MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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Law Docket No. Ken-23-426

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**WILLIAM CLARDY, ET AL.**

(*Appellants*)

v.

**TROY D. JACKSON, ET AL.**

(*Appellees*)

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On Appeal from the Kennebec County Superior Court

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# REPLY BRIEF OF APPELLANTS

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Carl E. Woock, Esq. – Bar No. 5657
Stephen C. Smith, Esq. – Bar No. 8720
Attorneys for Appellants
STEVE SMITH TRIAL LAWYERS
191 Water Street
Augusta, Maine 04330
207-622-3711
*info@mainetriallaw.com*

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**ARGUMENT**

The Defendant-Appellees (hereafter the "State Actors"), via the executive branch's Office of the Maine Attorney General, raise several arguments in their Brief that go beyond the issues of law that are immediately on appeal from the Superior Court's Order granting their Motion to Dismiss. Appellants reply only to (i) correct obvious errors and mischaracterizations in the "State Actors'" brief and to (ii) address the novel issues raised by the "State Actors" that go beyond the Superior Court's decision.

To cut to the quick, though: if this Court affirms the Superior Court's dismissal of the Amended Complaint on one of the myriad alternative grounds that State Actors raise outside of the actual decision, such as lack of standing, it would do a disservice to the parties—to the Maine public—by leaving a controversial part of the Maine Constitution open to interpretation and further abuse by bad faith "State Actors"—both those present here and those other state actors who might govern in the future.

For the reasons set forth in Appellants' original brief, and for the foregoing reasons, the grasping arguments from the "State Actors" should not guide this Court's reasoning, and to the extent that the Court considers the controversies that arise in this case, it should ultimately rule on the merits of the issue and in review of the actual findings of the Superior Court. In so doing, this Court should, with

respect, vacate the Order granting the "State Actors'" motion to dismiss and remand for further proceedings.

## I. The "State Actors" misstate and misconstrue relevant historical context that explains the scope of the Maine Constitution's "extraordinary occasions" language in its original form.

The "State Actors" invent historical controversy by scrounging up early occasions where a United States president ordered the United States Senate to convene, as though this is explanatory to any appropriate interpretation of Article V, Part 1, Section 13 of the Maine Constitution. See Red Br. 10-11. The examples cited focus on moments where the president sought to address diverse matters such as the appointment of individuals for "numerous nominations" or, per Red Br. fn. 6, other "numerous . . . nominations," or entirely separately, on a "matter touching on the public good" which was specifically—yes—the confirmation of executive nominations. Red Br. 10. Another supposedly-telling example of congressional assembly cited by the "State Actors" is when President George Washington summoned the U.S. Senate to consider a foreign treaty—an unremarkable event since the Senate is uniquely tasked with providing "advice and consent" to the president when the president seeks to enter a treaty with another nation. Red Br. at 10; U.S Const. art. II, sec. 2.

Obviously, the "State Actors" fundamentally miss the point of the Appellants describing the terms upon which Founders—those who drafted and ratified limiting

language for government actors—considered it appropriate to summon both houses of Congress, as illustrated by the documented hesitation of those founding-era executive agents in considering the merits of summoning *both houses of Congress* upon an "extraordinary occasion." See Blue Br. at 24-25. The "State Actors'" historical deflection should be ignored.

The situations highlighted by the State Actors do little to inform this Court about the scope and authority of Maine's governor to convene the legislature. Any chief executive officer might summon a discrete legislative body to approve nominations and such an action is not "extraordinary" by definition. Indeed, in Maine, both the governor and the president of the Maine Senate jointly possess the authority to summon the Maine Senate—but not the entire Legislature—for voting on appointments: "Either the Governor or the President of the Senate shall have the power to call the Senate into session for the purpose of voting upon confirmation of appointments." Me. Const. art. V, pt. 1, § 8. This is, as the "State Actors" characterize it, a "mundane" task. Red Br. at 10. It is not qualified or conditioned on "extraordinary" circumstances. Notably, Governor Mills proffered the need for approving appointments as the basis for her summoning the *entire* Legislature for an "extraordinary" occasion, which Appellants quite rightly contend belies the flimsy pretense of the action. APP009; see also Blue Br. at 11.

