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

KEVIN F. MCCOY and MARY C. GEDDES, Plaintiffs, v. MICHAEL J. DUNLEAVY, Governor of the State of Alaska, Defendant.	Case No. 3AN-19-08301 CI

DEFENDANT'S REPLY TO OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Introduction.

This Court should decline to issue an advisory opinion on the constitutionality of the Governor's proclamation calling the legislature into special session in Wasilla without the legislature's consent. That special session is now complete, so a declaratory judgment by this Court on the constitutionality of the original proclamation would have no practical effect.[1] The dispute is moot.

Regardless, a decision from this Court would have no effect on Mr. McCoy and Ms. Geddes. The legislature as a body, and its individual members, were most directly affected by the Governor's original proclamation and they chose not to sue. Instead, they effectively resolved their dispute with the Governor over the location of the special session through political processes. The fact that the legislature and its members chose

[1] *See* First Amended Complaint (July 22, 2019) at pages 6 – 7 ("Prayer For Relief").

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to resolve this dispute without judicial intervention does not entitle the plaintiffs to seek judicial intervention on their own behalf. They lack standing to sue.

If this Court chooses to issue an advisory opinion on the constitutionality of the original proclamation, it should hold that the complaint fails to state a claim on which relief can be granted. Even assuming that the plaintiffs can prove each allegation in their complaint, they would still not be entitled to a declaratory judgment in their favor. The challenged statute is constitutional on its face and as applied in this case, and does not violate the principle of separation of powers. This Court should dismiss the complaint.

II. This case is moot.

Under ordinary circumstances, Alaska courts refrain from deciding questions where events have rendered the legal issue moot.[2] The plaintiffs agree that this case is moot, but ask this Court to apply the "public interest" exception to the mootness doctrine and decide it anyway.[3] Alaska courts are never required to hear moot cases, but may "choose to address" moot questions when the exception applies.[4] Courts may apply the exception when the disputed issues are capable of repetition, when application of the mootness doctrine may cause review of the issues to be repeatedly circumvented, and

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2 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

3 *See* Opposition to Motion to Dismiss (September 9, 2019) at pages 15 – 16.

4 *Fairbanks Fire Fighters Ass'n*, 48 P.3d at 1168 (*quoting Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995)).

when the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[5]

The basic facts supporting the plaintiffs' facial challenge to AS 24.05.100(b) are capable of repetition because the Governor may again call the legislature in to special session outside of Juneau without legislative consent. But the specific factual presentation of the plaintiffs' "as-applied" challenge is unlikely to be exactly repeated.[6] A case is not considered capable of repetition where hypothetical future uses of the challenged law would not likely present the same factual and legal context as the case at hand.[7] Thus, a decision from this Court on the constitutionality of AS 24.05.100(b) "as applied" would be advisory, since the specific facts of this case are unlikely to recur.

As to the second factor, in the event that the governor calls a special session outside of Juneau in the future and an appropriate party sues, the dispute is not likely to evade review. The plaintiffs cite numerous Alaska Supreme Court cases regarding the time that is required to complete appellate review,[8] but this case is not before the Alaska

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5 *Id.*

6 For example, the plaintiffs' briefing relies on the fact that some legislators traveled to Wasilla while the majority convened in Juneau, and that the governor vetoed certain items of the legislature's operating budget after calling a second special session so that the legislature had the first five days of the special session in which to override those vetoes. *See* First Amended Complaint (July 22, 2019) at page 4 paragraphs 11 – 13.

7 *Alaska Community Action on Toxics v. Hartig,* 321 P.3d 360, 367 (Alaska 2014). The plaintiffs' argument at page 12 of their Opposition to Defendant's Motion to Dismiss (September 9, 2019) presents an improbable hypothetical, as discussed further below.

8 *See e.g. Copeland v. Ballard,* 210 P.3d 1197, 1202 (Alaska 2009); *Alaska Community Action on Toxics,* 321 P.3d at 368.

Supreme Court. It is before the superior court, which has the capability to respond quickly in appropriate situations.[9] The superior court has the power to hear motions on an expedited basis and issue preliminary injunctions in appropriate circumstances.[10] In this very case, the plaintiffs moved for expedited review of their motion for preliminary injunction, and this Court heard and decided the motion within three days of its filing.[11] So if this dispute arises again, it is not likely to evade review at the superior court level.

