THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. _____

GEORGIA A. TUTTLE, M.D., LRGHEALTHCARE, and
DERRY MEDICAL CENTER,
on behalf of themselves and those similarly situated,

v.

JOHN LYNCH,
GOVERNOR OF THE STATE OF NEW HAMPSHIRE,

and

MICHAEL A. DELANEY,
ATTORNEY GENERAL FOR THE STATE OF NEW HAMPSHIRE

and

ROGER A. SEVIGNY,
COMMISSIONER OF THE DEPARTMENT OF INSURANCE

PETITION FOR WRIT OF MANDAMUS PURSUANT TO SUPREME COURT RULE 11

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INTRODUCTION

Our democracy stands on the unassailable proposition that we are a country of laws, not of individuals. When public officials elevate and enforce their personal agenda over the law of the State, our Constitution is violated and our democracy imperiled. This Court exists, in part, to constrain public officials from using the instrumentalities of government to satisfy their personal caprice. Court intervention is necessary when public officials either ignore the rule of law or intentionally act to subvert it. Extraordinary writs exist to address such extraordinary circumstances. As set forth below, because three executive branch officials have set in place a plan with the intent of deliberately undermining a decision of this Court and the adjudicated rights of citizens of this State, such a writ must issue.

I. DECISIONS TO BE REVIEWED:

Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n., 159 N.H. 627 (2010).

Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n., No. 09-E-148 Belknap Super. Ct., Order on Petitioners' Motion to Disqualify (June 25, 2009) (McGuire, J.).

II. QUESTION PRESENTED FOR REVIEW:

A. Whether a Writ of Mandamus should issue against the Governor, Attorney General and Insurance Commissioner to compel them to take reasonable actions to prevent impairing the vested contractual rights of JUA Policyholders

III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE:

U.S. Constitution, Article I, § 10; N.H. Const. part I, article 12.

IV. INSURANCE POLICY PROVISIONS, CONTRACTS, OR OTHER DOCUMENTS INVOLVED IN THE CASE, VERBATIM:

Not applicable.

V. A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED, WITH APPROPRIATE REFERENCES TO THE APPENDIX, IF ANY:

The factual and procedural background leading to this Court's decision in *Tuttle* are set forth in detail in that opinion. *See Tuttle*, 159 N.H. at 633-39. Facts relevant to this petition are set forth herein.

On June 24, 2009, the General Court passed House Bill 2, which was signed by the Governor on June 30, 2009 and became 2009 New Hampshire Laws chapter 144:1. That law directed the transfer of $110 million of funds held by the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") to the state's general fund. The petitioners, Georgia Tuttle, M.D., LRGHealthcare and Derry Medical Center, sued the State of New Hampshire in Belknap County Superior Court to prevent the proposed transfer.

The Attorney General had entered an appearance for both the JUA and the Insurance Department. The petitioners moved to disqualify the Attorney General from representing both the JUA and the state. The Superior Court (McGuire, J.) granted that motion, concluding "the Attorney General's simultaneous representation of both the JUA and the Insurance Department creates a conflict under New Hampshire Rule of Professional Conduct 1.7(a)." *Tuttle v. New Hampshire Medical Malpractice Joint*

Underwriting Ass'n, Belknap County Super. Ct. No. 2009-E-0148, Order on Motion to Disqualify, at p. 6 (June 25, 2009). In so ruling, the Superior Court found as follows:

> Given the quasi-private/public and voluntary nature of the JUA; the lack of any State funding to implement or support the JUA; the fact that the Department does not guarantee coverage to policyholders if the JUA were unable to do so; and the broad powers and responsibilities of the JUA board, the Court concludes that the JUA is a separate entity from the Insurance Department and is not part of the executive branch of State government. Rather, it is akin to the New Hampshire Retirement System which the New Hampshire Supreme Court has held is "an independent entity rather than an executive department or agency."

