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

TREG R. TAYLOR, in his official capacity as ATTORNEY GENERAL for the STATE OF ALASKA, Plaintiff, v. ALASKA LEGISLATIVE AFFAIRS AGENCY, Defendant.	Case No. 3AN-21-06391CI

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the parties' cross-motions for summary judgment.[1] Because the relevant facts in this case are undisputed and disposition of the case turns entirely on questions of law, the Court believes the matter is appropriate for disposition on summary judgment. For the reasons described herein, the Court grants summary judgment in favor of the Defendant.

I. BACKGROUND.

This suit involves a dispute over Conference Committee Substitute for House Bill 69 (CCS HB 69), an appropriations bill to fund the Alaska state government for Fiscal Year

[1] The Defendant's motion to dismiss included material outside the pleadings. Because the Court accepted and considered this material, it must convert the motion into a motion for summary judgment. *Martin v. Mears*, 602 P.2d 421, 426 (Alaska 1979).

2022.[2] The Alaska Legislature passed CCS HB 69 on June 16, 2021.[3] The bill included a provision giving it an effective date of June 30,[4] but the provision did not achieve a two-thirds supermajority vote.[5] Per Article II of the Alaska Constitution, this meant the bill would not have come into force for ninety days,[6] well after the new fiscal year's July 1 beginning. This meant that Alaska faced a "government shutdown" at the end of June 2021.

On June 18, 2021, Governor Mike Dunleavy sent a letter to Chief Justice Joel H. Bolger informing him that "[s]ome members of the Legislature" believed that the Governor could use supplemental funding from a previous appropriation to fund the government in the interim period despite the failure of the CSS HB 69's effective-date provision.[7] Governor Dunleavy wrote that the Office of the Attorney General's opinion was that such a course would be illegal, and that he had "asked my Attorney General to seek a determination of the issue through the Alaska Court System."[8]

On June 21, 2021, Plaintiff Treg R. Taylor filed the present suit against Defendant

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[2] C.C.S. H.B. 69, 32nd Legis., 1st Spec. Sess. (Alaska 2021).

[3] 2021 HOUSE JOURNAL 1317–19; 2021 SENATE JOURNAL 1287–90.

[4] C.C.S. H.B. 69, § 84.

[5] 2021 HOUSE JOURNAL 1317. The effective-date provision had already achieved the requisite two-thirds supermajority in the Senate. 2021 SENATE JOURNAL 1196.

[6] ALASKA CONST., art. II, § 18 ("Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date").

[7] Ex. A to Def.'s Mot. to Dismiss 3–4.

[8] *Id.* In response, Chief Justice Bolger wrote that he could not engage in *ex parte* discussions of substantive legal matters, and encouraged Governor Dunleavy to "bring [his] concerns to the attention of the appropriate forum." Ex. A to Def.'s Mot. to Dismiss 2.

Alaska Legislative Affairs Agency (LAA)[9] in his official capacity as Attorney General of the State of Alaska. The complaint alleges that the LAA "informed its employees and the legislature that it will have the authority to spend state funds authorized by the FY 2022 budget without limitation,"[10] and this violates Alaska constitutional law. It seeks a declaratory judgment that "declare[s] unlawful any expenditure of state funds without an effective appropriation absent expenditure necessary to meet constitutional obligations to maintain the health and safety of residents or federal obligations."[11] Attorney General Taylor filed a motion for summary judgment simultaneously with his complaint and included a motion for expedited consideration of the case, which the Court granted.

In a press release issued the same day, Attorney General Taylor said that the suit was meant to resolve "a dispute between branches of government."

> When there is a dispute between branches of government, we need the courts to step in. The executive and legislative branches need clarity now from the courts as to whether the governor can, if the bill is enacted, spend money immediately despite HB 69 not taking effect until 90 days after enactment.[12]

The press release included a statement from Governor Dunleavy "agree[ing]" with

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[9] The LAA is an agency of the Alaska Legislative Council that fulfills the Council's statutory duty to provide "[a]ll administrative services necessary to the operation of the legislature . . . ." AS 24.20.061. It is headed by an executive director who "serve[s] as the executive officer for the council in the accomplishment of its functions through the [LAA]." AS 24.20.050. The LAA serves as "the vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature." HANDBOOK ON ALASKA STATE GOVERNMENT 90 (Sept. 2011), *available at* http://w3.legis.state.ak.us/infodocs/handbook_stategov/handbook.pdf.

