IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Kevin F. McCoy and Mary C. Geddes, Plaintiffs, v. Michael J. Dunleavy, Governor of the State of Alaska, Defendant.	)	Case No. 3AN-19-08301CI

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

Introduction

Governor Dunleavy called a special session of the Alaska Legislature in Wasilla on June 13, 2019 to meet on July 8, 2019. Legislators traveled to both Wasilla and Juneau on July 8, and on July 15 the Plaintiffs filed this suit for declaratory and injunctive relief. The Plaintiffs argued that the Governor's proclamation calling a special legislative session outside of Juneau pursuant to AS 24.05.100(b) violated the constitutional doctrine of separation of powers. Subsequently, the Governor changed the location of the special legislative session to Juneau. A quorum was reached to conduct the special legislative session on July 18 in Juneau.

After the special session adjourned, the Plaintiffs amended their complaint, now seeking only a declaratory judgment from this court. The Defendant has filed a motion to dismiss, arguing that: 1) the matter is moot and this court should not review it under the public interest exception to the mootness doctrine; 2) the Plaintiffs do not meet the requirements for citizen-taxpayer standing, and; 3) the Plaintiffs failed to state a claim

upon which relief can be granted[1] because AS 24.05.100(b) does not violate separation of powers.

The Defendant's Motion to Dismiss is denied because 1) the claims brought by the Plaintiffs fall within the public interest exception to the mootness doctrine; 2) the Plaintiffs have citizen-taxpayer standing; and 3) the Plaintiffs have successfully stated a claim upon which relief can be granted.

Factual Background

On June 13, 2019, Governor Michael Dunleavy issued a proclamation calling the Alaska Legislature into a second special session to be held in Wasilla on July 8, 2019 at 1:00 p.m. at the recommended venue of Wasilla Middle School.[2] The proclamation directed the Legislature to consider an appropriations bill for payment of Permanent Fund Dividends.[3] On June 28, 2019, Governor Dunleavy vetoed a series of line items from the Fiscal Year 2020 state operating budget.[4] As a result, reconsideration of the vetoed line items were also to be considered at the special session.[5]

On July 8, 2019 some legislators met in Wasilla pursuant to the Governor's special session proclamation, but not enough to constitute a quorum to do business.[6] Most legislators met in Juneau, where there were enough present to constitute a quorum, but still shy of the amount which would have been required to override any veto issued by the Governor.[7] On July 10, the legislators in Juneau cast a vote on whether to

---

[1] Alaska R. Civ. P. 12(b)(6).
[2] Defendant's Motion to Dismiss at *1 (filed 8/23/2019) ("Motion"); Plaintiffs' Opposition to Motion to Dismiss at *3 (filed 9/9/2019) ("Opposition").
[3] Motion at *1-2.
[4] *Id.*
[5] Alaska Const. art. II § 9.
[6] *Id.*; Opposition at *3.
[7] Opposition at *3. According to the Alaska Constitution, Article II, section 16, any action taken by the legislature to override a veto by the Governor must be completed within five days of the start of the special legislative session.

override the Governor's budget vetoes, but did not garner the votes necessary to do so.[8] On July 17, the Governor issued a supplemental proclamation changing the location of the special session to Juneau.[9] On July 18, the legislative session continued meeting in Juneau with the arrival of the legislators who had convened in Wasilla.[10]

On July 15, Plaintiffs sued, alleging that AS 24.05.100(b) is facially unconstitutional and unconstitutional as applied because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.[11] Plaintiffs requested and sought expedited consideration of an injunction, which the Defendant opposed and this court denied.[12] Plaintiffs amended their complaint after Governor Dunleavy's second proclamation changing the location of the special session to Juneau.[13] Plaintiffs no longer seek injunctive relief. Instead, they now ask this court to issue a declaratory judgment that:

1) AS 24.05.100(b) is facially unconstitutional as it pertains to the Governor's authority to call a special session at a location other than the capital because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers;

2) AS 24.05.100(b) is unconstitutional as applied as it pertains to the Governor's authority to call a special session at a location other than the capital because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers, unless it is construed to require legislative agreement;

---

[8] Motion at *2.
[9] *Id.* at *3; Opposition at *3-4; First Supplemental Proclamation by Governor Michael Dunleavy (July 17, 2019).
[10] Motion at *2-3.
[11] Complaint for Declaratory Judgment and Injunctive Relief at *9-10 (filed 7/15/2019).
[12] Plaintiffs' Motion for Preliminary Injunction (filed 7/15/2019); Defendant's Opposition to Motion for Expedited Consideration (filed 7/18/2019); Order on Motion for Expedited Consideration of Plaintiffs' Motion for Preliminary Injunction (entered 7/18/2019).
[13] First Amended Complaint for Declaratory Judgment (filed 7/22/2019).

