MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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Law Docket No. Ken-23-426

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**WILLIAM CLARDY, ET AL.**

(*Appellants*)

v.

**TROY D. JACKSON, ET AL.**

(*Appellees*)

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On Appeal from the Kennebec County Superior Court

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# APPENDIX

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## APPENDIX TABLE OF CONTENTS

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vs
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AUGUSTA ME 04333
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KIMBERLY L PATWARDHAN - RETAINED
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AUGUSTA ME 04333-0006

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AUGUSTA ME 04333

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CV-2023-00052

**DOCKET RECORD**

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Filing Document: COMPLAINT Minor Case Type: CONSTITUTIONAL/CIVIL RIGHTS
Filing Date: 04/10/2023

## Docket Events:

04/10/2023 FILING DOCUMENT - COMPLAINT FILED ON 04/10/2023

04/24/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS
OTHER FILING - ENTRY OF APPEARANCE FILED ON 04/18/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN

04/24/2023 Party(s): TROY D JACKSON
ATTORNEY - RETAINED ENTERED ON 04/18/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN

Party(s): RACHEL TALBOT ROSS
ATTORNEY - RETAINED ENTERED ON 04/18/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN

Party(s): JANET T MILLS
ATTORNEY - RETAINED ENTERED ON 04/18/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN

04/28/2023 Party(s): WILLIAM CLARDY
SUPPLEMENTAL FILING - AMENDED COMPLAINT FILED ON 04/27/2023

05/04/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS
MOTION - MOTION FOR ENLARGEMENT OF TIME FILED ON 04/28/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN
CONSENTED-TO MOTION TO EXTEND TIME TO RESPOND TO AMENDED COMPLAINT.

05/10/2023 CASE STATUS - CASE FILE LOCATION ON 05/10/2023
M MICHAELA MURPHY , JUSTICE
IN CHAMBERS

05/16/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS
MOTION - MOTION TO DISMISS FILED ON 05/12/2023
WITH MEMORANDUM OF LAW, DRAFT ORDER, NOTICE OF HEARING

05/18/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS

MOTION - MOTION FOR ENLARGEMENT OF TIME GRANTED ON 05/17/2023
M MICHAELA MURPHY , JUSTICE
COPIES TO PARTIES/COUNSEL

06/20/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS
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06/20/2023 ORDER - COURT ORDER ENTERED ON 06/20/2023
M MICHAELA MURPHY , JUSTICE
ORDERED INCORPORATED BY REFERENCE AT THE SPECIFIC DIRECTION OF THE COURT. COPIES TO PARTIES/COUNSEL ORDER ON MOTION TO DISMISS

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M MICHAELA MURPHY , JUSTICE
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06/20/2023 FINDING - FINAL JUDGMENT CASE CLOSED ON 06/20/2023

06/21/2023 Party(s): TROY D JACKSON,RACHEL TALBOT ROSS,JANET T MILLS
OTHER FILING - REPLY MEMORANDUM FILED ON 06/16/2023
Defendant's Attorney: KIMBERLY L PATWARDHAN
REPLY TO SUPPORT MOTION TO DISMISS

06/22/2023 Party(s): WILLIAM CLARDY
OTHER FILING - OPPOSING MEMORANDUM FILED ON 06/02/2023
Plaintiff's Attorney: CARL E WOOCK
PLTFS OPPOSITION TO MOTION TO DISMISS DOCKETED LATE DID NOT GET ENTERED UNTIL AFTER DECISION ON MOTION TO DISMISS WAS MADE

06/22/2023 ORDER - COURT ORDER VACATED ON 06/22/2023
M MICHAELA MURPHY , JUSTICE
DUE TO CLERICAL ERROR OPPOSITION WAS NOT TIMELY PRESENTED. ORDER OF 6/20/23IS VACATED.
ORAL ARGUMENT TO BE SET AS SOON AS REPLY IS FILED.

06/22/2023 Party(s): WILLIAM CLARDY
ATTORNEY - RETAINED ENTERED ON 06/22/2023
Plaintiff's Attorney: CARL E WOOCK

Party(s): MICHELLE TUCKER
ATTORNEY - RETAINED ENTERED ON 06/22/2023
Plaintiff's Attorney: CARL E WOOCK

Party(s): SHELLEY RUDNICKI
ATTORNEY - RETAINED ENTERED ON 06/22/2023
Plaintiff's Attorney: CARL E WOOCK

Party(s): RANDALL GREENWOOD
ATTORNEY - RETAINED ENTERED ON 06/22/2023
Plaintiff's Attorney: CARL E WOOCK

Party(s): RESPECT MAINE
ATTORNEY - RETAINED ENTERED ON 06/22/2023
Plaintiff's Attorney: CARL E WOOCK

06/22/2023 ORDER - COURT ORDER ENTERED ON 06/22/2023
M MICHAELA MURPHY , JUSTICE
ORDERED INCORPORATED BY REFERENCE AT THE SPECIFIC DIRECTION OF THE COURT. COPIES TO PARTIES/COUNSEL DISMISSAL IS VACATED DUE TO CLERICAL ERROR

06/28/2023 CASE STATUS - CASE FILE RETURNED ON 06/28/2023

06/28/2023 HEARING - MOTION TO DISMISS SCHEDULED FOR 07/07/2023 at 09:15 a.m. in Room No. 4

06/28/2023 HEARING - MOTION TO DISMISS NOTICE SENT ON 06/28/2023

06/30/2023 MOTION - MOTION TO CONTINUE FILED ON 06/29/2023

07/06/2023 MOTION - MOTION TO CONTINUE GRANTED ON 07/06/2023
M MICHAELA MURPHY , JUSTICE
COPIES TO PARTIES/COUNSEL CLEAR TO RESET POSS 7/14/23

07/06/2023 HEARING - MOTION TO DISMISS NOT HELD ON 07/06/2023
CONTINUED

07/10/2023 HEARING - MOTION TO DISMISS SCHEDULED FOR 07/14/2023 at 01:00 p.m. in Room No. 4

07/10/2023 HEARING - MOTION TO DISMISS NOTICE SENT ON 07/10/2023

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07/24/2023 OTHER FILING - OTHER DOCUMENT FILED ON 07/24/2023
REQUEST FOR TRANSCRIPT AUDIO BY WILLIAM CLARDY MAILED 7/24/23

09/18/2023 Party(s): WILLIAM CLARDY,MICHELLE TUCKER,SHELLEY RUDNICKI,RANDALL GREENWOOD,RESPECT MAINE
LETTER - FROM PARTY FILED ON 09/15/2023
Plaintiff's Attorney: CARL E WOOCK
LETTER ASKING ABOUT STATUS OF COURTS ORDER ON DEFENDANTS MOTION TO DISMISS.

10/13/2023 ORDER - COURT ORDER ENTERED ON 10/13/2023
M MICHAELA MURPHY , JUSTICE
ORDERED INCORPORATED BY REFERENCE AT THE SPECIFIC DIRECTION OF THE COURT. COPIES TO PARTIES/COUNSEL
ORDER ON MOTION TO DISMISS GRANTED

10/27/2023 Party(s): WILLIAM CLARDY,MICHELLE TUCKER,SHELLEY RUDNICKI,RANDALL GREENWOOD,RESPECT MAINE
APPEAL - NOTICE OF APPEAL FILED ON 10/20/2023
Plaintiff's Attorney: CARL E WOOCK

10/27/2023 Party(s): WILLIAM CLARDY,MICHELLE TUCKER,SHELLEY RUDNICKI,RANDALL GREENWOOD,RESPECT MAINE
OTHER FILING - TRANSCRIPT ORDER FORM FILED ON 10/20/2023

Plaintiff's Attorney: CARL E WOOCK
TRANSCRIPT AND AUDIO ORDER FORM

FORM COMPLETED AND FORWARDED TO
TRANSCRIPT OFFICE 11/7/23 BY CTA CATHERINE SMITH

11/22/2023 TRANSFER - TEMPORARY TRANSFER GRANTED ON 11/22/2023
TRANSFERED TO LAW COURT ON APPEAL

## Receipts

| | | | |
|---|---|---|---|
| 04/10/2023 | Misc Fee Payments | $175.00 | paid. |
| 07/21/2023 | Misc Fee Payments | $25.00 | paid. |
| 10/27/2023 | Misc Fee Payments | $25.00 | paid. |
| 10/27/2023 | Misc Fee Payments | $150.00 | paid. |

A TRUE COPY
ATTEST: Tamara M. Rueda
Clerk

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-23-52

WILLIAM CLARDY, et al.,

Plaintiffs,

v.

TROY D. JACKSON, in his official capacity as President of the Maine Senate; RACHEL TALBOT ROSS, in her official capacity as Speaker of the Maine House of Representatives; and JANET MILLS, in her official capacity as Governor of the State of Maine,

Defendants.

**ORDER ON MOTION TO DISMISS**

This case arises from Governor Mills's March 31, 2023 proclamation convening a special session of the Legislature, pursuant to which President Jackson, Speaker Ross, and other members of the Legislature assembled. Plaintiffs—consisting of taxpayers, a non-profit organization, and two members of the Maine Legislature—challenge the constitutionally of Defendants' actions, and have filed an Amended Complaint seeking declaratory and injunctive relief pursuant to the Declaratory Judgments Act, 14 M.R.S. § 5951, *et seq*. In the currently pending motion, Defendants ask the Court to dismiss the Amended Complaint in its entirety pursuant to M.R. Civ. P. 12(b)(1) and M.R. Civ. P. 12(b)(6). For the reasons that follow, Defendants' motion is granted.

BACKGROUND

Maine legislators serve two-year terms, with the Legislature holding a session during each of these years. 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. *See* Me. Const. art. IV, pt. 3, § 1. The statutory deadline for the end of the First Regular Session is the third Wednesday in June. *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 statutory deadline for the end of the Second Regular Session is the third Wednesday in April. *See* 3 M.R.S. § 2.[1]

In addition to the First and Second Regular Sessions, "special sessions" may be called by the Legislature and the Governor. Me. Const. art. IV, pt. 3, § 1; art. V, pt. 1, § 13. A special session may be convened by the Legislature, "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." Me. Const. art. IV, pt. 3, § 1. The Governor, meanwhile, may convene the Legislature "on extraordinary occasions." Me. Const. art. V, pt. 1, § 13.

The events giving rise to the present action began on March 30, 2023. On that day, the First Regular Session of the 131st Maine Legislature passed an appropriations bill for the upcoming fiscal years. Pls.' Am. Compl. ¶ 23. To assure the continuous funding of government operations, the appropriations legislation needed to take effect no later than July 1, 2023. Pls.' Am. Compl. ¶¶ 28-30. While emergency legislation passed by a legislative supermajority takes effect immediately upon the Governor signing it into law (Pls.' Am. Compl. ¶ 31; Me. Const. art. IV, pt. 3, § 16), nonemergency legislation passed by a simple majority takes effect 90 days after

[1] While the Maine Constitution does not limit the type of business that may be conducted during the First Regular Session, it limits the business of the Second Regular Session to budgetary matters, legislation in the Governor's call, and other specifically enumerated items. *See* Me. Const. art. IV, pt. 3, § 1.

the legislature "recess[es]," i.e., adjourns *sine die*.[2] Me. Const. art. IV, pt. 3, § 16; *Opinion of Justices*, 2015 ME 107, ¶ 37, 123 A.3d 494.

The facts of what occurred are not really in dispute and are well described in Amended Complaint filed by Plaintiffs. The appropriations bill, which was passed by only a simple majority, was nonemergency legislation; thus, its effective date was dependent on the timing of the Legislature's adjournment *sine die*. Pls.' Am. Compl. ¶¶ 25-27; Me. Const. art. IV, pt. 3, § 16. As a practical matter, this meant that the Legislature needed to adjourn *sine die* sufficiently 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. Pls.' Am. Compl. ¶¶ 28-30.

Apparently mindful of this timeline, the Maine Legislature adjourned *sine die* on March 30, 2023 following its passage of the appropriations bill. Pls.' Am. Compl. ¶¶ 43, 46. Their adjournment *sine die* was significant not only because of the resulting impact on the effective date of the appropriations legislation, but also because it officially marked the end of the First Regular Session. Pls.' Am. Compl. ¶ 16. 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." Pls.' Am. Compl. ¶¶ 41-42.

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. Pls.' Am. Compl. ¶¶ 33-37; Me. Const. art. IV, pt. 3, § 1. Those polls revealed that a majority of only *one* political party

[2] "*Sine die*" is the Latin term for "without day." *Opinion of Justices*, 2015 ME 107, ¶ 16 n.3, 123 A.3d 494.

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. Pls.' Am. Compl. ¶¶ 36-37; Me. Const. art. IV, pt. 3, § 1.

On March 31, 2023, Governor Mills issued a proclamation declaring an extraordinary occasion and convening the Legislature for a special session. Pls.' Am. Compl. ¶¶ 48, 51; Ex A. 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.

Pls.' Am. Compl. Ex A.

Pursuant to the Governor's call, the 131st Legislature convened its First Special Session on April 5, 2023. Pls.' Am. Compl. ¶¶ 63-64; *Opinion of the Justices*, 2023 ME 34, ¶ 6, 295 A.3d 1212. 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*." Pls.' Am. Compl. ¶¶ 64, 66.

By Amended Complaint dated April 27, 2023, Plaintiffs contend that the special session of the Legislature ordered by the Governor and conducted by Defendants Jackson and Ross violates the Maine Constitution. In Count I, Plaintiffs ask the Court to declare the Governor's proclamation unconstitutional and enjoin the Legislature from convening pursuant to the Governor's call. Count II seeks declaratory and injunctive relief halting the legislative work of the First Special Session; nullifying the legislation passed during the special session; and requiring that all matters "not finally disposed of at the time of [the Legislature's] adjournment sine die . . . remain held over . . . until the legislature reconvenes in a manner consistent with the Maine State Constitution."

Defendants thereafter moved to dismiss the Amended Complaint in its entirety, raising issues regarding standing, legislative immunity, separation of powers, and the reviewability of the Governor's proclamation, *inter alia*. As this case raises a number of significant legal questions of first impression, the Court encouraged the parties to agree to a report of at least some of those questions directly to the Law Court pursuant to Rule 24 of the Maine Rules of Appellate Procedure. Ultimately, however, the parties could not reach an agreement to do so. Defendants' motion to dismiss is therefore in order for decision.

## STANDARD OF REVIEW

To the extent Defendants challenge this Court's jurisdiction over Plaintiffs' claims pursuant to M.R. Civ. P. 12(b)(1), that presents a question of law. *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335. "When a motion to dismiss is based on the court's lack of subject matter jurisdiction, [the court] make[s] no favorable inferences in favor of the plaintiff." *Id.*

A motion to dismiss under M.R. Civ. P. 12(b)(6), meanwhile, "tests the legal sufficiency of the complaint." *Livonia v. Town of Rome*, 1998 ME 39, ¶ 5, 707 A.2d 83. "For purposes of a

Rule 12(b)(6) motion, the material allegations of the complaint must be taken as admitted." *Id.* "In reviewing a dismissal, [the court] will examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* "A dismissal should occur when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claims." *Id.* (quotation marks omitted).

DISCUSSION

Among other reasons, Defendants contend that dismissal is required because the Governor's proclamation is not subject to judicial review and because principles of legislative immunity and separation of powers otherwise preclude the Court from granting the relief requested.[3] For the reasons below, the Court agrees.

**A. The Governor's Proclamation is Not Subject to Judicial Review**

In her proclamation, the Governor relied on her constitutional authority in Article V, Part I, Section 13 to convene a special session of the Legislature based on an "extraordinary occasion." The Governor did not claim any constitutional authority to order an extension of the First Regular Session or otherwise alter the length of a regular session of the Legislature. The Amended Complaint acknowledges as much, recognizing that the Governor called for a special

[3] Additionally, Defendants ask the Court to dismiss the Amended Complaint on the basis of standing and because the Declaratory Judgments Act ("DJA") does not provide a cause of action. Given the Court's disposition of this matter on the separate grounds discussed herein, the Court need not address the issues of standing raised by Defendants. Rather, for purposes of this motion, the Court assumes without deciding that at least one Plaintiff has standing to bring this action. Similarly, the Court need not conclusively resolve whether the DJA provides a cause of action, other than to note that Defendants' position is seemingly at odds with recent decisions of the Law Court. *See, e.g., Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882.

session after the First Regular Session officially adjourned *sine die*. Pls.' Am. Compl. ¶¶ 46, 51. Plaintiffs furthermore do not deny the Governor's constitutional authority to call a special session in certain circumstances, i.e., when an "extraordinary occasion" necessitates it. Me. Const. art. V, pt. 1, § 13. Rather, Plaintiffs assert that the Governor "contrived an 'extraordinary occasion'" and that "unfinished legislative business" does not constitute an "extraordinary occasion" upon which to call a special session. Pls.' Am. Compl. ¶¶ 76-78. Indeed, the notion that there was no *legitimate* "extraordinary occasion" is central to most of the claims in the Amended Complaint.

The Court, however, concludes that the critical premise underlying the Amended Complaint—that the Governor erroneously declared an "extraordinary occasion"—is not subject to judicial review, as the Governor enjoys plenary authority to determine when there is an extraordinary occasion for convening the Legislature. While there are few decisions addressing the Governor's constitutional power to call a special session pursuant to Article V, Part I, Section 13, the Supreme Judicial Court ("SJC") opined on the Governor's authority in *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940). In that case, the Governor declared an extraordinary occasion and issued a proclamation convening a special session. *Id.* The question before the court was whether the Governor could revoke the initial proclamation by issuing a subsequent proclamation before the Legislature convened. *Id.* at 420. The SJC answered this question in the affirmative.

While the court acknowledged that there was no express constitutional provision authorizing the Governor to revoke a call, it reasoned that "such power [wa]s necessarily inferable from that clearly granted." *Id.* Notably, the court looked to the clear grant of authority in Article V, Part I, Section 13, which provides that the Governor "'may, on extraordinary

occasions, convene the Legislature.'" *Id.* (quoting Me. Const. art. V, pt. 1, § 13). The SJC continued: "*The Governor alone is the judge of the necessity for such action, which is not subject to review.*" *Id.* (emphasis added). In keeping with the Governor's plenary authority in this regard, the SJC concluded that the Governor had the discretion to revoke his earlier call for a special session. *Id.* Moreover, "[s]uch revocation, if made, would not preclude the Governor from issuing a new Proclamation to convene the Legislature in Special Session at a date certain, if and when, in his judgment, occasion may require . . . ." *Id.*

While Plaintiffs seek to dismiss the above-italicized language as mere dicta, the notion that Article V, Part I, Section 13 vests absolute power in the Governor was critical to the SJC's ultimate conclusion regarding the Governor's discretion to revoke a call. And although *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940), constitutes a nonbinding advisory opinion, it nevertheless "provide[s] necessary guidance and analysis for decision-making by the other branches of government." *Opinion of the Justices*, 2023 ME 34, ¶ 9, 295 A.3d 1212.

Even if the language is dicta, the Cout finds no reason to reject it as unsound. In Article V, Part I, Section 13, the authority to convene the Legislature upon extraordinary occasions is textually committed to the Governor. Me. Const. art. V, pt. 1, § 13. The constitution does not define what constitutes an "extraordinary occasion," nor does it refer the settlement of such a question to the judicial branch. *McConnell v. Haley*, 711 S.E.2d 886, 887 (S.C. 2011); *Farrelly v. Cole*, 56 P. 492, 498 (Kan. 1899). The text of the constitution therefore suggests that "[t]he Governor alone is the judge of the necessity for [calling a special session]" pursuant to Article V, Part I, Section 13. *In re Opinion of the Justices*, 12 A.2d 418, 420 (Me. 1940). Moreover, contrary to Plaintiffs' suggestions, a conclusion in this regard does not mean that the Governor may abuse the power in Article V, Part I, Section 13 without recourse. Indeed, the Legislature's

power to impeach places a necessary check on governors who abuse their authority. *See* Me. Const. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7.[4]

In short, the Court finds it appropriate to adhere to the principle articulated in *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940): The Cour concludes that the Governor alone is the judge of what constitutes an extraordinary occasion for convening the Legislature, and her determination is not subject to judicial review. Accordingly, any error in the Governor's decision to call a special session does not provide a basis for judicial relief.

