MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. Ken-23-426

WILLIAM CLARDY, ET AL.

(*Appellants*)

v.

TROY D. JACKSON, ET AL.

(*Appellees*)

On Appeal from the Kennebec County Superior Court

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

CONSTITUTIONAL RESOLUTIONS

LEGISLATIVE MATERIALS

BOOKS, PERIODICALS & ESSAYS

TREATISES

STATEMENT OF FACTS

This appeal requires, first and foremost, familiar background on certain parliamentary and constitutional aspects related to the process of enacting legislation in Maine.

Maine legislators serve two-year terms, with the Maine State Legislature (the "Legislature") holding a session in each year. Me. Const. art. IV, pt. 1, § 2; art. IV, pt. 3, § 1. The First Regular Session begins on the first Wednesday of December following the November general election. Me. Const. art. IV, pt. 3, § 1. The statutory deadline for the end of the First Regular Session is the third Wednesday in June, though the session can end earlier if the Legislature votes to adjourn. See 3 M.R.S. § 2. The Second Regular Session begins on the first Wednesday after the first Tuesday in January of the subsequent year. See Me. Const. art. IV, pt. 3, § 1.

The date on which the Legislature adjourns its regular session *sine die* ("without day") is significant beyond ending the regular legislative session as it starts the clock on the effective date of non-emergency legislation, including non-emergency legislation pertaining to budget appropriations, under the Maine State Constitution. To pass legislation, the Maine State Constitution states that: "No Act or joint resolution of the Legislature . . . shall take effect until 90 days after the recess of the session of the Legislature in which it was passed, unless in case of emergency, which with the facts constituting the emergency shall be expressed in the preamble

of the Act, the Legislature shall, by a vote of 2/3 of all the members elected to each House, otherwise direct." Me. Const. art. IV, pt. 3, § 16. As interpreted by the Maine Supreme Judicial Court, the term "recess" as specifically used in Article IV, Part 3, Section 16, is "synonymous[] with 'adjournment *sine die*.'" *Opinion of the Justices*, 2015 ME 107, ¶ 36, 123 A.3d 494.

As found by the Superior Court in the context of the underlying Order granting Appellees' Motion to Dismiss, the Legislature passed an appropriations bill on March 30, 2023, which pertained to appropriations for fiscal years ending June 30, 2023, 2024, and 2025. APP 007; see also APP 020. The appropriations bill was passed by only a simple majority, so its effective date was dependent on the timing of the Legislature's adjournment *sine die*. APP 008. The Legislature needed to adjourn *sine die* well in advance of the commencement of the 2023-2024 fiscal year (that is, at least 90 days before July 1, 2023) in order to guarantee that the appropriations legislation would be in effect for the upcoming fiscal year. APP 008. The Maine Legislature adjourned *sine die* on March 30, 2023, following its passage of the appropriations bill. APP 008. Prior to adjourning, the Legislature voted to carry over its unfinished business "to a subsequent special or regular session of the 131st Legislature in the posture in which they were at the time of adjournment of the First Regular Session of the 131st Legislature." APP 008. This is a routine practice. See APP 039-42.

Also on March 30, 2023, Defendants Ross and Jackson polled members of both houses, inquiring as to whether they wished to return for a special session, starting on April 5, 2023. APP 008; APP 035-36. Only the majority of one political party consented to the convening of a special session, and thus, a special session could not be convened on the call of Speaker Ross and President Jackson as presiding officers of the Legislature. APP 008; APP 036.

On March 31, 2023, Governor Mills issued a proclamation declaring an "extraordinary occasion" and convening the Legislature for a special session, on the same date that the Legislature had declined to begin a special session of the Legislature: April 5, 2023. See APP 009; APP 048-49. The proclamation stated:

> WHEREAS, there exists in the State of Maine an extraordinary occasion arising out of the need to resolve many legislative matters pending at the time of the adjournment of the First Regular Session of the 131st Legislature of the State of Maine; and
>
> WHEREAS, the public health, safety and welfare requires that the Legislature resolve these pending matters as soon as possible, and in any event prior to the date of the Second Regular Session of the 131st Legislature of the State of Maine, including but not limited to the state budget, pending legislation, pending nominations of state board and commission members, and pending nominations of judicial officers by the Governor requiring legislative confirmation;
>
> NOW, THEREFORE, I, JANET T. MILLS, Governor of the State of Maine, by virtue of the constitutional power vested in me as Governor pursuant to Article V, Part I, Section 13 of the Constitution of the State of Maine, do convene the Legislature of this State, and hereby request the Representatives to assemble at ten o'clock and the Senators to assemble at ten o'clock in the morning in their respective chambers at the Capitol in Augusta on Wednesday, April 5, 2023, in order to receive

> communications, resolve pending legislation carried over from the First Regular Session of the 131st Legislature and act upon pending nominations and whatever other business may come before the legislature.

APP 009; *see also* APP 048-49. The 131st Legislature convened its First Special Session on April 5, 2023. APP 009. While in special session, the Legislature passed various laws and acted on legislative items which had not been finally disposed of at the time of the March 30, 2023, adjournment *sine die*. APP 009.

Appellants include Maine state residents, taxpayers, current elected representatives serving in the Legislature, and a not-for-profit organization comprised of Maine residents and taxpayers with a collective interest in seeing state government faithfully adhere to the Maine Constitution. See APP 087; APP 031-32. Appellees are Governor Janet Mills, who used her executive power to summon the Legislature arising out a faux "extraordinary occasion," and Appellees Rachel Talbot Ross and Troy Jackson were, respectively, the Speaker of the Maine House of Representatives and President of the Senate of Maine. See APP 032.

Appellants contend that the special session of the Legislature ordered by the Governor and conducted by Appellees Jackson and Ross violates the Maine Constitution. In Count I, Appellants asked the Superior Court to declare the Governor's proclamation unconstitutional for want of an "extraordinary occasion" and to enjoin the Legislature from convening pursuant to the Governor's inappropriate call to convene. Count II seeks declaratory and injunctive relief halting

the legislative work of the first special session; nullifying the legislation passed during the special session *ab initio*; and requiring that those matters not addressed by the end of the regular session be held until a constitutionally sound legislative session occur. Appellees moved to dismiss the Amended Complaint in June 2023. Oral arguments on the Motion to Dismiss occurred on July 14, 2023. The Superior Court encouraged the parties to agree to a report appropriate questions of law directly to the Law Court pursuant to Rule 24 of the Maine Rules of Appellate Procedure, but Appellees would not agree to do so.

