STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-23-426

WILLIAM L. CLARDY; MICHELLE TUCKER; RESPECT MAINE;
SHELLEY RUDNICKI, Maine State Representative; and
RANDALL GREENWOOD, Maine State Representative,

Plaintiffs-Appellants

v.

TROY D. JACKSON, President of the Maine Senate;
RACHEL TALBOT ROSS, Speaker of the Maine House of Representatives; and
JANET T. MILLS, Governor of the State of Maine,

Defendants-Appellees

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF DEFENDANTS-APPELLEES

AARON M. FREY
Attorney General

THOMAS A. KNOWLTON
Deputy Attorney General

Of Counsel

KIMBERLY L. PATWARDHAN
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Federal and State Constitutions

Statutes and Session Laws

Court Procedural Rules

Other Authorities

INTRODUCTION

Through this appeal, two Maine citizens, two current Members of the House of Representatives, and a non-profit organization (collectively, "Clardy") ask that this Court revive their claims against Troy D. Jackson, President of the Maine Senate; Rachel Talbot Ross, Speaker of the Maine House of Representatives; and Janet T. Mills, Governor of the State of Maine (collectively, "State Officers"). Clardy's claims seek sweeping relief: a declaration that 1) the First Special Session of the 131st Legislature was unconstitutionally convened by the Governor and then unconstitutionally conducted by the House Speaker and Senate President, and, 2) as a result, all laws and resolves enacted during that session are void *ab initio* and without effect. Appendix ("A.") 45-46.

According to Clardy, this sweeping relief is justified because the Governor's proclamation that convened the First Special Session was not prompted by a true "extraordinary occasion," as they interpret that phrase in Article V, Part 1, Section 13 of the Maine Constitution, and because the State Officers allegedly engaged in "[p]artisan collusion to undermine legislative authority" by calling or conducting the First Special Session. Blue Brief ("Br.") 9-10.

The Superior Court (*Murphy, J.*) correctly dismissed the Amended Complaint as non-justiciable and barred by the interrelated doctrines of legislative immunity and separation of powers. A. 6-17. The State Officers request that this Court affirm

the Superior Court's judgment and reject the "incalculable mischief" sought by Clardy in their Amended Complaint. *See Whiteman v. Wilmington & S.R. Co.*, 2 Del. 514, 525 (Del. Super. Ct. 1839) ("the doctrine that a mistake or even corruption on the part of the governor in convening the general assembly invalidates the acts of that body, would be productive of incalculable mischief").

FACTUAL BACKGROUND

The following facts are drawn from the Amended Complaint and are assumed to be true on appeal. *Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 3, 242 A.3d 182.

On March 30, 2023, after passing an appropriations bill on a majority vote, A. 34-35, the Legislature adjourned the First Regular Session of the 131st Maine Legislature, A. 37-38. That adjournment was *sine die*, or without day, and marked the official end of the First Regular Session. A. 37. *See also Opinion of the Justices*, 2015 ME 107, ¶¶ 46-52, 123 A.3d 494. Prior to adjournment, the Legislature voted to carry over its unfinished business to a subsequent regular or special session of the 131st Maine Legislature. A. 36-37, 81.

Also on March 30, 2023, the House Speaker and Senate President polled the members of both houses to ask whether they wished to return for a special session. A. 35-36. *See* Me. Const. art. IV, pt. 3, § 1 (requiring a majority vote of all members of each political party for the Legislature to call itself into session). The results of

those polls showed that the requirements of the Maine Constitution had not been met for the Legislature to convene by consent vote. A. 35-36. *See also* Legis. Rec. H-274 (1st Reg. Sess. 2023).

On March 31, 2023, Governor Mills issued a proclamation declaring an extraordinary occasion, Me. Const. art. V, pt. 1, § 13, and convening the Legislature on April 5, 2023. A. 38-39, 48-49. In support, the proclamation cited "the need to resolve many legislative matters pending at the time of the adjournment of the First Regular Session," including, "but not limited to the state budget, pending legislation, pending nominations of state boards and commission members, and pending nominations of judicial officers by the Governor requiring legislative confirmation."[1] A. 48. The First Special Session of the 131st Legislature convened on April 5, 2023; its work included matters carried over from the First Regular Session. A. 41. *See also Opinion of the Justices*, 2023 ME 34, ¶ 6, 295 A.3d 1212.

PROCEDURAL HISTORY

William L. Clardy initiated this case against the State Officers on or about April 10, 2023. A. 2, 18-30. On April 17, 2023, Clardy filed an Amended Complaint, which added four new plaintiffs: Michelle Tucker, Maine State

[1] The Governor's proclamation was not unique in this regard. A Maine Governor convened during the First Special Session of the 118th Legislature, the Second Special Session of the 121st Legislature, and the First Special Session of the 122nd Legislature to resolve matters pending during a regular session of the Legislature that had adjourned just days before. *See* Me. Leg. Rec. H-357 & S-411 (1st Spec. Sess. 1997); Me. Leg. Rec. H-1194 & S-1210 (2d Spec. Sess. 2004); Me. Leg. Rec. H-343 & S-411 (1st Spec. Sess. 2005).

Representative Shelley Rudnicki, Maine State Representative Randall Greenwood, and Respect Maine (collectively, "Clardy"). A. 2, 31-59. In the two-count Amended Complaint, Clardy contended that the First Special Session was unconstitutional because its convening allegedly was not occasioned by a true "extraordinary occasion," A. 42-43, and that all laws enacted during the allegedly unconstitutional First Special Session are void *ab initio*, A. 44-45. Clardy requested that the Superior Court: 1) issue a "temporary injunction" barring the Senate President and House Speaker "from calling their respective chambers" while this lawsuit was pending; and 2) declare that the Governor's proclamation convening the First Special Session was unconstitutional and that all matters not resolved at the *sine die* adjournment of the First Regular Session remain held until the next constitutionally convened session. A. 45-46. Clardy did not move for a temporary restraining order, preliminary injunction, or an expedited schedule. A. 2-5.

The State Officers moved to dismiss the Amended Complaint pursuant to M.R. Civ. P. 12(b)(1) and 12(b)(6), which motion was fully briefed on June 16, 2023. A. 2-3, 60. Oral argument occurred on the motion on July 14, 2023. A. 4.