**B. Legislative Immunity and Separation of Powers**

To the extent Plaintiffs seek relief based on the actions of Speaker Ross and President Jackson—including their assembling of the Legislature pursuant to the Governor's proclamation and their consideration of "legislative items which had not been finally disposed of at the time of the March 30, 2023, adjournment *sine die*" (Pls.' Am. Compl. ¶ 64) —overlapping principles of legislative immunity and separation of powers prevent the Court from granting the relief requested.

Under the Maine Constitution, governmental powers are "divided into 3 distinct departments, the legislative, executive and judicial." Me. Const. art. III, § 1. The separation of powers provision provides that "[n]o person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. The Law Court has held that the "Legislature acts within its constitutional sphere of activity when it exercises discretion to reject

[4] That the Governor enjoys plenary authority to determine what constitutes an "extraordinary occasion" is likewise consistent with the prevailing view articulated by courts in other jurisdictions. *See, e.g., McConnell*, 711 S.E.2d at 887; *In re Platz*, 108 P.2d 858, 863 (Nev. 1940); *Bunger v. State*, 92 S.E. 72, 73 (Ga. 1917); *Farrelly*, 56 P. at 496-500.

or enact legislation." *Lightfoot v. State of Me. Legislature*, 583 A.2d 694, 694 (Me. 1990). Thus, "[t]o preserve legislative independence within this sphere of legitimate legislative activity[,] the Legislature enjoys absolute common law immunity from" actions seeking declaratory and injunctive relief. *Id.*

Moreover, as a matter of justiciability, the Court must be satisfied that its adjudication of an issue observes constitutionally-mandated separation of powers. *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 27, 183 A.3d 749 ("the requirement of justiciability demands that our authority to decide a matter is limited by that most basic tenet of our governmental structure—the constitutionally-mandated separation of powers"). Article III, Section 2 "'does not require that the Judicial Branch shrink from a confrontation with the other two coequal branches.'" *Id.* ¶ 28. However, the Court should "refus[e] to adjudicate matters where the adjudication 'would involve an encroachment upon the executive or legislative powers.'" *Id.* The relevant inquiry is whether the particular power has been "explicitly granted to one branch of state government, and to no other branch." *State v. Hunter*, 447 A.2d 797, 800 (Me. 1982). If the answer is yes, "article III, section 2 forbids another branch to exercise that power." *Id.* This approach is akin to a standard used by federal courts to ascertain whether an issue is nonjusticiable as a "political question"; that standard asks "whether there is a 'textually demonstrable constitutional commitment' of the issue to another branch of the government." *Id.* at 800 n.4.

Here, in keeping with separation of powers principles, the Court concludes that Speaker Ross and President Jackson are entitled to legislative immunity, and in any event, Plaintiffs' challenges to their actions are nonjusticiable. 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.

The Maine Constitution does not dictate how the Legislature must respond to a Governor's call for a special session or describe any circumstances warranting repudiation of such a call. Nor does it limit the scope of the Legislature's power upon being called into session by the Governor. Rather, the constitution states that the Legislature "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." Me. Const. art. IV, Pt. 3, § 1. There is no constitutional language limiting this "full power and authority" to a regular session or prohibiting the Legislature's consideration of material carried over from a prior session. Under these circumstances, the Court concludes that Speaker Ross and President Jackson are entitled to legislative immunity, as their actions were within the sphere of legitimate legislative activity.

Under the Maine Constitution, the authority to respond to a Governor's call for a special session and to legislate during it are demonstrably committed to the Legislature. Therefore, where such a commitment exists, the Court cannot encroach upon the functions of the Legislature. Accordingly, the Court separately concludes that the challenges directed at Speaker Ross and President Jackson are nonjusticiable.

## CONCLUSION

**The entry is**: Based on the foregoing, Defendants' motion to dismiss the Amended Complaint is GRANTED.

The clerk is directed to incorporate this order on the docket by reference pursuant to M.R. Civ. P. 79(a).

**Date: October 13, 2023**

**Michaela Murphy**
**Justice, Maine Superior Court**

State of Maine
Kennebec, ss

Superior Court
Civil Action
Docket No. AUGSC-CV-2023-00052

William Clardy of Augusta, ME; and
Does 1-600

Plaintiffs

v.

Troy D. Jackson, in his official capacity as President of the Senate of Maine; Rachel Talbot Ross, in her official capacity as the Speaker of the Maine House of Representatives; and Janet T. Mills, in her official capacity as the Governor of the State of Maine

Defendants

Complaint for Declaratory Judgment and Injunctive Relief

Now comes William Clardy et al ("Plaintiffs") and hereby complain against Troy D. Jackson, in his official capacity as President of the Senate of Maine; Rachel Talbot Ross, in her official capacity as the Speaker of the Maine House of Representatives; and Janet T. Mills, in her official capacity as the Governor of the State of Maine, as follows:

**Parties**

1. William Clardy is a citizen, registered voter, and taxpayer in the State of Maine.

2. Does 1-600 are people of and taxpayers in the State of Maine.

3. Defendant Troy Jackson is the President of the Maine Senate and is sued in his official capacity only. As President of the Senate, Defendant Jackson is a presiding officer in the 131st Legislature of Maine, which ended its first regular session by adjourning *sine die* on March 30, 2023.

4. Defendant Rachel Talbot Ross is the Speaker of the Maine House of

Representatives and is sued in her official capacity only. As Speaker of the House, Defendant Talbot Ross is a presiding officer in the 131st Legislature of Maine, which ended its first regular session by adjourning *sine die* on March 30, 2023.

5. Defendant Janet Mills is the Governor of the State of Maine and is sued in her official capacity only. As the supreme executive power of the State, the Governor is constitutionally barred from exercising any legislative power.

**Jurisdiction and Venue**

6. This Court has initial civil jurisdiction over Plaintiff's claims under 4 M.R.S.A. §105, although Plaintiff believes that some aspects of allegations are likely to fall within the jurisdiction of Supreme Judicial Court sitting as the Law Court.

7. Initial venue is properly in the Kennebec County Superior Court. Defendants Jackson, Talbot Ross and Mills conduct their official business in Augusta. In addition, Plaintiff Clardy resides within the City of Augusta.

**Statement of Facts**

1. The date on which the Legislature adjourns *sine die* is legally significant. The Maine Constitution prescribes 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)

2. The Maine Constitution provides that "The Legislature shall enact appropriate statutory limits on the length of the first regular session and of the second regular session." (Me. Const. art. IV, pt. 2, § 1)

3. 3-AM.R.S. § 2 provides that, "The first regular session of the Legislature, after its convening, shall adjourn no later than the 3rd Wednesday in June and the 2nd regular session of the Legislature shall adjourn no later than the 3rd Wednesday in April. The Legislature, in case of emergency, may by a vote of 2/3 of the members of each House present and voting, extend the date for adjournment for the first or 2nd regular session by no more than 5 legislative days, and in case of further emergency, may by a vote of 2/3 of the members of each House present and voting, further extend the date for adjournment by 5 additional legislative days." (Me. Const. art. IV, pt. 3, § 16)

4. No statutory limits are defined for legislative sessions except for the limits on the First and Second Regular Sessions.

5. In 2023, the third Wednesday of June falls on June 21, 2023.

6. The State of Maine's fiscal year 2023-24 ("FY 23-24") begins on July 1, 2023. Fiscal year 2022-2023 ("FY 22-23") ends on June 30, 2023.

7. If the Legislature adjourned on its statutory final day, no non-emergency appropriation could take effect before the end of FY 22-23.

8. On March 30, 2023, both houses of the 131st Maine Legislature passed "An Act Making Certain Appropriations and Allocations and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2023, June 30, 2024, and June 30, 2025." L.D. 424 (131st Legis. 2023) At approximately 9:56 p.m., the Maine House voted 76-48 to pass L.D. 424 to be enacted. At approximately 10:31 p.m., the Maine Senate also passed L.D. 424 to be enacted.

9. Having not been passed with a two-thirds majority in the Maine House, L.D. 424 could not become law until 90 days after the Legislature adjourned *sine die*. If the Legislature had

not adjourned until after April 2, 2023, FY 22-23 would expire before L.D. 424's funding provisions for FY 23-24 could take effect, creating a gap where no expenditure of state funds would be legal. If the Legislature had not adjourned until after April 2, 2023, none of L.D. 424's adjustments would take effect in time to affect FY 22-23. The next scheduled meetings of the Senate and the House were past those deadlines.

10. Having voted to enact L.D. 424 with a simple majority, the majority party's only option for making it take effect in time to avoid a majority-induced shutdown was to immediately adjourn the Legislature *sine die*. At approximately 10:52 p.m. on March 30, 2023, the Maine Senate passed a motion to adjourn *sine die*. At approximately 11:04 p.m., the Maine House of Representatives also passed a motion to adjourn *sine die*. At that moment, the First Regular Session of the 131st Legislature was officially adjourned.

11. The Maine Constitution provides that, "The Legislature may convene 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." (Me. Const. art. V, pt. 2, § 1)

12. Shortly after 10:00 p.m., almost immediately after the House's vote to pass L.D. 424, Defendant Talbot Ross called for a division of the House to "poll members to reconvene for the 1st Special Session to be held on Wednesday, April 5, 2023." Prior to their adjournment, the next meeting of the House during the First Regular Session was scheduled for April 5, 2023. This means that the presiding officer of the House paused the proceedings to poll the members of the House, asking for their consent to reconvene on the same day they would be meeting if they chose not to adjourn – effectively, asking for their consent to adjourn for no significant length of time.

13. The polling of the members was completed before any motion was made to adjourn. At approximately 10:50 p.m., Defendant Jackson announced the results of that poll: 95 out of 103 members of one party consented to reconvene and none of the 80 members of the other party consented to reconvene. Because only one party consented to reconvene on the date proposed by Defendant Talbot Ross, the Defendants Jackson and Talbot Ross would not be able to immediately reconvene the Legislature on their own authority as presiding officers of the Legislature.

14. On March 31, 2023, Defendant Mills issued a proclamation declaring that, "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." Predicated on that extraordinary occasion, Defendant Mills' proclamation called for the Legislature to convene for a special session and to assemble "in their respective chambers" on April 5, 2023, the same day that they had been scheduled to meet prior to their official adjournment. Defendant Mills' proclamation also added "and whatever other business may come before the legislature" to the matters she mandated the Legislature to address.

15. The Maine Constitution provides that "The Governor may, on extraordinary occasions, convene the Legislature." Me. Const. art. V, pt. 1, § 13

16. As a comparative standard for "extraordinary occasions," Plaintiffs note that during the 8½-month interval between the early adjournment of the 129th Legislature's Second Regular Session on March 17, 2020, and the convening of the 130th Legislature's First Regular Session on December 2, 2020 – the first several months of the 15-month declared civil emergency declared in response to a pandemic – Defendant Mills declined to use her authority to

convene a special session of the Legislature for extraordinary circumstances at any time during the pandemic, preferring to issue executive orders explicitly suspending and modifying statutes and even unilaterally rescheduling the primary election of that year.

17. Article III, Section 1 of the Maine Constitution provides that "The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial." Article III, Section 2 of the Maine Constitution further provides that "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." (Me. Const. art. III, § 2)

18. It is constitutionally routine for the Legislature to adjourn their first regular session with unfinished business. The Maine Constitution calls for each Legislature to "convene on the first Wednesday after the first Tuesday of January in the subsequent even-numbered year in what shall be designated the second regular session of the Legislature; provided, however, that the business of the second regular session of the Legislature shall be limited to budgetary matters; legislation in the Governor's call; legislation of an emergency nature admitted by the Legislature; legislation referred to committees for study and report by the Legislature in the first regular session; and legislation presented to the Legislature by written petition of the electors under the provisions of Article IV, Part Third, Section 18." (Me. Const. art. IV, pt. 3, § 1)

19. On March 30, 2023, both houses of the 131st Maine Legislature jointly ordered that "all matters not finally disposed of at the time of adjournment of the First Regular Session of the 131st Legislature in the possession of the Legislature, including working papers and drafts in the possession of nonpartisan staff offices, gubernatorial nominations and all determinations of the Legislative Council regarding after-deadline bill requests and policies, be held over 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." S.P. 594 (131st Legis. 2023) At approximately 10:27 p.m. on that date, the Senate voted to pass S.P. 594 as a joint order. Twenty minutes later, the House of Representatives passed S.P. 594 in concurrence with the Senate, making it official that the intent of the Legislature was to adjourn with unfinished business carrying over to a subsequent session.

20. At approximately 11:00 p.m. on March 30, 2023, Representative Nathan Carlow made a parliamentary inquiry in anticipation of the Maine House's motion to adjourn *sine die*, "Section 12, Mason's Manual of Legislative Procedure, states 'Legislative body cannot make a rule that evades or avoids the effect of a rule prescribed by the Constitution governing it. It cannot do indirectly what it cannot do directly.' Could the Speaker please provide information to the House how this statute does not violate this provision?" Defendant Talbot Ross responded, "The House is within its bounds to adjourn as it sees fit. Without day. Adjourned without day as it sees fit."

21. Defendant Mills' proclamation does not respect the Legislature's authority to adjourn "as it sees fit." Instead, Defendant Mills orders the Legislature to remain in session until it resolves all matters which were pending at the time of adjournment and "whatever other business may come before the legislature" to the matters she mandated the Legislature to address, with an admonition to "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." In effect, Defendant Mills' proclamation replaced the regular session's restriction that the Legislature adjourn at a specific time to continue their work in the Second Regular Session with a mandate that they not adjourn unless they had no remaining business to conduct, or when they need to adjourn to convene the

Second Regular Session.

22. At the time of this filing, the Maine House of Representatives and the Maine Senate have met twice in their respective chambers, on April 5, 2023, and April 6, 2023, for more than 3 hours each time and voted on numerous legislative items which had not been finally disposed of at the time of their adjournment *sine die*.

23. On April 20, 2022, Defendants Jackson and Talbot Ross were among the Legislators who voted to exercise their emergency authority under 3-AM.R.S. § 2 to extend the Second Regular Session of the 130th Legislature by one day. No emergency was identified in the joint order extending that session, nor in any legislative records pertaining to the passage of that order. The extra day was used to pass numerous bills still pending on the scheduled adjournment date and increase state expenditures by tens of millions of dollars.

24. Based on news reports and public statements by legislators, a simple majority in the Legislature intends to exploit this special session to authorize hundreds of millions of dollars in additional spending and to continue passing non-emergency legislation unabated. Plaintiff Clardy believes that some or all of the additional spending will result in increased taxation, and that some of the legislation will mandate the imposition of costs on the people of Maine – *e.g.*, fee increases, targeted tax increases, unfunded mandates imposed on municipal and county governments, and subsidy programs funded by fees imposed on electricity ratepayers.

25. As an official elected by the Legislature, and being statutorily committed to defending their actions in litigation, the Attorney General cannot be expected to fulfill his normal role as litigant for the public interest when the public interest is at odds with the acts of elected officials whom he is statutorily bound to represent in litigation.

26. In 1983, the Supreme Judicial Court of Maine explicitly rejected requiring that

taxpayers must suffer a special injury to have standing when challenging injurious unconstitutional conduct:

> "An argument sometimes advanced for denying standing to taxpayers without special injury is that the denial tends to protect state officials from being harassed by litigation at the instance of plaintiffs who dislike the policies the officials are carrying out, particularly where the plaintiffs have lost in the political arena. The difficulty with this line of thought is that, in effect, it prejudges the very issue sought to be raised: namely, the legality of the governmental acts in question. Protection of state officials from harassment by litigation is only a by-product of the denial of standing; whether that by-product is desirable in any particular case cannot be determined without examining the merits of the claim. If the official conduct involved is indeed unconstitutional, protecting the officials in question from harassment cannot be deemed a desirable end in itself." *Common Cause v. State*, 455 A.2d 1, 9 (Me. 1983) (emphasis added)
>
> "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.
>
> "Second, and equally important, it is a central function of American courts to protect and relieve the individual from injurious unconstitutional conduct by government officials. Where taxpayers offer to show that such conduct has occurred, that it threatens to injure them by increasing their taxes, and that it cannot be stopped except by judicial intervention, a court having all the powers of a court of equity may not turn them away because possible political repercussions

from the ultimate decision on the merits may lead to hostile criticism of the judiciary. We therefore reject the proposition that taxpayers without special injury may never have standing to challenge illegal state action. *Common Cause v. State*, 455 A.2d 1, 9-10 (Me. 1983)

**Allegations**

27. Plaintiffs allege that Defendants Jackson and Talbot Ross are colluding to frustrate the Constitution's mandate that no non-emergency law may take effect sooner than 90 days after the final adjournment of the session in which it was passed by willfully adjourning the regular session 83 days before the statutory adjournment date with a clear intent to reconvene the following week, on the date of the next then-scheduled meetings of the Senate and the House. This official adjournment triggered the 90-day clock, while Defendant's intended immediate reconvening would render it a *pro forma* adjournment without invoking the legislative inconvenience of a significant recess.

28. Plaintiffs further allege that Defendant Mills is colluding with Defendants Jackson and Talbot Ross in bypassing the Constitution's mandates by issuing a proclamation convening the Legislature immediately after Defendants Jackson and Talbot Ross were unable to obtain the consent of majorities of both parties' members to reconvene in a special session commencing the same day that Defendants had unsuccessfully polled the members of the 131st Legislature for consent to reconvene. Plaintiffs find Defendant Mills' choice of April 5, 2023 – the same date proposed by the presiding officers and rejected by the minority party – indicative of tacit collusion.[1] We find Defendant Talbot Ross' reticence in protesting Defendant Mills' willful

[1] Plaintiff contends that tacit collusion between officials is sufficient to justify intervention to defend constitutional mandates, much as a police officer tacitly colluding with a private person conducting an unwarranted search is sufficient to trigger concerns about unreasonable search in evidentiary hearings.

violation of the minority party's constitutional right to refuse consent even more compelling.

29. Plaintiffs further allege that Defendants Jackson and Talbot Ross are colluding to frustrate the Constitution's mandate that the Legislature adjourn its regular sessions no later than statutory deadlines for adjournment by adjourning the regular session *pro forma* with an intent to reconvene in special session the following week, with the regular session's statutory deadline for adjournment mooted.

30. Plaintiffs further alleges that, if Defendant Mills is not colluding with Defendants Jackson and Talbot Ross, Defendant Mills' proclamation convening the Legislature immediately after their adjournment *sine die* is an unconstitutional usurpation of the Legislature's authority, in direct contradiction of the Legislature's official act to adjourn. Plaintiffs also allege that Defendant Mills' unwillingness to tolerate carrying over "many legislative matters pending at the time of the adjournment" to the next regular session directly usurps the authority of the Legislature's joint order to do so. Defendant Mills' addition of "whatever other business may come before the legislature" to the "matters to be resolved" represents a further insult to the Legislature's authority to define rules for their own proceedings.

31. Plaintiffs allege that, based upon the aforementioned allegations, the Governor's proclamation convening the Legislature lacks constitutional authority and is therefore unlawful to the extent it exceeds the Governor's constitutional authority to call the Senate into session for the purpose of voting upon confirmation of appointments.

32. Plaintiffs allege that the Legislature, when not lawfully convened, does not have the ability to form a quorum when there is no session, and therefore lacks the power to conduct its business assembled as a body outside of a lawfully convened session.

33. Plaintiffs allege that laws enacted during an unconstitutional session of the

Legislature inherit that unconstitutionality. Therefore, continuing to conduct Legislative business as if in session while the legitimacy of that session is being reviewed judicially risks great harm by continuing to enact laws which are at immediate risk of being invalidated.

