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]

[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

(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

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[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

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[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 <u>must</u> 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

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[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.

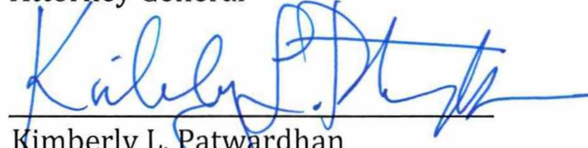
CONCLUSION

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,
Attorney General



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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.**