3) the Governor's June 13, 2019 executive proclamation calling for the special legislative to be held in Wasilla violated article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.[14]

In lieu of filing an answer, the Defendant has filed a Motion to Dismiss. This court held oral argument on the motion on October 28, 2019.

Discussion

Alaska Statute 24.05.100 governs special sessions of the legislature. Under AS 24.05.100(a)(1), the governor may call the legislature into special session. Under AS 24.05.100(a)(2), the legislature may call itself into special session. Alaska Statute 24.05.100(b) provides, in pertinent part:

> A special session may be held at any location in the state. If a special session called under (a)(1) of this section is to be convened at a location other than at the capital, the governor shall designate the location in the proclamation. If a special session called under (a)(2) of this section is to be convened at a location other than at the capital, the presiding officers shall agree to and designate the location in the poll conducted of the members of both houses.[15]

Plaintiffs' lawsuit concerns the constitutionality of AS 24.05.100(b), and in particular, of the statute's grant of authority to the Governor to call special sessions at locations other than the capital.

The Defendant raises three separate and independent arguments in support of its Motion to Dismiss. The Defendants allege that the Plaintiffs' complaint should be dismissed because 1) the claims made by the Plaintiffs are moot; 2) the Plaintiffs do not have citizen-taxpayer standing; and 3) the Plaintiffs' claims should be dismissed

[14] *Id.* at *6-7.
[15] AS 24.05.100(b).

pursuant to Alaska Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This court denies the Defendant's Motion to Dismiss.

1. **The public interest exception to the mootness doctrine applies.**

Both parties agree that this issue is moot because the Governor ultimately amended the proclamation, moving the special session to Juneau, and because the session was held.[16] The Defendant urges this court not to exercise its discretion to decide this case pursuant to the public interest exception to the mootness doctrine, arguing that the court should not interfere in "a political dispute between coordinate branches of government."[17] Plaintiffs argue that all prongs of the public interest exception to the mootness doctrine are present, and that this court should therefore not dismiss this matter despite its mootness.[18]

Courts resolve issues of "standing and mootness using ... independent judgment because they are questions of law involving matters of judicial policy."[19] Courts will "refrain from deciding questions where events have rendered the legal issue moot."[20] "A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[21] "Mootness can also occur when 'a party no longer has a personal stake in the controversy and has, in essence, been divested of standing.'"[22] "The basic requirement for standing in Alaska is adversity."[23]

---

[16] Motion at *4; Opposition at *15-16.
[17] Motion at *5.
[18] Opposition at *15-24.
[19] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).
[20] *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995).
[21] *Fairbanks Fire Fighters Ass'n, Local 1324*, 48 P.3d at 1167 (Alaska 2002).
[22] *Id.*
[23] *Trustees for Alaska v. State* 736 P.2d 324, 327 (Alaska 1987) (citing *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976)).

There is a "long recognized 'public interest' exception to the mootness doctrine."[24] The court applies three factors when determining whether to apply the public interest exception: 1) whether the disputed issues are capable of repetition; 2) if the mootness doctrine were applied, would the legal issue repeatedly circumvent review; and 3) whether the issues presented are as important to the public interest as to justify overriding the mootness doctrine.[25] None of the individual factors is dispositive; rather, the court must use its discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate.[26]

With respect to the first requirement, courts "have refused to apply the public interest exception to unusual factual circumstances that were unlikely to repeat themselves or situations where the applicable statute or regulation was no longer in force."[27] The Alaska Supreme Court has concluded that the first factor of the public interest exception is not satisfied where the statute or regulation that was at the heart of the litigation has been amended, changed, or repealed prior to the court's decision.[28] For example, in *Alaska Community Action on Toxics v. Hartig*,[29] the Court held that the expiration of a two-year herbicide application permit granted by the Department of Environmental Conservation prior to the Alaska Supreme Court's decision on the matter rendered the specific factual and legal circumstances unlikely to repeat themselves.[30]

But when the statute, law, or regulation that is at the heart of the litigation pending before the court remains unchanged from the moment the first pleading was

---

[24] *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).
[25] *Id.*
[26] *Fairbanks Fire Fighters Ass'n, Local 1324*, 48 P.3d at 1168.
[27] *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 367-68 (Alaska 2014).
[28] *Id.*
[29] *Id.*
[30] *Id.*.

filed to the present, the legal issue is capable of repetition and satisfies the first factor of the public interest exception.[31] In *Legislative Council v. Knowles*,[32] the court held that a legal issue arising under a provision of the Alaska Constitution that remained unchanged from the time the first pleading was filed to the time the case was heard before the Alaska Supreme Court was capable of repetition and satisfied the first public interest exception factor.[33]

