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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, vs. MICHAEL J. DUNLEAVY, Governor of the State of Alaska, Defendant.	) Case No. 3AN-19-08301CI

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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The defendant, Governor Michael J. Dunleavy, has moved to dismiss the plaintiffs' first amended complaint. That complaint seeks a judgment declaring that the statute the governor relied on to call legislators into second special session at a location away from the capital violates the separation of powers doctrine.

The governor's motion should be denied because (1) plaintiffs' amended complaint easily meets the threshold standard for stating a claim under Alaska Civil Rule 12(b)(6), (2) they are "appropriate plaintiffs" and have standing as citizen-taxpayers, and (3) they raise a simple but profoundly important question of ongoing public significance that is capable of repetition and likely to evade review.

I. FACTS AND PROCEEDINGS

On June 13, 2019, Governor Dunleavy issued a proclamation calling the Alaska Legislature into a second special session at Wasilla on July 8. On July 8, lawmakers gathered in two different locations, Wasilla and Juneau, for the special session. Wasilla attendance was shy of the number required to constitute a quorum; Juneau attendance was larger than in Wasilla but still shy of the total which would be required to approve any veto overrides during the first five days of the special session.

The plaintiffs filed their complaint on July 15, challenging the legal basis for the declaration and seeking expedited injunctive and declaratory relief. On July 17, the Governor changed the location of the special session to Juneau.

On July 18, this court denied expedited consideration of the plaintiffs' motion for injunctive relief. On July 22, the plaintiffs filed an amended complaint limiting their claim to a request for a declaratory judgment.

On August 23, the Governor filed a motion to dismiss the amended complaint.

II. PERTINENT COURT RULE

Because the Alaska Rules of Civil Procedure apply to declaratory judgment actions[1] and because the governor has not yet answered the plaintiffs' complaint, his challenges are controlled at this early stage by Alaska Civil Rule 12(b).

III. REASONS THE COURT SHOULD DENY THE MOTION

A. The Complaint Sufficiently Alleges A Constitutional Violation For Which Declaratory Relief Can Be Provided.

One of the governor's stated grounds for dismissal ("AS 24.05.100 (b) is constitutional")[2] is a prematurely pleaded defense. The governor is not entitled to argue the merits *prior* to filing his answer. Accordingly his motion to dismiss on this ground should be denied.

Assuming *arguendo*[3] that the governor is asking the court to dismiss the complaint under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted," the motion should still be denied. Rule 12(b)(6) motions,

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[1] Alaska Civil Rule 57.
[2] Motion to Dismiss at 9-12.
[3] The governor's motion did not cite any civil rule.

providing for early dismissal, are disfavored and should rarely be granted.[4] Under the standard of review for 12(b)(6) motions, a court is required to liberally construe a complaint for its sufficiency,[5] must "presume all well-pleaded facts are true, and make all reasonable inferences in favor of the non-moving party."[6] "'A complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action.'"[7] Thus "'[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[8]

Plaintiffs allege that the governor, in calling a special session away from the capital without legislative agreement, violated the constitutional doctrine of separation of powers. In this motion to dismiss, the governor does not contest the sufficiency of the plaintiffs' factual allegations.[9] Instead the governor argues the plaintiffs' legal "theories are wrong" under relevant case law.[10] As discussed below, Alaska law fully supports the plaintiffs' legal arguments.

The governor has failed to show beyond doubt in the Rule 12(b)(6) context that declaratory relief is not available for this claim because "the test of sufficiency is not whether the complaint demonstrates that the plaintiff will

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[4] *Guerrero v. Alaska Hous. Fin. Corp.,* 6 P.3d 250, 253 (Alaska 2000)
[5] *Larson v. State, Dept. of Corrections,* 284 P.3d 1, 6 (Alaska 2012), *citing Clemenson v. Providence Med. Ctr.,* 203 P.3d 1148, 1151 (Alaska 2009).
[6] *Guerrero, supra,* 6 P.3d at 253.
[7] *Guerrero,* 6 P.3d at 253-54 (cites omitted).
[8] *Id.*
[9] Ref. to First Amended Complaint, ¶ ¶ 7-14.
[10] Motion to Dismiss at 8-12.

succeed but rather whether the allegations disclose he is entitled to a declaration of rights."[11]

A declaratory judgment is an appropriate form of relief for an as-applied challenge to the constitutionality of a statute.[12] Declaratory judgments "can terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings."[13]

Thus, the plaintiffs' first amended complaint easily satisfies the low bar for a sufficiently pleaded complaint and the Governor's motion to dismiss should be denied.

