STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
DOCKET NO. CV-23-52

WILLIAM CLARDY, et al.

Plaintiffs,

v.

TROY D. JACKSON, in his official capacity, RACHEL TALBOT ROSS, in her official capacity, and JANET MILLS, in her official capacity,

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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