34. Plaintiffs allege that taxpayers have standing to seek preventative relief without showing special injury, based upon the Supreme Judicial Court's clearly expressed reasoning in *Common Cause v. State*.

35. Plaintiffs also allege that, as litigants, we are not barred from asserting constitutional claims on behalf of absent third parties when those third-party rights are congruent with the interests of both the plaintiffs and the third party. We find it unreasonable to assert that the Attorney General has a monopoly on making constitutional claims when the Attorney General is statutorily obligated to defending state officials against those same claims.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for the following relief:

(A) Adjudication of this complaint be placed on an expedited schedule;

(B) A temporary injunction barring Defendants Jackson and Talbot Ross from calling their respective chambers to order in obedience of Defendant Mills' proclamation while that proclamation is undergoing judicial review;

(C) A declarative judgement that the Defendant Mills' proclamation is unconstitutional, as either intrusion on the Legislature's power to "to adjourn as it sees fit" or as a collusive effort to subvert the Constitution's mandates;

(D) A declarative judgement that the S.P. 594 remains in effect until the next lawful session of the 131st Legislature, and that all matters not finally disposed of at the time of adjournment of the First Regular Session of the 131st Legislature are to remain held over in the posture in which they were at the time of adjournment of the First Regular Session of the 131st Legislature until the Legislature reconvenes in a manner not offensive to the state Constitution;

(E) Compensation for reasonable costs incurred in the course of this litigation.

(F) Any such further and other relief as the Court deems fit and proper.

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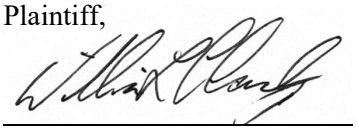
Plaintiff,



Dated: April 10, 2023

William Clardy
13 Maple Street, Apt 1
Augusta, ME 04330
Tel: (207) 242-7248
william.clardy@mainecandidates.org

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STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-23-52

WILLIAM CLARDY, et al.

Plaintiffs,

v.

TROY D. JACKSON, in his official capacity as President of the Senate of Maine; RACHEL TALBOT ROSS, in her official capacity as the Speaker of the Maine House of Representatives; and JANET MILLS, in her official capacity as the Governor of the State of Maine,

Defendants.

**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

NOW COME William Clardy, Michelle Tucker, Shelley Rudnicki, Randall Geenwood, and Respect Maine (the "Plaintiffs")[1] and hereby amend their complaint against Troy D. Jackson, in his official capacity as President of the Senate of Maine; Rachel Talbot Ross, in her official capacity as the Speaker of the Maine House of Representatives; and Janet T. Mills, in her official capacity as the Governor of the State of Maine, pursuant to Maine Rule for Civil Procedure 15(a), as follows:

**Parties**

1. William Clardy is a citizen, taxpayer and registered voter in the State of Maine.

2. Michelle Tucker is a citizen, taxpayer and registered voter in the State of Maine.

3. Shelley Rudnicki is an elected member of the 131st Maine State Legislature, a citizen, taxpayer and registered voter in the State of Maine.

[1] This lawsuit originally named Plaintiffs William Clardy and "Does 1-600." The Plaintiffs named in this Amended Complaint clarify the previously unnamed parties. Defendants have not yet responded to the original Complaint and are not prejudiced by the clarification of parties.

4. Randall Greenwood is an elected member of the 131st Maine State Legislature, a citizen, taxpayer and registered voter in the State of Maine.

5. Respect Maine is an incorporated non-profit organization comprised of Maine residents, taxpayers, and members of the 131st Maine State Legislature, that advocates for responsible government that respects the rule of law, the supremacy of the constitution, and the People of Maine.

6. Defendant Troy Jackson is the President of the Maine Senate and is sued in his official capacity. As President of the Senate, Defendant Jackson is a presiding officer in the 131st Legislature of Maine.

7. Defendant Rachel Talbot Ross is the Speaker of the Maine House of Representatives and is sued in her official capacity. As Speaker of the House, Defendant Talbot Ross is a presiding officer in the 131st Legislature of Maine.

8. Defendant Janet Mills is the Governor of the State of Maine and is sued in her official capacity.

**Jurisdiction and Venue**

9. This action arises out of a declaration of rights under the Maine State Constitution.

10. The Superior Court is the court of general jurisdiction in the State of Maine and has jurisdiction to declare Plaintiffs' rights as raised in this Amended Complaint. See 14 M.R.S.A. § 5953.

11. Defendants Jackson, Talbot Ross and Mills conduct their official business in the City of Augusta, County of Kennebec, State of Maine.

12. Plaintiffs Greenwood and Rudnicki conduct their official business as elected Representatives in the City of Augusta, County of Kennebec, State of Maine.

13. Plaintiff Clardy resides within the City of Augusta, County of Kennebec, State of Maine.

14. Plaintiff Tucker resides within the City of Auburn, County of Androscoggin, State of Maine.

15. Kennebec County Superior Court is the appropriate venue for this Complaint.

**Statement of Facts**

16. The date on which the Maine State Legislature (the "Legislature") adjourns *sine die* ("without day") is significant in its signifying the conclusion of a regular legislative session and, thus, its resulting impact on the enactment of non-emergency legislation, including non-emergency legislation pertaining to budget appropriations, under the Maine State Constitution.

17. 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 (emphasis added).

18. 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*.'" *In re Op. the Justices of the Supreme Judicial Court Given Under the Provisions of Article IV, Section 3 of the Maine Constitution*, 2015 ME 107 (123 A.3d 494).

19. The Legislature directs its own session limits. The Maine Constitution provides that: "The Legislature shall enact appropriate statutory limits on the length of the first regular session and of the second regular session." Me. Const. art. IV, pt. 2, § 1.

20. No statutory limits are defined for legislative sessions except for the limits on the First and Second Regular Sessions. See 3-A M.R.S.A. § 2.

21. Pursuant to statute, the first regular session of the Legislature, after its convening, "shall adjourn no later than the 3rd Wednesday in June," and the second regular session of the Legislature "shall adjourn no later than the 3rd Wednesday in April." 3-A M.R.S.A. § 2.

22. The same statute permits the Legislature to extend the date for adjournment under specified conditions, with a vote of two-thirds of the members of each House present and voting. See 3-1 M.R.S.A. § 2.

**On March 30, 2023, the Budget Act Passes by Simple Majority in the First Regular Session of the 131st Maine Legislature**

23. On March 30, 2023, both houses of the 131st Maine Legislature passed "An Act Making Certain Appropriations and Allocations and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2023, June 30, 2024, and June 30, 2025." L.D. 424 (131st Legis. 2023) (hereafter the "Budget Act").

24. The Budget Act outlines and directs the appropriation and spending of approximately $10,000,000,000 of State money.

25. On March 30, 2023, at or around 10:00 p.m., the Maine House voted 76-48 to pass the Budget Act.

26. On March 30, 2023, at or around 10:30 p.m., the Maine Senate voted 22-9 to pass the Budget Act.

27. Because the Budget Act was not passed as with a two-thirds majority in the Maine House, the Budget Act could not become enacted law until 90 days after the Legislature adjourned *sine die*. Me. Const. art. IV, pt. 3, § 16.

28. The State of Maine's fiscal year 2022-2023 ends on June 30, 2023; fiscal year 2023-2024 begins on July 1, 2023.

29. The Maine State Government faced a potential shutdown if governmental operations were unfunded on July 1, 2023, at the outset of fiscal year 2023-2024.

30. Having voted to enact the Budget Act with a simple majority, the Legislature needed to adjourn *sine die* at least 90 days before July 1, 2023, for the Budget Act to take effect and for fundings to be in place at the beginning of fiscal year 2023-2024.

31. Alternatively, the Legislature could have voted to pass a bipartisan appropriations bill with the two-thirds majority required for emergency legislation, which would take effect immediately upon the governor's signing the passed legislation into law. See Me. Const. art. IV, pt. 3, § 16; see also Me. Const. art. IV, pt. 3, § 2.

32. The majority party in the Legislature made a deliberate choice that allowed them to avoid engaging in bipartisan negotiations to obtain a two-thirds majority in passing an appropriations bill within 90 days of July 1, 2023.

**Prior to Passing the Budget Act, the Legislature Does Not Consent to Reconvene on April 5, 2023**

33. Also on March 30, 2023, at or around 10:00 p.m., Defendant Talbot Ross called for a division of the House to "poll members to reconvene for the First Special Session to be held on Wednesday, April 5, 2023."

34. The Maine State Constitution provides that, "The Legislature may convene 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." Me. Const. art. IV, pt. 3, § 1.

35. At this time, prior to formal adjournment, the next meeting of the House during

the First Regular Session was already scheduled for April 5, 2023.

36. Defendant Talbot Ross paused the proceedings on the Budget Act to poll the members of the House, asking for their consent to reconvene for a "special session" on the same day they would be meeting if they chose not to adjourn *sine die*.

37. At approximately 10:50 p.m., Defendant Jackson announced the results of the poll: 95 out of 103 members of one party consented to reconvene. No member of the other party consented to reconvene.

38. Because the majority of only one party consented to reconvene on the date proposed by Defendant Talbot Ross, the Defendants Jackson and Talbot Ross lacked consent to call the Legislature to reconvene on their own authority as presiding officers of the Legislature. Me. Const. art. IV, pt. 3, § 1.

**Prior to Adjourning on March 30, 2023, the Legislature Votes to Carry Over Unfinished Legislative Business into the Next Session**

39. It is routine for the Legislature to adjourn their first regular session with unfinished business.

40. The Maine State Constitution calls for each Legislature to "convene on the first Wednesday after the first Tuesday of January in the subsequent even-numbered year in what shall be designated the second regular session of the Legislature; provided, however, that the business of the second regular session of the Legislature shall be limited to budgetary matters; legislation in the Governor's call; legislation of an emergency nature admitted by the Legislature; legislation referred to committees for study and report by the Legislature in the first regular session; and legislation presented to the Legislature by written petition of the electors under the provisions of Article IV, Part Third, Section 18." Me. Const. art. IV, pt. 3, § 1.

41. On March 30, 2023, both houses of the 131st Maine Legislature jointly ordered

that "all matters not finally disposed of at the time of adjournment of the First Regular Session of the 131st Legislature in the possession of the Legislature, including working papers and drafts in the possession of nonpartisan staff offices, gubernatorial nominations and all determinations of the Legislative Council regarding after-deadline bill requests and policies, be held over 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." S.P. 594 (131st Legis. 2023).

42. The Senate voted to pass S.P. 594 as a joint order. Soon thereafter, the House of Representatives passed S.P. 594 in concurrence with the Senate, permitting the Legislature to adjourn *sine die* with unfinished business carrying over to a "subsequent special or regular session."

**The Legislature Adjourns *Sine Die***

43. On March 30, 2023, after passing the Budget Act in both houses, the Maine Senate passed a motion to adjourn *sine die*. Soon thereafter, the Maine House of Representatives passed a motion to adjourn *sine die*.

44. At approximately 11:00 p.m. on March 30, 2023, Rep. Nathan Carlow, a member of the Maine House of Representatives, made a parliamentary inquiry in anticipation of the motion to adjourn *sine die*, noting that "Mason's Manual of Legislative Procedure, states 'A legislative body cannot make a rule that evades or avoids the effect of a rule prescribed by the Constitution governing it. It cannot do indirectly what it cannot do directly.' Could the Speaker please provide information to the House how this statute does not violate this provision?"

45. In response to the inquiry, Defendant Talbot Ross responded, "The House is within its bounds to adjourn as it sees fit. Without day. Adjourned without day as it sees fit."

46. On March 30, 2023, the First Regular Session of the 131st Legislature was officially adjourned *sine die*.

**Governor Mills Issues a Proclamation Ordering the Legislature to Convene to Finish All Outstanding Business**

47. A day later, on March 31, 2023, Defendant Mills signed the Budget Act, making it Public Law 17, to become effective 90 days after the Legislature's prior adjournment *sine die.*

48. On the same day, Governor Mills issued a proclamation declaring that, "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. . . " See **Exhibit A** (Proclamation of Governor Janet T. Mills Convening the Members of the 131st Legislature in Special Session Dated March 31, 2023) (hereafter the "Proclamation").

49. In so convening the Legislature, Defendant Mills references the "constitutional power vested" in her office pursuant to Article V, Part I, Section 13 of the Constitution of the State of Maine. Exhibit A.

50. Article V, Part I, Section 13 of the Constitution of the State of Maine provides that the Governor "may, on extraordinary occasions, convene the Legislature . . . not beyond the day of the next regular session."

51. Predicated on that "extraordinary occasion," Defendant Mills' Proclamation called for the Legislature to convene for a special session and to assemble "in their respective chambers" on April 5, 2023, the same day that they had been scheduled to meet prior to their official adjournment, "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." Exhibit A.

52. Defendant Mills' Proclamation effectively orders the Legislature to address both old and new/yet-unannounced legislative business that did not exist prior to the Legislature adjourning the session *sine die* on March 30, 2023. Exhibit A.

53. Defendant Mills' Proclamation plainly disregards the Legislature's authority to adjourn *sine die* "as it sees fit."

54. The Governor has constitutional power under Article V, Section 8 of the Constitution of the State of Maine to call the Senate into session for the specific purpose of voting upon confirmation of appointments, so there is no need to assemble the entire Legislature for that stated purpose.

55. Upon information and belief, some members of the Maine Legislature, including Defendants Talbot Ross and Jackson, anticipated and/or expected Defendant Mills to issue the Proclamation, providing the Defendants pretense to reconvene and resume other legislative business despite failing to obtain appropriate consent from members of the Legislature.

56. Defendant Mills' Proclamation was also foreshadowed—two years to the day—by previous official statements made by the governor in 2021, in which she threatened to call back the Legislature after the 2021 biennial budget was passed with a narrow majority vote before adjourning *sine die*—though in that case, the Legislature established a consensus vote to reconvene without her ordering a special session. See **Exhibit B** (Governor Mills Statement on Legislature's Passage of Biennial Budget Dated March 30, 2021) (stating "[I]f the Legislature does not call themselves back into session, I will call them back on April 28, 2021.").

**Defendant Mills' Proclamation Contradicts Her Own Interpretation of the Constitution**

57. As Maine State Attorney General in 2015, Defendant Mills wrote an official letter

to State Senator Dawn Hill and State Senator Thomas Saviello, evaluating the legal status of several bills presented to then-Governor Paul Lepage which were neither signed nor vetoed (hereafter the "Attorney General Letter").

58. The Attorney General Letter analyzed the status of bills that were passed when the Legislature had, critically, not formally adjourned *sine die*, and which the then-governor had not formally vetoed. See **Exhibit C** (Letter from Attorney General Janet Mills to State Senators Dated July 10, 2015).

59. In the Attorney General Letter, Defendant Mills wrote: "The determination of the length of the session is uniquely a legislative one, and for another branch of government to reinterpret the decision of the Legislature might well violate the provisions of Article III, Section 2 of the Maine Constitution. ('No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.' Cf. *State v. Hunter*, 447 A.2d 797 (1982))." See Exhibit C, p. 2.

60. Attorney General Letter also states: "It is exclusively the Legislature that decides when it adjourns, not another branch of government . . . ." See Exhibit C, p. 2.

61. Defendant Mills also wrote in the Attorney General Letter: "[W]hen the Legislature adjourns its session *sine die*, it does so deliberately, with a degree of formality befitting the occasion, each house sending a committee notifying the other body and sending a committee to officially notify the governor that they are ready for final adjournment so that [s]he may confirm that there is no further business for them to address." Exhibit C, p. 2-3.

62. In issuing her Proclamation, which compels the Legislature to convene based on the "extraordinary occasion" of the Legislature intentionally and deliberately adjourning *sine die*

on March 30, 2023, Defendant Mills flouted her published interpretation of the Maine State Constitution's separation of powers doctrine as to the Legislature's right to adjourn *sine die* as it sees fit.

**The Legislature Reconvenes as Ordered by the Governor and Resumes Passing Legislation**

63. Despite lacking the constitutionally-required consent of the members of the 131st Maine State Legislature, Defendants Talbot Ross and Jackson reconvened the Legislature pursuant to Defendant Mills' Proclamation.

64. At the time of filing this amended complaint, the Maine House of Representatives and the Maine Senate have met eight times between April 5, 2023, and April 25, 2023, and in these meetings the houses have voted on numerous legislative items which had not been finally disposed of at the time of the March 30, 2023, adjournment *sine die*.

65. Members of the Legislature who refused to consent to reconvening would, if they refused to attend the "special" legislative session, permit the majority party to pass legislation without any objection whatsoever, and thereby have a personal stake in being compelled to the Legislature due to Defendant Mills' Proclamation and Defendants Talbot Ross and Jackson acquiescing to the Proclamation.

66. The Legislature has, during this "special" session, passed laws that do or will impact Maine State expenditures, permitting rights, governmental services, aid programs, and other laws impacting taxpayer interests.

67. Moreover, based on news reports and statements by legislators, the majority in the Legislature intends to use the "special" session to further authorize hundreds of millions of dollars in additional State spending and to continue passing non-emergency legislation.

68. Upon information and belief, some or all of the additional spending will result in

increased taxation, and that some of the legislation will mandate the imposition of costs on the people of Maine in the form of fee increases, targeted tax increases, unfunded mandates imposed on municipal and county governments, and subsidy programs funded by fees imposed on electricity ratepayers.

69. There exists direct and ongoing harm to Plaintiffs by permitting an unconstitutional "special" session of the 131st Legislature to persist after the Legislature adjourned *sine die* and did not consent to reconvene.

**COUNT I**

**Request for Declaratory Judgement and Injunctive Relief**

**(Prohibiting Further Legislative Convening Pursuant to Gubernatorial Proclamation and Nullifying Defendant Mills' Proclamation)**

70. Plaintiffs hereby repeat and reallege all previous paragraphs as if fully set forth herein.

71. There exists an actual controversy between Plaintiffs and Defendants involving the constitutionality of Defendant Mills' Proclamation and the subsequent legislative activity occurring pursuant to the Proclamation.

72. Article III, Section 1 of the Maine State Constitution provides that "The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial."

73. Article III, Section 2 of the Maine Constitution further provides that "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

74. The Legislature "shall enact appropriate statutory limits on the length of the first regular session and of the second regular session," Me. Const. art. IV, pt. 2, § 1; and the

Legislature has done so by enacting 3-A M.R.S.A. § 2.

75. The Legislature has further exclusive and absolute authority to adjourn *sine die* with unfinished legislative business, as it sees fit.

76. The Governor does not have the constitutional power to reconvene the Legislature and compel legislative action simply because there is unfinished legislative business after the Legislature adjourns *sine die*.

77. The Governor has contrived an "extraordinary occasion" where the Legislature, intentionally and deliberately, adjourned *sine die* after continuing its business pertaining to matters of interest to the executive branch, such as "pending nominations of state board and commission members" or "pending nominations of judicial officers by the Governor requiring legislative confirmation."

78. The Governor need not compel the entire Legislature to convene to confirm gubernatorial nominations, there being separate constitutional provisions permitting her to convene the State Senate for such a specific purpose, and the mere existence of unfinished legislative business is not an "extraordinary occasion."

79. Defendant Mills' Proclamation violates the Legislature's right to control its regular legislative sessions and violates the separation of powers by convening the Legislature indefinitely until such time that its old and new business is complete.

80. Plaintiffs suffer ongoing harm by being compelled to legislate to Defendant Mills' satisfaction and by being subject to laws passed in an unconstitutional legislative session.

## COUNT II

### Request for Declaratory and Injunctive Judgement

### (Prohibiting Further Legislative Activity and Nullifying Legislation Passed by the 131st Legislature Since Adjournment *Sine Die*)

81. Plaintiffs hereby repeat and reallege all previous paragraphs as if fully set forth herein.

82. There exists an actual controversy between Plaintiffs and Defendants involving the constitutionality of the Legislature's resumption of legislative action following the adjournment *sine die* on the First Regular Session of 131st Maine State Legislature.