B. AS 24.05.100(b) Is Unconstitutional.

Should the court choose to reach the merits of this claim, the laintiffs can demonstrate that Alaska Statute 24.05.100(b) violates the doctrine of separation of powers in three important respects. First, under Article II, section 1 of the Alaska Constitution, the power to conduct legislative business is an attribute of the legislative function; this power necessarily encompasses the ability to determine whether its constitutional responsibilities can be fulfilled at locations away from the capital. Second, section 9 does not cede to the Governor a unilateral power to dictate where the legislature can meet in special session; the governor's power is not separate or independent from the

[11] *Jefferson v. Asplund*, 458 P.2d 995, 1002 (Alaska 1969).
[12] *See, e.g., Aulukestai et al v State*, 351 P.3d 1041 (2015) (declaratory judgment action involving an as-applied challenge to the constitutionality of a statute).
[13] *Jefferson, supra*, 458 P.2d at 997-98; *Kanuk v State*, 335 P.3d 1088, 1099 (Alaska 2014).

legislature's power to conduct special sessions. And finally, AS 24.05.100(b), as written, constitutes an unconstitutional delegation of legislative authority as it purports to give the governor power to designate special session locations without any standards to control the exercise of that power.[14]

1. Establishing the location for special sessions away from the capital is an attribute of the legislative function.

Establishing the location for special sessions is a critical attribute of the legislative function that cannot be usurped by the executive without violating separation of powers principles. Authorizing a governor to set special session locations away from the capital without legislative agreement delegates too much power to the executive branch and allows it to be exercised at the expense of the legislative branch.

Article II of the Alaska Constitution establishes the Legislature and enumerates its powers. Section 1 specifically vests the legislative power in the Legislature. Section 9 provides that the legislative power to call itself into special session is shared with the governor. This shared power is an attribute

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[14] The separation of powers doctrine requires the court to presume that a challenged statute is constitutional. *State Dept. of Revenue v, Andrade,* 23 P.3d 58, 71 (Alaska 2001). The party attacking the statute has the burden of proving the statute violates the doctrine and all doubts must be resolved in favor of constitutionality. *Id.* Courts are obligated to construe statutes to avoid unconstitutionality if at all possible *Id., citing Kimoktoak v. State,* 584 P.2d 21, 31 (Alaska 1978) (footnotes and citations omitted), but should not redraft otherwise constitutionally defective legislation. *State v.Fairbanks North Star Borough,* 736 P.2d 1140, 1142 (Alaska 1987).

When assessing whether AS 24.05.100(b) violates the separation of powers doctrine, this court must consider the following: 1) the nature of the power granted, (2) the branch of government assigned this power in the constitution, (3) whether the constitution suggests the power is shared by two branches, and finally (4) whether the limits of any express grant have been exceeded or present an encroachment on another branch. *Alaska Public Interest Research Group v. State,* 167 P.3d 27, 35 (Alaska 2007).

of the legislative function in Article II and cannot exist independent of the legislative function. Thus, the governor's unilateral order that the special session be convened at a location outside of the capital went beyond that which article II, Section 9 authorized, and so violated separation of powers principles.