[10] Compl. 7, ¶ 24.

[11] Compl. 8, ¶ 1.

[12] Ex. B to Def.'s Mot. to Dismiss 1 (narrative descriptors omitted).

Attorney General Taylor's "decision to petition the Court on this important matter."[13] Governor Dunleavy said that "[w]e need the third branch of government to step in and resolve this dispute to ensure we all carry out our constitutional duties appropriately."[14]

On June 25, 2021, the LAA responded with a motion to dismiss for lack of subject-matter jurisdiction, failure to state a claim, and failure to join an indispensable party. Three days later, on June 28, 2021, the Legislature held a new vote on CCS HB 69's effective-date provision and passed it by a two-thirds supermajority.[15] The Court took supplementary briefing and heard oral arguments on July 23, 2021.

II. RELEVANT LAW.

A. Summary Judgment

Under Civil Rule 56, a party is entitled to summary judgment upon their motion if they show that "there is no genuine issue as to any material fact and that [the] party is entitled to a judgment as a matter of law."[16]

B. Mootness

Alaska courts normally "refrain from deciding questions where events have rendered the legal issue moot."[17] A legal claim is moot "if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[18]

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[13] *Id.*
[14] *Id.*
[15] 2021 House Journal 1360.
[16] Alaska R. Civ. P. 56(c).
[17] *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995).
[18] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

The mootness doctrine contains a "public interest exception" whereby courts can "choose to address certain issues" even if a case has become moot.[19] The exception involves three factors: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[20] "No one individual factor is dispositive."[21] The ultimate consideration is "whether the public interest dictates that immediate [adjudication] of a moot issue is appropriate,"[22] and the decision to apply the exception is left to the court's discretion.[23]

The first factor considers how likely an issue is to repeat itself. This factor will not be met when a case involves "unusual factual circumstances that [are] unlikely to repeat themselves or situations where the applicable statute or regulation [is] no longer in force and [is] unlikely to be reinstated."[24] The Alaska Supreme Court has specifically concluded that the application of the constitutional bar in Section 16 of Article III of the Alaska Constitution on suits by the Governor against the Legislature is an issue likely to repeat itself.[25]

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[19] *Id.* at 1168 (quoting *Kodiak Seafood*, 900 P.2d at 1196).
[20] *Id.*
[21] *In re Heather R.*, 366 P.3d 530, 532 (Alaska 2016).
[22] *Fairbanks Fire Fighters*, 48 P.3d at 1168.
[23] *Kodiak Seafood*, 900 P.2d at 1196.
[24] *Id.*
[25] *Legis. Council v. Knowles*, 988 P.2d 604, 606 (Alaska 1999).

The second factor considers whether an issue "will continually evade court review."[26] The Alaska Supreme Court has found this requirement satisfied in cases where "threatened harm" was "caused by the means of resolution and not the resolution itself."[27] Disputes over the Article III, Section 16 ban on suits against the Legislature are such cases.[28]

The third factor considers the importance of an issue to the public interest. In general, cases involving the legal power of public officials are likely to satisfy this requirement.[29] The Supreme Court has said that the ability of the Governor to sue the Legislature is "unquestionably an issue of great public importance" that weighs in favor of applying the exception.[30]

C. Constitutional Prohibition on Suits Against the Legislature in the Name of the State

Article III of the Alaska Constitution vests the Governor with the State's executive power,[31] and charges him or her with "responsib[ility] for the faithful execution of the laws."[32] Section 16 of Article III authorizes the Governor to, "by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty,

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[26] *Fairbanks Fire Fighters*, 48 P.3d at 1168.
[27] *Id.*
[28] *Knowles*, 988 P.2d at 606–07.
[29] *See id.* at 1169 ("We have applied the public interest exception to situations, otherwise moot, where the legal power of public officials was in question").
[30] *Knowles*, 988 P.2d at 606.
[31] ALASKA CONST., art. III, § 1.
[32] ALASKA CONST., art. III, § 16.