Id. at 4-5 (emphases added) (quoting *State Retirement Sys. v. Sununu,* 126 N.H. 104, 108 (1985) (noting the Retirement System board of trustees was given "full power" by the governing statute and those trustees owed fiduciary obligations to the system's members and beneficiaries). Shortly after Judge McGuire's order, Michael F. Aylward, Esq., entered an appearance for the JUA.

While the litigation was pending in Superior Court, Respondent Roger A. Sevigny authored an opinion column which was printed in at least New Hampshire newspapers. In that column, Commissioner Sevigny made the following statements: "From my perspective, the Legislature was right to transfer the excess surplus from the JUA to the general fund."; "The law does not give [JUA policyholders] the right to a windfall."; "[T]he JUA excess surplus funds belong to us all."; and "The people of New Hampshire established the JUA, and they deserve to benefit from it." *The JUA Surplus Rightfully Belongs to the People of New Hampshire*, by Roger A. Sevigny, New Hampshire Union Leader (July 9, 2009). Appendix to Petition for Writ of Mandamus ("App.") at 1.

Following the submission and argument on cross-motions for summary judgment,

the Court entered an order granting the petitioners' motion. *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n,* Belknap County Super. Ct. No. 2009-E-0148, Order on Motions for Summary Judgment (July 29, 2009). The State appealed from this order, but did not appeal Judge McGuire's order regarding disqualification.

On January 28, 2010, this Court affirmed the trial court and held the proposed transfer was an unconstitutional impairment of the vested contractual rights that policyholders have with the JUA. Specifically, this Court concluded:

> We find that the language of the policies and the regulations, taken together, confers upon the policyholders a vested contractual right in the treatment of any surplus. The policies entitle the policyholder to "participate in the earnings of the [JUA]" and the incorporated regulations mandate the board's application of excess funds in one or both of the two specified ways: either against future assessments, or distribution to the policyholders. Under either option, the policyholders have a direct financial interest, and not a mere expectancy, in any excess surplus. Thus, the policyholders have a vested right not necessarily in the distribution of the funds, but in the treatment of the funds for their benefit.

Tuttle, 159 N.H. at 644 (emphases added).

Although the Court's language on this point could hardly be clearer, the respondents have been engaged in a course of conduct—some of which is being masked from public scrutiny under the claim of privilege—with the aim of depriving the policyholders of their adjudicated constitutional rights. At minimum, their public statements reveal a profound lack of respect for this Court's express holding. For example, immediately after this Court announced its decision, Respondent Roger A. Sevigny was widely quoted in the trade press as saying, "'The decision leaves the question wide open about who is entitled to the money.'" Best's Insurance News, January 28, 2010 (quoting Commissioner Sevigny) (emphasis added).

Respondent John Lynch, the Governor of New Hampshire, has expressed similar contempt for this legal ruling and has indicated an intention not to respect or protect the vested contractual rights of policyholders. Specifically, the Governor's spokesman has made the following comments about the *Tuttle* decision:

- "The Governor believes taxpayers have a right to use that [JUA] money." Concord Monitor, April 21, 2010;

- "The governor believes the taxpayers have a right to that [JUA] money and we'll continue to examine ways to allow that to happen." New Hampshire Union Leader, April 21, 2010;

- "The JUA was established as a government run and government subsidized malpractice insurance program for doctors. The doctors who paid their premiums, got the benefit of the insurance…. The governor agreed with the attorney general, the insurance commissioner and the Legislature that any surplus funds rightfully belong to the taxpayers of New Hampshire." The Hotline, National Journal Group, March 19, 2010; and

- "We continue to believe the strongly worded opinion of the dissenting justices correctly highlights the majority's misapplication of the law." Concord Monitor, March 10, 2010.