The Superior Court granted the Motion to Dismiss on October 13, 2023. Appellants timely filed a notice of appeal and motion for transcript on or around October 20, 2023.

ISSUES PRESENTED FOR REVIEW

I. Whether the Governor is completely immune from judicial review when invoking a pretextual "extraordinary occasion" to convene a special session of the Legislature under Article V, Part 1, Section 13 of the Maine Constitution in direct conflict with the Legislature's own rejection of a call to hold a special session.

II. Whether Legislative Officers who coordinate with the Governor to allow the Governor to unconstitutionally dictate the terms of legislative sessions, and who improperly delegate legislative constitutional authority to the executive branch, are nevertheless protected from judicial review by principles of legislative immunity and separation of powers.

SUMMARY OF THE ARGUMENT

This case turns on the separation of powers principles that divide the legislative and executive branches of Maine government, and more pointedly, tests the existence of any limiting principle that might check Maine governors from cynical abuses of executive powers that would imperil legislative independence. In its most granular terms, Appellants ask two questions. First, does the Maine Constitution provide that the governor can reconvene the Legislature for when no "extraordinary" situation exists immediately after the Legislature formally voted to end its session *sine die* and—to underline the Legislature's intentions—further voted not to reconvene in a special session? Second, and relatedly, do separation of powers principles tolerate the Legislature's leadership, in partisan collusion with the Governor, overriding the will of its members by working with, and acquiescing to, the Governor to ensure that a special session is ordered in defiance of its members express refusal to convene a special session under their own constitutional authority?

A straightforward reading on the Maine Constitution, with a simple appreciation of its plain language and some contextual history, demonstrates that Governor Mills misused a limited power in a manner that functionally undermined the Legislature's own power to control its sessions, in a manner that violates the Maine Constitution; and the genuflection of Appellees Ross and Jackson cannot be

sanctioned as legitimate legislative activity when ceding legislative authority to the executive without any legitimate purpose.

However, the Superior Court snuffed out a complete inquiry into these questions by issuing an Order granting the Appellees' Motion to Dismiss ("the Order"). The Superior Court principally relied on the contextual dicta in an advisory opinion in shaping its decision, and failed to apply a more straightforward approach to interpreting the Maine Constitution. APP 012-14. The Superior Court then sheltered the legislator Appellees from judicial scrutiny by deeming that the alleged coordination with the Governor—to thwart the intention of the Legislature's membership in voting to *not* reconvene for a special session—was a nonjusticiable issue, ruling that the adjudication of this issue would require the courts to encroach on supposedly legislative functions. APP 014-16. In shrinking away from adjudicating the matter on justiciability and separation of power grounds, the Superior Court ironically allows the legislative and executive branches to deliberately contaminate each other, thus flouting separation of powers principles legitimately policed by the courts.

The Superior Court decision, if upheld, cuts off any process for creating some process to limit—or even deter—rampant abuse of this nature from becoming baked into government. To whatever extent the Maine Constitution created deliberate safeguards through plain English, the courts would be cutting the brake lines and

unbuckling the seatbelts to abide obvious abuses. For those foregoing reasons and the following, the Order should be reversed and the case remanded to Superior Court for further proceedings consistent with the Court's opinion.

ARGUMENT

Appellants appeal the Order of the Superior Court granting the Appellees' Motion to Dismiss. First, as explained in Section I, *infra*, the Superior Court's reasoning that the Governor's Proclamation is not subject to judicial review (A) is based on a dicta in a non-binding that is, in fact, inconsistent with post-decision amendments to the Maine Constitution; (B) does not hold up to close constitutional analysis and plain language interpretation; (C) fails to uphold checks and balances despite claiming otherwise; and (D) shirks the responsibility of the courts to call an executive to task for circumventing and abusing limited, delegated powers. Therefore, the Superior Court's Order and underlying reasoning set forth an illogical precedent that leaves the Legislature subject to past and future executive abuse.

Second, as argued in Section II, *infra*, the Superior Court erred in finding that the specific actions of Appellees Ross and Jackson are shielded by legislative immunity and separation of powers principles. The unwarranted concession of the Legislature's power to dictate the terms of its own sessions—including its own affirmative decision to *not* reconvene on the very date that the Governor then ordered them to convene—violates principles of the nondelegation doctrine. Partisan

collusion to undermine legislative authority is not legitimate legislative action, and rather than using separation of powers principles to justify inaction, the circumstances presented in the case compel judicial intervention.

For either or both of those reasons, the Order granting the Motion to Dismiss should be vacated and the case remanded for further proceedings.

I. Standard of Review.

For both issues briefed herein, the Law Court reviews questions of constitutional interpretation de novo. *State v. Reeves*, 2022 Me. 10, ¶ 42, 268 A.3d 281. As the Superior Court granted a motion to dismiss, the grant of a judgment on the pleadings de novo. *Faith Temple v. DiPietro,* 2015 ME 166, ¶ 26, 130 A.3d 368. The Court reviews the underlying pleadings "assuming that the factual allegations are true, examining the complaint in the light most favorable to plaintiff, and ascertaining whether the complaint alleges the elements of a cause of action or facts entitling the plaintiff to relief on some legal theory." *Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 4, 187 A.3d 609 (citation omitted).

II. The Superior Court's conclusion that the Governor's authority to reconvene the Legislature is not subject to judicial review is inconsistent with the Maine Constitution and separation of powers principles.

The Superior Court found that the Governor's proclamation is not subject to judicial review. See APP 011. The basis for that ruling turns primarily on the lower court's reliance on the Supreme Judicial Court's decision in *Opinion of the Justices*,

136 Me. 531, 12 A.2d 418 (1940), and in reference to that putative authority, the court held that the Governor "enjoys plenary authority to determine when there is an extraordinary occasion for convening the Legislature." APP 012. For several reasons, that conclusion is incorrect.

First, the Court may assume, in reviewing the Order, that there was *no* actual exigency, other than the reasons cited by the Governor, i.e., "the need to resolve many legislative matters pending at the time of the adjournment," or to address "pending nominations of state board and commission members, and pending nominations of judicial officers," and so on.[1] APP 009. So stipulated, the Superior Court nevertheless determined that the Maine Supreme Judicial Court had already ruled satisfactorily that this exercise of executive power was beyond judicial oversight in a non-precedential but "[not] unsound" advisory opinion. APP 008. However, as explained in Section II(A), the trial court's reliance on this particular case was misplaced. The advisory opinion in question is non-precedential; the key language in question is dicta; and even looking past those deficiencies, the statement in question hinges on a faulty premise. This issue called for a different type of constitutional analysis, and rote reliance on the advisory opinion is a reversible error.