83. The Legislature is bound by the Maine State Constitution, which is the supreme law of State (limited only by the Federal Constitution).

84. Defendants Talbot Ross and Jackson are similarly bound to obtain the consent of the members of the Legislature to reconvene the Legislature following *sine die* adjournment. Me. Const. Art. IV, pt. 3, § 1.

85. Upon information and belief, and based upon statements previously made by Defendant Mills when the majority party passed a partisan appropriations bill in 2021, leadership in the Maine House of Representatives and the Maine Senate ignored the consequences of adjourning *sine die* by anticipating that Defendant Mills would compel the Legislature to reconvene, regardless of the legitimacy of the gubernatorial order.

86. Defendants' collective actions undermine a faithful application of the checks-and-balances system created by the constitutional separation of powers, and undermine the constitutionally-created incentive to pass appropriations bills with broad legislative support.

87. Moreover, regardless of the constitutionality of Defendant Mills' Proclamation, the actions of Defendants Talbot Ross and Jackson are unconstitutional unto themselves by

ceding legislative power to the executive contrary to the Maine State Constitution.

88. The Legislature, when not lawfully convened, does not have the ability to form a quorum when there is no consented-to session, and therefore lacks the power to conduct its business assembled as a body outside of a lawfully convened session.

89. Laws enacted during an unconstitutional session of the Legislature inherit that unconstitutionality, rendering those laws void *ab initio*. Therefore, continuing to conduct Legislative business as if in session while the legitimacy of that session is being reviewed judicially risks great harm by continuing to enact laws which are at immediate risk of being invalidated.

90. Plaintiffs suffer ongoing harm by being compelled to legislate during an unconsented to "special" session and by being subject to laws passed in an unconstitutional legislative session.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for the following relief:

(A) Adjudication of this Amended Complaint be placed on an expedited schedule;

(B) A temporary injunction barring Defendants Jackson and Talbot Ross from calling their respective chambers pursuant to Defendant Mills' Proclamation while that Proclamation is subject to judicial review;

(C) A declarative judgement that the Defendant Mills' Proclamation is unconstitutional, as intrusion on the Legislature's power to determine the length of its legislative session and to adjourn *sine die* with unfinished legislative business;

(D) A declarative judgement that S.P. 594 remains in effect until the next lawful regular session of the 131st Legislature, and that all matters not finally disposed of at the time of

adjournment *sine die* of the First Regular Session of the 131st Legislature are to remain held over in the posture in which they were at the time of adjournment until the Legislature reconvenes in a manner consistent with the Maine Sate Constitution;

(E) Compensation for reasonable costs incurred in the course of this litigation.

(F) Any such further and other relief as the Court deems fit and proper.

DATED: April 27, 2023

Stephen C. Smith, Esq. – Me. Bar No. 8720
Carl E. Woock, Esq. – Me. Bar No. 5657
Attorneys for Plaintiffs
STEVE SMITH TRIAL LAWYERS
136 State Street, 2nd Floor
Augusta, Maine 04330
207-622-3711
info@mainetriallaw.com

# EXHIBIT A

State of Maine

Proclamation

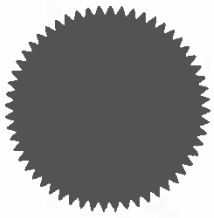
# Proclamation of Governor Janet T. Mills Convening the Members of the 131st Legislature in Special Session

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 131 st 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.

In testimony whereof, I have caused the Great Seal of the State to be hereunto affixed GIVEN under my hand at Augusta and dated this thirty first day of March Two Thousand Twenty-Three.



Shenna Bellows

Shenna Bellows
Secretary of State
TRUE ATTESTED COPY

Janet T. Mills
Governor

# EXHIBIT B

# Governor Mills Statement on Legislature's Passage of Biennial Budget

March 30, 2021

Governor Janet Mills released the following statement on the State Legislature's passage of a current services biennial budget:

> *"I believe this budget – which maintains current services and invests in public education and property tax relief without any added bells or whistles – was deserving of strong bipartisan support. While I am disappointed our Republican colleagues did not support it, passing and enacting this budget now provides much-needed stability and ensures continuity of services during this ongoing pandemic. I will sign it when it reaches my desk.*
>
> *"This will not be the end of budget discussions for this biennium. There is much more work to be done. In the coming weeks, the non-partisan Revenue Forecasting Committee will meet to provide an updated projection of Maine's revenues, and my Administration is expecting to receive guidance from the Federal government about the allowable uses of Federal funding under the American Rescue Plan Act.*
>
> *"With this information in hand, my Administration will propose a supplemental budget – effectively part two of the biennial budget – for the Legislature's consideration. Republicans, Democrats, and Independents alike will have ample opportunity to consider the most recent revenue projections and the impact of unallocated Federal funds and adjust the State's biennial budget accordingly. I hope, and fully expect, this important work can and will proceed in a bipartisan manner. To that end, if the Legislature does not call themselves back into session, I will call them back on April 28, 2021."*

# EXHIBIT C

JANET T. MILLS
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301
PORTLAND, MAINE 04101
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

July 10, 2015

The Honorable Dawn Hill
The Honorable Thomas Saviello
Maine State Senate
3 State House Station
Augusta, ME 04333-0003

Dear Senator Hill and Senator Saviello:

You have inquired about the status of bills that were presented to the Governor but which he has neither signed nor vetoed. The Legislature has not adjourned *sine die,* and more than ten days have elapsed since certain bills were presented to the Governor.

Article IV, Part 3, Section 2, of the Maine Constitution states:

> If the bill or resolution shall not be returned by the Governor within 10 days (Sundays excepted) after it shall have been presented to the Governor, it shall have the same force and effect as if the Governor had signed it *unless the Legislature by their adjournment prevent its return*, in which case it shall have such force and effect, unless returned within 3 days after the next meeting of the same Legislature which enacted the bill or resolution; if there is no such next meeting of the Legislature which enacted the bill or resolution, the bill or resolution shall not be a law. (Emphasis added).

The most recent act of the Legislature was to pass a joint order reciting "that when the House and Senate adjourn they do so until the call of the President of the Senate and the Speaker of the House, respectively, when there is a need to conduct business, or consider possible objections of the Governor." Joint Order S.P. 556, June 30, 2015 (copy attached). This joint order was a day to day adjournment, and not a final adjournment *sine die* of the first regular session of the Legislature, which would start the 90-day period for non-emergency bills to become effective under Article IV, Part Third, Section 16, allowing time for a people's veto effort under Article IV, Part Third, Section 17 ("recess of the Legislature" in these sections means "the adjournment without day of a session of the Legislature." *Opinion of the Justices,* 116 Me. 557, 587, 103 A. 761, 774 (1917); Article IV, Part Third, Section 20).[1]

[1] Although literally "sine die" means simply "without day," in custom, practice and constitutional and historical context, of course, adjournment "sine die" has much greater significance than merely not scheduling a specific day to come back into session.

The adjournment order of June 30, 2015, has not prevented the Governor from returning the bills with his objections. To the contrary, the Legislature specifically envisioned receiving veto messages and made it clear in the joint order that they were prepared to deal with them in timely fashion, and possibly even line item vetoes requiring more immediate attention, allotting the full ten days authorized in the Constitution.

The Maine Constitution delegates to the Legislature the authority to "enact appropriate statutory limits on the length" of the first and second regular sessions. Article IV, Part Third, Section 1. The Legislature has done so by enacting Title 3 M.R.S. sec. 2. The determination of the length of the session is uniquely a legislative one, and for another branch of government to reinterpret the decision of the Legislature might well violate the provisions of Article III, Section 2 of the Maine Constitution. ("No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Cf. State v. Hunter, 447 A.2d 797 (1982)).

It is exclusively the Legislature that decides when it adjourns, not another branch of government, and there is no requirement that the Legislature set a specific date for the next meeting when it finishes its business of the day. Conversely, the failure to set a specific date for reconvening does not become an adjournment *sine die* by default.

In this instance, the Legislature invoked its constitutional authority and complied with the procedure in Title 3 M.R.S. sec. 2 by twice voting to extend the date of final adjournment by five legislative days each. See, Senate RC #288; House RC #296; HP 991, Joint Order Extending the First Regular Session of the 127th Legislature for Five Legislative Days; and remarks of Rep. Fredette, June 24, 2015. The second five-day period has not expired, nor has the Legislature used the extra day authorized by the same statute for "considering possible objections of the Governor to any bill or resolution presented to him by the Legislature under the Constitution, Article IV, Part Third, Section 2." The first regular session of the 127th Legislature has not concluded and the Legislature specifically extended the time for final adjournment in order to review any additional line item vetoes, giving the Governor the time allotted to him under Article IV, Part 3, Section 2-A, and to consider any vetoes under Section 2, giving the Governor the full ten days to review enacted legislation.

The term "adjournment" must be read in the context of the constitutional passage in which it appears. The phrase "unless the Legislature by their adjournment prevent its return" means final adjournment or adjournment *sine die*, because a day to day adjournment does not prevent the return of bills, as the presiding officers may call the Legislature back to work at any time. In recent decades the Legislature has regularly adjourned until the call of the presiding officers for the purpose of acting on veto messages from the governor. See, e.g., Leg.Rec.-H-1361, June 1, 1997, Orders; Leg.Rec.-H-2699, April 28, 2000; Leg.Rec. H-1589, May 17, 2012. Bills that were vetoed and overridden became effective 90 days after adjournment *sine die*—at the same time as bills that were not vetoed—*not* 90 days after the day to day adjournments of the Legislature.

There is no 'default' provision whereby the end of a legislative day becomes a final adjournment simply because the Legislature has not said otherwise or has not set a specific date for the next meeting. To the contrary, when the Legislature adjourns its session *sine die*, it does

so deliberately, with a degree of formality befitting the occasion, each house sending a committee notifying the other body and sending a committee to officially notify the governor that they are ready for final adjournment so that he may confirm that there is no further business for them to address. (Historically, this practice goes back at least as far as 1850; see, e.g. House Jour. 1850, http://lldc.mainelegislature.org/Open/LegJrnl/HJ1850.pdf, pp. 521, 525 (copy attached); Senate Rec., p.453 March 27, 1897). The event is significant, the action intentional and formal because it starts the clock ticking for nonemergency legislation to become law in ninety days and it notifies citizens that they may then commence a people's veto effort under Article IV, Part 3, Section 17. It also signifies that any unfinished business on the calendar automatically expires,[2] that the Legislature does not anticipate any additional meetings and that it may not reconvene except by the special and somewhat cumbersome procedures of Section 1 of Article IV, Part 3.[3] No such formal adjournment *sine die* occurred in the Maine Legislature on June 30, 2015.[4]

Common sense says that the term "adjournment" in Section 2, as amended in 1973, must be read to be consistent with the term "recess" in Section 16, enacted in 1909; otherwise, different ninety day periods would be invoked for many different bills. In any case, neither a recess per Section 16, nor an adjournment per Section 2 has occurred for the first regular session of the 127th Legislature.

Notably, the same provision of the Constitution that authorizes the Governor to veto, or "return" a bill with his objections, in calculating the ten-day period excepts Sundays and Sundays only. The provision therefore envisions that the Governor could return bills with his objections—or vetoes—on Saturdays and holidays when the Legislature does not meet, still within that session of the legislature and before adjournment *sine die*. Thus the Legislature need not actually be meeting in order for the Governor to return a bill with his objections to the house in which it originated.

This reading is consistent with the term "adjournment" as it is used generally and in other sections of the Constitution when it refers to final adjournment of the legislative *session*, not simply a day to day adjournment of that particular legislative day. See, e.g., Tinkle, The Maine Constitution, p.79 ("if a final adjournment of the legislature intervenes during the period that the governor has to consider a bill, then he may pocket-veto it...."). See also, Mason's Manual of Legislative Procedure, 2010, p.295, Sec. 445 Motion to Adjourn Sine Die: "1. When a state legislature is duly convened, it cannot be adjourned sine die nor be dissolved except in the regular legal manner, and an adjournment from day to day cannot have that effect."[5]

---

[2] Mason's Manual of Legislative Procedure, 2010, Sec.445.3: "A motion to adjourn sine die has the effect of ....terminating all unfinished business...and all legislation pending upon adjournment *sine die* expires with the session."

[3] "The Legislature may convene 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."

[4] This situation therefore is distinguishable from the facts addressed in the Opinion of the Justices, 437 A.2d 597 (1981), the Opinion of the Justices, 484 A.2d 999 (1984) and the 2003 and 2005 controversies during the Baldacci administration; in each of those cases, the Legislature expressly and distinctly adjourned *sine die*.

[5] "Adjournment" as used in constitutional provisions "is generally held to relate to final adjournment rather than temporary adjournment or recess. Thus, a return of a bill after a temporary recess does not prevent the bill from becoming law." Singer & Singer, Sutherland Statutory Construction, §16.4, p. 740.

This reading is also consistent with the view adopted by the majority of jurisdictions which have construed similar state constitutional provisions and with interpretations of the comparable provision of the U.S. Constitution. See, e.g., NLRB v. Noel Canning et al., 573 U.S. ____, 134 S.Ct. 2550, 2574-76 (2014); Wright v. United States, 302 U.S. 583 (1938); State, ex rel. Gilmore v. Brown, 6 Ohio St. 3d 39, 40, 451 N.E.2d 235 (1983) (only adjournment *sine die* prevents delivery of Governor's veto message under Ohio Constitution); 1 Singer & Singer, Sutherland Statutory Construction § 16.4 (7th ed). Finally, it is consistent with the historical practice of every legislature and every governor, including the present Governor, in recent memory, and it is consistent with the determination of the effective dates of enacted legislation under the Maine Constitution.

The Constitution requires that the Governor "return" a bill "with objections to the House in which it shall have originated" within ten days for the legislature's consideration of his veto. This provision clearly envisions a physical delivery of the bill with a veto message to the legislative branch within the ten day time frame.

Bills that have not been returned to the Legislature with the objections of the Governor within ten days of being presented to the Governor, excluding Sundays, have now become finally enacted in accordance with Article IV, Part 3, Section 2. Those that are emergency bills are in full force and effect.

I trust this answers your inquiry.

Yours very truly,

Janet T. Mills
Attorney General

JTM/elf
cc: President Michael Thibodeau
Sen. Garrett Mason
Sen. Andrea Cushing
Sen. Justin Alfond
Speaker Mark Eves
Rep. Jeff McCabe
Rep. Sara Gideon
Rep. Kenneth Fredette
Rep. Ellie Espling
Heather Priest, Secretary of the Senate
Rob Hunt, Clerk of the House
Grant Pennoyer, Executive Director of the Legislative Counsel
Paul R. LePage, Governor

STATE OF MAINE
ONE HUNDRED AND TWENTY-SEVENTH LEGISLATURE
FIRST REGULAR SESSION
SENATE ADVANCED JOURNAL AND CALENDAR

Tuesday, June 30, 2015

SUPPLEMENT NO. 31

## ORDERS

### Joint Order

(4-1) On motion by Senator MASON of Androscoggin, the following Joint Order:
S.P. 556

Ordered, the House concurring, that when the House and Senate adjourn they do so until the call of the President of the Senate and the Speaker of the House, respectively, when there is a need to conduct business, or consider possible objections of the Governor.

---

Chapman, Danforth, Dennett, Dunn, Garland, Gerrish, Gilman, H. F. Goodwin, Haines, Hathorn, Hayden, Hayes, Holbrook, Holmes, Howard, Huston, Jordan, Leighton, Lord, Littlefield, McIntyre, Mitchell, Percival, Pinkham, W. Plummer, Putnam, Rogers, Seward, Simonton, Stanley, Tolman, Waterhouse, W. Weed, Whitten, Whitney, Young.

Nays

Alexander, Ames, Arnold, Campbell, J. Chase, Cochran, Cox, Cunningham, M. P. Davis, Dudley, Gordon, Hall, Hancock, Higgins, Holway, Hopkins, King, Knowlton, Lane, Marrow, Milliken, J. Millett, Morrill, Norcross, Perry, H. Plummer, Quinnam, Quint, Reed, Sargent, N. Smith, Shaffer, Vickery, Walker, J. Weed, Wiggin, Wills, Wood.

The House joined Messrs Seward, N. Smith, Pinkham, Appleton & Howard to the Committee to wait on the Governor and inform him that the two Houses have acted on all business before them and are now ready to adjourn.

The Committee subsequently reported that the Governor had no further communication to make, except to communicate the title of acts & resolves they have signed.

Mr. Appleton of Bangor (the Speaker having left the chair on account of indisposition) rose and said—

Mr. Sewall of Oldtown was charged with a Message to the Senate informing that body that the House had acted upon all business before it and is now ready to adjourn without day.

A similar message was received from the Senate.

On motion of Mr. Sewall of Oldtown the House then adjourned without day.

E. W. Hagg Clerk

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-23-52

WILLIAM CLARDY; MICHELLE TUCKER; SHELLEY RUDNICKI, Maine State Representative; RANDALL GREENWOOD, Maine State Representative; and RESPECT MAINE,

Plaintiffs,

v.

TROY D. JACKSON, President of the Maine Senate; RACHEL TALBOT ROSS, Speaker of the Maine House of Representatives; and JANET T. MILLS, Governor of the State of Maine,

Defendants.

**MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW**

Defendants Troy D. Jackson, President of the Maine Senate; Rachel Talbot Ross, Speaker of the Maine House of Representatives; and Janet T. Mills, Governor of the State of Maine (collectively, "State Officers") hereby move pursuant to M.R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the Amended Complaint ("Compl.") filed by Plaintiffs William Clardy; Michelle Tucker; Shelley Rudnicki, Maine State Representative; Randall Greenwood, Maine State Representative; and Respect Maine. Plaintiffs have asserted claims against State Officers solely in their official capacities.

Plaintiffs failed to plead a plausible violation of the Maine Constitution or any state statute, and, in any event, their claims are non-justiciable and barred by separation of powers and legislative immunity. State Officers request that the Amended Complaint be dismissed.

## ALLEGATIONS IN COMPLAINT[1]

The following allegations are assumed to be true solely for purposes of this motion. After passing an appropriations bill on a majority vote, Compl. ¶¶ 23-32, the Legislature adjourned the First Regular Session of the 131st Maine Legislature on March 30, 2023, Compl. ¶¶ 16, 18, 43, 46. That adjournment was *sine die*, or without day, and marked the end of the First Regular Session. Compl. ¶ 43. *See also Opinion of the Justices*, 2015 ME 107, ¶¶ 46-52, 123 A.3d 494. Prior to adjournment, the Legislature voted to carry over its unfinished business to a subsequent regular or special session of the 131st Maine Legislature. Compl. ¶¶ 41-42; Exh. 1.

On March 30, 2023, Speaker Talbot Ross and President Jackson polled the members of both houses to ask whether they wished to return for a special session. Compl. ¶¶ 33-37. *See* Me. Const. art. IV, pt. 3, § 1. The results of those polls showed that the requirements of the Maine Constitution had not been met for the Legislature to convene by consent vote. Compl. ¶¶ 36-37.

On March 31, 2023, Governor Mills issued a proclamation declaring an extraordinary occasion and convening the Legislature on April 5, 2023. Compl. ¶¶ 48, 51; Compl. Ex. A. *See* Me. Const. art. V, pt. 1, § 13. The First Special Session of the 131st Legislature convened on April 5, 2023; its work includes matters carried over from the First Regular Session. Compl. ¶¶ 63-64. Plaintiffs Rudnicki and Greenwood have participated in the First Special Session.[2]

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[1] "[O]fficial public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint may be properly considered on a motion to dismiss without converting the motion to one for a summary judgment." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 11, 843 A.2d 43. Attached hereto are three exhibits (Exs. 1-4) that are either official public documents or documents referred to in Plaintiffs' Amended Complaint.