The second requirement of the public interest exception is whether the legal issue will continuously evade judicial review. The Alaska Supreme Court has analyzed the second factor under the public interest exception to mootness by "comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot."[34] Courts have ruled that permits and plans that are valid for periods of time ranging from as long as two to five years are capable of evading judicial review.[35] In *Copeland v. Ballard*,[36] the plaintiffs sought to appeal a contingency plan approved by the Department of Environmental Conservation that was valid for five years. However, the case was not decided by the Alaska Supreme Court until more than six years after the contingency plan went into effect.[37] The court found that even though the contingency plan was valid for five years, because the appeal did not reach the Alaska Supreme Court until after the plan expired, the issue was likely to evade review and satisfied the second prong of the public interest exception.[38]

---

[31] *See Legislative Council v. Knowles*, 998 P.2d 604, 606-08 (Alaska 1999).
[32] *Id.*
[33] *Id.*
[34] *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009).
[35] *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 367-68 (Alaska 2014); *Copeland*, 210 P.3d at 1202.
[36] *Copeland*, 210 P.3d at 1202.
[37] *Id.*
[38] *Id.*

In addition, the Alaska Supreme Court has also found the matter is not likely to evade review in scenarios where legal issues may be capable of repetition, but there is an independent right to appeal established by statute or case law. In *Clark* v. *State, Department of Corrections*[39] the court determined that the Department of Correction's decision to transfer Clark from a prison in Alaska to a prison in Arizona was not likely to "repeatedly circumvent review" because Alaska Supreme Court precedent guarantees prisoners an independent right to Superior Court review of each of their transfers.[40]

The third public interest exception factor requires that the issue be a matter of public interest so important to justify overriding the mootness doctrine.[41] The Alaska Supreme Court has stated "we have found this prong met when the case involved concepts of fairness underlying the right to procedural due process ... or situations, otherwise moot, where the legal power of public officials was in question."[42] Cases construing the power of public officials have explained that the scope of a public official's power is an issue of public interest[43] as well as issues that pertain to the "balance between the powers of two coordinate branches of government."[44] The Alaska Supreme Court has explicitly granted review pursuant to the public interest exception when a case "pits the political branches of our state government in a fundamental separation of powers confrontation."[45]

In *Legislative Council*, the court concluded that the resolution of a controversy involving the interpretation of a constitutional provision preventing the Governor from

---

[39] *See Clark v. State, Dept. of Corrections*, 156 P.3d 384 (Alaska 2007).
[40] *Id.* at 388.
[41] *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).
[42] *Copeland*, 210 P.3d at 1203.
[43] *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995).
[44] *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).
[45] *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977).

suing the Legislature was unquestionably "an issue of great public importance" because it dealt with the separation of powers doctrine and remained intact at the time the case was heard by the Court.[46] However, in *Alaska Community Action on Toxics*, the court found that the legal issue was no longer so important to override the mootness doctrine because the legal dispute dealt with a state agency's prior application of herbicides pursuant to an expired permit.[47] Similarly, in *Ahtna Tene Nene v. State, Department of Fish & Game*[48] the Court ruled that because the permitting scheme under review had been significantly changed since the lawsuit was originally filed, it was no longer so important to satisfy the public interest exception to the mootness doctrine.[49]

A. The issue is capable of repetition because the Governor can call another special legislative session without legislative consent in a location other than Juneau pursuant to AS 24.05.100(b).

In its Reply, the State concedes the issue at the heart of the current litigation is "capable of repetition because the Governor may again call the Legislature in to special session outside of Juneau without legislative consent."[50] Relying on *Alaska Community on Toxics*, the State argues that a case "is not to be considered capable of repetition where hypothetical future uses of the challenged law would not likely present the same factual and legal context as the case at hand."[51] According to the State, because the specific facts of this case (the Governor's line item vetoes shortly before the special session and the decision of some legislators to travel to Wasilla and some to Juneau for the special session) are unlikely to recur, this court should not find that issue is not

[46] *Legislative Council*, 988 P.2d at 606.
[47] *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).
[48] *See Ahtna Tene Nene v. State, Dept. of Fish & Game*, 288 P.3d 452 (Alaska 2012).
[49] *Id.* at 458.
[50] Reply to Opposition to Defendant's Motion to Dismiss at *3 (filed 9/17/2019)("Reply").
[51] *Id.*

capable of repetition such that the court should exercise its discretion to review the constitutionality of AS 24.05.100(b).[52]

However, in *Alaska Community on Toxics*, the Alaska Supreme Court ruled that the legal issue was not capable of repetition because the regulations under which the Department of Environmental Conservation issued the herbicide application permit were revised and replaced by significantly different regulations by the time the Court heard the case. Because the regulations that dictated the parameters of the herbicide application permit that the plaintiffs challenged were no longer in effect the Court found that the issue was not capable of repetition. Here, AS 24.05.100(b) remains in effect. As the State concedes in its Reply, the Governor could call the Legislature into a special session outside of Juneau at any time without legislative consent pursuant to AS 24.05.100(b). Special sessions called by the Governor are not rare events.[53] The fact that the precise factual or political context of a future special session may not be identical to the calling of the special session at issue here does not preclude repetition.

