus/elliott-sister-hospitals-announce-furloughs-pay-cuts-for-20-of-workforce/article_d754b0e9-4581-5037-856a-a8ad86b51907.html

¹⁶ https://www.unionleader.com/news/health/coronavirus/lakes-region-hospitals-to-furlough-more-than-600-employees/article_d9d43187-b2c0-5250-b056-25e9f1474d03.html

42. There is also growing evidence that shutting down society is ***increasing*** transmission of the Coronavirus. For example, in New York – the worst epicenter for the Coronavirus in the United States – 66% of new Coronavirus hospitalizations consist of people who *stayed home*: they are either retired or unemployed and not commuting to work on a regular basis.¹⁷ Meanwhile, the neighboring countries of Sweden and Denmark (which have similar social structures, demographics, and health care systems) took wildly different approaches to combatting the spread of the Coronavirus: Denmark locked down its schools, borders, restaurants, cafes, and shops, while Sweden merely encouraged citizens to use common sense, work from home if possible, and not gather in crowds over 50, but kept schools, bars, gyms, and restaurants open.¹⁸¹⁹ The resulting infection rate between the two countries was approximately the same; Sweden’s infection rate had stabilized; and Sweden’s mortality rate was lower than most major European countries (which shut down their economies).²⁰

43. There is no “state of emergency” in New Hampshire. The original need for shutting down the New Hampshire economy no longer exists, and there exists no basis for Governor Sununu’s recent orders extending that “state of emergency” and the resulting shutdown of “non-essential” businesses. The virus is also nowhere near as deadly as initially projected; it is nothing more than a more serious strain of the flu. The continuing shutdown is preventing the New Hampshire population from achieving “herd immunity,” which would ultimately eradicate the virus much more quickly than “slowing the spread” by forcing the shutdown of businesses and ordering people to stay home. It is also destroying the state’s economy.

¹⁷ <https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-coronavirus-stats-20200506-cyqui4b5lfdn7g6cqswwkf6otly-story.html>

¹⁸ <https://www.telegraph.co.uk/news/2020/05/05/sweden-suppressed-infection-rates-without-lockdown/>

¹⁹ <https://www.webmd.com/lung/news/20200501/sweden-sticks-with-controversial-covid19-approach>

²⁰ <https://www.telegraph.co.uk/news/2020/05/05/sweden-suppressed-infection-rates-without-lockdown/>

E. The Impact of the Continuing Shutdown on Ms. Rivard's Business

44. Ms. Rivard closed her hair salon on March 27, 2020, after Governor Sununu issued Emergency Order #17. It has been closed since then.

45. Her business has not been able to qualify for a Payment Protection Program (PPP) loan.

46. Before Governor Sununu's issuance of Emergency Order #40, Ms. Rivard was faced with the possibility of closing down her business for good.

47. Although Emergency Order #40 permits her to re-open her business on May 11, 2020, it does so on the condition she follow numerous guidelines. Those guidelines, unfortunately, do not permit her to operate her business properly or in a realistic way.

48. For example, Ms. Rivard – who is a licensed cosmetologist – principally colors, tones, and highlights her customers' hair. Some of the guidelines set forth in Emergency Order #40, however, conflict with the requirements of her license and the manufacturer's recommendations for many of the products she uses on her customers. Thus, she will be forced to operate her business at a limited capacity and/or with limited employees. In addition, the restriction on blow drying hair would make it impossible for her and her customers to evaluate the result of these treatments, since she would be forced to send customers home with wet hair. These guidelines essentially would force Ms. Rivard to limit her services to cutting hair and nothing more. If Ms. Rivard wanted to be a barber, she would have opened a barbershop, not a hair salon.

49. Ms. Rivard brought these concerns to a representative of the New Hampshire Board of Barbering, Cosmetology and Esthetics last week after Emergency Order #40 was issued. That representative explained to Ms. Rivard that, if she did not strictly follow these

guidelines or committed a mistake in implementing them, the Board would take action against her license and the licenses of any of her employees who failed to follow them.

