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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED In the TRIAL COURTS  
STATE OF ALASKA THIRD DISTRICT

JUL 09 2021

By \_\_\_\_\_ Clerk of the Trial Courts  
Deputy

TREG R. TAYLOR, in his official )  
capacity as ATTORNEY GENERAL of )  
the STATE OF ALASKA )

Plaintiff, )

v. )

ALASKA LEGISLATIVE AFFAIRS )  
AGENCY, )

Defendant, )

Case No. 3AN-21-06391CI

**ATTORNEY GENERAL'S BRIEFING ON WHETHER THIS CASE SHOULD  
BE DISMISSED AS MOOT**

The attorney general brought this lawsuit in the waning days of fiscal year 2021, as the state faced the possibility of a government shutdown because the budget for fiscal year 2022 lacked a special effective date of July 1. He sought a declaratory judgment confirming that the budget passed by the legislature would not authorize state spending before it became effective, contrary to the position taken by the Legislative Affairs Agency's executive director in an email to legislative employees. A week after the lawsuit was filed, the legislature passed a July 1 effective date for the FY2022 budget with the super majority required by article II, section 18 of the Alaska Constitution.

Although the legislature's action moots the attorney general's claim, this Court should apply the public interest exception to the mootness doctrine and address the underlying legal issue—whether a retroactivity provision in an operating budget authorizes the Legislative Affairs Agency (or any government entity) to spend money

before the law's effective date.

**A. The public interest exception to the mootness doctrine**

The Alaska Supreme Court "has long recognized a 'public interest' exception to the mootness doctrine."<sup>1</sup> When evaluating whether to apply the public interest exception, Alaska courts consider three factors: "1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine if applied, may repeatedly circumvent review of the issues and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."<sup>2</sup> "None of the individual factors is dispositive; rather, [courts have] discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate."<sup>3</sup>

**B. The Court should find that this case warrants application of the public interest exception to the mootness doctrine.**

The Legislative Affairs Agency (LAA) argues that this Court should apply the public interest exception to consider *only its claim* that the attorney general's suit should be dismissed as a violation of article III, section 16's direction that the governor may not sue the legislature, but not the claim that the attorney general brought regarding the effective date of CCS HB 69. But the public interest exception applies to the underlying merits of the attorney general's claim even more clearly than it does to the LAA's proffered constitutional defense, and, therefore, this Court should not dismiss this

<sup>1</sup> *Alaska Legislative Council v. Knowles*, 988 P.2d 604, 606 (Alaska 1999).

<sup>2</sup> *Id.* (quoting *Dep't of Health & Soc. Servs. v. Alaska State Hosp. & Nursing Home Ass'n*, 856 P.2d 755, 766 (Alaska 1993)).

<sup>3</sup> *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002).

litigation as moot.

The issue of the legal effect of the failure of a special effective date for the operating budget is certainly capable of repetition. In its earlier briefing on mootness, the LAA suggested that the historical record showing the legislature's long-standing practice of adopting a special effective date for the operating budget "belies the application" of the public interest exception in this case.<sup>4</sup> But the LAA misconceives both the first factor and the historical record.

The Alaska Supreme Court has explained that when considering the first factor, it has "refused to apply the public interest exception to unusual factual circumstances that were unlikely to repeat themselves or situations where the applicable statute or regulation was no longer in force and was unlikely to be reinstated."<sup>5</sup> Here, the applicable law is a constitutional provision that remains in force; and although the legislature has typically enacted a July 1 effective date for the operating budget, it has not always done so.<sup>6</sup>

Moreover, the inquiry is a forward-looking one, not a backward-looking one—the factor is not: has the issue arisen before, but rather: is it capable of repetition? Nor are the factual circumstances here "unusual" and "unlikely to repeat themselves."<sup>7</sup> Indeed, all the elements that led to this litigation appear likely to persist in the near

<sup>4</sup> LAA's Supplemental Briefing re: Dismissal at 3.

<sup>5</sup> *Fairbanks Fire Fighters*, 48 P.3d at 1168.

<sup>6</sup> See Exhibit 6, effective dates for operating budgets in 1978 and 1981.

<sup>7</sup> *Fairbanks Fire Fighters*, 48 P.3d at 1168.

future, with the potential that this exact situation could repeat as soon as next year. After all, there is not yet any solution to the State's fiscal problems, and next year's budget will be the product of negotiations between the same governor and legislature as this year.

With respect to the second factor—whether application of the mootness doctrine will prevent review of the issues—the LAA contends that “should the effective date issue arise in the future..., it seems highly unlikely it would evade review.”<sup>8</sup> But the opposite is true. *By definition*, any controversy about the legal effect of a statute before the constitutionally-provided default effective date will become moot within 90 days of enactment. Similarly, any dispute over the legal effect of an operating budget will be mooted by the end of the fiscal year. And the second factor is not: could the issue be resolved before it becomes moot if the parties and court pursue an extremely expedited briefing schedule? Instead, the court compares the time it typically takes to litigate with the time it takes for the issue to become moot.<sup>9</sup> And in making this comparison, the Court has held, for example, that the “five-year life span” of an oil discharge prevention and contingency plan was not long enough to guarantee judicial review before the plan

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<sup>8</sup> LAA's Supplemental Briefing re: Dismissal at 3.

<sup>9</sup> *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009) (“We have previously analyzed the second prong—whether an issue is likely to repeatedly evade review—by comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot.”)

expired.<sup>10</sup> Here, there can be no real dispute that the 90-odd days between the occurrence of an effective date dispute like this one and the moment when it will become moot is too short for litigation and, therefore, that application of the mootness doctrine would mean the issue would repeatedly evade review.<sup>11</sup>

The final factor is also easily met here. The Alaska Supreme Court has applied the exception in cases “where the legal power of public officials was in question.”<sup>12</sup> Here, the attorney general’s complaint raises the question of the authority of the Legislative Affairs Agency to spend appropriations in the operating budget before the budget’s effective date. Moreover, the state’s near miss with a government shutdown further demonstrates the public interest in a resolution of the underlying issues.

### CONCLUSION

Although this case was mooted by the adoption of a special effective date for CCS HB 69, this Court should nevertheless address the attorney general’s claim under the public interest exception to the mootness doctrine, because the issue is capable of repetition, will repeatedly evade review if the mootness doctrine is applied, and is of substantial public interest.

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<sup>10</sup> *Copeland*, 210 P.3d 1197, 1202 (Alaska 2009) (emphasis added); *see also, id.* (“[I]t is unreasonable to assume an opponent to an approved contingency plan would be able to appeal the agency decision within the five-year duration of the plan.”)

<sup>11</sup> In contrast, as the Alaska Supreme Court recognized in *Knowles*, the issue of whether an attorney general can sue the Legislative Affairs Agency would not necessarily evade review because what would moot that issue would depend on the claims brought by the attorney general. Of course, the Court will need to address the validity of the LAA’s constitutional defense in deciding summary judgment.

<sup>12</sup> *Fairbanks Fire Fighters*, 48 P.3d at 1169.

DATED: July 9, 2021.

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