[1] The latter two justifications for invoking an "extraordinary occasion" to summon the full Legislature are especially disingenuous, since the Governor has a separate, unlimited power to call the *Senate* into session for the specific purpose of "voting upon confirmation of appointments" for "judicial officers" and "all other civil and military officers whose appointment is not" otherwise directed by the Constitution. Me. Const. art. V, pt. 1, § 8. Thus, the claim that the whole Legislature needed to be summoned under Article V, Part 1, Section 13 to act on nominations is plainly wrong.

In Section II(B), infra, Appellants put forward a more nuanced, commonsense, and historically-supported view of the origin and meaning of the "extraordinary powers" clause. Respectfully, Appellants' interpretation does not rely on dicta in an advisory opinion, nor does it not rely on distorted definitions to common words to buttress even partial reliance on dicta in an advisory opinion. Contrasted with more practical analysis, the Superior Court's reliance on the 1940 advisory opinion, and more broadly, the court's embrace of Appellees' sweeping view of the governor's power appears inconsistent with the language, structure and history of the Maine Constitution.

Section II(C) addresses the Superior Court's conclusion that the constitutional interpretation offered by Appellees remains appropriately subject to reliable balance of powers safeguards. The "plenary" power interpretation, however, does no such thing. As seen in the immediate context of this case, the ruling offers no protections from executive abuse, and undermines Legislative constitutional authority; therefore, under separation of powers principles, the outcome should be different.

Finally, in Section II(D), Appellants briefly note the recent history of courts stepping in to limit gubernatorial abuse of certain extraordinary powers when those powers are used in contravention of statutory or constitutional limitation. Notwithstanding that these are foreign courts interpreting foreign constitutions, the underlying principles—separation of powers doctrine, namely—resonate with

familiar import to the present case. Insofar as the Governor's actions evidence a new-normal where "extraordinary occasions" are declared every time the Legislature adjourns, the courts need not sit idly when one branch wantonly abuses a limited power. Thus, judicial review has a place in limiting executive overreach, and can appropriately ward off the specter of "extraordinary occasions" becoming cynically indistinguishable from "business as usual."

A. Deference to the 1940 advisory opinion is misplaced, as (1) the language cited as addressing the issue of the "extraordinary occasions" power was not briefed for the Supreme Judicial Court and (2) subsequent amendment to the Constitution affects the scope of executive authority to convene an extraordinary session.

In shaping its Order, the trial court relied largely on dicta in a 1940 advisory opinion, as well as the presumptive logic underpinning the language used by the Supreme Judicial Court. This reliance was in error. The advisory opinion at issue here arose from a question of law submitted by Governor Lewis Barrows pursuant to Article VI, Section 3, dealing directly with the following:

> Has the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940 in Special Session, the power and authority to revoke the Proclamation already made for the convening of the Legislature on April 18, 1940 by another issued prior to the date mentioned for such convening of the Legislature?

Opinion of the Justices, 136 Me. 531, 12 A.2d 418, 420 (1940). The Supreme Judicial Court answered the question after citing Article V, Part 1, Section 13, stating: "The Governor alone is the judge of the necessity for such action [to convene

a special session], which is not subject to review." *Id*. The opinion goes on to reason that the power to rescind such a call "is necessarily inferable from that clearly granted." *Id*. Such is the totality of the constitutional analysis that may have any bearing on Appellants' lawsuit.

The reasons to discount the significance of this ruling are two-fold. First, it is, of course, "a nonbinding advisory opinion" as conceded by the Superior Court in its Order. APP 013. What's more, the statement is couched as dicta, a partial thought that offers no analysis to explain the assertion. Second, the premise that the executive "alone" has the authority to convene the Legislature is, as a factual description of the Maine Constitution, no longer true. The undue reliance on this outdated and uninformative sentence, which takes on dispositive importance in the Superior Court's Order, should, respectfully, warrant reversal and remand.

1. The issue in the advisory opinion was not necessarily briefed in 1940, and the Supreme Judicial Court's dicta reasoning should hold no precedential weight in deciding the present case.

The Superior Court incorrectly found that a challenge to the Governor's proclamation to convene an extraordinary session was adequately answered by the Supreme Judicial Court's 1940 advisory decision *Opinion of the Justices*, 136 Me. 531, 12 A.2d 418. One sentence carries the full weight of analysis and conclusion on this constitutional issue: "The Governor alone is the judge of the necessity for such action [to convene a special session], which is not subject to review." *Opinion*

of the Justices, 12 A.2d at 420 (1940). To Appellants' argument that the prefatory language acts as dicta to the actual decision on the issue presented, the Superior Court asserted that "the notion that Article V, Part I, Section 13 vests absolute power in the Governor was critical to the [Supreme Judicial Court's] ultimate conclusion regarding the Governor's discretion to revoke a call [to an extraordinary session]." APP 013. Additionally, while conceding that the decision was a "nonbinding advisory opinion," the Court turned to its reasoning on the basis that the opinion "provide[s] necessary guidance and analysis for decision making by the other branches of government." APP 013 (citation omitted).

We may start with the recognized limitations of these advisory opinions, which are well-documented. "It is familiar law that an advisory opinion binds neither the justice who gave the opinion nor the court when the same questions are raised in litigation." *Martin v. Maine Sav. Bank*, 154 Me. 259, 269, 174 A.2d 131 (1958). The Justices' advisory opinion "has no precedential value and no conclusive effect as a judgment upon any party, and is not binding upon even the individual Justices rendering it in any subsequent litigated matter before their Court." *Opinion of the Justices*, 396 A.2d 219, 223 (Me. 1979). In one such advisory opinion, following a question posed by Maine House of Representatives around 1871, a Justice qualified the weight of his own conclusions within the very same opinion, writing:

> [The Justices] can only proceed in the investigation upon the views of the law appertaining to the question, as they appear to us upon first

> presentation, and anticipate as well as we can the ground which may be urged for or against the proposition presented, *never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion*.

Opinion of the Justices, 58 Me. 589, 615 (1870) (emphasis added) (quoted in *Martin*, 154 Me. at 269, 174 A.2d at 137). Thus, when a question arises in actual litigation and not in the context of an Article VI, Section 3 advisory opinion, the courts have a "duty [ ] to consider the problem anew in light of the issues presented and with the aid and assistance of the research, briefs, and arguments of counsel." *Id*.