The Respondents' actions also reflect their contempt for binding court decisions and other law of the state. Following this Court's decision, Respondent Sevigny unlawfully intervened in the JUA affairs. On March 19, 2010, Sevigny and his deputy, Alexander Feldvebel, appeared at a JUA board of directors ("JUA Board") meeting. Neither Sevigny nor Feldvebel are members of the JUA Board. According to the minutes of that meeting:

> [JUA Board Chairman] Dr. [Merwyn] Bagan inquired regarding the effect on investment income of continuing to hold a substantial portion of the portfolio in liquid assets (initiated in 2009 in anticipation of such funds being transferred to the State). [James] Richard advised that approximately $2.3 MM in lost income was somewhat offset by the readiness to purchase new positions at unusually good

> prices as a result of the high degree of liquidity. Cmmr. Sevigny advised the Board that he would determine if and when the cash position of the portfolio could begin to be reduced.
>
> . . . .
>
> Mr. [James] Vaccarino reported that on March 11, the Executive Committee met with the Commissioner at the Insurance Department at which time the Commissioner had advised that the State of New Hampshire had engaged tax counsel to analyze and consider the tax status of the JUA and that no independent action should be taken by the Board concerning these tax issues or the question of any possible distribution of any possible surplus until the matter of tax status is clarified. In the interim, any inquiry or demand made to the JUA regarding distributions should be referred to the Attorney General.

Minutes, JUA Board of Directors, March 19, 2010 (emphases added), App. at 3.[1] The March 11, 2010 meeting between Sevigny and the JUA Executive Committee was not publicly noticed, in violation of RSA 91-A.

In addition to issuing dictates to the JUA Board, on or about February 22, 2010, Sevigny ordered a so-called "confidential examination" of the JUA, allegedly pursuant to RSA 400-A:37, IV-a. Sevigny has attempted to justify the confidential examination with false and misleading statements. In April 30, 2010 written testimony to the House Finance Committee, Sevigny stated as follows:

> In the *Tuttle* case, the Plaintiffs took the position that the JUA is not an integral part of the state, and the lower court agreed with this view, although the Supreme Court pointedly refrained from ruling on this question. The Plaintiffs [sic] argument and the lower court's concurrence that the JUA is not an integral part of the state has put in question the federal tax status of the JUA. As a result there is the potential for a very substantial tax liability for the JUA. This liability makes

[1] In response to a request made under RSA chapter 91-A, the Department of Insurance has informed the petitioners that no minutes of the March 11, 2010 Executive Committee meeting exist. Email from Chiara Dolcino to Kevin Fitzgerald, dated May 13, 2010, App. at 5.

> it uncertain whether there is any excess surplus available to be paid out at all.

Prepared Testimony, Commissioner Roger A. Sevigny, House Finance Committee, April 30, 2010 (emphasis added), App. at 9.

The issue of the JUA's tax status was, in fact, first raised by the state, apparently to buttress its argument that the JUA is a state entity. However, to qualify for tax-exempt status under the relevant section of the Internal Revenue Code, an entity's income must accrue "to a State or political subdivision thereof." 26 U.S.C. § 115. As this Court found and as quoted above, as a matter of law, the regulations and insurance contracts provide that the excess surplus accrue to the policyholders. Further, it is uncontroverted that, "'[f]rom 1986 to date, no funds managed by the JUA have been transferred to the State of New Hampshire.'" *See* Petitioners' Brief to Sup. Ct., dated September 25, 2009, at p. 29 (quoting Joint Statement of Undisputed Facts).

In his April 30th prepared testimony, Respondent Sevigny further stated that, "we are also working with our tax counsel and the Attorney General's office to evaluate what changes to the regulations governing the JUA are warranted in order to preserve the tax exempt status and to properly reflect the Supreme Court's decision in this matter." The petitioners have been aware of the state's effort to craft new regulations for the past several months. During that time, the petitioners, through their counsel, have sought assurances from state officials, including Respondent Delaney, that any new regulations will not attempt to defeat the policyholders' vested rights in the JUA surplus funds; in other words, that the regulations would "properly reflect the Supreme Court's decision in this matter." *See* Letter from Kevin Fitzgerald, Esq. to Michael Delaney, Attorney

General, dated April 8, 2010, App. at 11. Respondent Delaney refused to give such assurances.