The First Special Session adjourned *sine die* on July 26, 2023.[2] During the First Special Session, the 131st Legislature enacted hundreds of non-emergency

[2] Weekly Legislative Report, Vol. XLIX, No. 28 at 1 (August 31, 2023), *available at* https://legislature.maine.gov/house/house/Repository/Documents/131/WLRs/28-August%2031,%202023.pdf.

laws and resolves which became effective October 25, 2023. Those laws and resolves included: amendments to the Aroostook Band of Micmacs Settlement Act, now called "the Mi'kmaq Nation Restoration Act," 30 M.R.S.A. §§ 7201-7210 (Supp. 2024); the enactment of a paid family and medical leave benefits program, 26 M.R.S.A. §§ 850-A to 850-R (Supp. 2024); a supplemental budget that includes funding for all three branches of state government, P.L. 2023, ch. 412, §§ A-1 to A-46; and a resolve that requires the Department of Administrative and Financial Services to amend its rules to allow live plants in state-owned buildings, Resolves 2023, ch. 85. Both Representatives Rudnicki and Greenwood participated in the First Special Session after filing the Amended Complaint,[3] *see* A. 41, and voted on hundreds of bills.[4]

On October 13, 2023, the Superior Court (*Murphy, J.*) granted the State Officers' motion to dismiss. A. 4. Although the trial court assumed, without deciding, that at least one plaintiff had standing, A. 11, it determined that the Governor's decision (and subsequent proclamation) to convene a special session of

[3] Appellant Clardy also participated in the First Special Session by testifying at a public hearing in the Judiciary Committee on May 8, 2023. *Resolve, to Establish the Commission to Study the Constitution of Maine: Hearing on L.D. 1410 Before the J. Standing Comm. on Judiciary* at 1:52:42 PM, 131st Legis. (2023) (oral testimony of William Clardy neither for nor against the subject bill), *https://legislature.maine.gov/Audio/#438?event=88778&startDate=2023-05-08T09:00:00-04:00*.

[4] The voting record statistics kept by the Maine House of Representatives indicate that Representatives Rudnicki and Greenwood, respectively, participated in 250 out of 367 and 367 out of 367 floor votes of the First Special Session of the 131st Legislature. Maine House of Representatives, Member Voting Stats PDFs, https://legislature.maine.gov/house/house/Documents/MemberVotingStatsPDF.

the Legislature was "not subject to judicial review, as the Governor enjoys plenary authority to determine when there is an extraordinary occasion for convening the Legislature." A. 12. The court reasoned that *Opinion of the Justices*, 12 A.2d 418, 136 Me. 531 (1940), while not binding, "nevertheless 'provide[s] necessary guidance and analysis for decision-making by the other branches of government.'" A. 13 (quoting *Opinion of the Justices*, 2023 ME 34, ¶ 9, 295 A.3d 1212). The trial court also agreed with that opinion's reasoning, noting that:

> In Article V, Part I, Section 13, the authority to convene the Legislature upon extraordinary occasions is textually committed to the Governor. Me. Const. art. V, pt. 1, § 13. The constitution does not define what constitutes an "extraordinary occasion," nor does it refer the settlement of such a question to the judicial branch. . . . The text of the constitution therefore suggests that "[t]he Governor alone is the judge of the necessity for [calling a special session]" pursuant to Article V, Part I, Section 13.

A. 13 (quoting *Opinion of the Justices*, 12 A.2d at 420, 136 Me. at 534). The Superior Court thus concluded that "any error in the Governor's decision to call a special session does not provide a basis for judicial relief." A. 14.

The trial court also determined that the "overlapping principles of legislative immunity and separation of powers prevent[ed] the [c]ourt from granting" any relief "based on the actions of Speaker Ross and President Jackson." A. 14. The court held that the House Speaker and the Senate President were entitled to legislative immunity because they "acted within the sphere of legitimate legislative activity, both in convening a special session pursuant to the Governor's proclamation and in

passing laws regarding matters carried over from the regular session." A. 15-16. Further, the court reasoned that the "authority to respond to a Governor's call for a special session and to legislate during it are" functions of the Legislature alone. A. 16. Accordingly, the Superior Court held that the constitutional separations of powers prohibited the court from encroaching on those functions, and the claims against the House Speaker and Senate President were non-justiciable. A. 16.

Clardy timely appealed. A. 4.

ISSUES PRESENTED

I. Whether the Superior Court correctly dismissed all claims against the Governor as non-justiciable because the Governor alone has the authority to decide when and under what circumstances to convene the Legislature pursuant to Article V, Part 1, Section 13 of the Maine Constitution.

II. Whether the Superior Court correctly dismissed all claims against the House Speaker and Senate President because they were barred by absolute legislative immunity and the relief sought, if granted, would constitute a violation of the constitutional separation of powers.

III. Whether the Superior Court's judgment of dismissal can be affirmed on the alternate grounds of standing, ripeness, and failure to assert a valid cause of action.

ARGUMENT

I. The Superior Court correctly concluded that the Governor's authority to convene a special session of the Legislature pursuant to Article V, Part 1, Section 13 is plenary and not subject to judicial review.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 4, 796

A.2d 674. This Court reviews a trial court's determination on "the legal sufficiency of the complaint de novo, viewing the allegations in the complaint in the light most favorable to the plaintiff to determine whether the complaint sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Anctil v. Cassese*, 2020 ME 59, ¶ 10, 232 A.3d 245 (cleaned up).

A. Article V, Part 1, Section 13 vests the authority to determine what constitutes an extraordinary occasion solely with the Governor.

Maine's Constitution expressly provides the Governor with the power to convene the Legislature: "The Governor may, on extraordinary occasions, convene the Legislature." Me. Const. art. V, pt. 1, § 13. The Constitution does not define what constitutes an extraordinary occasion, but the text of the Constitution grants that authority solely to the Governor. The separation of powers provisions within Maine's Constitution "are explicit and restrictive." *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). Because the Governor's power is not limited by any other provision of the Constitution, *see id*. at 799-800, the Governor's determination of what constitutes an extraordinary occasion is solely for her to make and is not reviewable by the courts. A. 12.

Clardy resists this conclusion, and presents a series of arguments about what, in their view, constitutes a true "extraordinary occasion." Blue Br. 21-27. These arguments misunderstand the inquiry. The critical question is not <u>what</u> constitutes an extraordinary occasion, but <u>who</u> gets to decide what constitutes an extraordinary

occasion. When "there is a textually demonstrable constitutional commitment of the issue to another branch of the government," *Hunter*, 447 A.2d at 800 n.4 (cleaned up), as there is here, the other branches of government do not have a say.

Undeterred, Clardy claims that the Governor's authority to convene the Legislature should be limited by language in that same section[5] that does not modify the first clause. Blue Br. 23 (arguing language in third clause regarding danger "from an enemy or contagi[on]" limits the first clause and what can constitute an "extraordinary occasion"). Clardy cites no legal authority for this legal proposition, which is contrary to common sense, the natural reading of the section, and standard rules of construction. *See Costanzo v. Tillinghast*, 287 U.S. 341, 344-45 (1932) (phrase set off by commas in one clause did not apply to all other clauses separated by semicolons).

Clardy next contends that the Court must interpret the Maine Constitution consistently with the United States Constitution. Blue Br. 24-25. The federal Constitution provides, in part, that the President "may, on extraordinary Occasions,

---

[5] Article V, Part 1, Section 13 provides in full:

> The Governor may, on extraordinary occasions, convene the Legislature; and in case of disagreement between the 2 Houses with respect to the time of adjournment, adjourn them to such time, as the Governor shall think proper, not beyond the day of the next regular session; and if, since the last adjournment, the place where the Legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the State.