Beyond the general limitations of advisory opinions writ large, the 1940 advisory opinion is a barren cupboard if looking for persuasive, analytical insights. Although the Superior Court found that the advisory opinion rationale is not "unsound," the quoted language—representing the entirety of the discussion on this issue—is devoid of any significant analysis or elucidation. It is terse dicta, dropped into the opinion as received wisdom, to answer a separate legal question.

In some cases, a Justice's stray comment may reveal invaluable information. In *State v. Sklar*, 317 A.2d 160 (Me. 1974), the Law Court remarked on the lasting impact of *Johnson's Case*, 1 Me. 230 (1821), affirming the unrestricted constitutional guarantee of jury trials in criminal prosecutions. The Law Court wrote of the analysis offered by the individual Justices, describing the nature of the jury trial as understood within a year of Maine's Constitution being adopted, as such:

> Although these comments of the Justices in *Johnson's Case* may be dicta and, therefore, lack the controlling effect of judicial precedent, they express thoughts which are nonetheless enormously weighty as evidence of the content conveyed by the words of Article I, Section 6 of the Maine Constitution. Because of the stature of the men who were speaking, their expertness and the timing of their words as practically contemporaneous with the adoption of the Constitution, we attribute to the remarks in *Johnson's Case* an evidentiary cogency practically equivalent to that of statements made in debate by members of the Constitutional Convention speaking to support a proposed draft worded exactly in the language in which Article I, Section 6 was ultimately adopted.

Sklar, 317 A.2d 160, 168 (Me. 1974). The Law Court's appreciation for the fact-specific weight of the 1821 opinion is well-supported. In *Johnson's Case*, the Justices opined on an issue of constitutional consequence while the proverbial ink on the Maine Constitution was still wet. In contrast, the analysis-devoid statement heralded by the Superior Court in a non-binding advisory opinion from 1940 comes some 120 years after the constitutional provision in question was drafted and adopted. With due respect to their educated intuitions, the authors of the 1940 opinion did not speak with firsthand knowledge of the intent of the Maine Constitution's drafters, so bald assertions of constitutional purpose without reference to any other authorities can be second guessed. In sum, the case cited and relied upon by the trial court is an especially weak example of a persuasive authority to which any deference is owed.

For those reasons, the advisory opinion cited by the lower court, regardless of affirmations to the contrary, is a faulty foundation for a decision that grants

unchecked gubernatorial power to summon a coequal branch to work for routine business. Even in the best light, it is a poor roadmap for constitutional interpretation. In relying on it, and its limited reasoning, the Superior Court erred, and the Order granting Appellees' Motion to Dismiss should be overruled.

2. The constitutional amendment to Article IV of the Maine Constitution in 1970 further undermines the advisory opinion assumption that the executive branch possesses exclusive authority to convene a special session.

The question that flows from the preceding section is: even if the Supreme Judicial Court's 80-year-old comment about gubernatorial authority is unbriefed dicta from an advisory opinion, is it wrong on the merits? The answer is: yes, for the straightforward reason that it relies on a false premise, which is that only the Governor has the authority to call a special session. The Legislature—and the people of Maine—amended the Constitution some thirty years after the 1940 advisory opinion, making it quite clear that the Governor "alone" is no longer the judge of the necessity of convening a special session: that power is now decidedly vested in the Legislature's own constitutional fiat and control. The advisory opinion fails even at a descriptive level, let alone in its legal conclusions.

The key change in question is as follows. At the time of the 1940 opinion, Article IV, Part. 3, Section 1 (amended 1970) read:

> The Legislature shall convene on the first Wednesday of January biennially, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense

> and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.

This language was amended in 1970 to read:

> The Legislature shall convene on the first Wednesday of January biennially **and at such other times on the call of the President of the Senate and Speaker of the House, with the consent of a majority of the members of the Legislature of each political party, all members of the Legislature having been first polled** and, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.

Const. Res. 1969, ch. 74, approved in 1970; Me. Const. art. IV, pt. 3, § 1. The effect of this amendment was to give the Legislature its own power to convene the Legislature outside of a regular session, making the same authority to summon the Legislature a power shared, albeit with different dynamics, between the legislative and executive branches.

Commentary from those in power at the time of the amendment's presentation suggests that the proposed change modified the governor's "sole" authority to convene the Legislature. In justifying a passive veto of the proposal to put the amendment before Mainers for ratification, Governor Kenneth Curtis appealed to the Legislature by invoking a custom of collegiality, writing: "I know of no instance where the Governor, granted sole authority by the Constitution to call a Special Session of the Legislature, has failed to do so when the public interest demanded." 3 Legis. Rec. 44 (1970). He added: "Any Special Session, even under the present

Constitutional framework, could not be carried out without planning and advance work by members of the Legislature and the Legislative staff." Id.

The argument hinges on the optimistic view that the branches already functioned with cooperative symbiosis in holding special sessions, even if the authority was understood to be vested with the governor. This argument underscores the intent of the amendment's drafters to dilute, duplicate, or even overshadow a supposedly exclusive power that resided with the executive.[2] Despite the then-governor's protests, the amendment went to the people and was duly ratified.

This history underlines an important consideration in weighing Appellants' case. The Appellants' cause of action does not object merely to Governor Mills's use of this authority, due to a petty disagreement that it was warranted or to score political points. This case turns on the fact that the Legislature *had* exercised its concomitant power to convene the special session, and *voted not to*; the Governor's use of her own power is not just void of constitutional justification, but it conflicts with the Legislature's own exercise of comparable, competing authority, and therefore, creates a separation of powers dilemma.

For those reasons, and those described in Section II(A)(1), supra, reliance on the 1940 advisory opinion in granting the Motion to Dismiss was misplaced. Even

[2] In fact, the legislative power is less restrained than the executive power, since the Legislature may convene for no reason at all, so long as it has the requisite majority votes from each party, whereas the governor's power is limited to "extraordinary occasions."

if the governor was once "alone" in exercising power to summon the Legislature for a special session, that era of constitutional hegemony has been over for half a century. As such, the Order should be vacated, and the case remanded.

B. The analysis put forward in the Order relies on constitutional interpretation that is inconsistent with the Constitution's plain language and historical context.