The Alaska Supreme Court endorsed this analysis in *Bradner v. Hammond.*[15] *Bradner* began with a dispute between the legislature and the governor over the shared power of executive appointment and legislative confirmation. Section 25 of Article III ("The Executive") authorizes the governor to appoint the "head of each principal department . . . subject to confirmation by a majority of the members of the legislature in joint session."[16] Thus the executive power in this regard was shared with the legislature. The legislature enacted a law[17] expanding its confirmation authority to include sub-cabinet officials.[18] A declaratory judgment action followed when the governor refused to submit sub-cabinet officials for confirmation.[19]

The *Bradner* court held that "under Alaska's constitution, legislative confirmation is a specific attribute of the appointive power of the executive" and determined that the statute purporting to extend confirmation authority to

[15] *Bradner v. Hammond,* 553 P.2d 1 (Alaska 1976).
[16] *Id.* at 3, *quoting* Alaska Const., art III, sec. 25.
[17] The law was enacted over the governor's veto.
[18] *Id.* at 2, 3.
[19] *Id.* at 3.

sub-cabinet officials violated the doctrine of separation of powers.[20] It reasoned that:

> To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments.[21]

Like in *Bradner*, the governor's authority to call special sessions is a specific attribute of the legislature's power to conduct properly called special sessions. Permitting the governor to also set locations for special sessions away from the capital concentrates too much power in the executive, impermissibly intrudes on the independence of the legislature, and can frustrate the legislature's ability to fulfill its constitutional responsibilities.

In *Goodover v. Department of Administration,* the Montana Supreme Court confronted a comparable question when it considered inter alia whether a state administrative decision regarding the location of legislative chambers would violate the separation of powers.[22] The court held "the Montana State Senate, a distinguished, honorable, and independent arm of the legislative body, has the right to determine where it sits."[23] If determining the location of a legislative body's chambers is a protected legislative power, then certainly determining the location of a legislature's special sessions must be as well. A

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[20] *Id.* at 7.
[21] *Id.* at 8.
[22] *Goodover v. Dep't. of Admin.*, 651 P.2d 1005 (Mont. 1982).
[23] *Id.* at 1008.

statute that permits meddling by the executive in an exercise of legislative power would be "unconstitutional because it was violative of separation of powers requirements."[24]

2. Article II, Section 9 does not cede to the governor the power to determine special session venue away from the capital.

As noted, *Bradner* provides clear authority for the plaintiffs' position. Nonetheless, the governor would distinguish *Bradner* by relying on the definition of "to call" found in Black's Law Dictionary arguing that the "power to call a special session implicitly includes the power to choose the location."[25] This argument overlooks the *Bradner* directive that courts carefully scrutinize shared constitutional powers to guard against the concentration of power in one branch at the expense of another branch of government.

Article II, section 9 does not cede to the governor the power to set special session locations away from the capital and "the separation of powers doctrine requires that the blending of governmental powers . . . not be inferred in the absence of express constitutional provision."[26] The governor is wrong to suggest that the power to unilaterally set venue for special sessions away from the capital should be inferred from Article II, section 9.

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[24] *Bradner, supra,* 553 P.2d at 6.
[25] Motion to Dismiss at 11.
[26] *Bradner, supra,* 553 P.2d at 7.

3. AS 24.05.100(b) constitutes an unconstitutional delegation of legislative power.

AS 24.05.100(b) provides that "a special session may be held at any location in the state" and that "if a special session . . . is to be convened at a location other than the capital, the governor shall designate the location in the proclamation." The statute provides absolutely no guidance to the governor as to how he or she should exercise the delegated power to set special sessions at locations away from the capital. Thus AS 24.05.100(b) violates separation of powers principles for two reasons. First, it delegates the power to set venue for special sessions away from the capital to the governor, a power which only the legislature can exercise. Second, the statute lacks any standards to guide the governor to exercise of that discretion, allowing the governor to designate the location on a whim without regard to the legislature's ability to conduct business at that location.