[2] Plaintiff Clardy has also participated in the First Special Session by testifying at a public hearing in the Judiciary Committee on May 8, 2023. *Resolve, to Establish the Commission to Study the Constitution of Maine: Hearing on L.D. 1410 Before the J. Standing Comm. on Judiciary* at 1:52:42 PM, 131st Legis.

Compl. ¶ 65.

Plaintiffs are two Maine citizens, two Maine legislators (Legislator Plaintiffs), and Respect Maine, a non-profit organization that advocates for responsible government. Compl. ¶¶ 1-5. In their two-count Amended Complaint, Plaintiffs contend that the First Special Session is unconstitutional because they allege that its convening was not occasioned by a true "extraordinary occasion," Compl. ¶¶ 70-80, and that all laws enacted during the allegedly unconstitutional First Special Session are void *ab initio*, Compl. ¶¶ 81-90. Plaintiffs ask this Court to: 1) issue a "temporary injunction" barring President Jackson and Speaker Talbot Ross from calling their chambers while this lawsuit is pending; and 2) declare that Governor Mills' proclamation convening the First Special Session is unconstitutional and that all matters not resolved at the *sine die* adjournment of the First Regular Session remain held until the next constitutionally convened session. Compl. at 15-16.

**STANDARD OF REVIEW**

State Officers move to dismiss pursuant to both M. R. Civ. P. 12(b)(6) for failure to state a claim and M. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 4, 796 A.2d 674; *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994). A basic requisite to stating a claim is asserting a valid cause of action. *See Edwards v. Black*, 429 A.2d 1015, 1016 (Me. 1981). When a plaintiff fails to set forth such a cause of action, dismissal is warranted. *Plimpton v. Gerrard*, 668 A.2d 882, 885 (Me. 1995).

In reviewing a Rule 12(b)(6) motion to dismiss, the Court ordinarily accepts as true

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(2023) (oral testimony of William Clardy neither for nor against the subject bill), *https://legislature.maine.gov/Audio/#438?event=88778&startDate=2023-05-08T09:00:00-04:00.*

the factual allegations in the complaint and decides whether, as a matter of law, the plaintiff can prove any set of facts that would entitle him or her to judicial relief. *Moody*, 2004 ME 20, ¶ 7, 843 A.2d 43. A complaint should be dismissed pursuant to M. R. Civ. P. 12(b)(6) when it fails to state a claim upon which relief can be granted. *Bean v. Cummings*, 2008 ME 18, ¶ 7, 939 A.2d 676.

With respect to M.R. Civ. P. 12(b)(1), the question of whether subject matter jurisdiction exists is a matter of law and differs from a typical Rule 12(b)(6) motion because courts "make no favorable inferences in favor of the plaintiff." *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335. Justiciability is an essential element of subject matter jurisdiction, and if a plaintiff cannot establish that his case is justiciable, Maine courts are compelled to dismiss a complaint for want of subject matter jurisdiction. *See, e.g., Dubois v. Town of Arundel*, 2019 ME 21, ¶ 6, 202 A.3d 524 ("Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place." (quoting *Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 6, 124 A.3d 1122)); *Wagner v. Sec'y of State*, 663 A.2d 564, 567 (Me. 1995) ("To satisfy the controversy requirement, the case must be ripe for judicial consideration and action.").

## ARGUMENT

### I. Plaintiffs' Amended Complaint should be dismissed pursuant to Rule 12(b)(6) because they failed to assert a valid cause of action or claim upon which relief can be granted.

#### A. Neither the Maine Constitution nor the Declaratory Judgments Act provides Plaintiffs with a valid cause of action.

A threshold defect in the Amended Complaint is that it fails to identify a valid cause of action for seeking relief in Maine's courts. Litigants may not seek relief in court unless they file suit pursuant to a valid cause of action grounded in statute or common law. *See*

*Edwards*, 429 A.2d at 1016 ("In order to state a claim upon which relief can be granted, a complaint must aver either the necessary elements of a cause of action or facts which would entitle a plaintiff to relief upon some theory." (quoting *E.N. Nason, Inc. v. Land-Ho Dev. Corp.*, 403 A.2d 1173, 1177 (Me. 1979))).

The Amended Complaint identifies two possible causes of action: the Maine Constitution itself and the Declaratory Judgments Act (DJA), 14 M.R.S.A. §§ 5951-63 (2003 & Supp. 2023). Compl. at 15; Compl. ¶¶ 9-10. Neither authority provides Plaintiffs with a cause of action.

The Maine Constitution, by itself, does not provide a private cause of action. The only cause of action authorized by the Legislature "for a violation of a person's rights under the Maine Constitution" is the Maine Civil Rights Act (MCRA), 5 M.R.S.A. §§ 4681-85 (2013). *Andrews v. Dep't of Envtl. Prot.*, 1998 ME 198, ¶ 23, 716 A.2d 212. The MCRA allows a person "whose exercise or enjoyment" of "rights secured by the Constitution of Maine" have been intentionally interfered with by another person through "physical force or violence against a person, damage or destruction of property or trespass on property or by the threat [thereof]" to "institute and prosecute" "a civil action for legal or equitable relief" against that person. 5 M.R.S.A. § 4682(1-A). Plaintiffs have not alleged "an interference with [their state constitutional] rights by physical force or violence, damage or destruction of property, trespass on property, or threats thereof," and therefore have "no cause of action pursuant to the MCRA." *Andrews*, 1998 ME 198, ¶ 23, 716 A.2d 212; *see also Duchaine v. Town of Gorham*, No. CV-99-573, 2001 WL 1710592, at *3 (Me. Super. Ct. Jun. 15, 2001) ("[I]t is apparent [in *Andrews* that] the Law Court was rejecting the plaintiff's argument to expand the remedies available under the MCRA to allow a private cause of action for claims that have not alleged

an interference by physical force or violence, damage or destruction of property, or trespass.").

Further, the Law Court has ruled consistently – and repeatedly – that the DJA does not create an independent cause of action. *See Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172 ("A declaratory judgment action cannot be used to create a cause of action that does not otherwise exist."); *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996) ("We have stated that the purpose of the [DJA] is to provide a more adequate and flexible remedy in cases where jurisdiction already exists." (emphasis added)); *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935, 942 (Me. 1993) ("[a]ll courts require the declaratory plaintiff to show jurisdiction and a justiciable controversy." (quoting *Hodgdon v. Campbell*, 411 A.2d 667, 670 (Me. 1980)); *Hodgdon*, 411 A.2d at 669 ("The statute does not create a new cause of action; its purpose is 'to provide a more adequate and flexible remedy in cases where jurisdiction already exists.'" (emphasis added) (quoting *Casco Bank & Trust Co. v. Johnson*, 265 A.2d 306, 307 (Me. 1970))). In other words, the DJA simply provides a remedy – declaratory relief – ancillary to some valid cause of action.

Plaintiffs have identified no such cause of action by which they may challenge the Governor's convening of the First Special Session. For example, Plaintiffs do not assert that any of their rights under federal law or the United States Constitution have been abridged, such that they could bring an action under 42 U.S.C. § 1983. Nor do Plaintiffs challenge the application of any laws enacted in the session to their individual situations under M.R. Civ. P. 80C or 80B. In either scenario, if Plaintiffs had a valid cause of action, the DJA could have provided a remedy.

Here, though, Plaintiffs cite to nothing that provides them with an independent cause

of action against the Governor, the House Speaker, or the Senate President. The claims should therefore be dismissed on that basis.

**B. Even if Plaintiffs had asserted a cause of action, the Amended Complaint fails to state a claim upon which relief can be granted because the Governor's convening of the First Special Session did not violate the Maine Constitution or any state statute.**

Assuming the Court determines that Plaintiffs have asserted a cause of action, the Court should dismiss the Amended Complaint under Rule 12(b)(6) because, as a matter of law, the Governor's convening of the First Special Session did not violate the Maine Constitution or any state statute.

Plaintiffs claim that the Governor "does not have the constitutional power to reconvene the Legislature and compel legislative action simply because there is unfinished legislative business after the Legislature adjourns *sine die*." Compl. ¶ 76. According to Plaintiffs, the "Governor has contrived an 'extraordinary occasion,'" Compl. ¶ 77, and "the mere existence of unfinished legislative business is not an 'extraordinary occasion,'" Compl. ¶ 78; *see also* Compl. ¶¶ 76-77. These claims fail as a matter of law.[3]

Maine's Constitution expressly provides the Governor with the power to convene the Legislature: "The Governor may, on extraordinary occasions, convene the Legislature." Me. Const. art. V, pt. 1, § 13. The Constitution does not define what constitutes an extraordinary occasion, but more than 80 years ago, the Supreme Judicial Court opined on the Governor's power to convene the Legislature. The Court explained: "The Governor alone is the judge of the necessity of such action, which is not subject to review." *In re Opinion of the Justices*, 12

[3] Plaintiffs seem to suggest that the State Officers are not permitted to discuss the course of the legislative session or sessions, Compl. ¶¶ 54-55, but they have identified no legal authority which would prohibit such discourse.

A.2d 418, 136 Me. 531 (1940). Contrary to Plaintiffs' claims, Maine's Governor can convene the Legislature for whatever reason that particular Governor sees fit. *See id.* That decision is not reviewable,[4] and all claims challenging Governor Mills's convening of the Legislature should be dismissed on that basis.

Apparently relying on Article IV, Part 3, § 1 of the Maine Constitution and 3 M.R.S.A. § 2 (Supp. 2023), Plaintiffs also claim that the Governor's proclamation violates "the Legislature's right to control its regular legislative sessions and violates the separation of powers by convening the Legislature indefinitely until such time that its old and new business is complete." Compl. ¶ 79. This claim also fails as matter of law.

Plaintiffs conflate the *sine die* adjournment of First Regular Session with the convening of the First Special Session. Compl. ¶¶ 49-53. The two sessions are separate, even if close in time, and spring from different provisions of the Maine Constitution. The Legislature adjourned itself *sine die* on March 30, 2023, to close the First Regular Session, as permitted by the Maine Constitution and state statute. *See* Me. Const. art. IV, pt. 3, §§ 1, 12;

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[4] When interpreting nearly identical state constitutional provisions regarding the power of a governor to convene the legislature on extraordinary occasions, numerous other jurisdictions have likewise concluded that the Governor's decision to convene the Legislature is not reviewable by the courts. *See McConnell v. Haley*, 711 S.E.2d 886, 887 (S.C. 2011) ("Because there is no indication in the [South Carolina] Constitution as to what constitutes an "extraordinary occasion" to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that decision."); *Opinion of the Justices*, 198 A.2d 687, 689 (Del. 1964) (Delaware Constitution "allows the Governor, in his sole discretion, to convene an extraordinary session of the General Assembly" which decision "cannot be subjected to judicial review"); *Diefendorf v. Gallet*, 10 P.2d 307, 314–15 (Idaho 1932) ("The determination as to whether facts exist such as to constitute 'an extraordinary occasion' is for [the Governor] alone to determine," which decision is "not to be interfered with by any other co-ordinate branch of the government."); *State v. Howat*, 191 P. 585, 589 (Kan. 1920) ("The Governor is the final judge of" whether an "extraordinary occasion" existed "to call the special session of the Legislature"); *Bunger v. State*, 92 S.E. 72, 72 (Ga. 1917) (the Governor "alone is to determine when there is an extraordinary occasion for convening the Legislature"); *In re Governor's Proclamation*, 35 P. 530, 531 (Colo. 1894) (the Governor "alone is to determine when there is an extraordinary occasion for convening the legislature").

3 M.R.S.A. § 2 (providing First Regular Session" shall adjourn no later than the 3rd Wednesday in June" (emphasis added)). The fact that the Governor then convened the Legislature for a special session, pursuant to Me. Const. art. V, pt. 1, § 13, did not interfere with the Legislature's adjournment of the First Regular Session or violate the separation of powers. The preceding is also entirely consistent with the opinion Governor Mills issued as Attorney General in 2015. *See* Compl. Ex. C (explaining hallmarks of an adjournment *sine die* by the Legislature, but not opining on the Governor's authority to convene the Legislature); Compl. ¶¶ 57-62.

Contrary to Plaintiffs' claims, the First Special Session is not "indefinite," Compl. ¶ 79; it will end when the Legislature determines that its business is finished. The Governor has no authority to end the First Special Session or any other session, *see* Compl. Ex. C at 2 ("The determination of the length of the session is uniquely a legislative one"), except in the event that both houses of the Legislature do not agree to adjourn, Me. Const. art. V, pt. 1, § 13. Moreover, 3 M.R.S.A. § 2 expressly contemplates that a special session may be "called during the time period specified . . . for a first regular session."

Plaintiffs allege in conclusory fashion that the Governor is "compelling" the Legislature to legislate to her satisfaction. Compl. ¶ 80. This allegation is unsupported by any specific factual allegations and is contrary to the applicable law. Maine's Governor may convene the Legislature for a specific purpose through proclamation, but the Legislature can and has considered bills beyond that purpose stated in the subsequent session so convened. For example, Governor McKernan convened the Second Special Session of the 115th Legislature on December 18, 1991, specifically to address budgetary shortfalls. Ex. 2. During that session, the Legislature not only passed several budget bills, but also legislation

exempting certain sales of snowmobiles from sales tax, *see* P.L. 1991, ch. 620 (eff. Dec. 21, 1991), and legislation regarding medical services for children in child protective proceedings, *see* P.L. 1991, ch. 623 (eff. Apr. 7, 1992). Governor LePage convened the First Special Session of the 128th Legislature on October 23, 2017, specifically to correct an issue with a prior enacted law regarding food systems and appropriate funds for the Maine Office of Geographic Information Systems (MEGIS). Ex. 3. In that session, the Legislature not only addressed those issues, *see* P.L. 2017, ch. 314 (eff. Oct. 31, 2017) (correcting prior enacted law regarding food systems); P.L. 2017, ch. 315 (eff. Oct. 31, 2017) (funding MEGIS), but also enacted comprehensive legislation addressing ranked choice voting, *see* P.L. 2017, ch. 316 (eff. Feb. 5, 2018), and amended the laws governing the Fund for the Efficient Delivery of Local and Regional Services, P.L. 2017, ch. 313 (eff. Feb. 5, 2018) (codified at 30-A M.R.S. §§ 6201-09). In other words, Maine's Governor can convene the Legislature, but the Legislature controls what business it then conducts.[5] Plaintiffs' claims to the contrary have no basis in law or fact.

Finally, relying on Article III, § 2 of the Maine Constitution, Plaintiffs claim that the Speaker and Senate President have "ced[ed] legislative power to the executive contrary to the Maine State Constitution." Compl. ¶¶ 83-87. That claim is at odds with their Amended Complaint and the Maine Constitution itself. Plaintiffs do not contend that the First Regular

[5] This is unlike in other States, in which the gubernatorial proclamation convening that State's legislature restricts the legislative action permissible at a special session to the subject matter identified in the proclamation. *See, e.g.*, Ky. Const. § 80 ("When [the Governor] shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered."); Neb. Const. art. IV, § 8 ("The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together."). *But see Washington v. Fair*, 76 P. 731, 733 (Wash. 1904) ("While the Constitution empowers the Governor to call extra sessions of the Legislature, and defines his duty respecting the same, it does not authorize him to restrict or prohibit legislative action by proclamation or otherwise.").

Session was unlawfully adjourned, that the appropriations bill, P.L. 2023, ch. 17 (eff. Jun. 29, 2023), was unlawfully enacted, or that the poll conducted to convene by consent was somehow improper or ineffective. All of these actions were appropriate exercises of legislative power, and Plaintiffs do not contend otherwise. Indeed, they ask this Court to declare the adjournment was one of the last lawful actions taken by the Legislature. Compl. at 15-16. They take issue only with the Governor convening the First Special Session, which is constitutionally permissible and addressed above. *Cf. Whiteman v. Wilmington & S.R. Co.*, 2 Del. 514, 525 (Del. Super. Ct. 1839) ("the doctrine that a mistake or even corruption on the part of the governor in convening the general assembly invalidates the acts of that body, would be productive of incalculable mischief").

## II. Plaintiffs' Amended Complaint should be dismissed because any cognizable cause of action would be barred by legislative immunity and separation of powers.

Even assuming the Court concludes that Plaintiffs have asserted a cognizable cause of action, the Court should dismiss the Amended Complaint because those claims would be barred by legislative immunity and separation of powers.

### A. Plaintiffs' claims are barred by legislative immunity.

Plaintiffs' claims seek to interfere with quintessentially legislative actions and are thus barred by legislative immunity. All the State Officers are sued solely in the official capacity, meaning Plaintiffs are seeking relief against the State itself, not the individuals. Plaintiffs ask this Court to enjoin President Jackson and Speaker Talbot Ross from calling their respective chambers while this lawsuit is pending and declare that the First Special Session convened by Governor Mills is unconstitutional. Compl. at 15-16. These claims are barred by the doctrine of absolute legislative immunity.

Legislative immunity applies when the conduct challenged is legislative in nature, meaning "acti[on] in a field where legislators traditionally have power to act," *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951), or an "integral step[] in the legislative process," *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). Because the immunity "attaches to legislative *actions* rather than legislative *positions*," "executive branch officials are also absolutely immune from liability 'when they perform legislative functions.'" *Gray v. Mills*, No. 1:21-CV-00071-LEW, 2021 WL 5166157, at *3 (D. Me. Nov. 5, 2021) (quoting *Bogan*, 523 U.S. at 55).

The Law Court has recognized and applied this doctrine in a context indistinguishable from this one. In *Lightfoot v. State of Maine Legislature*, 583 A.2d 694 (1990), the plaintiff brought a civil-rights action under 42 U.S.C. § 1983 seeking "an injunction to mandate that the Legislature enact certain legislation." *Id.* at 694. Observing that "[t]he Legislature acts within its constitutional sphere of activity when it exercises discretion to reject or enact legislation," the Court held that the common-law doctrine of legislative immunity applied to such legislative actions so as to preserve "legislative independence within this sphere of legitimate legislative activity." *Id.* This immunity is not limited to damages claims but applies equally to "suits for declaratory and injunctive relief." *Id.* (citing *Supreme Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731–34 (1980)). The Court therefore affirmed the trial court's ruling that the plaintiff's claims for injunctive relief against the Legislature were barred by legislative immunity.

Nothing distinguishes the claims asserted here from the claims barred in *Lightfoot*. Decisions and votes related to when or whether to convene the Maine Legislature or call the House or Senate into session are quintessentially legislative in nature. *See* Me. Const. art. IV, pt. 3, § 1; Me. Const. art. V, pt. 1, § 13. Any declaratory or injunctive relief against State

Officers would intrude into the "sphere of legitimate legislative activity" protected by legislative immunity. *Lightfoot*, 583 A.2d at 694; *see also Gray*, 2021 WL 5166157, at *3 ("Defendants' decisions around whether and when to convene the Legislature in the face of a global pandemic are the sort of 'quintessentially legislative' conduct that [legislative immunity] protects.").

Legislative immunity applies regardless of the type of claim asserted by Plaintiffs. Thus, it does not matter that Plaintiffs' action is not brought under 42 U.S.C. § 1983, the federal civil rights statute at issue in *Lightfoot*. The Law Court has long held that qualified immunity—another judicially created immunity doctrine protecting state actors in § 1983 suits—applies equally to constitutional claims under state-law causes of action such as the MCRA. *Clifford v. MaineGeneral Med. Ctr.*, 2014 ME 60, ¶ 46, 91 A.3d 567. Moreover, the separation of powers concerns that require recognizing legislative immunity in the context of § 1983 claims apply equally to state-law causes of action. As with qualified immunity, legislative immunity is meant to protect against not just certain types of judgments, but against the immune party being hauled into court in the first place. *Cf. Andrews*, 1998 ME 198, ¶ 4, 716 A.2d 212 (recognizing that qualified immunity is an immunity from suit, not just damages).