The Superior Court erred in relying on the 1940 *Opinion of the Justices* decision, which did not bind the trial court and did not proffer compelling reasoning, as argued in Section II(A). As such, the Superior Court should have tested the Appellees' Motion to Dismiss using more durable tools of constitutional analysis. When analyzing provisions of the Maine Constitution, courts "look primarily to the language used." *Voorhees v. Sagadahoc County*, 2006 ME 79, ¶ 6, 900 A.2d 733. Courts "apply the plain language of the constitutional provision if the language is unambiguous." *Id.* (citations omitted). When construing plain language, the Constitution's words are read "in light of what meaning they would convey to an 'intelligent, careful voter.'" *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) (quotation marks omitted). This Court—very reasonably—does not spurn an interpretation that "is consistent with practical commonsense…" *Reeves*, 2022 ME 10, ¶ 27, 268 A.3d 281. If the provision is ambiguous, courts can "determine the meaning by examining the purpose and history surrounding the provision." *Voorhees*, 2006 ME 79, ¶ 6, 900 A.2d 733 (citations omitted). It is "proper in

construing constitutional language to give decisive weight to the history of its development." *Opinion of the Justices*, 142 Me. 409, 415, 60 A.2d 903 (1947).

To test that framework on the language that animates the executive authority in question, one might check the Constitution itself, to determine if the language in question is unambiguous. The provision central to this lawsuit states:

> The Governor may, on extraordinary occasions, convene the Legislature; and in case of disagreement between the 2 Houses with respect to the time of adjournment, adjourn them to such time, as the Governor shall think proper, not beyond the day of the next regular session; and if, since the last adjournment, the place where the Legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the State.

Me. Const. art. V, pt. 1, § 13. The key term, "extraordinary occasions," is probably *not* entirely "unambiguous," but assume, arguendo, it is: would an "intelligent, careful voter" understand those words to mean that the Governor "can convene the Legislature for *whatever reason* that particular Governor sees fit"—even for a *bad* reason, or for a reason that is *ordinary*? That is the position of the Appellees. See APP 068 (arguing, broadly: "Maine's Governor may convene the Legislature for a specific purpose through proclamation.") To Appellees, an ordinary *but specific* reason is a legitimate exercise of a power specifically reserved for *extraordinary* occasions. Again, this twisted "plain language" reading invites an antithetical application to the words used. Convening the Legislature to "attend the Governor's birthday party at the capitol" is specific; it is not "extraordinary." So "extraordinary"

does not mean "specific," and certainly does not—cannot—mean "ordinary." The interpretation offered by Appellees, and embraced by the Superior Court, is illogical, implausible, and unpalatable.

The caveat of "extraordinary occasions" would seem to operate like other conditions placed on gubernatorial power within the same section of the Constitution. For example, the Governor is empowered to dictate the "place where the Legislature were next to convene," but *only* in situations where the original place of convening "shall have become dangerous from an enemy or contagious sickness," so long that the alternative is "convenient." Me. Const. art. V, pt. 1, § 13. By these conditions, the Governor can set the location for legislators to convene *but only if* prerequisites are met. It would not be tolerable as a geographical shell game designed to disrupt the Legislature's ability to perform its business. Empowering the Governor to have unlimited authority to set the location of the legislative session threatens to upset the balance of power between the branches, as restrictions on where one does work can affect the performance of that work to the point of nullifying the law-making efficacy of a competing governmental branch.

Alternatively, if the "extraordinary occasions" clause is ambiguous, we can turn to the history of Maine's adoption of the same language as a tool for resolving this interpretive question. Prior to 1820, the (then-) District of Maine was a part of the Commonwealth of Massachusetts. When drafting our own constitution, the

members of the Maine Constitutional Convention "looked to the 1780 Constitution of the Mother Commonwealth as a model for many provisions. . . . " *Matter of Benoit*, 487 A.2d 1158, 1173 n.23 (Me. 1985) (citation omitted). The Massachusetts Constitution of 1780 also allocates gubernatorial power to summon the legislative body, but presents that power quite differently, as the governor "shall have authority, from time to time, *at his discretion*, to assemble and call together the Counsellors of this Commonwealth for the time being…" Mass. Const. ch. II, § 1, art. IV (emphasis added). In creating an expressly discretionary authority to convene the legislature, the Massachusetts Constitution leaves little to interpretive imagination, and plainly does not impose qualifying prerequisite for the exercise of gubernatorial action.

The Maine Constitution of 1820 adopts language that more closely resembles the federal constitution, which authorizes the President "on extraordinary Occasions, [to] convene both Houses, or either of them." U.S. Const. art. II, § 3. Most contemporary Mainers at the Maine Constitutional Convention, in fact, would have seen how this particular power had been used at the federal level prior to 1819. President George Washington "sought advice about whether he could summon Congress to a safer locale" during an outbreak of yellow fever in Philadelphia in 1793, to which Alexander Hamilton opined that the reason for convening Congress under that power "must involve a 'special object of public business out of the preestablished course.'" Saikrishna B. Prakash, *Imperial from the Beginning*, 240

(1st ed. 2015) (citation omitted). Edmund Randolph, the first U.S. Attorney General, advised the president that such authority could be wielded in cases of foreign invasion or if Congress did not convene as required by law. *Id.* (citation omitted). President Washington never did convene both houses of Congress, for any reason. The "first presidential summons of Congress as a whole came in 1797, when John Adams called it to discuss France's naval war against the United States." *Id*. (citation omitted). The power appears, at least initially, to be reserved for extreme—one might even say "extraordinary"—circumstances outside the normal course of business, in which Congress was only to be convened to address pandemics, foreign wars, or other existential threats.

Presented with a formulation of this executive power that could be explicitly discretionary (the Massachusetts model) or one reserved for "extraordinary" circumstances (the federal model), Maine adopted the latter.[3] The problem with Defendant Mills' Proclamation is not that this constitutional authority cannot readily

[3] Those present at the Maine Constitutional Convention did not, it seems, debate the "extraordinary occasions" provision at length. However, one subject of debate was the question of whether the State treasury would pay travel expenses incurred as part of state legislative activity. Judge Judah Dana, commenting on the issue, opined that it was "manifestly right" for the State to bear the travel expenses, or else "small towns and districts, and those at a distance, will be deterred from sending representatives, on account of the travelling expenses." Jeremiah Perley, *The Debates, Resolutions, and Other Proceedings, of the Convention of Delegates, Assembled at Portland on the 11th, and Continued Until the 29th Day of October, 1819, for the Purpose of Forming a Constitution for the State of Maine* 157, (1820). That standard was adopted. *See* Me. Const. art. IV, pt. 3, § 7. The import of this—that the financial hardship incurred in traveling to and from the capitol might unfairly disfavor cities and towns further from the seat of power—can also be intuited as a motivation for limiting the authority of the governor to unseasonably convene legislators outside of the regular sessions, as such orders could prejudice the democratic representation of certain Mainers whose elected representatives had longer commutes, or were financially incapable of making a lengthy journey to attend to government business in the capitol.

be used in good faith, but that it cannot be misused, and misuse must have recourse. If the only "extraordinary occasion" identified in her Proclamation is the *sine die* adjournment of the Legislature with regular business unfinished, it is hardly "extraordinary." If the authors of the Maine Constitution intended the governor to possess discretionary power without oversight, the model for that language existed in the constitution that Mainers formally shed in 1820.