Me. Const. art. V, pt. 1, § 13.

convene both Houses, or either of them, ..." U.S. Const. art. II, § 3. Clardy contends, based on a secondary source, that this presidential power is limited to "extreme" "circumstances, outside the normal course of business, in which Congress was only to be convened to address pandemics, foreign wars, or other existential threats." Blue Br. 24-25.

The Law Court has not addressed the scope of Article V, Part 1, Section 13 or whether it is co-extensive with Article II, Section 3 of the United States Constitution. *Cf. State v. Letalien*, 2009 ME 130, ¶ 25, 985 A.2d 4 ("the ex post facto clauses of the Maine and United States Constitutions are interpreted similarly and are coextensive"). Generally, the Court will examine the Maine Constitution independently of the United States Constitution, but it may consider federal authority or precedent if persuasive. *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281.

Here, Clardy's arguments regarding the federal constitution are not only at odds with history, but also do not support their position. The President's power to convene Congress "on extraordinary Occasions" applies equally to convening one House of Congress. U.S. Const. art. II, § 3. President Washington used this power to convene the Senate in 1791, 1793, and 1795, for reasons both mundane (numerous nominations) and significant (consideration of the Jay Treaty with Great Britain).[6]

[6] S. Exec. Journal, 2d Cong., Spec. Sess. 79-84 (1828) (convening Senate into session on March 4, 1791, one day after prior session concluded to consider "certain matters touching the public good," which included numerous judicial, civil, and military nominations); S. Exec. Journal, 3d Cong., Spec. Sess. 137-39 (convening Senate into session on the same day as inauguration in 1793

In other words, in the early days of our nation, the corollary provision in the United States Constitution touted by Clardy as narrow, and limited to emergencies, in fact was used by the President to conduct ordinary business. Further, as explained by the Department of Justice Office of Legal Counsel, since the adoption of the federal constitution, "the Senate has been convened many times and for many reasons. It has considered both nominations and treaties during those times. The Constitution places no limitation on when the President may convene either or both Houses." President's Auth. to Convene the Senate, 13 Op. O.L.C. 245, 247 (1989) (emphasis added). Thus, early uses and persuasive analyses of the President's power to convene Congress support the State Officers' position: the Governor's determination of what constitutes an extraordinary occasion under the Maine Constitution is for her to make and is not limited by atextual constraints.

Clardy's comparison of Article V, Part 1, Section 13 to the Massachusetts Constitution fares no better. Blue Br. 23-26. As an initial matter, Clardy quotes the incorrect provision of the Massachusetts Constitution. In Massachusetts, the two houses of the legislative body are called the "General Court of Massachusetts." Mass. Const. pt. 2, ch. I, § 1, art. I. The provision cited by Clardy refers to the Executive Council, *see* Mass. Const. pt. 2, ch. II, § 3, art. I (establishing the

to consider "certain matter, touching the public good," namely three nominations, including an Associate Justice of the United State Supreme Court); S. Exec. Journal, 4th Cong., Spec. Sess. 177-92 (convening Senate into Session on June 8, 1795, to consider "certain matters, touching the public good" including the Jay Treaty and numerous civil and military nominations).

Executive Council), not the General Court. The cited provision allows the Massachusetts governor to assemble that council, which is withing the executive branch, "at [her] discretion." Mass. Const. pt. 2, ch. II, § 1, art. IV; *Murphy v. Casey*, 15 N.E.2d 268, 270 (Mass. 1938) ("The council is part of the executive branch of the government of the Commonwealth.").

Separately, the Massachusetts governor, with the advice of the Executive Council, has the "full power and authority" to "call [the general court] sooner than the time to which it may be adjourned or prorogued, if the welfare of the commonwealth shall require the same." Mass. Const. pt. 2, ch. II, § 1, art. V. Neither provision of the Massachusetts Constitution, which bear no resemblance to Article V, Part I, Section 13, supports Clardy's arguments.

B. A 1940 *Opinion of the Justices* and decisions from other jurisdictions support the Governor's plenary authority to convene the Legislature.

More than 80 years ago, the Supreme Judicial Court had the opportunity to address the Governor's power to convene the Legislature under Article V. The Justices opined: "The Governor alone is the judge of the necessity of such action, which is not subject to review." *Opinion of the Justices*, 12 A.2d 418, 420, 136 Me. 531, 534 (1940). In that opinion, the Governor had called for a special session of the Legislature by proclamation[7] because

[7] The proclamation did not formally declare an "extraordinary occasion" or identify the

> it appears advisable that the Legislature of this State should meet in special session for the following purposes:
>
> To consider legislation relative to unemployment compensation made necessary by certain changes in Federal Social Security Laws.
>
> To consider legislation concerning present laws relating to guaranty of titles of motor vehicles.
>
> To act upon any legislation to promote the welfare of the State."

Id. at 419, 136 Me. at 531. But circumstances changed, necessitating, in Governor Barrows' view, a postponement of the special session. *Id.*; 136 Me. at 532. Governor Barrows then sought an opinion from the Supreme Judicial Court on whether he could revoke the initial proclamation by issuing a subsequent proclamation before the Legislature convened. *Id.* at 420; 136 Me. at 533.

The Supreme Judicial Court answered the Governor's question in the affirmative. According to the Justices,

> Although there is no express constitutional provision authorizing the revocation of such call, yet such power is necessarily inferable from that clearly granted. The Governor in [her] discretion may revoke such call by Proclamation issued prior to the convening of the Legislature pursuant to the original Proclamation. Such revocation, if made, would not preclude the Governor from issuing a new Proclamation to convene the Legislature in Special Session at a date certain, if and when, in [her] judgment, occasion may require, even though such call be for the same cause.

Governor's constitutional authority under Article V, Part 1, Section 13. In one of the first, if not the first, gubernatorial proclamations calling for a special session, then Governor Plaisted also did not formally declare an "extraordinary occasion" when calling on the Legislature to convene on March 20, 1912. 1913 Me. Laws 1044 (Proclamation of Governor Frederick W. Plaisted convening Spec. Sess. of 75th Legis.).

Opinion of the Justices, 12 A.2d at 420, 136 Me. at 534. Thus, Maine's Governor has the authority to convene the Legislature for whatever reason that particular Governor sees fit, and that decision is not reviewable by the courts. *See id.*; 136 Me. at 534.