On April 20, 2010, the petitioners, though counsel, made a written demand on the JUA Board through its counsel, Attorney Aylward. In that letter, the petitioners noted that "[w]e have tried without success to obtain assurances from representatives of the State that it will not attempt to defeat the policyholders' vested rights in the surplus funds of the JUA." In light of that concern, the policyholders requested that the JUA Board convene a special meeting to take up two issues flowing from this Court's order: first, the process and procedure by which it will engage the Internal Revenue Service regarding any tax obligations; second, to determine the amount of excess surplus that exists and which is subject to distribution to the policyholders. *See* Letter from Kevin M. Fitzgerald, Esq. to Michael F. Aylward, Esq., dated April 20, 2010, App. at 13.

Attorney Aylward never responded. Instead, Associate Attorney General Anne Edwards did. In a letter dated April 28, 2010, she stated that "[w]e are responding on behalf of our clients, Commissioner Sevigny and the JUA Board." Letter from Anne M. Edwards, Esq. to Kevin M. Fitzgerald, Esq., dated April 28, 2010, App. at 16. In her response, Attorney Edwards purported to decline to act on the policyholders' demand as follows: "Until the examination is complete, no final determination of the status of funds held by the JUA can be made. Therefore, it is impossible for the JUA Board to take action or respond further at this time with regard to your demands." *Id.*

The conduct described above is part of a deliberate plan to deprive the JUA policyholders of their vested rights. On information and belief, utilizing the pretense of a self-created tax issue, the Department of Insurance is prepared to propound new

regulations which would have the effect of dismantling the JUA in its present form and transferring control to the Department of Insurance. The intent of this scheme is to transfer control of the JUA excess surplus to the Commissioner of Insurance in an effort to effect a taking of these funds and a nullification of the policyholders' adjudicated vested rights in direct defiance of this Court's holding.

Through counsel, the policyholders have demanded that the Attorney General cease and desist from representing the JUA board in contravention of Judge McGuire's June 25, 2009 order and Rule 1.7(a) of the Rules of Professional Conduct. The state has not responded.

VI. A CONCISE STATEMENT SPECIFYING THE STAGE OF THE PROCEEDINGS IN THE LOWER COURT OF ADMINISTRATIVE AGENCY AT WHICH THE QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED, THE MANNER IN WHICH THEY WERE RAISED, AND THE WAY IN WHICH THEY WERE PASSED UPON BY THE LOWER COURT OR ADMINISTRATIVE AGENCY:

Not applicable.

VII. A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR PETITIONING THIS COURT TO EXERCISE ITS ORIGINAL JURISDICTION AND SETTING FORTH WHY THE RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT OR CANNOT BE HAD THROUGH OTHER PROCESSES:

Fundamental principles underlie the petitioners' request. First, from the earliest days of this state, it has been well understood that decisions of this Court, even those affecting the co-equal branches, are the law of the State. *See Petition of Mone,* 143 N.H. 128, 133 (1998) ("It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it.") (citing *Merrill v. Sherburne*, 1 N.H. 199 (1818)). The governor and, through that office, the remainder of

the executive branch, are required to follow the law. N.H. Const. part II, art. 41 (providing that the governor "shall be responsible for the faithful execution of the laws"). The "executive power may not be used to frustrate valid legislative enactments," *Opinion of the Justices*, 118 N.H. 7, 14 (1978), and that same power may not be used to circumvent a clear judicial statement of what the law is, *see Opinion of the Justices*, 118 N.H. 582, 584 (1978).

This Court has expressed skepticism about whether the necessity for a writ of mandamus against the governor would ever arise. *See Brouillard v. Governor & Council*, 114 N.H. 541, 544 (1974). Yet, this appears to be a situation – without apparent historic precedent – where such relief is necessary:

> While we are not prepared to assert that mandamus will not lie against a Governor, it is unlikely that the necessity of the writ should ever arise in this State. When the law is settled, it will be obeyed. It should not be necessary to order a Governor of this State to obey the law he has taken an oath to execute.