Tracking the Founders' concerns about the appropriate use of the "extraordinary" call to convene the whole of the U.S. Congress remains a logical consideration for this Court's interpretation of the same clause in Maine's Constitution. In contrast, the "State Actors'" confused interpolation that the concerns were supposedly nonexistent because the president summoned the U.S. Senate to perform separate and exclusively senatorial duties is either obtuse or spurious.

Perhaps worried that this Court might be unpersuaded by a fumbling review of history, the "State Actors" (speaking through an office of the Governor, remember) cite and underline analysis from the Department of Justice Office of Legal Counsel (a federal executive department of government) to parade what a federal executive department official thought of the president's authority to summon Congress in 1989. Red Br. at 11. The "State Actors" could just as well issue their own press release, explaining why they should win this lawsuit, with equal persuasive force. Self-serving claims from executive branches of any stripe are, of course, just that. Fortunately, the executive branch does not get to say what the law is. *See Higgins v. Wood*, 2018 ME 88, ¶52, 189 A.3d 724, (citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")). And the importance of that delegation of governmental power is the very reason the

Appellants turned to the courts when these "State Actors" colluded to conceive a sham special session.

Appellants referenced the statements of founding executive officers and officials who offered careful clarification about the relevant "extraordinary occasions" caveat in the federal constitution. In so doing, Appellants were not citing to kindred spirits likeminded in cause. Appellants cite to those authorities because the drafters' understanding of the scope of governmental authority sheds light on how we should interpret the use of similar powers today. This Court, with respect, should reject the "State Actors'" bad history offered to justify their recent bad conduct.

## II. Appellants have not failed to preserve the issue of whether the 1940 Opinion of the Justices was applicable to this lawsuit, because Appellants have maintained that it is inapplicable throughout this lawsuit.

The "State Actors" state that Appellants failed to preserve the argument that the governor does not have power to convene the Legislature "alone." Reply Br. at 16-17. This is a very narrow interpretation of the myriad arguments raised by Appellants in opposition to their Motion to Dismiss. Appellants literally argued—in the Amended Complaint—that the language of Maine's Constitution at Article IV, Part 3, Section 1 "conflicts with the presupposition that the executive may demand legislators to resume regular business," because the power for the Legislature to conduct special business has also been vested with that same branch

of government. APP099. This argument is neither new nor novel on appeal. The Amended Complaint—the original complaint, even—highlights the fundamental conflict that the legislature at once exercised its authority and the executive misused a separate authority, and hence there exists a separation of powers issue. The "State Actors" pretending to be ambushed by this argument recurring in the appellate brief is, frankly, surprising.

Appellants consistently argued that adopting the reasoning of the 1940 Opinion of the Justices is an error because the opinion is unreliable, untimely, underexplained, and in conflict with the plain language of the current Maine Constitution. See APP091-99. The Superior Court's specific reliance on the 1940 advisory opinion in ruling on the Motion to Dismiss, which approvingly gleaned language from that opinion, wrongly confirmed that the constitution says that "[t]he Governor alone is the judge of the necessity for [calling a special session]" pursuant to Article V, Part I, Section 13. *In re Opinion of the Justices,* 12 A.2d 418, 420 (Me. 1940). Addressing both the fault in the advisory opinion, as well as the fault in the Superior Court's reliance upon it, is not new.

The "State Actors" again invent controversy where it does not exist. The issue of the applicability of an advisory opinion has been at the forefront of this case since the "State Actors" filed their Motion to Dismiss. But, for that matter, the Superior Court actually adopting the opinion's reasoning in a particular way also affects the

nuances of the arguments on appeal. Either way, the "State Actors" (and the Superior Court) err in their reliance on the advisory opinion, for all the reasons set forth in Appellants' brief.

## III. Legislative collusion with the executive branch is not protected legislative activity.

Ever overreaching and mirroring the "State Actors'" claim the governor can utilize an expressly limited right in an inexhaustible manner, the "State Actors" argue that they are legislatively immune from suit. Red Br. at 20-25. But that is not the case.

