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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