Id. (emphasis added) (citations and quotations omitted).

As the foregoing factual recitation establishes, the governor has unabashedly rejected the pronouncement of this Court. There is no possible way to reconcile the many statements emanating from his office – "We continue to believe the strongly worded opinion of the dissenting justices correctly highlights the majority's misapplication of the law."; "The Governor believes taxpayers have a right to use that [JUA] money." – with this Court's holding that the policyholders have a constitutionally protected vested right in the excess surplus. The statement of Respondent Sevigny is even more contemptuous of the law as pronounced by this Court: "The [*Tuttle*] decision leaves the question wide open about who is entitled to the money."

The respondents have deliberately proceeded on a course designed to deprive the policyholders of their interest in these funds, and thus to subvert the decision of this Court. Specifically:

-- Respondent Delaney, the highest law enforcement officer in the State, has refused to give the policyholders assurances that the State will not take actions to deprive them of their rights, as declared by this Court;

-- Respondent Sevigny appeared at two JUA Board meetings and unlawfully ordered that "no independent action should be taken by the Board concerning these tax issues or the question of any possible distributions of any possible surplus"; that he alone would "determine if and when the cash position of the portfolio could begin to be reduced"; and, in defiance of Judge McGuire's order, purported to direct the Board that "any inquiry or demand made to the JUA regarding distributions should be referred to the Attorney General."

-- Respondent Sevigny has ordered a "confidential examination" but has deliberately misled the House Finance Committee, and the public, about the origins of the so-called "tax issue" facing the JUA;

-- Respondent Delaney is defying the terms of Judge McGuire's order disqualifying his office from representation of the JUA; and

-- The Governor, through his spokesman, has unambiguously declared that he not only does not respect the core holding of this Court: "The governor believes the taxpayers have a right to that [JUA] money and we'll continue to examine ways to allow that to happen." That examination has led, on information and belief, to the development of regulations purportedly mandated by "tax issues" which have the effect of dismantling the JUA in its present form, transferring control to the

Department of Insurance with the intent of gaining control of the JUA excess funds and then acting to deprive the JUA policyholders of their rights, as adjudicated by this Court. Accordingly, this Court should issue a Writ of Mandamus directing the respondents to take reasonable actions to prevent impairing the vested contractual rights of JUA policyholders.

VIII. THE JURISDICTIONAL BASIS FOR THE PETITION, CITING THE RELEVANT STATUTES OR CASES:

RSA 490:4 which provides:

> The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, . . . shall have exclusive authority to issue writs of error, and may issue . . . other writs and processes to other courts . . . and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts.

IX. A STATEMENT, IF APPLICABLE, THAT EVERY ISSUE SPECIFICALLY RAISED HAS BEEN PRESENTED TO THE ADMINISTRATIVE AGENCY AND HAS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW BY A CONTEMPORANEOUS OBJECTION OR, WHERE APPROPRIATE, BY A PROPERLY FILED PLEADING:

Not applicable.

X. A LIST OF ALL PARTIES OF RECORD AND THEIR COUNSEL, AND THE ADDRESSES OF ALL PARTIES AND ALL COUNSEL:

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XI. A STATEMENT AS TO WHETHER A TRANSCRIPT OF ANY PROCEEDINGS WILL BE NECESSARY IF THE PETITION IS ACCEPTED FOR FURTHER REVIEW BY THE COURT:

No transcript will be required.

Respectfully submitted,

GEORGIA TUTTLE, M.D.,
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By their attorneys,

Date: May 24, 2010

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CERTIFICATION OF COMPLIANCE
(Supreme Court Rule 11(5))

I hereby certify that a copy of the foregoing has been mailed this 24th day of May 2010 to the following parties to the case:

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