In *State v. Fairbanks North Star Borough,* the court found the legislature's attempt to delegate its appropriation power to the governor in response to declining state revenues was an unconstitutional delegation of legislative powers.[27] To avoid deficient spending, the governor had relied on a statute permitting him to withhold appropriations to state agencies if the "estimated receipts and surpluses will be insufficient to provide for

[27] 736 P.2d 1140, 1143 (Alaska 1987).

appropriations."[28] The court found the statute unconstitutional "because it authoriz[ed] the exercise of sweeping power over the entire budget with no guidance or limitation."[29] It concluded that wholesale absence of standards made the exercise of authority "no more predictable than the identity and priorities of our next governor."[30]

AS 24.05.100(b) is constitutionally defective for the same reasons. As interpreted by the governor, the statute gives the executive unbridled authority over the location of special sessions without any reference to the legislature's ability to conduct business at the selected location. It provides no standards to guide the exercise of discretion purportedly afforded under the statute. Indeed, the Attorney General has observed that, under the statute, "[the governor] could have picked Kotzebue or Bethel or Huslia or Mile 135 of the Sterling Highway – literally anywhere in the state."[31]

C. The Plaintiffs Have Standing As Citizen-Taxpayers.

The governor also seeks dismissal of the complaint because, he asserts, the plaintiffs lack citizen-taxpayer standing.

A standing question is "'limited to whether the litigant is a 'proper party

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[28] *Id.*at 1142.
[29] *Id.* at 1142-1143.
[30] *Id.* at 1143.
[31] See Attorney General Kevin Clarkson's recorded interview with Andrew Kitchenman, Alaska Public Media and KTOO, June 26, 2019; https://www.alaskapublic.org/2019/06/26/alaska-ag-dunleavy-could-have-state-troopers-bring-legislators-to-wasilla/.

to request an adjudication of a particular issue....'"[32] The Alaska Supreme Court has rejected restrictive interpretations of standing requirements.[33] Consistent with that approach, the court in *Trustees for Alaska v. State* formally recognized that a person's status as a citizen or taxpayer may provide a legally-sufficient basis for challenging allegedly illegal government conduct.[34] The decision also clarified the requirements for citizen-taxpayer standing: (1) the case must be of public significance and (2) the plaintiff must be "appropriate in several respects."[35] 'Appropriateness' has "three main facets": "The plaintiff must not be a sham plaintiff with no true adversity of interest, he or she must be capable of competently advocating his or her position and he or she may still be denied standing...if there is a plaintiff more directly affected by the challenged conduct who has or is likely to bring suit."[36]

In this case, the governor contends the plaintiffs are "not appropriate" for citizen-taxpayer standing only because legislators are "the people most directly affected by the Governor's power to call the legislators into session in a location other than Juneau."[37]

Even if the court decides that state legislators are potential plaintiffs who

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[32] *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (cites omitted).
[33] *Id.* (cites omitted).
[34] *Trustees, supra,* 736 P.2d at 329.
[35] *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)(discussing *Trustees*).
[36] *Id.*
[37] Motion to Dismiss, pages 1 and 8.

are more directly concerned,[38] the plaintiffs are still entitled to sue under *Fannon v. Matanuska-Susitna Borough, Baxley v. State, and Trustees (*and additional authority cited in the footnote)[39] because the suggestion of other potential plaintiffs does not justify a denial of citizen-taxpayer standing when the plaintiffs are otherwise appropriate. The governor's reliance on the holding

[38] The plaintiffs readily agree that the governor's choice of location for a special session directly affects the legislators who must travel to and conduct legislative business. However, this claim does not involve an individual interest in a particular venue. It concerns the state constitution's allocation of and balance of powers among the branches of government. Consequently plaintiffs believe that their interests as Alaska citizens in having an independent, accessible and *functional* state legislature are on a par with that of their elected representatives.