As to the final consideration, the public has no interest in the judiciary wading into a now-resolved dispute between its coordinate branches. The two branches involved have resolved this dispute through political processes.[12] And the public has its own recourse through political measures, including the ballot box, protests and contact with legislators and the Governor's office. This case is not like *Legislative Council v. Knowles*, which involved not just separation of powers but the "unique nature of the protection embodied in article III, section 16" of the Alaska Constitution.[13] The issue in

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9 *See e.g. In re Tracy C.*, 249 P.3d 1085, 1090 (Alaska 2011). In *Tracy C.*, the Alaska Supreme Court explained that thirty-day mental commitments are likely to evade appellate review because it is unlikely that an appeal could be completed within thirty days. In such cases, the superior court typically makes the original decision regarding commitment within seventy-two hours of the filing of a petition. *See* AS 47.30.715.

10 *See e.g.* Alaska R. of Civ. P. 65, Alaska R. of Civ. P. 77(g).

11 Note that the plaintiffs filed this case more than thirty days after the Governor issued the challenged proclamation. Prompt action by appropriate plaintiffs in a future case would also enable expeditious review by the superior court.

12 The defendant does not argue that this case presents a non-justiciable political question. Rather the defendant argues that, because there has already been a political resolution of this issue, the public has no strong interest in a *post hoc* judicial resolution.

13 *Legislative Council v. Knowles*, 988 P.2d 604, 607 (Alaska 1999).

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that case was the governor's power to sue the legislature. The public has a significant interest in judicial resolution of that question. Unlike this dispute over the location of the special session, that question is not amenable to resolution through the political process.

Thus, the factors of the "public interest" exception to the mootness doctrine weigh against hearing this case.[14] This Court should grant the defendant's motion to dismiss.

III. The plaintiffs lack standing.

Mr. McCoy and Ms. Geddes lack standing because the legislature, and its members, are the most directly affected parties and they have chosen not to sue. This case is like *Keller v. French*, in which certain legislators sued other legislators over an allegedly unconstitutional legislative investigation of the governor's actions.[15] The Alaska Supreme Court explained that the governor was the most appropriate plaintiff to challenge the constitutionality of the action, but she chose not to sue.

> Even if the governor did not intend to sue, there is no indication that, if she thought her rights were being violated, she would be unable to do so. The Keller plaintiffs do not contend that the governor or any other potential plaintiffs were somehow limited in their ability to sue. That individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.[16]

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14 *See Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) ("None of the individual factors is dispositive; rather, we use our discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate.")

15 *Keller v. French*, 205 P.3d 299, 300 (Alaska 2009).

16 *Id.* at 303.

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In this case, of course, the legislature and its individual members are the most directly affected parties. They have chosen not to sue, and there is no indication that they are somehow limited in their ability to do so. The case of *Bradner v. Hammond,* extensively cited by the plaintiffs in support of their argument on the merits, was a lawsuit brought by the speaker of the house, the president of the senate, and the legislature against the governor to resolve a separation of powers dispute.[17] The legislature's decision to resolve the present dispute through political processes rather than through judicial intervention does not confer standing on Mr. McCoy and Ms. Geddes.

The plaintiffs admit that the legislature has the power to call itself into session outside the capitol. So taxpayers like the plaintiffs have no expectation or guarantee that the legislature will only convene in Juneau. Therefore the only individuals affected by the governor's proclamation are the legislators who are allegedly deprived of the right to determine where they will meet – not the general public. Although the plaintiffs are correct that their claims do not concern the personal rights of others, their claims concern the rights of the legislature as a body. The plaintiffs allege that the governor infringed on the powers of the legislature by calling it into special session in Wasilla without its consent. But a majority of the legislature expressed that lack of consent, not

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17 *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976). As further evidence of the legislature's ability to sue on its own behalf, around the same time that Mr. McCoy and Ms. Geddes filed this lawsuit, the legislature sued the Governor over an unrelated funding dispute. *Alaska Legislative Council v. Dunleavy et al.*, 1JU-19-00753CI (filed July 16, 2019).

through a legal challenge, but by convening the special session in Juneau anyway.[18] The legislature did not consider a lawsuit necessary to establish their position. And that decision did not confer standing on these plaintiffs.

The legislature, and individual members of the legislature, are by far the most appropriate plaintiffs to bring this case. Their decision not to sue does not make Mr. McCoy and Ms. Geddes appropriate plaintiffs.

IV. As a matter of law, the amended complaint fails to state a claim on which relief can be granted.

Dismissal of a case under Alaska Rule of Civil Procedure 12(b)(6) is appropriate when the plaintiffs would not be entitled to the relief they seek even assuming all facts alleged in the complaint are true and construing the complaint liberally in the plaintiffs' favor.[19] It is appropriate to dismiss on these grounds before the defendant has answered the complaint; even if the defendant admitted every allegation, the plaintiff would still not be entitled to relief. For this reason, the Alaska Rules of Civil Procedure expressly permit a defendant to file a motion to dismiss under Rule 12(b) before answering a complaint,[20] and toll the time period to answer until after resolution of the motion.[21]

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18 First Amended Complaint (July 22, 2019) at page 3 paragraph 8, and page 4 paragraphs 12 and 14.