The aforementioned amendment to the Legislature's authority to convene outside of regular sessions might similarly be tested under plain language interpretation. If legislative leadership argued that it could, under Article IV, Part 3, Section 1, convene the Legislature *without* a majority of both parties consenting to the call of the President of the Senate and Speaker of the House, that claim is inconsistent with the constitutional language. The words impose conditions and limitations on the Legislature's authority to reconvene outside of a regular session. To then read Governor Mills's related authority, to convene the Legislature in "extraordinary occasions," as a "plenary" power that radiates from the executive as an unlimited *right*, is incoherent and anomalous in this constitutional ecosystem.

In short, history and straightforward constitutional interpretation favor a reading of the governor's power to convene the legislature as one that is true to the "extraordinary occasions" limitation set forth by authors and ratifiers of the Maine Constitution. Appellees argue that the occasion need not be "extraordinary" at all,

and that the Governor can constitutionally exercise a *shared* power even when the Legislature *specifically rejects a call to convene a special session* in order to finish *normal business* when there exist *completely ordinary circumstances*. The Superior Court endorsed this interpretation, despite it being at odds with the Constitution and appropriate canons of interpretation. The decision, respectfully, should be vacated.

C. The Superior Court's reliance on the Legislature's impeachment power as a check on supposedly non-reviewable executive authority is inconsistent with the logic of the Order, and therefore, the Superior Court's constitutional interpretation leaves the extraordinary sessions authority nakedly unrestricted.

The Superior Court's Order offers reassurances that, despite its expansive view of executive authority under Article V, Part 1, Section 13, abuse of this power is unlikely because "the Legislature's power to impeach places a necessary check on governors who abuse their authority." APP 013-14. Yet that supposed "check" is internally at odds with the same judicial interpretation of the "extraordinary occasions" clause. The Order fails to consider a glaring inconsistency with this premise: that by declaring the executive power unlimited, the court undermines the legitimacy of any legislative effort to hold a governor accountable for abuse should they try a Governor in an impeachment.

If the judiciary puts its imprimatur of approval on a unilateral and unreviewable authority for the governor to act on this "extraordinary" power, even when the Legislature had almost-simultaneously rejected to use its own authority to

convene a special session, how can a Governor ever be held accountable for misuse? The legitimization of Governor Mills's cynical misuse of this authority undermines the ability to call any future misuse unconstitutional, let alone a "misdemeanor" for which a governor may be removed from office. See Me. Const. art. IX, § 5 ("Every person holding any civil office under this State, may be removed by impeachment, for misdemeanor in office. . . ."). If the governor "alone" is the judge of what constitutes an "extraordinary occasion," as is erroneously concluded in the Order, nettlesome, noxious, unserious or even flat-out abusive calls for convening cannot lawfully be called a misdemeanor if the courts sanction the activity.

For the Superior Court's Order to make sense in a constitutional system of coequal branches with shared power to convene the Legislature—the Governor's power handcuffed to a prerequisite of extraordinariness, the Legislature's power subject to a polling hurdle—it cannot be the case that the Legislature can announce it is adjourning *sine die* only for the Governor to summon them back to session to complete patently routine business *and* for the Governor's actions to be both (a) completely constitutional at her sole discretion and yet (b) be subject to removal through impeachment for "abuse." To the extent that the Order is read in the context of the entire Constitution, as a coherent whole with appropriate checks and balances between the coequal branches, the Superior Court's reasoning on this subject is internally illogical.

D. Decisions limiting the invocation of executive powers under misleading pretenses suggest that the judiciary does have a role to play in limiting the use of executive powers to circumvent constitutional or statutory intent.

The Covid-19 pandemic created a historically unprecedented scenario where every single state governor invoked some form of emergency authority to deal with the same incident. *See* Richard Briffault, *States of Emergency: Covid-19 and Separation of Powers in the States*, 2023 Wis. L. Rev. 5, 1633 (2023) (citation omitted). The authority for calls of emergency power is usually statutory, though some states vest broad emergency powers with the governor in "disaster" situations. Id. A handful of state supreme courts were prompted by the Covid-19 crisis to address the scope of gubernatorial emergency powers, and some of those cases may be instructive in a case where (i) an exercise of executive power (ii) designed for use in times of unusual, irregular, emergency, or extraordinary circumstances (iii) comes into conflict with separation of powers principles. With due caveats that these are not binding cases interpreting our own Constitution, their analysis may prove informative. Consider two examples.

First, the Supreme Court of Michigan considered whether the state's governor possessed "constitutional and legal authority" to declare a "state of emergency" or "state of disaster" successively, over the same conditions, each time the 28-days duration of the prior "state of emergency" concluded. *See In re Certified Questions from the U.S. Dis. Ct.*, 958 N.W.2d 1, 5 (Mich. 2020). The governor of Michigan

had, under the state's Emergency Management Act of 1976 ("EMA"), issued an executive proclamation declaring a state of emergency due to the Covid-19 pandemic on March 10, 2020. *Id.* at 6-7. Under the EMA, the governor was required to "issue an executive order or proclamation declaring the state of emergency terminated" after 28 days, unless a request for an extension for a specific number of days was approved by resolution of the Michigan legislature. *Id.* at 9. On April 1, 2020, the governor asked the legislature for a 70-day extension of the state of emergency; the legislature instead passed a resolution giving her until April 30, 2020. *Id*. at 6-7. On April 30, 2020, with no extension forthcoming, the governor terminated the state of emergency previously declared, and immediately issued a new executive order declaring a state of emergency due to the very same Covid-19 crisis. *Id*. at 7.

In a certain light, the governor was merely exercising a power duly conferred to her, for her to exercise at her sole discretion. But the Michigan Supreme Court saw things differently, and unanimously found that the governor can only declare a state of emergency once (per emergency), and she lacks the authority to "redeclare the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority under the EMA." *Id.* at 10. Obviously, "[t]o allow such a redeclaration would effectively render the 28-day limitation a nullity." *Id*. Thus, the Michigan Supreme Court held that the invention of successive emergencies, when

the legislature has passively rejected a continuation of the emergency, cannot circumvent a specific limitation on the exercise of that gubernatorial power.