Bad acts of the legislative actors are not "immune" to judicial review. In reviewing the trial court's decision on a motion to dismiss pursuant to M.R. Civ. P. 12(b)(6), the appellate court views the facts alleged in the complaint "as if they were admitted." *Nadeau v. Frydrych*, 2014 ME 154, ¶ 5, 108 A.3d 1254. Appellants' Amended Complaint alleges, accurately, that the legislative defendants coordinated with the executive defendant to circumvent the will of the Maine legislature, concocting a faux "extraordinary occasion" and dragging the whole of the legislature back to conduct normal, regular work. APP042-45. The "State Actors" claim that these are "legislative actions" immune from judicial oversight. Red Br. at 21. However, legislative immunities "are susceptible to abuse," and are not unlimited. *Cushing v. Packard*, 30 F.4th 27, 52 (1st Cir. 2022). If the legislator "State Actors" are using legislative tools to circumvent the proper functioning of government, they

are not protected by "immunity." *See Gravel v. United States*, 408 U.S. 606, 625 (1972) ("Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.") (citation omitted). The "State Actors" assert that any deed self-servingly characterized as "legislative activity" cannot be reviewed in the courts. Red Br. at 23. This is, as a matter of law, utterly false. "*Legitimate* legislative activity" is subject to "absolute common law immunity." *Lightfoot v. State of Maine Legislature*, 583 A.2d 694 (Me. 1990) (emphasis added). But question-begging pronouncements of legitimacy do not, by fiat, end judicial inquiry.

The "State Actors" also unctuously argue that there is no "record support" for the allegations of misconduct set forth in Appellants' Amended Complaint. Red Br. at 23. Of course, the record is limited because there was no discovery given the case's posture, but if there were discovery, the record would establish that these "State Actors" did in fact email each other during the First Regular Session to tee up and finetune the Governor's Proclamation prior to the *sine die* adjournment and, thus, they clearly coordinated their parliamentary circus. Appellants are not asking the courts to read the "hearts and minds" of legislators, but to view their actions—the coordination with the governor, the concession of legislative authority to dictate

its sessions, the deliberate circumvention of constitutional constraints—for what they are.

In short, the "State Actors" confuse Appellants' arguments. While Appellants disagree with the Superior Court's finding that the legislators' actions were "legitimate," APP015, the "State Actors" go beyond even what the Superior Court found and, in fact, beyond the cognizable limits of what is recognized as legislative immunity.

## IV. The Superior Court was correct not to rely on the "State Actors'" stubbornly-flawed arguments about the Declaratory Judgements Act.

The "State Actors" argue that the Amended Complaint could and should have been dismissed for failing to "identify a valid cause of action" other than the Maine Constitution and the Declaratory Judgments Act (the "DJA"). Red Br. at 35-36. The Superior Court politely chastised the "State Actors" for asserting this position at oral arguments on the Motion to Dismiss, but never mind, they assert the argument again. The "State Actors" instruct this Court that it "should affirm its earlier rulings that the DJA itself is not an independent cause of action," while identifying recent cases in which their argument was unavailing. Red Br. At 38. The Law Court has heard this argument before, and hopefully, it need not hear it again.

As it happens, the Law Court has serendipitously addressed this issue (again) just before the filing of this brief, and in so doing, the "State Actors'" arguments on this question are moot. In *Parker v. Dep't of Inland Fisheries and Wildlife*, 2024

ME 22, __ A.3d. __, the citizen plaintiffs alleged that a governmental action of refusing to issue a Sunday hunting permit violated the Maine Constitution following the enactment of a "right to food" amendment. *Id.* at ¶¶ 4-5. The cause of action brought by the plaintiffs was simple: they asserted that the amendment to the Maine Constitution means they can hunt on Sundays, and a state actor said it does not. As this Court reiterated its position from other cases, "[i]f a party asserts 'a disagreement over an official interpretation of a statute' that involves 'presently existing and specific facts, as opposed to hypothetical or uncertain facts,' that party has standing" to seek a declaratory judgment under the [DJA]." *Parker*, 2024 ME 22, ¶ 13, __ A.3d. __ (quoting *Passamaquoddy Water Dist. v. City of Eastport,* 1998 ME 94, ¶ 8, 710 A.2d 897). Fundamentally, all that a court needs to adjudicate a request for declaratory judgment is "the presence of a justiciable controversy." *Id.* (quoting *Annable v. Bd. of Env't Prot*., 507 A.2d 592, 594-95 (Me. 1986).