[39] In *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 986 (Alaska 2008), plaintiffs had standing to litigate the legality of the Borough's tax on cigarettes and other tobacco products even though the Borough asserted "'there are more appropriate plaintiffs who are willing and able to bring suit, but have not.'" In *Baxley v. State,* 958 P.2d 422, 429 (Alaska 1998), plaintiffs had standing to argue that enactment giving effect to oil and gas leases violated competitive bidding statutes and public notice clause of state constitution even though the state could identify other potential plaintiffs more directly affected. In *Trustees*, plaintiffs had standing even though the US Attorney General was statutorily authorized to litigate the very same question presented, i.e. whether State's mineral leasing systems had violated specific provisions of the Alaska Statehood Act. Similarly, in cases predating the *Trustees* decision, standing was approved in *Carpenter v. Hammond,* 667 P.2d 1204 (Alaska), *appeal dismissed* 464 U.S. 801 (1983), a legislative redistricting case, even though "a resident and voter of a House District in question would theoretically have been more interested in litigating the question whether the district was malapproprationed than was the non-resident plaintiff." *Trustees*, 736 P.2d at 330. In *Coghill v. Boucher*, 511 P.2d 1297 (Alaska 1973) standing was approved for registered voters and pollwatchers even though "candidates or political parties might be more interested in challenging the [proposed] vote-counting procedures." *Trustees*, 736 P.2d at 330.

of *Keller v. French*[40] is misplaced. In *Keller* as well as in *Ruckle v. Anchorage School District*, [41] other plaintiffs had actually brought suit and so citizen-taxpayer standing was not appropriate. Plaintiffs who seek to litigate the personal rights of third-parties are also not appropriate for citizen-taxpayer standing.[42]

The complaint sufficiently establishes that the plaintiffs are appropriate plaintiffs for standing purposes: their claims have public significance and plaintiffs are not seeking to enforce or protect another's personal interest. Additionally, as long-standing members of the Alaska Bar Association, they can capably advocate their case.[43] Accordingly, the governor's motion to dismiss for lack of standing should be denied.

D. The Public Interest Exception To The Mootness Doctrine Gives The Court The Power To Hear The Case.

The governor says the plaintiffs' first amended complaint should be dismissed as moot because the controversy ended once the amended

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[40] 205 P.2d 299, 303 (Alaska 2009). In *Keller*, six state legislators sought citizen-taxpayer as well as interest-injury standing to enjoin other legislators' investigation into the governor's dismissal of a Public Safety Commissioner. The court concluded that the legislators were inappropriate plaintiffs for many reasons and not just because the governor was a possible potential plaintiff. There were more directly concerned persons – subpoenaed witnesses in the investigation - who had actually sued; the court also perceived that the *Keller* plaintiffs were attempting to use citizen-taxpayer standing as a means by which to assert the personal constitutional rights of a small number of third-parties.

[41] 85 P.3d 1030, 1035 (Alaska 2004).

[42] *See Keller, supra,* 205 P.2d at 304 and *Law Project for Psychiatric Rights, Inc. v. State,* 239 P.2d 1252, 1255 (Alaska 2010).

[43] Pursuant to Alaska Evidence Rule 201, plaintiffs request judicial notice of their admission dates to and membership in the Alaska Bar Association. McCoy was admitted in 1977 and Geddes was admitted in 1985. Together they have more than 70 years experience.

proclamation moved the special session from Wasilla to Juneau.[44] The court should deny this request because, contrary to the governor's assertion, the amended complaint presents a justiciable controversy that falls squarely within the public interest exception to the mootness doctrine.

Under the circumstances presented in this case, the court should exercise its discretion to override the mootness doctrine and resolve the merits of plaintiff's constitutional claim because (1) the question presented is one of overriding public importance, (2) the question is readily capable of repetition, and (3) most importantly, the question is likely to evade review because the extremely short time constraints associated with special session calls make meaningful judicial review impractical if not impossible.

1. The issue is one of overriding public importance.

Alaska Statute 24.05.100(b) purports to authorize the governor to force the legislature into special session away from the capital. The propriety of this statute is one of public importance because it directly implicates the separation of powers doctrine whenever the legislature, as its leadership did in this

[44] Mtn. to Dismiss at 4.

case,[45] objects to the proposed location away from the capital.[46] The issue is important because it goes to the "heart of the delicate constitutional balance between the powers of two coordinate branches of government."[47]

The governor's proclamation in this case engendered an unnecessary constitutional crisis by interfering with and intruding upon the legislature's ability to meet together and perform one of its critical constitutional functions. Ten days before the special session started, the governor vetoed 182 line items from the State's FY 2020 (operating budget (CCS SSHB39).[48] By operation of law, any legislative reconsideration of the Governor's vetoes had to be finalized before the first five days of the session expired. This became impossible when the legislature failed to meet together: only one third of the legislators went to Wasilla; and two-thirds of the membership refused to attend.[49] Significantly, the governor did not issue the amended proclamation moving the special session from Wasilla to Juneau until after the harm caused by the initial proclamation was complete, namely until after the time for veto

[45] First Amended Complaint at ¶ 8.