Further, the Business and Consumer Court, in reliance on *Lightfoot*, recently dismissed state-law claims for declaratory and injunctive relief brought against the House and Senate. *See NECEC Transmission, LLC v. Bureau of Parks & Lands*, BCD-CIV-2021-00058 (Me. B.C.D. Dec. 7, 2022) (attached hereto as Ex. 4). As the Court explained: "the Legislature enjoys absolute common law immunity from suits for declaratory and injunctive relief." *Id.* at 1-2. The Court should rule the same here and dismiss all claims brought against State

Officers because they are all premised on the exercise of legislative power.

### B. Any injunctive or declaratory relief directed against State Officers would violate the constitutional separation of powers.

Under separation-of-powers principles, Plaintiffs are not entitled to any relief against State Officers, even if they were to prove their claims.

Under Article 3, § 2, of the Maine Constitution, "[n]o person or persons, belonging to one of [the executive, legislative, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." This provision establishes a separation-of-powers test that is "much more rigorous" than the test applicable to the federal government. *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). To evaluate whether a particular act by a member of one department violates this provision, the Court must ask: "has the power in issue been explicitly granted to one branch of state government, and to no other branch?" *Id.* at 800. If so, exercise of that power by a different branch violates the separation of powers. *Id.* In *Hunter*, the Law Court applied this test to conclude that a statute permitting courts to resentence offenders based on their behavior while incarcerated violated the separation of powers because the statute "duplicate[d] a part of the Governor's power to commute a criminal sentence." *Id.* at 802.

The separation-of-powers violation that Plaintiffs ask the Court to commit here is more clear-cut than the one at issue in *Hunter*. Maine's Constitution specifies the power of the Legislature and the regular sessions at which it will convene. Me. Const. art. IV, pt. 3, § 1. The Legislature has the authority to convene at other times: "The Legislature may convene 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." *Id.* In addition, Maine's Governor can

convene the Legislature: "The Governor may, on extraordinary occasions, convene the Legislature." Me. Const. art. V, pt. 1, § 13. The Governor, the Senate President, and the Speaker exercise powers "explicitly granted" by the Maine Constitution to them, and not to the judiciary. *Hunter*, 447 A.2d at 802.

Decisions of the Law Court and opinions of the Justices have recognized the constitutional imperative that the judicial branch avoid interference in the legislative process. In 1981, the Governor sought an Opinion of the Justices as to whether enactment of a particular bill would affect the State's property interests in filled land. The Justices declined to answer the question, explaining that "[t]o express a view as to the future effect and application of proposed legislation would involve the Justices at least indirectly in the legislative process." *Opinion of the Justices*, 437 A.2d 597, 611 (Me. 1981). The Justices explained that the separation of powers principle in Article 3, § 2, required them to avoid any such "intrusion on the functions of the other branches of government." *Id.* The Law Court has since endorsed that principle in a precedential decision, explaining in *Wagner v. Secretary of State* that any effort by the judicial branch to "elaborate on the ramifications" of proposed legislation would violate the separation of powers by involving the Court in the legislative process. 663 A.2d 564, 567 (Me. 1995); *accord Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 16, 237 A.3d 882.

The relief that Plaintiffs request is more intrusive than the relief sought in *Wagner* and *Avangrid*: they ask the Court to declare that the First Special Session is unconstitutional based on State Officers' actions, effectively requesting that the Court 1) proclaim that all the legislation passed in First Special Session is without any legal effect, and 2) prevent the Legislature from continuing its business. If it violates the separation of powers for the Court

merely to opine on the legal effects of proposed legislation, then the far more intrusive relief Plaintiffs seek would also violate that principle. The Court would, in effect, be telling the Legislature that it can no longer introduce, debate, and vote on any bills or resolves—a direct intrusion by one branch into the core functions of another. Just as the legislative branch cannot tell the judicial branch who should win in a particular case, *see Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.17 (2016) ("Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'"); *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117 ("The Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers."), the judicial branch cannot tell the legislative branch when to convene or adjourn.[6]

In short, because the Constitution explicitly grants the power to convene and adjourn to the Legislature and, in certain circumstances, to the Governor, and to no other branch, any injunctive or declaratory relief limiting or prohibiting the Legislature from conducting its business would violate the separation of powers. Because the Court cannot issue any relief that would be consistent with the separation of powers, Plaintiffs have stated no claim against State Officers "upon which relief can be granted." M.R. Civ. P. 12(b)(6).

## III. The Amended Complaint should be dismissed pursuant to Rule 12(b)(1) because Plaintiffs have failed to allege sufficient facts to demonstrate their standing or that their claims are ripe.

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[6] A number of other jurisdictions have recognized that relief of the type sought by Plaintiffs would violate those jurisdictions' separation-of-powers doctrines. *See, e.g., Pauling v. Eastland*, 288 F.2d 126, 129 (D.C. Cir. 1960) (declining to issue a declaratory judgment prohibiting a U.S. Senate subcommittee from issuing a contempt citation based on the "right of the Senate to pursue its legislative duties without judicial interference"); *Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME*, 784 So. 2d 404, 408 (Fla. 2001) ("Where the Legislature is concerned, it is only the final product of the legislative process that is subject to judicial review"); *City of Phoenix v. Superior Ct. of Maricopa Cnty.*, 175 P.2d 811, 814 (Ariz. 1946) ("Courts have no power to enjoin legislative functions"); *Fletcher v. City of Paris*, 35 N.E.2d 329, 332 (Ill. 1941) ("The courts can neither dictate nor enjoin the passage of legislation.").

Under the Law Court's standing doctrine, a plaintiff must allege and prove a requisite "minimum interest or injury suffered" to be eligible for judicial relief. *Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700; *Brunswick Citizens for Collaborative Gov't v. Town of Brunswick*, 2018 ME 95, ¶ 7, 189 A.3d 248 (the DJA is not an exception to justiciability requirements). "[T]o have standing to seek injunctive and declaratory relief, a party must show that the challenged action constitutes 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Madore v. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 13, 715 A.2d 157, 161 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The standing doctrine in Maine is prudential, but it is not optional: "Every plaintiff seeking to file a lawsuit in the courts must establish its standing to sue, no matter the causes of action asserted." *Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 (emphasis added). A "plaintiff's lack of 'standing to sue' concomitantly gives rise to a lack of subject-matter jurisdiction in the Court." *Walsh v. City of Brewer*, 315 A.2d 200, 210 (Me. 1974).

Although the Law Court has not had occasion to address the specific issue of whether legislators have standing in this situation, *cf. Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶ 31, 288 A.3d 346, under well-reasoned federal jurisprudence, individual legislators do not have standing to challenge an alleged "institutional injury" suffered by all legislators or both houses of the Legislature as a whole. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997). When legislators challenge an institutional injury—that is, one that "runs (in a sense) with the Member's seat"—they lack a sufficiently particularized stake in the outcome to sue as individuals. *Id.* at 814. This principle seeks to ensure, among other goals, that the judiciary is not placed in a position of adjudicating disputes between various members of the

Legislature. *Cf. Wright v. Dep't of Def. & Veterans Servs.*, 623 A.2d 1283, 1285 (Me. 1993) (refusing to adjudicate matters on separation of powers basis where doing so "would involve an encroachment upon the executive or legislative powers").

Here, the Legislator Plaintiffs seek to vindicate an alleged injury that is not personal to them but rather one suffered, if at all, by the Legislature as a body. Although Plaintiffs have sought to artfully label their respective injuries as the deprivation of the prerogative to adjourn *sine die* or being forced to legislate, Compl. ¶¶ 52-53, 62, 65, no such right is personal to any legislator, but one that "runs (in a sense) with the Member's seat."[7] *Raines*, 521 U.S. at 821. As the Law Court has put it, the Legislator Plaintiffs, like the legislators in *Raines*, are not the best suited plaintiffs to bring this action. *See Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 ("[W]e may limit access to the courts to those best suited to assert a particular claim." (quotation marks omitted)).

Plaintiffs fare no better in their other attempts to demonstrate standing, as taxpayers or otherwise. Compl. ¶¶ 1-2, 66-69. In order to establish that they have standing, Plaintiffs must allege and prove not only that they have "definite and personal legal rights" "at stake," *Nichols v. City of Rockland,* 324 A.2d, 295, 297 (Me. 1974), but also that their alleged injury is concrete and specific to them, not an abstract injury to the public generally. *See Buck v. Town of Yarmouth,* 402 A.2d 860, 861 (Me. 1979); *see also Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257 ("One who suffers only an abstract injury does not gain standing to challenge governmental conduct."). The injury must be concrete and defined by a legal harm that is "fairly traceable to the challenged action" of the adverse party. *Collins*, 2000 ME 85, ¶ 6, 750

[7] This is not a case where these Plaintiffs were denied the effectiveness of their vote. They voted not to return for a special session, and the Legislature did not convene itself by consent. Compl. ¶¶ 33-38.

A.2d 1257. Plaintiffs allege no such individual right or personal injury that has been caused by the actions of State Officers.

Any reliance on *Common Cause v. State*, 455 A.2d 1 (Me. 1983), by Plaintiffs is misplaced. *Common Cause* authorized so-called "taxpayer standing" in narrow circumstances. In that case, the Court held that taxpayers had standing to sue the State to enjoin it from spending tax dollars in a manner that the plaintiff-taxpayers contended was not permitted by the Maine Constitution. *Id.* at 7-13. *Common Cause* is inapplicable here because Plaintiffs seek not to prevent the spending of state funds, but to enjoin the Legislature from enacting legislation that might increase their taxes.

And Respect Maine has not satisfied the requirements for associational standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Black*, 2022 ME 58, ¶ 29, 288 A.3d 346 (quotation marks omitted). Respect Maine has not identified any member that has standing to sue in their own right. Respect Maine's claims should therefore be dismissed.

Even if Plaintiffs had standing, their taxpayer claims are not ripe. Ripeness "prevents judicial entanglement in abstract disputes, avoids premature adjudication, and protects agencies from judicial interference until a decision with concrete effects has been made." *Id. Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 17, 221 A.3d 554. (cleaned up). "Ripeness is a two-prong analysis: (1) the issues must be fit for judicial review, and (2) hardship to the parties will result if the court withholds review." *Id.* ¶ 20.

Plaintiffs' claims as taxpayers and citizens fail each ripeness prong. First, an issue is

fit for review only if the action "presents a concrete and specific legal issue that has a direct, immediate and continuing impact on the" complaining party. *Me. AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 8, 721 A.2d 633 (quotation marks omitted). Plaintiffs have not shown that any of the issues in their Amended Complaint for which they seek preventative/injunctive relief affected their personal, property, or pecuniary rights. Moreover, in order for the issues raised to be fit for review, the Court would need to assume that any legislation enacted in the First Special Session will violate the Maine Constitution or Maine statute – and would affect Plaintiffs' personal, property, or pecuniary rights. Speculation as to what may occur in a legislative session falls far short of a concrete and specific legal issue that directly affects Plaintiffs.

Second, the hardship prong requires that Plaintiffs allege and prove that an immediate burden will result from the Court declining to address the issue. *See New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 302-03 (Me. 1982). Speculative future adverse consequences do not satisfy the hardship prong. *Blanchard*, 2019 ME 168, ¶ 22, 221 A.3d 554. Because Plaintiffs have identified no legislation that has been passed during the First Special Session that affect their rights, their injury is purely speculative and unripe for judicial review.

**CONCLUSION**

Based on the foregoing, State Officers request that the court dismiss Plaintiffs' Amended Complaint pursuant to M.R. Civ. P. 12(b)(1) and M.R. Civ. P. 12(b)(6).

Dated: May 12, 2023

Respectfully submitted,

AARON M. FREY,
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Attorney for State Officers

**IMPORTANT NOTICES**

A. **Any opposition to this motion must be filed within 21 days after the date of its filing, unless another time is specified by the court.**

B. **Failure to file a timely opposition to this motion will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.**

EXHIBIT 1

# STATE OF MAINE
# ONE HUNDRED AND THIRTY-FIRST LEGISLATURE
# FIRST REGULAR SESSION
# SENATE ADVANCED JOURNAL AND CALENDAR

Thursday, March 30, 2023

SUPPLEMENT NO 3

## ORDERS

### Joint Order

(4-1) On motion by Senator **VITELLI** of Sagadahoc, the following Joint Order.
S.P. 594

**ORDERED**, the House concurring, that all matters not finally disposed of at the time of adjournment of the First Regular Session of the 131st Legislature in the possession of the Legislature, including working papers and drafts in the possession of nonpartisan staff offices, gubernatorial nominations and all determinations of the Legislative Council regarding after-deadline bill requests and policies, be held over 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; and be it further

**ORDERED**, that any public hearing, work session or other meeting to conduct the business of the Legislature that is scheduled at the time this order is passed is hereby authorized to occur

State of Maine

# Proclamation

WHEREAS, pursuant to 5 MRSA §1668, the Commissioner of Finance has reported to the Governor and the leadership of the 115th Legislature that the anticipated income and other available funds will not be sufficient to meet the expenditures authorized by the 115th Legislature in Fiscal Year 1992; and

WHEREAS, the imminent need to correct this insufficiency prior to the convention of the Second Regular Session of the 115th Legislature creates an extraordinary occasion within the meaning of Article V, Part First, Section 13 of the Constitution of Maine; and

WHEREAS, Article V, Part First, Section 13 of the Constitution of Maine authorizes the Governor upon extraordinary occasions to convene the Legislature;

NOW, THEREFORE, I, JOHN R. McKERNAN, JR., Governor of the State of Maine, pursuant to Article V, Part First, Section 13, do hereby convene the 115th Legislature on Wednesday, December 18, 1991, at 9:00 A.M. in the City of Augusta.

In testimony whereof, I have caused the Great Seal of the State to be hereunto affixed GIVEN under my hand at Augusta this sixteenth day of December in the Year of our Lord One Thousand Nine Hundred and Ninety-One.

JOHN R. McKERNAN, JR.
Governor

Gary Cooper
Deputy Secretary of State

EXHIBIT 3

# State of Maine

# Proclamation

**WHEREAS,** the Legislature of this State should meet in special session to consider legislation to correct an issue in LD 725, "An Act to Recognize Local Control Regarding Food Systems" which was passed by the Legislature and signed into law during the last legislative session and is scheduled to go into effect on November 1, 2017 and to appropriate to state agencies funding for the Maine Office of Geographic Information Systems (MEGIS); and

**WHEREAS,** the proposed legislative changes to LD 725 is designed to promote the continued inspection of meat, poultry, fish and milk by federal and state inspectors to ensure compliance with federal and state food safety laws, rules and regulations; and

**WHEREAS,** compliance with federal and state food safety laws, rules and regulations promotes the public health and welfare of all people in the State of Maine and prevents negative economic impacts to the economy of the State of Maine; and

**WHEREAS,** the budget passed by the Legislature to end the government shutdown did not allocate money from the general fund to state agencies for the MEGIS program, and the program has been operating with funds that were carried over from the previous fiscal year of 2017; and

**WHEREAS,** MEGIS provides critical services at the state, regional and local level across Maine in support of economic development activities and public safety; and

**WHEREAS,** State Agencies have funding until November 2017 and without appropriations from the Legislature, MEGIS and the State's ability to adequately provide Geographic Information System services will be in extreme jeopardy.

**NOW, THEREFORE,** I, Paul R. LePage, Governor of the State of Maine, by the virtue of the power vested in me as Governor by Article V, Part 1, Section 13 of the Constitution of the State of Maine, convene the Legislature of this State, hereby requiring the Representatives and the Senators to assemble at ten o'clock in the morning in their respective chambers at the Capitol in Augusta on, Monday, October 23, 2017, in order to receive communications, and to consider and determine on such measures as in their judgment will best promote the welfare of the State.

IN TESTIMONY WHEREOF, I have caused the Great Seal of the State to be hereunto affixed GIVEN under my hand at Augusta this Twenty-ninth Day of September Two Thousand Seventeen

Paul R. LePage
Governor

Dorothy A. Carelli, Chief Deputy
Matthew Dunlap
Secretary of State

EXHIBIT 4

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CIV-2021-00058

| | | |
|---|---|---|
| NECEC TRANSMISSION, LLC, et al., | ) | |
| Plaintiffs & Intervenors, | ) | |
| v. | ) | ORDER GRANTING IN PART AND RESERVING IN PART STATE DEFENDANTS' MOTION TO DISMISS CERTAIN PARTIES AND CLAIMS |
| BUREAU OF PARKS AND LANDS, et al., | ) | |
| Defendants & Intervenors. | ) | |

Defendants Bureau of Parks and Lands ("BPL" ),Public Utilities Commission ("PUC" ),Maine House of Representatives (the "House" )and Maine Senate (the "Senate" )(collectively, the "State Defendants" )move to dismiss all claims against the House and Senate and certain other claims against the remaining defendants. The Court here takes up only the request to dismiss the claims against the House and Senate. The Court reserves, for the time being, on all other aspects of State Defendants' Motion to Dismiss and will issue a separate order after Plaintiffs' Motion for Judgment on the Pleadings is fully briefed.

Plaintiffs seek declaratory and injunctive relief against the House and Senate (collectively, the "Legislature" ).[1]However, the Legislature enjoys absolute common

[1] Plaintiffs note that at the preliminary injunction stage they made it clear they would limit their request for relief against the Legislature to a declaratory judgment, but in the ensuing year Plaintiffs have not sought to amend their Complaint, which still expressly seeks declaratory and injunctive relief against the Legislature But even if Plaintiffs had asked to amend their Complaint to drop the claim for injunctive relief against the Legislature, it would make no

law immunity from suits for declaratory and injunctive relief. *Lightfoot v. State of Maine Legislature*, 583 A.2d 694, 694-95 (Me. 1990). Plaintiffs argue that this "legislative immunity" only protects legislators from personal liability, but that argument is unsupported by any citation to a Maine case and runs directly contrary to the pronouncement in *Lightfoot*. Plaintiffs also protest that legislative immunity is merely a variation on sovereign immunity, and this Court previously rejected the Legislature's sovereign immunity defense. *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, BCD-CIV-2021-00058, 2021 Me. Bus. & Consumer LEXIS 2, at *21 n.15 (Dec. 16, 2021). However, the Constitutional underpinnings of the two types of immunity are distinct. *Compare Lightfoot*, 583 A.2d at 694-95 (legislative immunity based on separation of powers) *with Alden v. State*, 1998 ME 200, ¶ 6, 715 A.2d 172 (1999) (sovereign immunity based on ancient principle that a state cannot be sued without its consent). Accordingly, this Court's previous ruling on sovereign immunity does not foreclose the application of legislative immunity.

Furthermore, the House and Senate are not necessary parties to this action. Complete relief (declaratory and injunctive) is still available to Plaintiffs because state agencies (the BPL and PUC) are parties to the suit.[2]

For all of these reasons, State Defendants' Motion to Dismiss Certain Parties and Claims is GRANTED IN PART. All claims against the Maine House of

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difference to the outcome here. The Court's analysis would be the same even if Plaintiffs were only seeking declaratory relief against the Legislature.

[2] There is also a pending Motion to Dismiss BPL from this litigation, because of the result in *Black et al. v. Bureau of Parks and Lands, et al*, 2022 ME 58, __ A.3d __. Even if the BPL is dismissed, complete relief will remain available to Plaintiffs because the PUC will still be a party to the action.

Representatives and Maine Senate are dismissed, and the Maine House and Senate are dismissed as parties to the action.

So Ordered.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Dated: 12-7-2022

Michael A. Duddy
Judge, Business and Consumer Court

Entered on the docket: 12/07/2022

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
DOCKET NO. CV-23-52

| | | |
|---|---|---|
| WILLIAM CLARDY, et al.<br><br>Plaintiffs,<br><br>v.<br><br>TROY D. JACKSON, in his official capacity, RACHEL TALBOT ROSS, in her official capacity, and JANET MILLS, in her official capacity,<br><br>Defendants. | ) | **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** |

NOW COME William Clardy, Michelle Tucker, Shelley Rudnicki, Randall Greenwood, and Respect Maine (the "Plaintiffs"), by and through undersigned counsel, and respectfully submit this opposition to Defendants' Motion to Dismiss (the "Motion"). For the reasons stated below, the Court should deny the Defendants' Motion.