The Justices' 1940 Opinion is in accord with numerous other courts interpreting nearly identical state constitutional provisions regarding the power of a governor to convene the legislature "on extraordinary occasions." Those courts likewise have concluded that the Governor's decision to convene the Legislature is not reviewable by the courts. *See McConnell v. Haley*, 711 S.E.2d 886, 887 (S.C. 2011) ("Because there is no indication in the [South Carolina] Constitution as to what constitutes an 'extraordinary occasion' to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that decision."); *Opinion of the Justices*, 198 A.2d 687, 689 (Del. 1964) (Delaware Constitution "allows the Governor, in his sole discretion, to convene an extraordinary session of the General Assembly" which decision "cannot be subjected to judicial review"); *Diefendorf v. Gallet*, 10 P.2d 307, 314–15 (Idaho 1932) ("The determination as to whether facts exist such as to constitute 'an extraordinary occasion' is for [the Governor] alone to determine," which decision is "not to be interfered with by any other co-ordinate branch of the government."); *State v. Howat*, 191 P. 585, 589 (Kan. 1920) ("The Governor is the final judge of"

whether an "extraordinary occasion" existed "to call the special session of the Legislature"); *Bunger v. State*, 92 S.E. 72, 72 (Ga. 1917) (the Governor "alone is to determine when there is an extraordinary occasion for convening the Legislature"); *In re Governor's Proclamation*, 35 P. 530, 531 (Colo. 1894) (the Governor "alone is to determine when there is an extraordinary occasion for convening the legislature").

Clardy attempts to discredit the 1940 *Opinion of the Justices* by first arguing the opinion is non-binding and non-precedential. Blue Br. 14-17. The State Officers agree that the Justices' 1940 Opinion is not binding on this Court. *Opinion of the Justices*, 2017 ME 100, ¶ 9, 162 A.3d 188. Such opinions "may, however, provide necessary guidance and analysis for decision-making by the other branches of government." *Opinion of the Justices*, 2023 ME 34, ¶ 9, 295 A.3d 1212.

Further, this Court has relied on Opinions of the Justices when interpreting Maine's Constitution in precedential decisions. For example, the Court relied on *Opinion of the Justices*, 159 Me. 209, 191 A.2d 357 (1963), and *Opinion of the Justices*, 673 A.2d 693 (Me. 1996), when determining the scope of the legislative power of citizens provided in Maine's Constitution. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 28-35, 237 A.3d 882; *see also Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 19 & n.12, 183 A.3d 749 (adopting reasoning of *Opinion of the Justices*, 2017 ME 100, ¶¶ 64–69, 162 A.3d 188, in full); *State v. Haskell*, 2008

ME 82, ¶ 8, 955 A.2d 737 (relying on *Opinion of the Justices*, 437 A.2d 597 (Me. 1981), and *Opinions of the Justices*, 118 Me. 503, 106 A. 865 (1919), in holding that the public right "to use great ponds" is not a fundamental right under the Maine Constitution). Thus, while not binding, the Court should adopt the reasoning of the Justices' 1940 Opinion, which analyzes the exact constitutional provision at issue in the present case and is persuasive authority.

Clardy also attacks the 1940 *Opinion of the Justices'* statement that "the Governor alone is the judge of the necessity [of convening a special session], which is not subject to review," 12 A.2d at 420, 136 Me. at 534, as "terse dicta." Blue Br. 11, 14, 16. But, a key part of the Justices' analysis regarding the Governor's discretion to revoke a proclamation convening the Legislature was the Governor's authority to issue that proclamation in the first instance. *Opinion of the Justices*, 12 A.2d at 420, 136 Me. at 534. In both decisions, and contrary to Clardy's interpretation, the Justices opined that the Governor has broad discretion.

Clardy also argues, for the first time on appeal, that the 1940 Opinion relies on a "false premise, which is that only the Governor has the authority to call a special session." Blue Br. 18-21. According to Clardy, because the Legislature has, since 1970, separate constitutional authority to call itself into a special session, *see* Me. Const. art. IV, pt. 3, § 1, the 1940 Opinion "fails even at descriptive level, let alone in its legal conclusions." Blue Br. 18. Clardy's arguments on this point lack merit.

As an initial matter, Clardy never argued to the trial court that the Legislature's authority to convene itself diluted or overshadowed the Governor's authority to convene the Legislature or undercut the reasoning of the 1940 *Opinion of the Justices*. *See* A. 87-106. Because this Court generally does not address issues that are raised for the first time on appeal, *Warren Const. Group, LLC v. Reis*, 2016 ME 11, ¶¶ 9-10, 120 A.3d 969, the Court should reject it outright as unpreserved for appellate review.

In addition to the lack of preservation, Clardy's arguments on this point are flawed and unpersuasive. There is no textual basis in the Constitution to characterize the Executive's power to convene the Legislature and the Legislature's power to convene the Legislature as "shared." Blue Br. 19. Nor is there any textual basis to contend that one branch's power limits the other. Blue Br. 19-20. The Governor's authority to convene the Legislature and the Legislature's authority to convene itself stem from two different constitutional provisions, which operate wholly independently of one another, empowering two different branches of government to achieve the same result. Contrary to Clardy's claims, there is no "conflict" or "separation of powers dilemma" between Article V, Part 1, Section 13 and Article IV, Part 3, Section 1. Blue Br. 20.

Because the two powers operate independently, the interpretation of Article V, Part 1, Section 13 in the 1940 *Opinion of the Justices* remains persuasive authority

on which the Superior Court correctly relied. A. 12-14.

C. The Maine Constitution provides checks on the Governor's plenary authority under Article V, Part 1, Section 13.

The Superior Court reasoned that even though the Governor's authority under Article V, Part 1, Section 13 was plenary, the Governor could not "abuse [that] power . . . without recourse." A. 13. The trial court noted that the "Legislature's power to impeach places a necessary check on governors who abuse their authority." A. 13-14 (citing Me. Const. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7). Clardy attacks this reasoning as logically inconsistent: how can a Governor's "nettlesome, noxious, unserious or even flat-out abuse calls" to convene the Legislature be a misdemeanor when the courts sanction the conduct? Blue Br. 27-28.

Clardy's argument misconstrues the Superior Court's reasoning. The trial court did not "approve" or "sanction," implicitly or explicitly, the Governor's stated reasons for convening the First Special Session. Rather, the trial court concluded that the Judiciary could not review the wisdom or legality of her decision. A. 14

Further, Clardy's assertions that the Superior Court's decision countenances unchecked gubernatorial power are without basis. The Superior Court identified one potential check, i.e., the political check of impeachment, on the Governor's authority under Article V, Part 1, Section 13. A. 13-14.

A second check is the Legislature's sole authority to control the length of its sessions. The Governor has no authority to end any legislative session, *see* A. 54

("The determination of the length of the session is uniquely a legislative one"), except in the event that both houses of the Legislature do not agree to adjourn, Me. Const. art. V, pt. 1, § 13. Indeed, if the Legislature objected to the Governor convening a special session, the Legislature could, once convened, immediately adjourn. *See, e.g.*, Wis. Senate J., 105th Legis. June 2022 Spec. Sess. 960 (2022) (convening in response to a governor's call, but then adjourning minutes later).