[46] *Bradner v. Hammond, supra,* 553 P.2d at 7(statute purporting to extend confirmation of executive department head appointments to subcabinet officials violated separation of powers doctrine); *State v. Fairbanks North Star Borough, supra,* 736 P.2d at 1143 (unconstitutional delegation of legislative appropriation authority to governor violated separation of powers principles); *see also Goodover v. Dep't. of Admin., supra,* 651 P.2d at 1007 (power delegated to committee to determine location of legislative chambers violated doctrine of separation of powers unless legislature approved the selected location).

[47] *Legislative Council v. Knowles,* 988 P.2d 604, 606 (Alaska 1999).

[48] First Amended Complaint, ¶ 11.

[49] *Id.* ¶ 12.

reconsideration had expired.[50] The resulting dysfunction, again caused solely by the governor's unconstitutional action, did not operate to toll the five days permitted for veto reconsideration votes under the constitution.[51]

The ongoing public importance of the issue continues to be highlighted by the governor's sustained public assertion of authority to order the legislature into special session away from the capital no matter how remote, inconvenient, or untenable that location might be.[52] As previously noted, the Attorney General has said "[The governor] could have picked Kotzebue or Bethel or Huslia or Mile 135 of the Sterling Highway – literally anywhere in the state."[53]

The governor minimizes the harm caused by the constitutional crisis he created, arguing the public interest favors avoiding a "political dispute between coordinate branches of government."[54] The argument is not persuasive. While the constitutional question clearly touches on a political dispute, it is not a political question. It is the unique province of the judicial branch to evaluate the constitutionality of AS 24.05.100(b).[55] This court can and should determine

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[50] First Amended Complaint, ¶¶ 11, 12, 13, 14; Alaska Const. art. II, sec. 16 (requiring veto reconsideration votes with the first five days of next lawfully called special session).

[51] *Cf. Legislative Council,* 988 P.2d at 606, n.5 (five-day deadline for veto reconsideration votes not tolled by recess or adjournment); *see also* First Amended Complaint, ¶ 14.

[52] First Amended Complaint, ¶¶ 9, 10.

[53] See Attorney General Kevin Clarkson's recorded interview with Andrew Kitchenman, Alaska Public Media and KTOO, June 26, 2019; https://www.alaskapublic.org/2019/06/26/alaska-ag-dunleavy-could-have-state-troopers-bring-legislators-to-wasilla/.

[54] Motion to Dismiss at 7.

[55] *Kanuk, supra,* 335 P.3d at 1099 (under Alaska's constitutional structure of government the judicial branch has a constitutionally mandated duty to ensure compliance with the provisions of the Constitution) *citing State Dep't. of Health and Social Service. V. Planned Parenthood, Inc.*, 26 P.3d 904, 913 (Alaska 2001).

whether AS 24.05.100(b) violates separation of power principles.

2. This issue is capable of repetition.

The issue is capable of repetition for three reasons. First, the authority relied upon by the governor to set venue in Wasilla, AS 24.05.100(b), remains in force and there is no indication that its repeal is imminent.[56] Second, the governor and his attorney general have publicly asserted that AS 24.05.100(b) provides continuing authority to call special sessions away from the capital without the legislature's agreement and that this authority includes the right to compel recalcitrant legislators to attend special sessions at those locations pursuant to court order.[57] Third, although the governor issued the amended proclamation directing the legislature to meet in Juneau nine days after the special session commenced in Wasilla, he has never acknowledged that his initial proclamation violated the Alaska Constitution nor has he pledged not to call special sessions away from the capital in the future.[58]

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[56] *Compare Alaska Judicial Counsel v. Kruse, 331 P.3d 375, 380 (Alaska 2014)* (applying the public interest exception to the mootness doctrine because challenged statute still in effect) with *Alaska Community Action on Toxics v. Hartig,* 321 P.3d 360, 367 (Alaska 2014) (refusing to apply the public interest exception where statute or regulation no longer in force).