50. Ms. Rivard’s employees are now also concerned about Board action if they cannot follow these guidelines, and they have threatened not to come to work during this period of time.

51. As a result of Emergency Order #40, Ms. Rivard will, once again, likely have to remain closed or – if she re-opens – offer limited services with fewer employees. She will likely not be able to earn a profit and will possibly have to terminate her business for good.

CLAIMS

COUNT I

(Declaratory Judgment)

52. Ms. Rivard repeats and incorporates by reference the allegations of the paragraphs above as if fully stated herein.

53. There is a genuine and bona fide dispute and an actual controversy and disagreement between Ms. Rivard and Governor Sununu regarding whether Executive Order 2020-08 and Emergency Order #40 are valid exercises of Governor Sununu’s emergency powers under RSA 4:45.

54. RSA 4:45, I permits the Governor to declare a “state of emergency . . . 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.” (Emphasis added.)

55. A “state of emergency” is defined as a “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.” RSA 21-P:35, VIII (emphasis added).

56. Although “[a] state of emergency shall terminate automatically 21 days after its declaration,” “[t]he governor may, by executive order, 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.” RSA 4:45, II (emphasis added). If a “state of emergency is no longer justified, the governor shall issue an executive order terminating the state of emergency.” RSA 4:45, II(b) (emphasis added).

57. As noted above, the purpose of the Governor’s various executive and emergency orders was to “slow the spread” of the Coronavirus so that New Hampshire’s healthcare system would not be overwhelmed. This was the “emergency” necessary to implement these orders.

58. By the Governor’s own admission and various other sources, however, New Hampshire’s healthcare system has not come close to being overwhelmed. Rather, New Hampshire’s COVID-dedicated hospital beds have reached just over 10% capacity, remained there for a significant period of time, and then decreased during the time the Governor’s prior executive and emergency orders were in place. There is no “emergency” in New Hampshire. Despite these facts, Governor Sununu issued Executive Order 2020-08 and Emergency Order #40.

59. Governor Sununu has exceeded his authority under RSA 4:45 in issuing these Orders.

60. Pursuant to the RSA 491:22, Ms. Rivard requests, in good faith, that this Court declare the following:

- a. Executive Order 2020-08 is null and void because it was not a valid exercise of Governor Sununu's authority under RSA 4:45.
- b. Emergency Order #40 is null and void because it was not a valid exercise of Governor Sununu's authority under RSA 4:45 and 4:47.
- c. Any further executive or emergency orders issued in response to the Coronavirus issued after the date of any order issued in this proceeding attempting to declare another "state of emergency," renew a declaration of a "state of emergency," or order the shutdown of "non-essential" businesses are void ab initio.

COUNT II

(Violation of Equal Protection, Part I, Art. 12, N.H. Const.)

61. Ms. Rivard repeats and incorporates by reference the allegations of the paragraphs above as if fully stated herein.

62. The New Hampshire Constitution states, "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary." Part I, Art. 12, N.H. Const.

63. Executive Order 2020-08 and Emergency Order #40 treat Ms. Rivard's business and similarly situated businesses differently solely based on the nature and type of their business. Under these orders, businesses like Ms. Rivard's have been deemed "non-essential" and ordered to shut down. They may re-open but only if they follow a strict set of arbitrary "guidelines" that make it virtually impossible to operate efficiently or profitably.

64. As a result of these orders, Ms. Rivard has suffered damages.

COUNT III
(Unlawful Taking, Part I, Art. 12, N.H. Const.)

65. Ms. Rivard repeats and incorporates by reference the allegations of the paragraphs above as if fully stated herein.

66. The New Hampshire Constitution states, “[N]o part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.” Part I, Art. 12, N.H. Const.

67. The Governor’s orders amount to an unlawful taking because they have deprived Ms. Rivard of the economic use of her property without just compensation.