A third check is the Legislature's authority, once in session, to consider bills beyond that purpose stated in a gubernatorial proclamation. For example, Governor LePage convened the First Special Session of the 128th Legislature on October 23, 2017, specifically to address an issue with a prior enacted law regarding food systems and appropriate funds for the Maine Office of Geographic Information Systems (MEGIS). A. 83. In that session, the Legislature not only addressed those issues, *see* P.L. 2017, ch. 314 (eff. Oct. 31, 2017) (repealing prior enacted law regarding food systems); P.L. 2017, ch. 315 (eff. Oct. 31, 2017) (funding MEGIS), but also enacted comprehensive legislation addressing ranked choice voting, *see* P.L. 2017, ch. 316 (eff. Feb. 5, 2018), and amended the laws governing the Fund for the Efficient Delivery of Local and Regional Services, P.L. 2017, ch. 313 (eff. Feb. 5, 2018). In other words, Maine's Governor can convene the Legislature, but the Legislature controls what business it then conducts.[8]

[8] Maine is unlike other States in this regard, in which the gubernatorial proclamation convening

In sum, the trial court's decision correctly balances Maine's constitutionally mandated separation of powers.

II. The Superior Court correctly concluded that overlapping principles of legislative immunity and separation of powers barred any relief against the House Speaker and Senate President.

A. Absolute legislative immunity bars all of Clardy's claims because they seek to interfere with quintessentially legislative actions.

"[A]bsolute [legislative] immunity affords protection not only from liability but from suit." *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 (1st Cir. 1996). It applies when the conduct challenged by a plaintiff is legislative in nature, meaning "acti[on] in a field where legislators traditionally have power to act," *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951), or an "integral step[] in the legislative process," *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). Because the immunity "attaches to legislative *actions* rather than legislative *positions*," "executive branch officials are also absolutely immune from liability 'when they perform legislative functions.'" *Gray v. Mills*, No. 1:21-CV-00071-LEW, 2021 WL 5166157, at *3 (D. Me. Nov. 5, 2021) (quoting *Bogan*, 523 U.S. at 55).

---

that State's legislature restricts the legislative action permissible at a special session to the subject matter identified in the proclamation. *See, e.g.*, Ky. Const. § 80 ("When [the Governor] shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered."); Neb. Const. art. IV, § 8 ("The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together."). *But see Washington v. Fair*, 76 P. 731, 733 (Wash. 1904) ("While the Constitution empowers the Governor to call extra sessions of the Legislature, and defines his duty respecting the same, it does not authorize him to restrict or prohibit legislative action by proclamation or otherwise.").

In the Amended Complaint, Clardy sought to enjoin President Jackson and Speaker Talbot Ross from calling their respective chambers while this lawsuit was pending and declare that the First Special Session convened by Governor Mills was unconstitutional. A. 45-46. As the trial court correctly held, because Clardy's claims seek to interfere with quintessentially legislative actions, they are barred by legislative immunity.[9]

This Court has recognized and applied the doctrine of absolute legislative immunity in a context indistinguishable from this one. In *Lightfoot v. State of Maine Legislature*, 583 A.2d 694 (1990), the plaintiff brought a civil-rights action under 42 U.S.C. § 1983 seeking "an injunction to mandate that the Legislature enact certain legislation." *Id.* at 694. Observing that "[t]he Legislature acts within its constitutional sphere of activity when it exercises discretion to reject or enact legislation," the Court held that the common-law doctrine of legislative immunity applied to such legislative actions so as to "preserve legislative independence within this sphere of legitimate legislative activity." *Id.* Legislative immunity is not limited to damages claims but applies equally to "suits for declaratory and injunctive relief." *Id.* (citing *Supreme Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731–34 (1980)). The Court therefore affirmed the trial court's ruling that the

[9] The Superior Court addressed legislative immunity only with respect to Clardy's claims against President Jackson and Speaker Talbot Ross, but the same principles apply equally to their claims against Governor Mills regarding her calling for a special legislative session.

plaintiff's claims for injunctive relief against the Legislature were barred by legislative immunity. *Lightfoot*, 583 A.2d at 694.

The claims asserted here are indistinguishable from the claims barred in *Lightfoot*. Decisions and votes related to when or whether to convene the Maine Legislature or call the House or Senate into session are quintessentially legislative in nature. *See* Me. Const. art. IV, pt. 3, § 1; Me. Const. art. V, pt. 1, § 13. Any declaratory or injunctive relief provided against the State Officers would intrude into the "sphere of legitimate legislative activity" protected by legislative immunity. *Lightfoot*, 583 A.2d at 694; *see also Gray*, 2021 WL 5166157, at *3 ("Defendants' [i.e., Governor Mills, Senate President Jackson, and former House Speaker Gideon] decisions around whether and when to convene the Legislature in the face of a global pandemic are the sort of 'quintessentially legislative' conduct that [legislative immunity] protects.").

Legislative immunity applies regardless of the type of claim. Thus, it does not matter that Clardy's action is not brought under 42 U.S.C. § 1983, the federal civil rights statute at issue in *Lightfoot*. This Court has long held that qualified immunity—another judicially created immunity doctrine protecting state actors in § 1983 suits—applies to constitutional claims under state-law causes of action such as the MCRA. *Clifford v. MaineGeneral Med. Ctr.*, 2014 ME 60, ¶ 46, 91 A.3d 567. Moreover, the separation of powers concerns that require recognizing legislative

immunity in the context of § 1983 claims apply equally to state-law causes of action. As with qualified immunity, legislative immunity is meant to protect the immune party from not only certain types of judgments, but also from being hailed into court in the first place. *Cf. Andrews v. Dep't of Envtl. Prot.*, 1998 ME 198, ¶ 4, 716 A.2d 212 (recognizing that qualified immunity is an immunity from suit, not just damages). *See also* A. 84-86. The Superior Court applied these principles correctly and concluded that President Jackson and Speaker Talbot Ross were immune from suit. A. 14-16.

Clardy disparages the trial court's focus on the State Officers' conduct. Blue Br. 33-37. Clardy argues, without record support, that there was "unconstitutional chicanery" and "collusion" among the State Officers between when the Legislature's special session vote failed and when the Governor called for a special session of the Legislature. Blue Br. 36; *see also* Blue Br. 7, 8, 9, 10, 32 34, 36 (characterizing State Officers' conduct as, *inter alia*, "obvious abuses," "pretextual," "banal partisan gamesmanship," "baseless," "partisan collusion," and "rampant abuse"). Clardy asserts this amounted to an unconstitutional delegation of legislative authority to the Executive. Blue Br. 35-36. These unsupported arguments miss the mark for two reasons.