## Background

Plaintiffs include Maine state residents, taxpayers, current elected representatives serving in the Maine State 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 Amended Complaint ("Am. Compl.") ¶¶ 1-5.

The gravamen of the Amended Complaint is as follows. The Maine State Legislature passed an appropriations bill with a simple majority on March 30, 2023, and later that same day, voted to adjourn the First Regular Session of the 131st Legislature *sine die*, thereby formally concluding the regular legislative session and ensuring that the appropriations bill would take effect within 90 days. Am. Compl. ¶¶ 25-31. Unfinished legislative business was voted to be carried into the next special or regular session. Am. Compl. ¶ 41. Just before adjournment,

members of the Legislature were polled to reconvene for a special session a week later, and the response from the legislators did not meet constitutional threshold for the body to reconvene on their own accord. Am. Compl. ¶¶ 33-38. Defendant Talbot Ross then adjourned the chamber, saying that the session was adjourned "without day as it sees fit." Am. Compl. ¶¶ 44-45.

The next day, Defendant Mills issued a proclamation (the "Proclamation") ordering the Legislature to reconvene, citing "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." Am. Compl. ¶¶ 47-48. As other reasons provided for the Proclamation, Defendant Mills ordered the legislators to return to their chambers "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." Am. Compl. ¶51. No emergency was cited.

Plaintiffs contend that the special session of the legislature ordered by Defendant Mills and conducted by Defendants Talbot Ross and Jackson violate the Maine Constitution. Plaintiffs indicate that at the time of filing the Amended Complaint, the extraconstitutional legislature had passed legislation affecting state expenditures, permitting rights, governmental services, aid programs, and other taxpayer interests. Am. Compl. ¶ 66. The legislator plaintiffs have also been compelled, against their will and adverse to the interests of their districts, to participate in an extraconstitutional special session. Am. Compl. ¶¶ 65, 80. All plaintiffs have interests in preventing executive abuses that usurp the power of the Legislature and impair the efficacy of representative government. Am. Compl. ¶¶ 76, 85-89.

In general terms, Defendants contend that Rule 12(b)(6) dismissal is compelled due to (i) there being no recognized cause of action for the abuse of constitutional authority identified in

the Amended Complaint, or (ii) the Governor's actions are not subject to judicial review, or (iii) due to doctrines of legislative immunity or separation of powers, the judiciary cannot remedy the injury in question. Separately, Defendants contend that there is no subject matter jurisdiction under Rule 12(b)(1) based on lack of standing, and/or lack of ripeness.

As a sum of its parts, Defendants' Motion seeks to create a legal barricade to protect abuses of power. Ultimately, the Defendants' position ignores the express language of the Maine Constitution and the history of its origins. The Motion diminishes the principle of a checks-and-balances system of government and explicitly seeks to insulate present and future abuses of power from appropriate judicial review. The Motion should, respectfully, be denied.

## Standard of Review

Defendants filed their Motion pursuant to the separate standards under Maine Rules of Procedure 12(b)(6) and 12(b)(1). In weighing the Rule 12(b)(6) arguments, the Court should review the Amended Complaint "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 5, 708 A.2d 283. Dismissal "should only occur when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quotation marks omitted). Ripeness and standing, as jurisdictional questions, are subject to standards set forth in their respective subsections, *infra*.

## Argument

Defendants offer many reasons for why this case should be dismissed. None stick. Ultimately, there is no applicable legal basis to compel dismissal of this action, and Defendants Motion should, respectfully, be denied.

## I. Plaintiffs Properly Seek Injunctive and Declaratory Relief for Violations of the Maine Constitution.

### A. Defendants misstate the availability of declaratory and injunctive relief as a remedy to violations of the Maine Constitution.

Defendants' contention that there is no legal mechanism for turning to the Maine Constitution in seeking declaratory and injunctive relief is curious, and contrary to legal decisions that run the opposite direction. The Defendants assert that only the narrowest relief is afforded to private persons when state actors make public policy decisions that violate of the Maine Constitution, which, according to Defendants, can only be redressed through the Maine Civil Rights Act. Motion at 5. The supposed rule does not hold up to scrutiny.

The Law Court has established that there is a clear path for constitutional relief when state actors flout constitutional restraints or when governmental action results in an unconstitutional outcome. As a notable example, a private company obtained declaratory and (quasi-)injunctive relief when a public initiative set to be placed on the ballot exceeded the people's legislative power under article IV, part 3, section 18 of the Maine Constitution. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882. In that case, the private company brought suit seeking to enjoin the Secretary of State from putting the citizens' initiative on ballots, arguing the initiative did not meet the "constitutional prerequisite that [it was] an initiative proposing a 'bill, resolve or resolution'—meaning legislative action…" *Id.* ¶ 37. The constitutional deficiency with the citizens' initiative is that it directed an executive agency, the Public Utilities Commission (the "PUC"), to reverse its previous adjudication and issue an amended order reflecting the initiative proponents' desired outcome. See *id.* ¶ 5, 35. The Law Court, after reviewing the language of the Maine Constitution, ruled that the initiative was constitutionally defective, and only declined to enjoin the Secretary of State because "there was no need" to after

the office agreed that it would comply with the Law Court's ruling. *Id.* ¶ 39 Even if the outcome of that case was not a formal injunction, per se, there seems little doubt that the private entity appropriately sued the Secretary of State—the state actor—to enjoin him from placing an unconstitutional initiative on the ballot.

The parallels between *Avangrid* and the present case are clear. There was no Maine Human Rights Act basis for the constitutional issue presented in *Avangrid*, nor a Section 1983 action, nor a Maine Tort Claims Act action, etc. The cause of action was based upon an issue combining the administration of government (i.e., the Secretary of State placing the citizen initiative on the ballot) with an unconstitutional violation of the separation of powers principle (i.e., the so-called 'legislation' dictating the PUC's regulatory decisions), a combination of events proving both justiciable and warranting the injunctive relief sought.

Defendants' cloistered view of permissible avenues for constitutional relief does not align with practice. There is a clear path for Plaintiffs to obtain appropriate relief for unconstitutional actions exceeding the authority delegated to state actors. Their Motion should be denied.

**B. Dicta in a non-authoritative advisory opinion does not affect the viability of the claims in the Amended Complaint.**

As an extension of their Motion, Defendants wrongly contend that this matter is mooted by past decisions. Defendants marshal a handful of non-authoritative cases, and in their reliance on those cases, Defendants neglect to engage in appropriate constitutional interpretation and offer little to no insight into the meaning and history of Maine's Constitution.

Contrary to the arguments in Defendants' Motion, any reliance on *Opinion of the Justices*, 12 A.2d 418, 136 Me. 531 (1940), is misplaced. While the decision does mention, in passing, that "The Governor alone is the judge of the necessity of such action [to convene the Legislature], which is not subject to review," the quotation is dicta in an advisory opinion, and has little utility

in resolving the current controversy. *Id.* at 420. The formal question before the individual Justices, submitted pursuant to article VI, section 3, was whether the Governor "has the power and authority to revoke [a] 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?" *Id.* Dicta are "[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court" or "[e]xpressions in [a] court's opinion which go beyond the facts before the court and . . . [are] not binding in subsequent cases as legal precedent." *Black's Law Dictionary*, 454 (6th ed. 1990). The question before the individual Justices of the Supreme Judicial Court in 1940 was whether the Governor could revoke a call to convene, not whether the Governor properly exercised the extraordinary authority to convene the Legislature in the first place. The stray comment was not determinative to the question.

The unreliable nature of the advisory opinions of individual justices is well documented by the Law Court. It is an abiding principle "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, 137 (1958). A Justice's 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 (1979). Due to those shortfalls, when a question is presented in actual litigation, 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." *Martin*, 154 Me. at 269, 174 A.2d at 137. The advisory opinion cited by Defendants therefore binds no court with respect to the question of gubernatorial power to summon a coequal branch to work for routine business.

Even if viewed as persuasive jurisprudence, such deference is not warranted here. While some advisory opinions have held sway beyond their limited purpose, the influence was contextual. One example of an advisory opinion shaping judicial precedent is documented in *State v. Sklar*, 317 A.2d 160 (Me. 1974), in which the Law Court remarked on the lasting impact of *Johnson's Case*, 1 Me. 230 (1821), a case affirming the unrestricted constitutional guarantee of jury trials in criminal prosecutions. The Law Court wrote, describing the nature of the right to a jury trial as understood within a year of Maine's Constitution being adopted, that:

> 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 that particular opinion is well-founded and well-reasoned. 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 Defendants in a non-binding advisory opinion from 1940 comes some 121 years after the constitutional provision in question was drafted and adopted.[1] Thus, not only is the advisory opinion without precedential value as a matter of doctrine, but the case cited and relied upon Defendants is particularly unenlightening for the purpose referenced.[2]

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[1] The Maine Constitutional Convention began on October 11, 1819, and the convention adopted a draft constitution on October 29, 1819. That draft was adopted on December 6, 1819.

[2] Defendants' string citation to various decisions from other states interpreting their own constitutions are not elucidated to be any more informative about the present litigation involving Maine's Constitution, as

In sum, the resolution of this case is not determined by advisory opinion dicta. The issue raised in the Amended Complaint has not been properly decided by the Law Court and cannot be short-circuited as proposed by Defendants. The Motion should be denied.

### C. Appropriate analysis of the constitutional text in Article V strongly favors Plaintiffs' request for judicial relief pursuant to the Amended Complaint.

Defendants argue that the Governor's authority to convene the Legislature is without limit, period, and this supposedly concrete legal principle bars the Plaintiffs from seeking redress. See Motion at 8 ("Contrary to Plaintiffs' Claims, Maine's Governor can convene the Legislature for whatever reason that particular Governor sees fit"). Whatever the reasoning supplied for that position, it does not align with sober constitutional analysis.

Better than dicta in advisory opinions, Maine courts have useful tools to aid constitutional interpretation. 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). 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*

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those decisions are a grab bag of context-stripped decisions, some advisory, some decided on other grounds, and all, ultimately, non-binding and non-precedential to this Court. Motion at 8 n.4. Interestingly, though, in one case cited by Defendants, *McConnell v. Haley*, 393 S.C. 136, 711 S.E.2d 866 (S.C. 2011), the South Carolina Supreme Court held that the governor's authority to convene the legislature was precluded in the circumstances presented in that case and enjoined the governor's order to hold an extra session of the South Carolina General Assembly. *See id.* at 138-39.

*Justices*, 142 Me. 409, 415, 60 A.2d 903 (1947).

So, to test that framework against the arguments in Defendants' Motion, 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 "unambiguous," but for argument's sake, assume 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 decidedly *ordinary*? See Motion at 8 (emphasis added). It is implausible. Defendants take a conditional clause—"extraordinary occasions"—and they paint it with an idiosyncratic meaning—i.e., that those words in that context mean the Governor can convene legislators for literally any reason or no reason, upon any occasion, without cavil. This interpretation is unpalatable.

The particular caveat of "extraordinary occasions" would seemingly operate like other conditions placed on gubernatorial power within the same section. Namely, 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," long that the alternative is "convenient." Me. Const. art. V, pt. 1, § 13. By this relatively plain language, the Governor *can* set the location for legislators to convene *but only if* prerequisite conditions are met. Applying a rationale interpretation of the clause, the

Governor cannot dictate where the Legislature convenes during regular business absent those conditions existing. Sure enough, empowering the Governor to have unilateral 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.[3]

If the clause is ambiguous, we can turn to the history of Maine's adoption of the "extraordinary occasions" authority to convene the Legislature as an informative tool for resolving this interpretive question. Prior to 1820, the District of Maine was a part of the Commonwealth of Massachusetts. 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.

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. Contemporary Mainers would have seen this power used at the federal level. The use of this authority first came up when 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

[3] For example, the Governor could use the provision to require the Legislature to convene its next session in Fort Kent, then refresh that requirement indefinitely. If southern Maine were under attack or quarantined, the directive *might* be prudent, and constitutional. If, however, there were no plausible basis for such an order, the exercise would disrupt to the regular operation of government, and even thwart the Legislature from fulfilling its constitutional duties.

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 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.

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.[4] The problem with Defendant Mills' Proclamation is not that this constitutional authority cannot readily be used in good faith, but that pretextual abuse must have recourse. If the only "extraordinary occasion" identified in her Proclamation is the *sine die* adjournment of the Legislature with some business unfinished, it is hardly extraordinary. If the authors of the Maine Constitution intended a discretionary power without oversight, the model for that language existed in the very constitution that Mainers shed in 1820.

[4] 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.

Moreover, any suggestion that the "extraordinary occasions" provision is incapable of sound judicial interpretation is flawed. The precedential value of advisory opinions received scrutiny already, *supra* at section I(B), but the constitutionality of a given request is relevant here. Under the Maine Constitution, Justices of the Supreme Judicial Court "*shall be obliged* to give their opinion upon *important questions of law*, and *upon solemn occasions*, when required by the Governor, Senate or House of Representatives." Me. Const. art. VI, § 3 (emphasis added). The language in this separate section may not directly point to any decisive interpretation of article IV, but does tumble into a problem of selective interpretative modes.

Can the other branches independently dictate to the Supreme Judicial Court what constitutes a "solemn occasion," thereby compelling Justices to render an advisory opinion under article VI? Notwithstanding the compulsory-sounding language in the Constitution, the answer is: no. The Supreme Judicial Court set out a multipart test to use when considering whether a "solemn occasion" compels an answer to a question propounded by the legislature or governor:

> First, the matter must be of 'live gravity,' referring to the immediacy and seriousness of the question. . . . 'A solemn occasion refers to an unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the Constitution or under existing statutes.' . . . In addition, the questions presented must be sufficiently precise that we can determine 'the exact nature of the inquiry,' . . . and we will not answer questions that are 'tentative, hypothetical and abstract.'

*Opinion of the Justices*, 2002 ME 169, 815 A.2d 791 (citations omitted). With that, the Justices have created guardrails to prevent other branches from abusing a limited constitutional right.

This example presents a corollary in constitutional interpretation: if the judiciary has the authority to reject one branch's invocation of a "solemn occasion," the judiciary has the power to

reject one branch's invocation of an "extraordinary occasion."[5] An effective framework could detect, protect, and deter improperly summoned legislatures. "It follows that clarity of process and adherence to settled expectations are critical to assuring that the procedures of democracy do not devolve into uncertainty." *Opinion of the Justices*, 2015 ME 107, ¶ 72, 123 A.3d 494. The violation identified by Plaintiffs' lawsuit is that a governor invoked a limited power in an unlimited way, and unmitigated, the will of the people is undermined by that usurpation of power.

Finally, compare the executive branch's "extraordinary" right to convene legislators with the Legislature's unconditioned constitutional right to meet biennially or "convene 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." Me. Const. art. IV, pt. 3, § 1. The Legislature's self-determinative power to convene—which, in fact, was exercised in the present case and yielded a decision *not* to convene on the date the Governor ordered—conflicts with the presupposition that the executive may demand legislators to resume regular business.

Defendants' Motion favors a perfunctory reading of the Maine Constitution, cribbed from advisory opinion dicta. Constitutional history reveals much more to consider, and when applied to the facts giving rise to this litigation, the abuse of power highlighted by this case must give rise to injunctive relief. For those reasons, the Motion should be denied.

## II. There Is No Separation of Powers Issue Warranting Dismissal of the Complaint.

Defendants argue that the case should be dismissed because Plaintiffs' claims are "barred

[5] A formal question to the Justices arose out of the same *sine die* adjournment foofaraw from March 2023. Following the *sine die* adjournment, the Legislature posed a question to the Justices concerning direct initiatives of voters that the Secretary of State transmitted to the 131st Legislature during its First Regular Session, but which the Legislature did not act on during that session. The Legislature asked the Justices to review the issue of whether the initiatives could still be subject to a legislative vote, and the Justices solicited briefs from the public on the substantive question, as well as whether the situation posed a "solemn occasion."

by legislative immunity and separation of powers." Motion at 11. These contentions, in turn and together, should be rejected.

### A. Legislative immunity does not protect the activities of Defendants Talbot Ross and Jackson as outlined in the Amended Complaint.

The legislative immunity concerns raised by the Defendants do not square with the facts of the case. The Motion casts the actions of Defendants Talbot Ross and Jackson as being "legislative in nature"—an amorphous threshold, mostly assumed because the Defendants claim that the cloak of officialdom renders all things "legislative in nature"—so as to have complete immunity from legal challenge. Motion at 12. Defendants overstate and oversimplify the common law license afforded to legislative actors for certain actions, and fail to apply legislative immunity to the facts in this case. By merely invoking "legislative immunity," Defendants assume to be protected by it. However, the specific facts of this case do not give rise to immunity, absolute or otherwise, and Plaintiffs' claims should move forward.

Defendants claim that the legislative immunity issue raised here is "indistinguishable" from the circumstances arising in *Lightfoot v. State of Maine Legislature*, 583 A.2d 694 (Me. 1990). As summarized in the svelte, two-page opinion that forms the entirety of the judgment in *Lightfoot*, the plaintiff's claim was premised on 42 U.S.C. § 1983, and the plaintiff wanted the court to compel that the Legislature "enact certain legislation." *Id.* at 694. The courts declined to entertain the claim, adding that "*legitimate* legislative activity" is subject to "absolute common law immunity." *Id.* (emphasis added). Of course, the idea that one individual could compel, through the courts, the Legislature as a democratic body to pass certain legislation is anathema to the entire system of government in the State of Maine, and bears no resemblance to the issues presented in Plaintiffs' Amended Complaint. But Defendants embrace one broad phrase and a conclusory position that the conduct subject to this lawsuit is also "legitimate" legislative activity,

and thus, they argue that legislative immunity applies. Motion at 12. Where Defendants' question-begging premise clashes with Plaintiffs' Amended Complaint, it should not, respectfully, be a determinative basis for ruling on their Rule 12(b)(6) Motion.

As with the interpretation of the provisions of the Maine Constitution, some history affords a lesson in the scope and purpose of legislative immunity. The principle was recognized by state courts early on, such as when the Massachusetts Supreme Judicial Court opined that legislative privileges were "secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). The principle comes with implied exceptions, though, as the U.S. Supreme Court has 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 v. Brandhove*, 341 U.S. 367, 377-8 (1951). As a takeaway, legislative immunity is not always absolute; and exists doctrinally to protect legislators in acting upon the will of their constituents, rather than to primarily protect them personally from inconvenient legal reckoning.

Defendants invoke legislative immunity not as a defense of legitimate legislative activity, but to keep unconstitutional actions outside of the purview of the courts. Votes of elected representatives *not* to reconvene were obviated by a transparent abuse of gubernatorial authority hours later, compelling those same legislators to work on an agenda that they voted to table. Whether certain legislators follow the lead of Defendants Talbot Ross and Jackson by abiding a constitutional insult is beside the point; the orchestration between the Defendants had the effect of disenfranchising the votes of representatives through unconstitutional chicanery. The

Defendants have invented shortcuts to exclude certain elected representatives, ignore legislative procedure, and turn a blind eye to constitutional limits on executive power.

If legislative immunity exists to protect the legislature from overwrought executive action, or to avoid disenfranchisement of voters, the application of such immunity to the present case would be a perversion. Defendants' actions as described in the Amended Complaint cannot be shielded as "legitimate legislative activity." Their Motion should be denied.

### B. There is no "separation of powers" or "political question" issue that prohibits judicial review of the allegations in the Amended Complaint.