68. As a result of these orders, Ms. Rivard has suffered damages.

REQUEST FOR RELIEF

WHEREFORE, Ms. Rivard respectfully requests that the Court:

- A. Declare Executive Order 2020-08 and Emergency Order #40 null and void;
- B. Enter judgment in favor of Ms. Rivard on all counts;
- C. Award Ms. Rivard her damages, which are within the jurisdictional limits of this Court;
- D. Award Ms. Rivard his attorney’s fees and costs; and
- E. Award such other relief as is just and equitable.

REQUEST FOR JURY TRIAL

Ms. Rivard requests a trial by jury on all claims so triable.

Respectfully submitted,

MARY RIVARD,

By Her Attorneys,

FOJO LAW, P.L.L.C.

Dated: May 10, 2020

/s/Robert M. Fojo

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VERIFICATION

I, Mary Rivard, certify that the foregoing facts are true and correct to the best of my knowledge and belief.

Mary Rivard

Mary Rivard

STATE OF Virginia

COUNTY OF Fairfax

The foregoing instrument was acknowledged before me this 10th day of May, 2020, by

Mary Rivard.



Emily Annette Ott

Emily Annette Ott

Signature of Notary Public

Print, Type/Stamp Name of Notary

Personally known: _____

OR Produced Identification: _____

Type of Identification Produced: NH Driver's License

EXHIBIT A

IN THE SUPREME COURT OF TEXAS

=====
No. 20-0340
=====

IN RE SALON A LA MODE, ET AL.

=====
ON EMERGENCY PETITION FOR WRIT OF MANDAMUS
=====

JUSTICE BLACKLOCK, joined by JUSTICE GUZMAN, JUSTICE BOYD, and JUSTICE DEVINE, concurring in the denial of the petition for writ of mandamus.

“The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020). All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions. Government power cannot be exercised in conflict with these constitutions, even in a pandemic.

In the weeks since American governments began taking emergency measures in response to the coronavirus, the sovereign people of this country have graciously and peacefully endured a suspension of their civil liberties without precedent in our nation’s history. In some parts of the country, churches have been closed by government decree, although Texas is a welcome exception. Nearly everywhere, the First Amendment “right of the people to peaceably assemble” has been suspended altogether. U.S. Const. amend. I. In many places, people are forbidden to leave their homes without a government-approved reason. Tens of millions can no longer earn a living because the government has declared their employers or their businesses “non-essential.”

Those who object to these restrictions should remember they were imposed by duly elected officials, vested by statute with broad emergency powers, who must make difficult decisions under

difficult circumstances. At the same time, all of us—the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.

Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should welcome the opportunity to demonstrate—both to its citizens and to the courts—that its chosen measures are absolutely necessary to combat a threat of overwhelming severity. The government should also be expected to demonstrate that less restrictive measures cannot adequately address the threat. Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government’s anti-virus actions. When the present crisis began, perhaps not enough was known about the virus to second-guess the worst-case projections motivating the lockdowns. As more becomes known about the threat and about the less restrictive, more targeted ways to respond to it, continued burdens on constitutional liberties may not survive judicial scrutiny.

Ideally, these debates would play out in the public square, not in courtrooms. No court should relish being asked to question the judgment of government officials who were elected to make difficult decisions in times such as these. However, when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.

* * *

This original petition, which challenges several local officials' coronavirus response measures, should first be presented to the appropriate district courts. The Supreme Court is generally a court of last resort. Our original jurisdiction to issue the requested relief is doubtful, and the petition is presented without supporting affidavits and with no record on which the Court could base its inquiry. Just as other government officials must not exceed their rightful power in extraordinary circumstances, this Court also must not do so. I therefore concur in the denial of the petition.