First, Clardy conflates the *sine die* adjournment of First Regular Session with the convening of the First Special Session. The two sessions are separate, even if

close in time, and spring from different provisions of the Maine Constitution. The Legislature adjourned itself *sine die* on March 30, 2023, to close the First Regular Session, as permitted by the Maine Constitution and state statute. *See* Me. Const. art. IV, pt. 3, §§ 1, 12; 3 M.R.S.A. § 2 (Supp. 2024) (providing First Regular Session "shall adjourn no later than the 3rd Wednesday in June" (emphasis added)). The fact that the Governor then convened the Legislature for a special session, pursuant to Article V, Part 1, Section 13 did not interfere with the Legislature's adjournment of the First Regular Session or usurp the Legislature's authority.

Second, "[t]he claim of an unworthy purpose does not destroy the privilege" afforded by legislative immunity. *Tenney*, 341 U.S. at 377. In other words, the doctrine of legislative immunity turns not on motive but on action; otherwise, courts could be called to referee intra-legislative disputes. *See* Blue Br. 36 (accusing State Officers of "disenfranchise[ing] state representatives"). Here, the Amended Complaint challenges the State Officers' conduct, i.e., the Governor's convening of the Legislature without a true "extraordinary occasion," A. 38-39, 42-43, and the Senate President and House Speaker calling their respective chambers into session and proceeding with the business of the legislative session, A. 41-42, 44-45. Under *Tenney*, State Officers' motives are irrelevant.

In sum, decisions and votes related to when or whether to convene the Maine Legislature or call the House or Senate into session are quintessentially legislative

in nature. *See* Me. Const. art. IV, pt. 3, § 1; art. V, pt. 1, § 13. The Superior Court correctly determined that any declaratory or injunctive relief against the State Officers based on these actions would intrude into the "sphere of legitimate legislative activity" that is protected by legislative immunity.[10] *Lightfoot*, 583 A.2d at 694.

B. Any injunctive or declaratory relief directed against the State Officers would violate the constitutional separation of powers.

Under Article 3, Section 2, of the Maine Constitution, "[n]o person or persons, belonging to one of [the executive, legislative, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. This provision establishes a separation-of-powers test that is "much more rigorous" than the test applicable to the federal government. *Hunter*, 447 A.2d at 799. To evaluate whether a particular act by a member of one department violates this provision, the Court must ask: "has the power in issue been explicitly granted to one branch of state government, and to no other branch?" *Id*. at 800. If so, exercise of that power by a

[10] Clardy claims that because the State Officers allegedly "worked in tandem" to orchestrate the Governor's call for a special session, that alleged "'legislative activity' cannot be called legitimate" legislative activity. Blue Br. 35-36 (referencing *Lightfoot*, 583 A.2d at 694). In the State Officers' view, this claim takes *Lightfoot* out of context. The Court explained that "[t]he Legislature acts within its constitutional sphere of activity when it exercises discretion to reject or enact legislation. To preserve legislative independence within this sphere of legitimate legislative activity the Legislature enjoys absolute common law immunity from section 1983 actions[.]" *Lightfoot*, 583 A.2d at 694. In context, "legitimate" refers back to the Legislature's "discretion to reject or enact legislation," which is committed to the legislative branch. *Id.*

different branch violates the separation of powers. *Id.* In *Hunter*, the Court applied this test to conclude that a statute permitting courts to resentence offenders based on their behavior while incarcerated violated the separation of powers because the statute "duplicate[d] a part of the Governor's power to commute a criminal sentence." *Id.* at 802.

The Superior Court correctly applied these principles and concluded that granting the relief Clardy requested would encroach upon the powers of the Legislative and Executive branches. A. 14-16.

Clardy argues that the Superior Court's decision "assume[d] a duty of deference from the courts that is neither warranted nor desirable." Blue Br. 37.[11] According to Clardy, the Judicial department can act and adjudicate the present case, Blue Br. 37-39, but they fail to explain how this Court could do so without violating the constitutional separations of powers. Indeed, the separation-of-powers violation that Clardy wants the judicial branch to commit here is more clear-cut than the one at issue in *Hunter*. Maine's Constitution specifies the power of the Legislature and the regular sessions at which it will convene. Me. Const. art. IV, pt. 1, § 1; art. IV, pt. 3, § 1. The Legislature also has the authority to convene at other times: "The Legislature may convene at such other times on the call of the President of the Senate

[11] Separately, Clardy analogizes the circumstances of this case to two decisions from Michigan and Wisconsin addressing the scope of gubernatorial emergency powers prompted by the COVID-19 pandemic. Blue Br. 29-32. As Clardy essentially concedes, Blue Br. 32, those decisions have no bearing on the issues before the Court.

and Speaker of the House, with the consent of a majority of the Members of the Legislature of each political party, all Members of the Legislature having been first polled." Me. Const. art. IV, pt. 3, § 1. And Maine's Governor can convene the Legislature "on extraordinary occasions." Me. Const. art. V, pt. 1, § 13. The Governor, Senate President, and House Speaker thus exercised powers "explicitly granted" by the Maine Constitution to them, and not to the judiciary. *Hunter*, 447 A.2d at 800.

Decisions of this Court and Opinions of the Justices have recognized the constitutional imperative that the judicial branch avoid interference in the legislative process. In 1981, the Governor sought an Opinion of the Justices as to whether enactment of a particular bill would affect the State's property interests in filled land. The Justices declined to answer the question, explaining that "[t]o express a view as to the future effect and application of proposed legislation would involve the Justices at least indirectly in the legislative process." *Opinion of the Justices*, 437 A.2d 597, 611 (Me. 1981). The Justices explained that the separation of powers principle in Article III, § 2, required them to avoid any such "intrusion on the functions of the other branches of government." *Id.* This Court has since endorsed that principle in a precedential decision, explaining in *Wagner v. Secretary of State* that any effort by the judicial branch to "elaborate on the ramifications" of proposed legislation would violate the separation of powers by involving the Court in the legislative process.

663 A.2d 564, 567 (Me. 1995); *accord Avangrid*, 2020 ME 109, ¶ 16, 237 A.3d 882.

Further, the relief sought in the Amended Complaint is more intrusive than the relief sought in *Wagner* and *Avangrid*. Clardy sought a declaration that all the legislation passed in First Special Session is without any legal effect and to prevent the Legislature from continuing its business. Just as the legislative branch cannot tell the judicial branch who should win in a particular case, *see Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.17 (2016) ("Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'"); *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117 ("The Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers."), the judicial branch cannot tell the legislative branch when to convene or adjourn or what bills and resolves should be introduced, debated, and voted upon.[12]

In sum, because the Constitution explicitly grants the power to convene and adjourn to the Legislature and, in certain circumstances, to the Governor, and to no