or right by any officer, department, or agency of the State or any of its political subdivisions."[33]

But Section 16 also provides that this authority "shall not be construed to authorize any action or proceeding against the legislature."[34] In its 1999 decision *Legislative Council v. Knowles*,[35] the Alaska Supreme Court held that this provision forbids any legal action "brought 'in the name of the State' and 'against the legislature.'"[36] *Knowles* involved a lawsuit brought by Governor Tony Knowles after the Alaska Legislature overrode his veto of a bill amending the statutes governing sales of state land classified for agricultural purposes.[37] The lawsuit sought a declaratory judgment that the Legislature's override of Knowles's veto was invalid.[38] Knowles did not, strictly speaking, bring his suit "in the name of the state" or "against the legislature." He filed the suit in his official capacity as Governor and named as the defendant the Alaska Legislative Council.[39] Despite these procedural maneuvers, however, the Court held that Knowles's suit was prohibited by Article III.[40]

First, the Court concluded that despite naming himself as plaintiff rather than the "State of Alaska," Knowles's suit was still an action brought under his Article III power to

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[33] *Id.*
[34] *Id.*
[35] 988 P.2d 604 (Alaska 1999).
[36] *Id.* at 609.
[37] *Id.* at 605–06; 1996 ALASKA SESS. LAWS, vol. II, ch. 1, 1–9.
[38] *Knowles*, 988 P.2d at 605.
[39] *Id.* at 605–06.
[40] *Id.* at 607–09.

initiate actions "in the name of the state."[41] By challenging the validity of the Legislature's override of his veto, his suit "test[ed] the basic constitutional structure of Alaska's tripartite system of government" and "by any realistic measure . . . involve[d] the interests of the state as a whole."[42] Using "substance rather than form as a measure of constitutional compliance," the Court concluded that despite bringing the action in his own name, Knowles's suit was an action "in the name of the state."[43]

Second, the Court concluded that Knowles's suit was in reality an action "against the legislature." Again emphasizing that "substance must prevail" over form, the Court found that Knowles's pleadings "belie[d] th[e] assertion" that he had sued the Legislative Council only in its service-agency capacity.[44] His suit "assert[ed] no particular service-related acts or functions as a basis for proceeding," but instead complained over the "purely and quintessentially legislative" act of overriding his veto.[45] Hence, it was a suit "against the legislature," and was constitutionally barred.

III. ANALYSIS.

A. The Public Interest Exception to the Mootness Doctrine Applies to Attorney General Taylor's Suit

Both parties concede that the Legislature's June 28 passage of CCS HB 69's effective-date provision has rendered this suit moot. The question is whether this suit falls

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[41] *Id.* at 607–08.
[42] *Id.*
[43] *Id.* at 608.
[44] *Id.*
[45] *Id.* at 609.

under the mootness doctrine's public-interest exception and should be decided by the Court anyway. The Court concludes that it does.

The issues in this case are similar to those of *Knowles*, in which the Alaska Supreme Court concluded that the exception applied. First, the *Knowles* Court said that the issue of whether Article III, § 16 forbids a suit by the Governor against the Legislative Council is "certainly capable of repetition."[46] Although this suit's plaintiff is the Attorney General and the defendant is the LAA, it involves the same underlying constitutional issue as *Knowles*, and is equally capable of repetition.[47]

Second, although it is conceivable that a dispute over an appropriations bill's effective-date provision could arise without the Legislature passing the provision at a subsequent vote; the issue will need to be litigated to completion within the ninety-day interim period to avoid becoming moot. Moreover, the *Knowles* Court points out that this factor is less applicable in cases involving alleged violations of the Article III, Section 16 prohibition, because the constitutional harm is inflicted at the moment an infringing suit is brought.[48]

Third, the current dispute between the Attorney General and the LAA involves the same constitutional issue that the *Knowles* Court said was "unquestionably of great public importance, for it goes to the heart of the delicate constitutional balance between the

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[46] *Id.* at 606.

[47] To a certain extent, the existence of this suit itself serves as evidence of such suits' capability of repetition.