The "State Actors" pretend, when it is convenient for them to do so, that the DJA has unspoken limitations that would impede a Maine resident from challenging a governmental actor's unconstitutional actions when the lawsuit is not tethered to another cause of action. That is not the law in Maine. The State Actors' position on this issue should, once and for all, be binned.

## V. The "State Actors'" complaints about standing and ripeness are not dispositive.

The "State Actors" again churn through standing and ripeness arguments that the Superior Court did not find persuasive. Appellants previously argued against the kitchen sink arguments raised by the "State Actors" at the trial court, and reiterate their arguments here.

The Appellants, individually and collectively, have standing to challenge the misconduct of the "State Actors." As an obvious example, the legislator appellants are directly impacted by gubernatorial and state officer mischief. The effect of the Governor's 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. The Governor usurped the rightful authority of the voting-members of the Legislature to dictate their own legislative session in an unconstitutional manner, steamrolling their representative authority. In contrast, "the Legislature," as a monolithic body, did not exclusively have "its" votes abrogated by gubernatorial action. Red Br. at 31. Both can be true, and both can have standing. 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 helpful in refining this point. 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, members of the public writ large, undoubtedly affected by legislation passed during an extraconstitutional session, have standing to challenge the constitutionally repugnant legislative activity precipitating the governmental action. 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. The "State Actors" assert that, for the case to survive a ripeness challenge, the Appellants must "allege and prove" an "immediate burden." Red Br. at 35. This is a novel

summation of the ripeness standard, but either way, the Appellants have claimed, and have in fact suffered, harm resulting from the actions of the "State Actors." The actions of the improperly summoned and unsanctioned legislature are themselves unconstitutional and void *ab initio*, not because of the content of any particular legislation, but because of the unconstitutional quorum presiding over the Legislature. This controversy was ripe from the inception of the lawsuit.

## CONCLUSION

As previously noted, if this Court affirms the dismissal on technical grounds or otherwise fails to address the fundamental issue raised, it does a gross disservice to the Maine public by leaving this section of the Maine Constitution open to interpretation and further abuse by bad faith "State Actors."

As ever, the most revealing tell in the "State Actors'" brief 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. The challenge to that position is, quite humbly: what if the words in the Maine Constitution mean what they say?

The "State Actors" make this lawsuit out to be some extreme challenge asking for an extreme remedy. It is not. Asking for accountability, judicial oversight, and for state actors to be *good actors*, is not extreme at all. This case, ultimately, pursues

the mundane goal of a predictable and lawful government. Maine's governmental actors should behave how the Maine Constitution directs its governmental actors to behave. This Court can help facilitate that extremely reasonable goal.

Dated: April 1, 2024

/s/Carl Woock
Carl E. Woock, Esq. Bar No. 5657
Stephen C. Smith, Esq., Bar No. 8720
Attorneys for Appellants
STEVE SMITH TRIAL LAWYERS
191 Water Street
Augusta, ME 04330
(207) 622-3711
Info@MaineTrialLaw.com

**CERTIFICATE OF SERVICE**

I, Carl E. Woock, Esq., certify that on the date indicated below, I have sent two copies of the Appellants' Reply Brief to the party listed below by email and U.S. Mail, first-class, postage prepaid, addressed as listed below:

Aaron Frey, Esq.
Kimberly L. Patwardhan, Esq.
Office of the Attorney General
6 State House Station
Augusta, Maine 04330

Dated: April 1, 2024

/s/Carl Woock
Carl E. Woock, Esq., Bar No. 5657