[12] A number of other jurisdictions have recognized that relief of the type sought by Clardy would violate those jurisdictions' separation-of-powers doctrines. *See, e.g.*, *Pauling v. Eastland*, 288 F.2d 126, 129 (D.C. Cir. 1960) (declining to issue a declaratory judgment prohibiting a U.S. Senate subcommittee from issuing a contempt citation based on the "right of the Senate to pursue its legislative duties without judicial interference"); *Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME*, 784 So. 2d 404, 408 (Fla. 2001) ("Where the Legislature is concerned, it is only the final product of the legislative process that is subject to judicial review"); *City of Phoenix v. Superior Ct. of Maricopa Cnty.*, 175 P.2d 811, 814 (Ariz. 1946) ("Courts have no power to enjoin legislative functions"); *Fletcher v. City of Paris*, 35 N.E.2d 329, 332 (Ill. 1941) ("The courts can neither dictate nor enjoin the passage of legislation.").

other branch, any injunctive or declaratory relief limiting or prohibiting the Legislature from conducting its business would violate the separation of powers. The Superior Court's reasoning on this issue was correct. Because the Court cannot issue any relief that would be consistent with the separation of powers, Clardy stated no claim against the State Officers "upon which relief can be granted." M.R. Civ. P. 12(b)(6). The trial court correctly dismissed Clardy's claims.

III. The Superior Court's judgment of dismissal can be affirmed on the alternate grounds of standing, ripeness, and failure to assert a valid cause of action.

Questions of justiciability, such as standing and ripeness, can be raised and addressed at any point in a proceeding.[13] *See JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 7, 10 A.3d 718; *Johnson v. Crane*, 2017 ME 113, ¶¶ 8-12, 163 A.3d 832 (addressing ripeness for the first time on appeal on court's own motion); *Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 8, 124 A.3d 1122 ("Because standing is a threshold concept dealing with the necessity for the invocation of the court's power to decide true disputes, it is an issue cognizable at any stage of a legal proceeding, even after a completed trial." (cleaned up)).

The Superior Court did not decide whether Clardy had standing, A. 11, but this Court reviews legal questions of justiciability de novo. *See McGettigan v. Town*

[13] "An appellee may, without filing a cross-appeal, argue that alternative grounds support the judgment that is on appeal." M.R. App. P. 2C(a)(1).

of Freeport, 2012 ME 28, ¶ 10, 39 A.3d 48. Further, dismissal for failure to assert a valid cause of action is reviewed de novo under the Rule 12(b)(6) legal sufficiency standard. *See Anctil*, 2020 ME 59, ¶ 10, 232 A.3d 245; *Edwards v. Black*, 429 A.2d 1015, 1016 (Me. 1981).

A. Clardy failed to allege sufficient facts to demonstrate their standing to sue.

Although the Superior Court enjoys general subject-matter jurisdiction, "[a]s a prudential matter," courts should open their doors only "to those best suited to assert a particular claim." *Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 (quoting *Mort. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 14, 2 A.3d 289). "Every plaintiff seeking to file a lawsuit in the courts must establish its standing to sue, no matter the causes of action asserted." *Greenleaf*, 2014 ME 89, ¶ 8, 96 A.3d 700. "[T]o have standing to seek injunctive and declaratory relief, a party must show that the challenged action constitutes 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Madore v. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 13, 715 A.2d 157, 161 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "A plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable – i.e., incapable of judicial resolution." *Bank of New York v. Dyer*, 2016 ME 10, ¶ 10, 130 A.3d 966 (internal quotation marks omitted).

1. Legislative Standing

Although this Court has not addressed the specific issue of whether legislators have standing in this situation, *cf. Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶ 31, 288 A.3d 346, under well-reasoned federal jurisprudence, individual legislators do not have standing to challenge an alleged "institutional injury" suffered by all legislators or both houses of the Legislature as a whole. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997). When legislators challenge an institutional injury—that is, one that "runs (in a sense) with the Member's seat"—they lack a sufficiently particularized stake in the outcome to sue as individuals. *Id.* at 821. This principle seeks to ensure, among other goals, that the judiciary is not placed in a position of adjudicating disputes between various members of the Legislature. *Cf. Wright v. Dep't of Def. & Veterans Servs.*, 623 A.2d 1283, 1285 (Me. 1993) (refusing to adjudicate matters on separation of powers basis where doing so "would involve an encroachment upon the executive or legislative powers").

In this case, Representatives Rudnicki and Greenwood seek to vindicate an alleged injury that is not personal to them but rather one suffered, if at all, by the Legislature as a body. Although they have sought to artfully label their respective injuries as the deprivation of the prerogative to adjourn *sine die* or being forced to legislate, A. 39-41, no such right is personal to any legislator, but one that "runs (in a sense) with the Member's seat."[14] *Raines*, 521 U.S. at 821. In such cases, the

[14] This is not a case where Representatives Rudnicki and Greenwood were denied the effectiveness

Legislature itself may have standing, but individual legislators do not.

Representatives Rudnicki and Greenwood also cannot rely on so-called appointments cases to establish their standing. In appointments cases, the executive's appointment of an officer (A) is conditioned upon approval of the one or both houses of a legislature (B). When the executive attempts to accomplish A without satisfying B, courts have found legislative standing because that action (A) interfered with their right of the legislative body to give advice and consent (B). That interference diminishes the constitutional authority unique to the particular legislators or legislative body. *See e.g.*, *Turner v. Shumlin*, 2017 VT 2, ¶¶ 12-18, 163 A.2d 1173.

Here, the Maine Constitution provides two avenues to convene the Legislature for a special session: a qualifying vote by the members of the Legislature (A) or action by the Governor (B). Unlike in *Turner*, neither avenue is conditioned on the other. The Governor can convene the Legislature (A) without the consent of the members of the Legislature (B), and vice versa. Accordingly, the Governor's convening of the Legislature does not diminish the two legislators' prior votes or prevent the Legislature from convening itself. Without vote diminishment, the legislators' standing claims as individual legislators fail because they have not

---

of their vote. They voted not to return for a special session, and the Legislature did not convene itself by consent. A. 35-36.

provided evidence of how their alleged, individual injuries are different from all the other Maine legislators that participated in the First Special Session. *See Raines*, 521 U.S. at 821.

2. Citizen and taxpayer standing.

Clardy fares no better in their other attempts to demonstrate standing, as taxpayers or otherwise.[15] A. 31, 41-42. In order to establish that they have standing, Clardy must allege and prove not only that they have "definite and personal legal rights" "at stake," *Nichols v. City of Rockland,* 324 A.2d, 295, 297 (Me. 1974), but also that their alleged injury is concrete and specific to them, not an abstract injury to the public generally. *See Buck v. Town of Yarmouth,* 402 A.2d 860, 861 (Me. 1979); *Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257 ("One who suffers only an abstract injury does not gain standing to challenge governmental conduct."). The injury must be concrete and defined by a legal harm that is "fairly traceable to the challenged action" of the adverse party. *Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257. Clardy alleges no such individual right or personal injury that has been caused by the actions of the State Officers.