[57] First Amended Complaint ¶¶ 9, 10; Attorney General Kevin Clarkson's recorded interview with Andrew Kitchenman, Alaska Public Media & KTUU – Juneau, June 26, 2019; https://www.alaskapublic.org/2019/06/26/alaska-ag-dunleavy-could-have-state-troopers-bring-legislators-to-wasilla/.

[58] *Kodiak Seafoods,* 900 P.2d at 1196 (case moot where state admitted violating procurement code and pledged not to do so in the future).

These facts readily demonstrate that the question of the governor's authority to call special sessions away from the capital without legislative agreement is one readily capable of repetition.[59]

3. The issue is likely to evade review.

Finally, the issue is likely to repeatedly evade review. This is so because the time constraints associated with special sessions are extremely short, making it impractical if not impossible for a court to meaningfully review a constitutional challenge before it becomes technically moot. A brief review of the time constraints associated with special sessions demonstrates why a constitutional challenge such as the one presented here is likely to repeatedly evade review.

a. The notice requirements for special sessions called by the governor are extremely short.

First, the notice requirements for special sessions called by a governor are extremely short and, depending on the circumstances, can be made even shorter by a governor if he or she chooses. Ordinarily, a governor is required to give at least 30 days notice before convening a special session "to enable the legislators to make travel and other arrangements" when tne legislature is not in session at the capital.[60] However, if "the proclamation is issued while both houses are in regular or special session" of if "the proclamation is issued

[59] The governor concedes that the question of his authority to call special sessions away from the capital without the legislative consent is capable of repetition. Defendant's Motion to Dismiss at 6.
[60] AS 24.05.100(a)(1).

within one hour after the second house has adjourned for a regular or special session" advance notice is not required.[61] Of course, this provision makes complete sense if the legislature is already in Juneau and the newly called special session is to be convened in Juneau and not a location far from the capital.

Second, the constitution places extremely short time constraints on certain important legislative duties. For example, the constitution requires veto override votes, if they are taken, must be finalized "by the legislature sitting as one body no later than the fifth day of a special session of that legislature."[62]

Finally, special sessions called by the governor are constitutionally limited to 30 days.[63]

b. This special session notice impermissibly intruded on the legislature's ability to perform its constitutional functions.

Constitutional challenges to special session calls are repeatedly likely to evade review because they will be technically moot before a court can meaningfully review the challenge. The present case is illustrative. First, the governor dispensed with the 30-day notice requirement by issuing the special

[61] AS 24.05.100(a)(1)(C) & (D).
[62] Alaska Const. art. II, sec. 16.
[63] Alaska Const., art. II, sec. 9.

session call on June 13 while the state senate was in session.[64] Second, the governor issued 182 line item vetoes eliminating 444 million dollars from the capital budget on June 28, when there were only four business days before the Wasilla special session was scheduled to commence on July 8.[65] Finally on July 17, after the time for veto reconsideration had expired, the governor amended his proclamation and moved the special session from Wasilla to Juneau. This July 17 proclamation in effect mooted plaintiffs' expedited request that the governor be enjoined from calling special sessions away from the capital without legislative agreement.

Finally, the special session ended by operation of law on August 6, 2019.

The facts in this case illustrate just how quickly constitutional challenges become technically moot and thereby repeatedly evade meaningful and thoughtful court review.

c. Time constraints associated with special session calls indicate this constitutional issue will repeatedly evade review.