The Defendants also move to dismiss the Amended Complaint, pursuant to Rule 12(b)(6), based on the ostensible incursion any judicial act will have on powers separately afforded to the executive and legislative branches. Read a certain way, Defendants warn the Court not to dirty its hands even if there is evidence of actors in other branches engaging in constitutional overreach. Abstract concerns about judicial restraint do not justify any abdication of constitutional responsibility, though, and dismissal of the case not only leaves gubernatorial power unchecked, but leaves important constitutional questions unanswered.

The Defendants mischaracterize the claims in the Amended Complaint by suggesting that Plaintiffs invite the judiciary to "tell the legislative branch when to convene or adjourn." Motion at 16. Of course, the underlying issue here is that the Legislature affirmatively voted to adjourn, affirmatively voted not to reconvene, and the executive branch told the Legislature to convene and to adjourn only after they "resolve pending legislation carried over from the First Regular Session. . . and act upon pending nominations and whatever other business may come before the Legislature." Am. Compl. ¶51. Defendants mistake the antidote for the poison. To abet their contorted view, Defendants present the issue not as one where executive power is reviewed, but one where the courts presume to tell the Legislature what to do. Motion at 15. A ruling on the

merits here is not tantamount to "telling the Legislature that it can no long longer introduce, debate, and vote on any bills or resolves," of course, since the Legislature *can* lawfully convene on its own, in accordance with the Constitution or any applicable statutory framework addressing the commencement of a new or special session. In fact, a judicial decision would simply enforce the "extraordinary" precondition on the Governor's constitutional power to convene the Legislature, which strengthens the autonomy of the independent branches.

Invoking the specter of a political question might sometimes shield the other branches from legal accountability, but courts are not spectators to governmental abuse. "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 omitted). Similarly, 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). 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. So, when a governmental action collides with the meaning of the constitution, courts can address that conflict. Indeed, this Court has not only a prerogative to act on matters of constitutional interpretation, but that interpretative role is vital to Maine's constitutional ecosystem.

This case calls for the Court to uphold the Maine Constitution, not to be a schoolmarm to legitimate legislative activity. Ironically, the separation of powers concerns wielded here are defenses for a violation of that very principle, which Defendants supervised and facilitated.

## III. Plaintiffs' Amended Complaint Is Not Barred by Rule 12(b)(1) Concerns.

Finally, Defendants raise standing and ripeness concerns under Rule 12(b)(1). Neither challenge raised by the Defendants satisfy the criteria for dismissal.

As noted previously, the Plaintiffs in this case are a combination of taxpayers, active legislators, and a non-profit dedicated to the fair operation of government and respect for the Maine Constitution. Defendants claim that all parties lack standing, again adopting a supplicative view of executive authority that should not be sanctioned by the courts.

Defendants suggest that the individual legislators cannot sue, and because the entire Legislature as a collective body is a better plaintiff, and therefore the individual legislators are not "best suited" to bring the claim. Motion at 18. In fact, the legislator plaintiffs have particularized standing in this situation. The effect of the Proclamation on the legislator plaintiffs, individually, is that the legislators would have anticipated that the legislative session had ended and that their vote not to reconvene would have appropriate force in a self-directed branch of government. Defendants contend, in a footnote, that this is "not a case where these Plaintiffs were denied the effectiveness of their vote," when common sense demonstrates that this is *precisely* what happened. See Motion at 18, n.7. The Governor usurped the rightful authority of the voting-members of the Legislature to dictate their own legislative session (including the Plaintiffs here), in an unconstitutional manner, steamrolling their representative authority. In contrast, "the Legislature," as a monolith, did not have "its" votes abrogated by gubernatorial fiat. (The idea that only the very "best" plaintiff can bring a claim is also an overreach: "Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue." *Clinton v. City of New York*, 524 U.S. 417, 435 (1998).)

A useful case from a nearby neighbor is illustrative. Vermont state representatives sought to enjoin the governor from appointing a successor justice to the Vermont Supreme Court, as the seat in question would not be vacant until after the governor's term had expired and a new governor was sworn in. *Turner v. Shumlin*, 2017 VT 2, 163 A.3d 1173. The legislators have only a constitutional right to advise and consent to judicial nominees, so arguably, their injury was not equal to that of an incoming governor or spurned nominee. The Vermont Supreme Court considered the plaintiffs standing, noting that the "legislators have a legally protected interest in their right to vote on legislation and other matters committed to the legislature, which is sometimes phrased as an interest in 'maintaining the effectiveness of their votes.'" *Id.* at 2017 VT 2, ¶ 13 (citation omitted). The court further observed that "legislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with." *Id.* (*quoting Markham v. Wolf*, 136 A.3d 134, 141 (Pa. 2016). The Vermont Supreme Court held that the legislators had a stake in assuring that the governor's exercise of power passed constitutional muster, and the legislators had no obligation to advise and consent to an appointment of "a patently unconstitutional appointee." *Id.* ¶¶ 17-18. If the legislator plaintiffs challenge whether the current special session of the Legislature is constitutionally convened, they have standing to bring the suit.

Similarly, the public affected by legislation passed during an extraconstitutional session have standing to challenge the constitutionally repugnant consequences of that legislative activity. For example, where taxpayers and users of public land asserted that a state agency entrusted with management of public lands had acted in excess of its authority and in violation of the public interest, the Law Court held those park users could enjoin the state agency's action. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978).

The claims are also ripe. Ripeness tests for a "genuine controversy," which is subject to two-prong analysis: (1) the issues must be fit for judicial review, and (2) hardship to the parties will result if the court withholds review. *Patrons Oxford Mut. Ins. Co. v. Garcia*, 1998 ME 38, ¶ 4, 707 A.2d 384. On its face, the Amended Complaint identifies an issue of constitutional dimension that warrants judicial review, and notes the hardships endured by all sitting legislators, taxpayers, and anyone affected by an unauthorized legislative session that thwarts the will of the people (directly or via representatives) who voted not to reconvene. Defendants mistakenly assert that, for the case to present a controversy, the Legislature must pass legislation that is unto itself unconstitutional. Motion at 20. That is not the case. The actions of the improperly summoned and unsanctioned legislature are themselves unconstitutional and void *ab initio*, not because of the content of the legislation, but because of the unconstitutional quorum presiding over the Legislature. The controversy is ripe, and the injuries mounting.

**Conclusion**

The most revealing tell in Defendants' Motion is that they—not just the executive, but the presiding officers of the legislative body—jointly argue that the Governor has immutable power to convene lawmakers to the Capitol, and that judiciary is bound to inaction by separation of powers principles, no matter how outrageous the Governor's actions are. What the Motion does not do, however, is articulate reasons why the Governor's power is properly exercised for the "extraordinary" reasons cited in Defendant Mills' Proclamation. This is because Defendant Mills' Proclamation is literally a call to finish regular business that the Legislature had already voted to table. This was an abuse of power that deserves to be heard on the merits.

For those reasons, and all foregoing reasons, this Court should, respectfully, DENY Defendants' Motion to Dismiss.

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STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-23-52

WILLIAM CLARDY, et al.

Plaintiffs,

v.

TROY D. JACKSON, et al.

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants Troy D. Jackson, President of the Maine Senate; Rachel Talbot Ross, Speaker of the Maine House of Representatives; and Janet T. Mills, Governor of the State of Maine (collectively, "State Officers") hereby submit this reply memorandum in support of their Motion to Dismiss Plaintiffs' Amended Complaint ("Compl.").

## ARGUMENT

### I. Maine's Governor has sole constitutional authority to determine what constitutes an "extraordinary occasion" pursuant to article V, part 1, section 13 of the Maine Constitution.

Plaintiffs attack State Officers' reliance on *Opinion of the Justices*, 12 A.2d 418, 420, 136 Me. 531, 534 (1940), in which the Supreme Judicial Court opined on the Governor's constitutional power to convene the Legislature on extraordinary occasions, explaining: "The Governor alone is the judge of the necessity of such action, which is not subject to review." Plaintiffs minimize this language as "dicta" and "a stray comment not determinative to the question presented." Opp'n 5-8. But a key part of the Court's analysis regarding the revocation of a proclamation convening the Legislature was the Governor's authority to issue that proclamation. According to the Court,

> Although there is no express constitutional provision authorizing the revocation of

> such call, yet such power is necessarily inferable from that clearly granted. The Governor in [her] discretion may revoke such call by Proclamation issued prior to the convening of the Legislature pursuant to the original Proclamation. Such revocation, if made, would not preclude the Governor from issuing a new Proclamation to convene the Legislature in Special Session at a date certain, if and when, in [her] judgment, occasion may require, even though such call be for the same cause.

*Opinion of the Justices*, 12 A.2d at 420, 136 Me. at 534. Far from dicta, the Court's answer on revocation turned on the Governor's discretion to issue the proclamation convening the Legislature in the first instance. In both decisions, the Court opined the Governor had broad discretion.

Plaintiffs also argue that opinions of the justices are not binding in future litigation, a point with which Defendants agree. Such opinions "may, however, provide necessary guidance and analysis for decision-making by the other branches of government." *Opinion of the Justices*, 2023 ME 34, ¶ 9, -- A.3d ---. In any event, the 1940 opinion analyzes the exact constitutional provision challenged by Plaintiffs, and the Court should consider it as persuasive authority, regardless of when it issued.

Plaintiffs next present a series of arguments about what constitutes an "extraordinary occasion." Plaintiffs first seems to suggest, without outright claiming, that the Governor's authority to convene the Legislature should be limited by language in that same section that does not modify the first clause. Opp'n 9-10. Plaintiffs cite no legal authority for this legal proposition, which is contrary to common sense, the natural reading of the section, and standard rules of construction. *See Costanzo v. Tillinghast*, 287 U.S. 341, 344 (1932) (phrase set off by commas in one clause did not apply to all other clauses separated by semicolons).

Plaintiffs do not commit to whether "extraordinary occasions" is ambiguous or unambiguous, *compare* Opp'n 9 ("The key term, 'extraordinary occasions,' is probably not 'unambiguous'"), *with id.* at 10 ("If the clause is ambiguous"), but they assert that the Court must interpret the Maine Constitution consistently with the United States Constitution. The federal

Constitution provides, in part, that the President "may, on extraordinary Occasions, convene both Houses, or either of them, . . . ." U.S. Const. art. II, § 3. Plaintiffs contend, based on a secondary source, that this presidential power is limited to "extreme" "circumstances, outside the normal course of business." Opp'n 10-11. Plaintiffs' argument is belied by history.

The President's power to convene Congress "on extraordinary Occasions" applies equally to convening one House of Congress. President Washington used this power to convene the Senate in 1791, 1793, and 1795, for reasons both mundane (numerous nominations) and significant (consideration of the Jay Treaty with Great Britain).[1] In other words, in the early days of our nation the corollary provision in the federal Constitution touted by Plaintiffs as narrow, and limited to emergencies, in fact was used to conduct ordinary business. As explained by the Department of Justice Office of Legal Counsel, since the adoption of the federal Constitution, "the Senate has been convened many times and for many reasons. It has considered both nominations and treaties during those times. The Constitution places no limitation on when the President may convene either or both Houses." President's Auth. to Convene the Senate, 13 Op. O.L.C. 245, 247 (1989) (emphasis added). Thus, early uses and persuasive analyses of the President's power to convene Congress support State Officers' position: the Governor's determination of what constitutes an extraordinary occasion under the Maine Constitution is for her to make and is not limited by atextual constraints.

Regardless, Plaintiffs' arguments about what constitutes an extraordinary occasion misunderstand the inquiry. The critical question is not what constitutes an extraordinary occasion,

[1] 1 Senate Executive Journal 78-84 (convening Senate into session on March 4, 1871, three days after prior session concluded to consider "certain matters touching the public good," which included numerous judicial, civil, and military nominations); *id* at 138 (convening Senate into session on the same day as inauguration in 1793 to consider "certain matter, touching the public good," namely three nominations, including an Associate Justice of the United State Supreme Court); *id.* at 177-95 (convening Senate into Session on June 8, 1975, to consider "certain matters, touching the public good" including the Jay Treaty and numerous civil and military nominations)

but who gets to decide what constitutes an extraordinary occasion. The text of the Constitution grants that authority solely to the Governor, and that power is not limited by any other provision of the Constitution. *See State v Hunter*, 447 A.2d 797, 799-800 (Me. 1982).

Moreover, Plaintiffs' invocation of the Supreme Judicial Court's constitutional obligation to issue opinions upon important questions of law on solemn occasions undermines their position. Opp'n 12-13 (discussing Me. Const. art. VI, § 3). The Court is the final decision maker on what constitutes a solemn occasion not because it is a court, but because the Constitution vests the Court alone with that discretion. *Opinion of the Justices*, 281 A.2d 321, 322 (Me. 1971) ("It is for each Justice of the Court from whom the opinion is sought to determine whether a solemn occasion exists."); *Opinion of the Justices*, 147 Me. 410, 414–15, 105 A.2d 454, 456 (1952); *Answer of the Justices*, 95 Me. 564, 567-70, 51 A. 224, 225-27 (1901). The Legislature can no more tell the Judiciary what constitutes a solemn occasion than the Judiciary can tell the Governor what constitutes an extraordinary occasion. *See* Me. Const. art. III, § 2.

Last, State Officers agree that "clarity of process and adherence to settled expectations are critical to assuring that the procedures of democracy do not devolve into uncertainty." Opp'n 13 (quoting *Opinion of the Justices*, 2015 ME 107, ¶ 72, 123 A.3d 494). The gravamen of Plaintiffs' Amended Complaint is that the Governor cannot convene a special session of the Legislature to resolve unfinished business of a regular session because that simply is not an "extraordinary occasion." Opp'n 1-2; Compl. ¶¶ 76-79. If Plaintiffs are right, however, the legitimacy of hundreds of laws enacted during the First Special Session of the 118th Legislature, the Second Special Session of the 121st Legislature, and the First Special Session of the 122nd Legislature would be called into question. A Maine Governor convened each of these special sessions to resolve matters pending during a regular session of the Legislature that had adjourned just days before. *See* Me. Leg. Rec. H-357 & S- 411 (1st Spec. Sess. 1997); Me. Leg. Rec. H-1194 &

S-1210 (2d Spec. Sess. 2004); Me. Leg. Rec. H-343 & S-411 (1st Spec. Sess. 2005). Settled expectations support the Governor's broad discretion to convene the Legislature, and "adherence to [those] expectations" supports certainty of process not only in this legislative session, but also in the ones preceding it.

## II. Legislative immunity and separation of powers bar the suit and prevent the Court from granting Plaintiffs the relief they seek.

Plaintiffs misconstrue the purposes of and protections afforded by absolute legislative immunity. Opp'n 13-16. Because of Maine's strict constitutional separation of powers, Me. Const. art. III, § 2, common law legislative immunity and separation of powers are largely two sides of the same coin. *See Lightfoot v. State of Me. Legislature*, 583 A.2d 694, 694 (Me. 1990). Both doctrines protect legislators from litigation or other action that would intrude on their legislative conduct. "[A]bsolute immunity affords protection not only from liability but from suit." *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 (1st Cir. 1996).

Plaintiffs claim that State Officers' actions are "abuses of power," not "legitimate," "unconstitutional chicanery," and "constitutional overreach," Opp'n 3, 14-16, but "[t]he claim of an unworthy purpose does not destroy the privilege" afforded by legislative immunity, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The doctrine of legislative immunity turns not on motive but on action; otherwise, courts could be called to referee intra-legislative disputes. *See, e.g.*, Opp'n 15-16 (accusing State Officers of "exclud[ing] certain elected representatives").

Decisions and votes related to when or whether to convene the Maine Legislature or call the House or Senate into session are quintessentially legislative in nature. *See* Me. Const. art. IV, pt. 3, § 1; Me. Const. art. V, pt. 1, § 13. Any declaratory or injunctive relief against State Officers based on these actions would intrude into the "sphere of legitimate legislative activity" protected by legislative immunity. *Lightfoot*, 583 A.2d at 694.

Plaintiffs argue that the Court should not "abdicat[e its] constitutional responsibility" and issue a decision to "enforce the 'extraordinary' precondition on the Governor's constitutional power to convene the Legislature." Opp'n 16, 17. The Court need not "shrink from a confrontation with the other two coequal branches," Opp'n 17 (quoting *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 28, 183 A.3d 749, but it should not "adjudicate matters where the adjudication would involve an encroachment upon the executive or legislative powers." *Maine Senate*, 2018 ME 52, ¶ 28, 183 A.3d 749. Although Plaintiffs claim they are not asking the Court to tell State Officers what to do, Opp'n 17, their Amended Complaint specifically asks this Court to "bar[] Defendants Jackson and Talbot Ross from calling their respective chambers pursuant to Defendant Mills' Proclamation." Compl. 15. Encroachment by the judiciary into the other branches' power is exactly what Plaintiffs seek, and what this Court should assiduously avoid.

## III. Plaintiffs have failed to show this case is justiciable or based on a valid cause of action.

Plaintiffs' attempts to demonstrate their standing fall short. Opp'n 18-20.

The Legislator Plaintiffs rely on *Turner v. Shumlin*, 2017 VT 2, 163 A.2d 1173, to claim that individual legislators have broad standing to challenge what they contend is unconstitutional conduct by the Governor. But *Turner* is not so broad as they claim. *Turner* is an appointments case, a particular type of case in which courts generally have found legislative standing. In appointments cases, the executive's appointment of an officer (A) is conditioned upon approval of the one or both houses of a legislature (B). When the executive attempts to accomplish A without satisfying B, courts have found legislative standing because that action (A) interfered with their right of the legislative body to give advice and consent (B). That interference diminishes the constitutional authority unique to the particular legislators or legislative body. *See id.* ¶¶ 12-18.

Here, the Maine Constitution provides two avenues to convene the Legislature for a special session: a qualifying vote by the members of the Legislature (A) or action by the Governor (B).

Unlike in *Turner*, neither avenue is conditioned on the other. The Governor can convene the Legislature (A) without the consent of the members of the Legislature (B), and vice versa. Accordingly, the Governor's convening of the Legislature does not diminish Legislative Plaintiffs' prior votes or prevent the Legislature from convening itself. Without vote diminishment, Legislator Plaintiffs' standing claims as individual legislators fail because they have not provided evidence of how their alleged, individual injuries are different from all the other Maine legislators currently participating in the First Special Session. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997).

Plaintiffs' invocation of *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978), fares no better. In that case, the plaintiffs demonstrated particularized injury because they were users of Baxter State Park, and the parties stipulated to plaintiffs' injury if the actions complained of were found to be unlawful. *Id.* at 197. No such showing or stipulation exists here.

Plaintiffs are adamant that the First Special Session is unconstitutional and ongoing, and thus their claims are ripe, Opp'n 20, but that is insufficient for their claims as taxpayers and citizens. Plaintiffs' theory of ripeness would turn the doctrine on its head by permitting any person who claims government action is unconstitutional to bring suit, regardless of its impact on them. *Cf. Blanchard v Town of Bar Harbor*, 2019 ME 168, ¶ 21, 221 A.3d 554. Plaintiffs' claims are speculative as to any future impacts on them and therefore unripe.

Finally, Plaintiffs' motion does not identify a recognized cause of action to support their claims. Opp'n 4-5. Litigants may not seek relief in court unless they file suit pursuant to a valid cause of action grounded in statute or common law. *Edwards v. Black*, 429 A.2d 1015, 1016 (Me. 1981). Plaintiffs rely on *Avangrid Networks, Inc. v Secretary of State*, 2020 ME 109, 237 A.3d 882, but neither the Court nor the Defendants in that case addressed whether plaintiffs had a valid cause of action. *Cf. Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172 ("A declaratory judgment action cannot be used to create a cause of action that does not otherwise exist.").

## CONCLUSION

Based on the foregoing reasons and those stated in their motion, State Officers request that the court dismiss Plaintiffs' Amended Complaint pursuant to M.R. Civ. P. 12(b)(1) and M.R. Civ. P. 12(b)(6).

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Respectfully submitted,

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