[48] *Knowles*, 988 P.2d at 606–07.

powers of two coordinate branches of government."[49]

For these reasons, the Court concludes that although Attorney General Taylor's claim is moot, the mootness doctrine's public interest exception applies and justifies the Court's immediate adjudication of the issues.

B. Article III, Section 16's Prohibition on Suits against the Legislature in the Name of the State Prohibits Attorney General Taylor's Suit against the Legislative Affairs Agency

First, the LAA argues that for the purposes of Article III, Section 16, this suit is really a suit brought by the Governor in the name of the State. It cites Governor Dunleavy's public statements that he directed Attorney General Taylor to bring this suit. Attorney General Taylor disagrees, arguing that he brought this suit himself under his "common law authority to file suit to protect the public interest."[50] He points out that the Alaska Supreme Court holds that the Attorney General has the common-law power to "bring any action which he thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce Alaska's statutes."[51] He argues that although this suit does seek to enforce compliance with the law, it was brought under his office's independent common-law powers, "not in service of the governor's responsibility to faithfully execute the laws under article III, section 16."[52]

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[49] *Id.* at 606.

[50] Pl.'s Opp'n to Def.'s Mot. to Dismiss 3.

[51] *Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001).

[52] Pl.'s Opp'n to Def.'s Mot. to Dismiss 3–4.

The Court agrees with the LAA. In the Department of Law's June 21 press release, Governor Dunleavy cast his role in the filing of this suit distantly, saying only that he "agree[d] with the Attorney General's decision to petition the Court on this important matter."[53] But in his letter to Chief Justice Bolger three days earlier, Governor Dunleavy wrote that he "ha[d] asked my Attorney General to seek a determination of the issue through the Alaska Court System."[54] This belies the assertion that Attorney General Taylor brought the present suit under his common-law powers as Attorney General. Despite his independent powers, the Attorney General is the head of a principal executive department,[55] and therefore serves under the supervision of the Governor and at his pleasure.[56] Based on Governor Dunleavy's statements, and "[u]sing substance rather than form as a measure of constitutional compliance,"[57] the Court concludes that Attorney General Taylor's suit is a suit by the Governor "in the name of the State" for the purposes of Article III, Section 16.

Attorney General Taylor further argues that "[t]he fact that the governor asked the attorney general to seek judicial input does not rob the attorney general of his independent authority to file suit nor does it bring the lawsuit within the scope of article III, section

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[53] Ex. B to Def.'s Mot. to Dismiss 1.
[54] Ex. A to Def.'s Mot. to Dismiss 3–4.
[55] AS 44.23.010.
[56] ALASKA CONST., art. III, §§ 24 & 25.
[57] *Id.*

16."[58] This argument raises serious constitutional problems. As described above, the Attorney General is supervised by and serves at the pleasure of the Governor. If the Attorney General's statutory and common-law powers allow him or her to bring suits against the legislative branch, the Governor could evade Section 16's prohibition and sue the Legislature whenever he wished simply by directing the Attorney General to bring the suit himself.

Attorney General Taylor's argument introduces a constitutional loophole that will make Section 16's limitation on the Governor's authority completely nugatory. Such a result seems incompatible with the Drafters' intent that Section 16 enact a policy that the Legislature be the "supreme elected body" to which the Governor was "answerable . . . [in] interpretations and handling of matters of law."[59]

Next, the LAA argues that this suit is "against the legislature" for the purposes of Article III, Section 16. It cites several executive branch officers' statements describing the dispute to be between the executive and legislative branches of government, not between the executive and the Legislature's service agency. Attorney General Taylor disagrees, arguing that the suit targets the LAA only in its "service-agency capacity," rather than as a substitute for the Legislature.[60] It attempts to distinguish its suit from the constitutionally prohibited suit in *Knowles*, saying that it targets only the LAA's "declared intention to

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[58] Pl.'s Opp'n to Def.'s Mot. to Dismiss 5.

[59] *Knowles*, 988 P.2d at 609 (quoting 3 PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1986 (Jan. 13, 1956)).