Alaska courts have analyzed whether an issue can repeatedly avoid review by considering the time it takes for an issue to become technically moot

[64] Pursuant to Alaska Evidence Rule 201, plaintiffs' ask the court to judicially notice the following: the House Journal reflects that it adjourned in Juneau *sine die* on June 13, 2019, at 10:51a.m; the governor issued the special session proclamation setting venue in Wasilla on June 13, 2019 at 11:00 a.m.; and the Senate Journal reflects that it did not adjourn in Juneau sine die until 11:59 a.m. on June 13, 2019 and was in session when the governor issued the proclamation.

[65] Pursuant to Alaska Evidence Rule 201, plaintiffs ask the court to judicially notice that June 28, 2019, the day the governor issued the vetoes was a Friday, and state courts are closed on weekends and for Independence Day (July 4).

and whether it is practical for a court to meaningfully review the issue prior to technical mootness. The amount of time depends on the issue confronted and the court's ability to meaningfully review the issue before it becomes technically moot.

For example, when asked to review technically moot involuntary civil commitment appeals, the court noted the issue would likely evade review because it was "quite unlikely that an appeal from a 30-day or 90-day commitment, or even a 180-day commitment could be completed before the commitment expired.[66] "It is practically impossible to perfect an appeal from [a commitment] order that by its terms will expire in 30 days."[67] When asked to review a citizen-taxpayer's constitutional challenge to a governor's veto, the court again found it likely to evade review because the time for the challenge "may not come within sufficient time to litigate the matter."[68]

Similarly, when asked to review administrative agency determinations, the court routinely compares "the time it takes to bring the appeal with the time it takes an appeal to become moot."[69] Thus, full judicial review of an agency permit set to expire in only two years was found likely to evade review because meaningful judicial intervention is impractical.[70] Similarly, judicial review of a contingency plan scheduled to expire in five years

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[66] *In re Naomi B.,* 435 P.3d 918, 928 (Alaska 2019).
[67] *In re Joan K,* 273 P. 3d 594, 608 (Alaska 2012) (Stowers, J., dissenting).
[68] *Lowell v. Rosen,* 569 P.2d 793,795 (Alaska 1977).
[69] *Copeland v. Ballard,* 210 P.2d 1197, 1202 (Alaska 2009).
[70] *Alaska Community Action on Toxics v. Hartig,* 321 P.3d 360. 368 (Alaska 2014).

was likely to evade review well before the contingency plan expired.[71]

In the present case, the time constraints associated with special session coupled with the five-day limit on veto reconsideration votes demonstrate that constitutional challenges are likely to repeatedly evade review because they will become technically moot well before meaningful and deliberate court review is possible.

d. *The likely to evade review requirement should be leniently applied to this case.*

Finally, any doubt about the likely to evade review prong in this case should be leniently resolved in favor of public interest exception. This is so because the separation of powers doctrine is central to the integrity of the Alaska Constitution. The doctrine limits the authority of each branch to interfere in the powers that have been delegated to other branches for two reasons; to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government.[72]

Plaintiff's amended complaint challenges the governor's threshold authority to call special sessions at locations away from the capital over the legislature's objection. Alaska courts have been instructed to apply the likely to evade review requirement more leniently if the question relates to a

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[71] *Id.*
[72] *Alaska Public Interest Research Group v. State,* 167 P.3d 27, 35 (Alaska 2007)

threshold authority to act or when the harm done by the if the harm is complete once the act is taken.[73]

In this instance, the impracticality of meaningful court intervention to correct this constitutional injustice becomes readily apparent when compared with the very high standards for *ex parte* temporary restraining orders, and for preliminary injunctions. The Governor should not be permitted to avoid accountability for his unilateral unconstitutional action by mere expedient of returning the session to the capital after the time for veto reconsideration expired.

IV. CONCLUSION

For all these reasons, the defendant's motion to dismiss should be denied.

Respectfully submitted at Anchorage this 9th day of September, 2019.

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[73] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks,* 48 P.3d 1165, 1169 (Alaska 2002)("Arbitrability is a threshold question; the harm is caused by the means of resolution and not the resolution itself,"); *Legislative Council v. Knowles,* 988 P.2d 604, 607 (Alaska1999) (constitutional harm complete when action taken and not when it is concluded).