19 *Clemensen v. Providence Alaska Medical Center*, 203 P.3d 1148, 1151 (Alaska 2009).

20 Alaska R. of Civ. P. 12(b) ("A motion making any of these defenses shall be made before pleading if a further pleading is permitted" but "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion").

21 Alaska R. of Civ. P. 12(a) ("The service of a motion permitted under this rule alters these periods of time as follows... if the court denies the motion or postpones its

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Therefore, if this Court chooses to resolve this moot dispute and finds that the plaintiffs have standing, this Court should dismiss the complaint under Rule 12(b)(6).

Courts presume statutes to be constitutional.[22] This Court need look no further than the plain language of Article II, Section 9 to find AS 24.05.100(b) constitutional. "Special sessions may be called by the governor or by vote of two-thirds of the legislators." In ordinary speech, the person calling a meeting identifies the time and place of the meeting. The plaintiffs ask this Court to interpret the governor's power to call special sessions of the legislature to mean that the governor merely instructs the legislature to have a special session at some time and place of its own choosing.[23] That is not a reasonable interpretation of the framers' language.

The constitutional language quoted above does not distinguish between the power of the governor to call special sessions and the power of the legislature to call special sessions (acting by vote of two-thirds of its members). The constitutional language equally balances the power of the governor and the legislature. The plaintiffs do not argue that the legislature cannot call itself into session outside of Juneau.[24] There

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disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action").

22 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90-91 (Alaska 2016).

23 As argued in the underlying Motion to Dismiss (August 23, 2019) at page 11, the constitutional language does not expressly grant the governor the power to set a date for a special session, but the plaintiffs do not seem to dispute that the power to "call" a special session includes the power to set a date.

24 The plaintiffs describe AS 24.05.100(b) as an "unconstitutional delegation of power," which presupposes that the legislature has this power to delegate. The plaintiffs do not argue that special sessions may take place only in Juneau, regardless of who calls them.

is no textual basis for interpreting the governor's power to call special sessions differently. This balanced interpretation of the plain language does not offend the notion of separation of powers.[25]

The plaintiffs cite the Montana case of *Goodover v. Department of Administration* in support of their position,[26] but that case sheds no light on this one. *Goodover* did not concern the limits of a governor's constitutional power to call a special session of the legislature. Rather, it was about the statutory power of an administrative agency to move senate chambers during a remodel of the state capitol building.[27] That decision does not address the extent of the governor's power to call special sessions outside the capitol.

The plaintiffs argue that AS 24.05.100(b) is unconstitutional because it places no limits on the governor's authority to call the legislature into special session. According to the plaintiffs, the statute would potentially allow the governor to call a special session in an inappropriate location where the legislature was incapable of conducting business.[28] But this type of highly unlikely hypothetical is not constructive. Presumably the governor would only exercise the power to call a special session in order for the

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25 *Compare to Bradner v. Hammond*, 553 P.2d 1, 6-7 (Alaska 1976) (describing one of the goals of the separation of powers doctrine to be avoiding concentration of power in one branch).

26 *Goodover v. Dep't of Admin.*, 651 P.2d 1005 (Mont. 1982).

27 *Id.* at 1006.

28 Opposition to Motion to Dismiss (September 9, 2019) at pages 11 – 12.

legislature to conduct some specific piece of business.[29] It would make no sense for the governor to call a session in a location where the legislature could not actually conduct that business. Such an implausible hypothetical does not render the statute unconstitutional.[30]

V. Conclusion.

This Court should grant the defendant's Motion to Dismiss pursuant to Alaska Rule of Civil Procedure 12(b)(6).

DATED September 17, 2019.

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29 *See* Constitution of the State of Alaska, art. II § 9 (requiring the governor to designate the business of the special session in the proclamation calling the session). In this case, the Governor called a special session for the purpose of legislative consideration of certain appropriation measures. *See* First Amended Complaint (July 22, 2019) at page 2 paragraph 7. The plaintiffs have not alleged that the legislature would be unable to conduct this business in Wasilla.

30 In the unlikely event that a governor were to call a special session in an inappropriate location, the legislature and its members could bring a challenge to the constitutionality of the proclamation "as-applied" to that unusual factual scenario at that time.