Any reliance on *Common Cause v. State*, 455 A.2d 1 (Me. 1983), is misplaced. *Common Cause* authorized so-called "taxpayer standing" in narrow circumstances.

[15] The State Officers have assumed that Representatives Rudnicki and Greenwood are asserting claims not just as legislators, but as citizens and taxpayers as well, because each individual Appellant identified themselves in the Amended Complaint as a "citizen, taxpayer and registered voter in the State of Maine." A. 31-32.

In that case, the Court held that taxpayers had standing to sue the State to enjoin it from spending tax dollars in a manner that the plaintiff-taxpayers contended was not permitted by the Maine Constitution. *Id.* at 7-13. *Common Cause* is inapplicable here because Clardy seeks not to prevent the spending of state funds, but to enjoin the Legislature from enacting legislation that might increase their taxes.

3. Associational standing.

Appellant Respect Maine has not satisfied the requirements for associational standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Black*, 2022 ME 58, ¶ 29, 288 A.3d 346 (quotation marks omitted). Respect Maine failed to identify any member that has standing to sue in their own right.

B. Clardy failed to allege sufficient facts to demonstrate their claims are ripe.

Even if any of the Appellants had standing, their claims are not ripe. Ripeness "prevents judicial entanglement in abstract disputes, avoids premature adjudication, and protects agencies from judicial interference until a decision with concrete effects has been made." *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 17, 221 A.3d 554 (cleaned up). "Ripeness is a 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." *Id*. ¶ 20.

Clardy's claims fail each ripeness prong. First, the issues are not fit because Clardy has not shown that any of the issues in their Amended Complaint for which they seek preventative/injunctive relief affected their personal, property, or pecuniary rights. *See Me. AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 8, 721 A.2d 633. Second, the hardship prong requires that Clardy allege and prove that an immediate burden will result from the Court declining to address the issue. *See New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 302-03 (Me. 1982). Speculative, future adverse consequences do not satisfy the hardship prong. *Blanchard*, 2019 ME 168, ¶ 22, 221 A.3d 554. Because Clardy identified no legislation that has been passed during the First Special Session that affected their rights, their alleged injury is purely speculative and unripe for judicial review.

C. Neither the Maine Constitution nor the Declaratory Judgments Act provides Clardy with a valid cause of action.

A threshold defect in the Amended Complaint is that it failed to identify a valid cause of action for seeking relief in Maine's courts. "In order to state a claim upon which relief can be granted, a complaint must aver either the necessary elements of a cause of action or facts which would entitle a plaintiff to relief upon some theory." *Edwards*, 429 A.2d at 1016 (quoting *E.N. Nason, Inc. v. Land-Ho Dev. Corp.*, 403 A.2d 1173, 1177 (Me. 1979))).

The Amended Complaint identifies two possible causes of action: the Maine

Constitution and the Declaratory Judgments Act (DJA), 14 M.R.S.A. §§ 5951-63 (2003 & Supp. 2024). A. 42-46. Neither provides Clardy with a cause of action.

The Maine Constitution, by itself, does not provide a private cause of action. The only cause of action authorized by the Legislature "for a violation of a person's rights under the Maine Constitution" is the Maine Civil Rights Act ("MCRA"), 5 M.R.S.A. §§ 4681-85 (2013 & Supp. 2024). *Andrews v. Dep't of Envtl. Prot.*, 1998 ME 198, ¶ 23, 716 A.2d 212. However, Clardy has not alleged "an interference with [their state constitutional] rights by physical force or violence, damage or destruction of property, trespass on property, or threats thereof," and therefore have "no cause of action pursuant to the MCRA."[16] *Andrews*, 1998 ME 198, ¶ 23, 716 A.2d 212.

Further, the DJA provides a remedy that is ancillary to some valid cause of action but does not, itself, create an independent cause of action. *See Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172 ("A declaratory judgment action cannot be used to create a cause of action that does not otherwise exist."); *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996) ("We have stated that the purpose of the [DJA] is to provide a more adequate and flexible remedy in cases where jurisdiction already exists." (emphasis added)); *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935, 942 (Me. 1993) ("[a]ll courts require the declaratory plaintiff to show

[16] The recent amendments to the MCRA, *see* P.L. 2023, ch. 287 (eff. Oct. 25, 2023), do not alter this analysis.

jurisdiction [and] a justiciable controversy." (quoting *Hodgdon v. Campbell*, 411 A.2d 667, 670 (Me. 1980)); *Hodgdon*, 411 A.2d at 669 ("The statute does not create a new cause of action; its purpose is 'to provide a more adequate and flexible remedy in cases where jurisdiction already exists.'" (emphasis added) (quoting *Casco Bank & Trust Co. v. Johnson*, 265 A.2d 306, 307 (Me. 1970))). *Cf. Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, ¶ 8, 209 A.3d 102 (permitting DJA claim to resolve a controversy over "a planned action, before the matter actually proceeds and the challenged" law or "ordinance is applied to the detriment of the plaintiffs" (cleaned up)). Clardy identified no such cause of action, such as 42 U.S.C. § 1983, M.R. Civ. P. 80B, or M.R. Civ. P. 80C, by which they may challenge the Governor's convening of the First Special Session.

Finally, although the cases cited above have not been repudiated or overruled by this Court, recent decisions of the Court seem to have assumed, without addressing, that a litigant had a valid, but unidentified, cause of action. *See generally Avangrid*, 2020 ME 109, 237 A.2d 882; *Maine Senate*, 2018 ME 52, 183 A.3d 749. Other decisions on this topic appear to go further, suggesting, without holding, the DJA may provide a cause of action when there is a genuine controversy between parties whose "rights, status or other legal relations" are affected or harmed, even when plaintiffs have not identified a separate cause of action and rely solely on the DJA. *See, e.g.*, *Utsch v. Dep't of Env't Prot.*, 2024 ME 10, ¶¶ 20-27, -- A.3d ---;

Blanchard, 2019 ME 168, ¶¶ 18-20, 221 A.3d 554. The Court should affirm its earlier rulings that the DJA itself is not an independent cause of action.

CONCLUSION

For the reasons stated above, the State Officers respectfully request that the Court affirm the Superior Court's decision and uphold the dismissal of Clardy's Amended Complaint.

Respectfully submitted,

AARON M. FREY
Attorney General

Dated: March 11, 2024

/s/ *Kimberly L. Patwardhan*
KIMBERLY L. PATWARDHAN
Assistant Attorney General
Maine Bar No. 4814
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I, Kimberly L. Patwardhan, hereby certify that I mailed two copies of the Brief of Defendants-Appellees by first-class mail, postage pre-paid to:

Carl Woock, Esq.
STEVE SMITH TRIAL LAWYERS
101 Water Street
Augusta, Maine, 04330

Dated at Augusta, Maine this 11th day of March, 2024.

/s/ *Kimberly L. Patwardhan*
Kimberly L. Patwardhan, Bar No. 4814
Assistant Attorney General