In Wisconsin, a similar story played out: the governor declared successive states of emergencies over the same, ongoing Covid-19 public health crisis, after the initial 60-day state of emergency ended and was not extended by joint resolution of the state legislature. *Fabick v. Evers*, 2021 WI 28, ¶¶ 1-4, 956 N.W. 2d 856, 859 (Wis. 2021). The Wisconsin Supreme Court held that the governor "may not deploy his emergency powers by issuing new states of emergency of the same statutory occurrence." *Id.* The governor argued that, because there was a provision that allowed the legislature to pass a resolution to end a state of emergency, there existed an effective legislative check on his recurring use of the emergency powers provision, and therefore, absent revocation, his successive declarations were valid. *Id*. at ¶ 40. The argument was unpersuasive: "[w]hether the legislature exercises its authority to terminate an unlawfully declared state of emergency has no bearing on whether it was lawful." *Id.* Moreover, the argument proved specious over the course of the pandemic, as there was, after the original filing of the lawsuit, a revocation passed by the legislature, which the governor immediately answered by declaring a new state of emergency. *Id.* at ¶¶ 41-42. Tellingly, the governor's concession of a hypothetical "check" on his executive authority existed only when convenient—

when purely hypothetical—and that supposed principle was jettisoned as soon as it hindered his exercise of executive power.

Appellants can concede the obvious: an invocation of a state of emergency, and the executive's ensuing access to delegated legislative power associated with those extreme circumstances, is a different use of executive authority than summoning the legislature, and one with greater downside risks of abuse. Further, there is no specific durational limitation on the "extraordinary occasions" provision that would pave the way for identical reasoning on the present issue. Even so, the underlying point here is that courts *can* give weight to language of restriction; *can* umpire transparent efforts to circumvent constitutional or statutory rules; and the judiciary can, and should, order its coequal branches to operate within the confines of the Constitution.[4] And if these premises are true when the world is in the throes of a worldwide pandemic, they are also true when an extraconstitutional act occurs to further banal partisan gamesmanship.

III. Legislative leaders are not legislatively immune when acting with unconstitutional purposes.

[4] Although not directly raised as a dispositive issue the Superior Court Order, it is worth nothing that the relief sought does not have the effect of commanding the governor to perform official duties through mandamus or any such coercive judicial order. Rather, the act of judicial review to permit the courts to restrict unconstitutional acts are well within judicial authority. *See Kelly v. Curtis,* 287 A.2d 426, 429 (Me. 1972) (describing the Law Court's reluctance to engage in judicial coercion and reaffirming "the principle that one co-ordinate branch of government must refrain from ordering another branch to perform its official duty . . ."; *see also Portland Pipe Line Corp. v. Env't Improvement Comm'n*, 307 A.2d 1, 8 (Me.1973) ("[I]t is our duty, when called upon to do so by appropriate procedure, to test laws passed by legislative bodies to see that such laws are not wanting when measured against the proscriptions of our Charters.") (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The Superior Court also erred in ruling that the actions of Appellees Ross and Talbot are protected by "overlapping principles" of legislative immunity and separation of powers. APP 014. In effect, the Superior Court's analysis restricts itself to two findings: first, that the Legislature is to be left alone when it "exercises its discretion to reject or enact legislation," APP 014-15 (*citing Lightfoot v. State of Maine Legislature*, 583 A.2d 694, 694 (Me. 1990); and second, that the Maine Constitution commits solely to the Legislature "the authority to respond to a Governor's call for a special session and to legislate during it . . . ." APP 016. The underlying Amended Complaint, however, pleads a different case than that conceived by the Superior Court. First, as argued in Section III(A), the Appellees' actions are not narrowly about "rejecting or enacting" legislation, but rather focus on the substance of their coordination with, and concession of powers to, the executive, which are not shielded by the concept of legislative immunity and, instead, violate non-delegation principles. Second, in Section III(B), the Superior Court's concept of separation of powers wrongly prioritizes judicial modesty in the face of unconstitutional actions by the other branches. The Superior Court's Order should, respectfully, be reversed.

A. Appellees' actions do not constitute legitimate legislative activities.

In its Order on Appellees' Motion to Dismiss, the Superior Court found that "Speaker Ross and President Jackson acted within the sphere of legitimate

legislative activity, both in convening a special session pursuant to the Governor's proclamation and in passing laws regarding matters carried over from the regular session." APP 015-16. The findings strip the actions of their context. The Appellees acted with the Governor to undermine the Legislature's own affirmative *rejection* of a call to a special session, and moreover, facilitated the Governor's baseless invocation of an "extraordinary" power to conduct ordinary business. To protect these actions under the auspices of "legislative immunity" is to sanction actions that compromise constitutional values, which is not, of course, the purpose of an otherwise credible principle.

Legislative immunity "has its taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783 (1951). The so-called privilege of parliament "was principally established, in order to protect [its] members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown." *Cushing v. Packard*, 30 F.4th 27, 54 (1st Cir. 2022) (Thompson, C.J., dissenting) (quoting William Blackstone, 1 Commentaries on the Laws of England 159 (1765)). The principle comes with implied exceptions, though, as the U.S. Supreme Court has repeatedly noted the possibility that "there may . . . be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." *Kilbourn v. Thompson*, 103 U.S.

168, 204 (1880); *see also Tenney*, 341 U.S. at 378-7. Legislative immunity is not an absolute protection for anything loosely connected to legislative activity or inaction, and exists doctrinally to protect legislators in acting upon the will of their constituents, rather than to protect them from inconvenient legal reckoning.

In the present sense, the challenge to the legislator Appellees is that they improperly ceded the authority of the Legislature to set its own sessions in accordance with its powers under the Maine Constitution, thereby empowering the executive branch to dictate legislative activity beyond the scope of the Governor's legitimate "extraordinary occasions" authority. The consequence of this act is to diminish legislative autonomy and enlarge executive power. This consequence is not to be taken lightly: "It would conflict with the basic theory of American government if two branches of government, the legislative and the executive, by acting in concert were able, unchecked, to frustrate the mandates of the state constitution." *Common Cause v. State*, 455 A.2d 1, 9 (Me. 1983). Indeed, before the ratification of the federal constitution, the founders warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison) (Rossiter ed., 1999), p. 298. Here, the Appellees worked in tandem to frustrate a feature of the

constitution, which checks gubernatorial power to call for legislative action under limited conditions.