[60] Pl.'s Opp'n to Def.'s Mot. to Dismiss 5–6.

continue operations at normal levels on July 1 despite the absence of an effective appropriation."[61]

The Court again agrees with the LAA. Attorney General Taylor points out that the *Knowles* Court did not state that Article III, Section 16 prohibited all possible lawsuits against the Legislative Council. The Supreme Court's analysis in *Knowles* suggests that if Governor Knowles had targeted the Legislative Council in a purely non-legislative "limited capacity as a service agency," his suit might not have been constitutionally prohibited.[62]

But in this case, Attorney General Taylor's pleadings and public statements belie any assertion that this suit targets the LAA only in its service-agency capacity. First, his complaint seeks a sweeping declaratory judgment that "any expenditure of state funds without an effective appropriation" is unlawful.[63] It speaks of "state funds" as a whole, and makes no mention of the LAA.

Second, Attorney General Taylor's and Governor Dunleavy's public statements consistently framed the suit as a vehicle to resolve a dispute between the executive and legislative branches. In the press release issued the day this suit was filed, Attorney General Taylor said: "When there is a dispute between branches of government, we need

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[61] *Id.* at 6.

[62] *See Knowles*, 988 P.2d at 608–09 ("Neither the original nor the amended complaint gives any indication that the governor named the Council as a defendant in its limited capacity as a service agency. Both complaints name the Council as a defendant only in its capacity as 'a permanent interim committee of the legislature.' . . . More significant is that the complaints assert no particular service-related acts or functions as a basis for proceeding against the Council or its individual legislator-members. . . . An action of this kind falls squarely within the originally intended scope of section 16's prohibition").

[63] Compl. 8, ¶ 1.

the courts to step in."[64] Governor Dunleavy's statement in the press release spoke of the Legislature, not the LAA, "ignor[ing] the constitution."[65] He spoke of "need[ing] the third branch of government to step in and resolve this dispute,"[66] implying that the suit was aimed at resolving a dispute between the first and second branches of government. These statements indicate that the Attorney General Taylor's suit was brought "against the legislature" for the purposes of Article III, Section 16.

The Legislative Affairs Agency's motion to dismiss includes exhibits beyond the pleadings such as the Governor's letter to the Chief Justice, and the Attorney General Taylor's press release. Therefore, the matter is appropriate for disposition by summary judgment. Because the parties do not disagree over the material facts, disposition of the case turns entirely on questions of law.[67] As a matter of law, the Court concludes that this suit is an action by the Governor "in the name of the state" directed "against the legislature." Attorney General Taylor's suit is prohibited by Section 16 of Article III of the Alaska Constitution, and the LAA is entitled to judgment in its favor as a matter of law.

C. Other Issues

The Court's grant of summary judgment in favor of the LAA on grounds that Attorney General Taylor's suit is prohibited by Article III, Section 16 disposes of all claims in this case, and makes it unnecessary for the Court to reach the suit's merits. This necessarily requires the Court to deny the Attorney General's motion for summary

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[64] Ex. B to Def.'s Mot. to Dismiss 1.
[65] *Id.*
[66] *Id.*
[67] *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519 (Alaska 2014).

judgment on whether money from CCS HB 69 could have been spent despite the effective-date provision's initial failure.

The Court's decision also makes it unnecessary to consider the other issues the LAA raised in its motion, such as whether the Legislature was an indispensable party the Attorney General failed to join.

IV. CONCLUSION.

The Court concludes that although the Legislature's passage of CCS HB 69's effective-date provision has rendered Attorney General Taylor's underlying claim moot, the public-interest exception to the mootness doctrine warrants immediate resolution of his case.

The Court also concludes that although Attorney General Taylor has the common-law power to bring suits to enforce compliance with Alaska statutes, his pleadings and the public statements of Governor Dunleavy and himself indicate that the present suit is in reality an action brought "in the name of the state" and "against the legislature," and is prohibited by Section 16 of Article III of the Alaska Constitution.

Accordingly, the Alaska Legislative Affairs Agency's motion to dismiss, which the Court treated as a motion for summary judgment, is GRANTED, and the Attorney General's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED this 29th day of July, 2021 at Anchorage, Alaska.

Hon. Herman G. Walker, Jr.
Superior Court Judge

I certify that on 7-29-21
a copy of the above was emailed to:

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