James D. Blacklock
Justice

OPINION DELIVERED: May 5, 2020

EXHIBIT B

Date	Total Cases	New Cases	Recovered Cases	Current Cases	Total Hospitalizations	New Hospitalizations	Current Hospitalizations	Hospital Delta	Hospitalization Rate	Total Deaths	New Deaths	Death Delta	Current Hospitalization Rate
16-Mar	17	4											
17-Mar	26	9											
18-Mar	39	13			2	2			5%				
19-Mar	44	5			2	0			5%				
20-Mar	55	11			2	0			4%				
21-Mar	65	10			3	1			5%				
22-Mar	78	13			5	2			8%				
23-Mar	101	23			11	5			11%	1	1	0	
24-Mar	108	7			13	1			12%	1	0	1	
25-Mar	137	29			19	6			14%	1	0	1	
26-Mar	158	21			25	3			16%	1	0	1	
27-Mar	187	29			30	5			16%	2	1	1	
28-Mar	214	27			33	3			15%	2	0	2	
29-Mar	258	25			39	5			15%	3	1	2	
30-Mar	314	56			45	4			14%	3	0	3	
31-Mar	367	53			49	5			13%	3	0	3	
1-Apr	415	48			58	8			14%	4	1	3	
2-Apr	479	64	101	373	73	10			15%	5	1	4	
3-Apr	540	61	144	389	80	7			15%	7	2	5	
4-Apr	621	81	146	466	86	6			13%	9	2	7	
5-Apr	669	48	147	513	92	6			14%	9	0	9	
6-Apr	715	46	151	555	103	9			14%	9	0	9	
7-Apr	747	32	211	523	108	3			14%	13	4	9	
8-Apr	788	41	227	542	118	10			15%	18	5	13	
9-Apr	819	31	234	564	127	9			16%	21	3	18	
10-Apr	885	66	234	629	134	7			15%	22	1	21	
11-Apr	929	45	236	670	146	12			16%	23	1	22	
12-Apr	985	57	239	723	152	6			15%	23	0	23	
13-Apr	1,020	35	249	748	152	0	72	72	15%	23	0	23	10%
14-Apr	1,091	73	329	735	163	11	63	52	15%	27	4	23	9%
15-Apr	1,139	53	365	742	178	15	70	55	16%	32	5	27	9%
16-Apr	1,211	71	455	722	187	9	74	65	15%	34	2	32	10%
17-Apr	1,287	78	468	782	190	3	86	83	15%	37	3	34	11%
18-Apr	1,342	56	513	791	192	2	85	83	14%	38	1	37	11%
19-Apr	1,392	50	521	830	198	6	79	73	14%	41	3	38	10%
20-Apr	1,447	56	521	884	201	3	78	75	14%	42	1	41	9%
21-Apr	1,491	44	546	903	206	5	94	89	14%	42	0	42	10%
22-Apr	1,588	99	550	990	213	7	91	84	13%	48	6	42	9%
23-Apr	1,670	84	551	1,068	218	5	92	87	13%	51	3	48	9%
24-Apr	1,720	53	578	1,089	224	6	89	83	13%	53	2	51	8%
25-Apr	1,787	69	777	950	238	14	95	81	13%	60	7	53	10%
26-Apr	1,864	77	779	1,025	242	4	101	97	13%	60	0	60	10%
27-Apr	1,938	75	798	1,080	246	4	99	95	13%	60	0	60	9%
28-Apr	2,010	82	936	1,014	249	3	106	103	12%	60	0	60	10%
29-Apr	2,054	50	980	1,008	259	10	107	97	13%	66	6	60	11%
30-Apr	2,146	96	980	1,094	262	3	112	109	12%	72	6	66	10%
1-May	2,310	164	980	1,249	270	8	103	95	12%	81	9	72	8%
2-May	2,429	121	1,007	1,238	277	7	103	96	11%	84	3	81	8%
3-May	2,518	90	1,017	1,415	282	5	110	105	11%	86	2	84	8%
4-May	2,588	72	1,019	1,483	286	4	111	107	11%	86	0	86	7%
5-May	2,636	50	1,105	1,439	295	9	115	106	11%	92	6	86	8%
6-May	2,740	108	1,110	1,519	307	12	113	101	11%	111	19	92	7%
7-May	2,843	104	1,165	1,564	308	1	113	112	11%	114	3	111	7%
8-May	2,947	104	1,210	1,616	309	1	112	111	10%	121	7	114	7%

NH COVID Hospitalizations