In deliberately ceding this authority to the Governor in conflict with its own expression of authority, the "legislative activity" cannot be called legitimate. This Court had noted that the line of demarcation between a legitimate and an illegitimate delegation of legislative power "is often quite dim." *Small v. Maine Bd. of Registration and Examination in Optometry,* 293 A.2d 786, 788 (Me. 1972). It is true that it is not an unlawful delegation of power if the legislature offers "an intelligible principle to which the person or body authorized to act is directed to conform." *Uliano v. Bd. of Envt'l Prot.,* 2009 ME 89, ¶ 30, 977 A.2d 400 (quotation marks omitted). Here, though, the Legislature exercised its authority to reconvene for a special session *by voting not to convene* on April 5, 2023; and it was Appellees, acting directly contrary to that affirmative legislative action taken under appropriate constitutional authority, who nevertheless ordered the Legislature to convene upon receipt of the Governor's pretextual proclamation. Whatever "principle" guided the Appellees, the actions cannot be said to further constitutional interests. This apparent delegation of power directly undermines the Legislature's self-direction, blurs the autonomy of the respective branches, and belies the concerning collusion between key members of the legislative and executive branches. The Appellees used unconstitutional chicanery to disenfranchise state representatives. Legislative

immunity does not apply to legislators who collaborate with the Governor to circumvent constitutional safeguards. For those reasons, the Order granting the Motion to Dismiss on legislative immunity grounds should be reversed.

B. Although the Legislature can respond to a governor's unconstitutional actions any number of ways, that irrelevant truism is no rationale for judicial non-interference on separation of powers grounds.

From the initial premise of mischaracterizing the specific actions of Appellees Talbot Ross and Jackson as being legislative in nature, the Superior Court demurred at its own role in reviewing the "legislative" response to Governor Mills's call for a specials session hours after the Legislature rejected, under its own authority, a call for a special session. The Order finds that "the authority to respond to a Governor's call for a special session and to legislate during it are demonstrably committed to the Legislature," and that "the [c]ourt[s] cannot encroach upon the functions of the Legislature." APP 016. But even if one were to call Appellees' actions "legislative" in nature, the court's conclusion assumes a duty of deference from the courts that is neither warranted nor desirable. The separation of powers is vitally important—hence Appellants' bringing this lawsuit—but that doctrine is not meant to bully the judiciary into inaction just because other branches have discretion to respond differently to one branch's unconstitutional action.

Even if the Appellees were acting within the sphere of "legislative activity," the courts have no corresponding obligation to sit on their hands. "[T]he separation

of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government." *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). The lower court read this mandate to order judicial deference, but the opposite conclusion is compelled. "Like the federal courts, 'our constitutional structure does not require that the Judicial Branch shrink from a confrontation with the other two coequal branches.'" *Senate v. Sec'y of State*, 2018 ME 52, ¶ 28, 183 A.3d 749 (citation and quotation marks omitted). As the U.S. Supreme Court has stated, "courts possess power to review either legislative or executive action that transgresses [the] identifiable textual limits [of the Constitution]." *Nixon v. United States*, 506 U.S. 224, 238, 113 S.Ct. 732 (1993). Indeed, the functioning of government depends on the judiciary playing its part by rendering decisions of constitutional consequence: "In furtherance of the fundamental powers and authority of the separate branches, the Maine Constitution must be read to support the exercise of the applicable powers of each branch." *Opinion of the Justices*, 2015 ME 107, ¶ 44, 123 A.3d 494. The domain of the courts is to call out unconstitutional actions, rather than balk at the idea of interference.

This sentiment was echoed by the Vermont Supreme Court, when reviewing a claim brought by two state legislators against the outgoing governor, the latter who presumed authority to appoint the successor for a retiring Vermont Supreme Court Justice even though the seat would not be vacant until after the governor's term

ended: "Not every gubernatorial action is a political question immune from judicial scrutiny, regardless of whether it comports with the Constitution. The issue here is not executive discretion or prerogative, but rather the meaning of the Vermont Constitution, which this Court must determine." *Turner v. Shumlin*, 2017 VT 2, ¶ 21, 204 Vt. 78, 163 A.3d 1173. The Vermont Supreme Court held that the governor had overreached in nominating a supreme court judge when no vacancy would open up until after the governor's term ended—which holding made regardless of whether the state legislature acted on or ignored his nomination. *Id.* ¶ 31. If the Superior Court were to apply its logic to the *Turner* case, the resulting holding might say: 'it is solely up to the individual legislators to respond to the Governor's unconstitutional use of the authority to nominate judges as they themselves see fit, and the court cannot put its finger on the scale one way or the other.' While judicial noninterference has its time and place, it is not compelled to benefit governmental actors facilitating and furthering unconstitutional acts. The Order should be reversed.

CONCLUSION

There is certainly another aspect to this lawsuit that towers over arguments about constitutional interpretation. Appellants do not pretend to ignore the political ramifications of their requested relief. In the many months in which this litigation has slowly simmered, the prospect of nullifying the many bills enacted by the Legislature and signing into law by the Governor poses a daunting political

consequence. The courts are understandably reluctant to use their own power of judicial review where the effect of its decision will boom across the country.

But in tension with that fear of political disruption is the animating motive of Appellants' lawsuit: the fear that an imperious executive, a collaborative legislature, and a demurring judiciary will send Maine adrift from its deliberate, constitutional framework. Drifting too far down this particular course portends disenfranchisement, weakened civil liberties, emboldened governmental abuse, political extremism, inefficiency, corruption, and so on.

The Appellees' position will circle back to cynical ideas that the Law Court has no business weigh in on this issue, that any judicial act to limit the executive power grab witnessed in March 2023 would lack propriety, that legislators can collude with the governor to circumvent constitutional provisions that inconvenience the governor or either majority party; that this Court should stay in its lane. Those appeals to judicial modesty mask a self-serving interest that the judiciary is empowered to thwart. If the Court sides with the Appellees, if the Governor's use of this power is beyond the Court's purview, *if the abuse is too great to be restrained*, we are kidding ourselves to call these branches "coequal."

Dated: January 22, 2024

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CERTIFICATE OF SERVICE

I, Carl E. Woock, Esq., certify that on the date indicated below, I have sent two copies of the Appellants' Brief to the party listed below by email and U.S. Mail, first-class, postage prepaid, addressed as listed below:

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