In *Legislative Council*, the Governor sued the Legislature on the grounds that the Legislature overruled a veto by the Governor in an untimely fashion. The Legislature argued that the Governor violated a provision of Alaska Constitution that forbids the Governor from bringing a lawsuit directly against the Legislature.[54] By the time the issue reached the Alaska Supreme Court the previously vetoed bill that had given rise to the lawsuit had become obsolete because the Legislature subsequently passed and the

---

[52] *Id.*

[53] Plaintiffs' Additional Exhibits Relating to Their Request for Judicial Notice, Exhibit G (filed 10/28/2019). The court takes judicial notice of the number of special sessions held between 1959 and 2018 (Exhibit G), the number of special sessions held by May 2006 and whether the sessions were called by the governor or the legislature (Exhibit H), and of the first days and locations of six special sessions called by the Governor between 2017 and 2019 (Exhibit I).

[54] Alaska Const. art. III, § 16.

Governor subsequently signed into law another "bill covering essentially the same subject matter" [55] as the previously vetoed bill. Even so, the Court held that the issue was capable of repetition because the provision of the Alaska Constitution that the Governor allegedly violated remained in effect and unchanged.[56]

Here, the specific conflict between the Governor and the Legislature that led the Plaintiffs to file this lawsuit has been resolved.[57] However, the statute at issue, AS 24.05.100(b), remains unchanged and in effect. The Governor can call another special session outside of Juneau pursuant to AS 24.05.100(b) without legislative consent. Because AS 24.05.100(b) remains unchanged and in effect since the commencement of the litigation, the same exact legal issue, whether AS 24.05.100(b) violates the doctrine of separation of powers, may come before the court in the future. The constitutionality of the statute is not a fact-specific question. The legal issues are capable of repetition, satisfying the first factor of the public interest exception to the mootness doctrine.

B. The issue will evade judicial review because it is likely to become moot before it can be fully adjudicated.

Pursuant to AS 24.05.100(b) and Alaska Constitution article II, section 9 the Governor must give at least 30 days' notice to the Legislature when he calls a special session without the consent of the Legislature. Each special session is to last a maximum of 30 days.[58] The State argues that the issue is unlikely to evade review because there is adequate time for the Superior Court to decide a case from the time a special session is announced by the Governor pursuant to AS 24.05.100(b) and the

[55] *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).
[56] *Id.* at 606-07.
[57] Motion at *7.
[58] AS 24.05.100(b); Alaska Const. art. II § 9.

adjournment of that special session.[59] But if AS 24.05.100(b) does violate separation of powers, at least a portion of the harm guarded against may occur when the session begins, not when it is adjourned.[60] The State also argues that because the Superior Court has the power to hear motions on an expedited basis and issue preliminary injunctions when the requisite conditions are satisfied that the issue will not evade review.[61] But the Superior Court is not the court of last resort in the State of Alaska and the constitutional issues raised by the Plaintiffs in the case are not issues that can be fully resolved by a preliminary injunction.[62]

Even if the harm guarded against is only complete when the session is adjourned, that still does not provide sufficient time for review. Issues can evade review even when the court system has up to five years to resolve a dispute.[63] In *Alaska Community Action on Toxics* the court ruled that full judicial review was unlikely to occur within the two year duration of the permit issued by the Department of Environmental Conservation which was subject to the pending litigation.[64] In *Copeland*, the court found that it was not likely that full judicial review would occur within the five year duration of a contingency plan issued by the Department of Conservation.[65] These cases indicate that issues brought before the court have been found to evade review even if the litigants and the courts have up to five years to resolve the dispute. Here, a Governor

---

[59] Reply at *3-4.
[60] *Cf. Legislative Council v. Knowles*, 998 P.2d 604, 606-08 (Alaska 1999). Legislation vetoed when the legislature is not in session may only be reconsidered by the legislature within the first five days of a special session held following a veto (Alaska Const art. II, § 16).
[61] Reply at *3-4.
[62] *See Ulmer v. Alaska Restaurant & Beverage Ass'n*, 33 P.3d 773, 778 (2001) (analyzing whether issue is likely to evade review by comparing time required to bring challenge and obtain appellate review of decision).
[63] *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009).
[64] *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).
[65] *Copeland*, 210 P.3d at 1202.

would have to call a special session at least two, potentially five, years before the special session is to take place in order to prevent this issue from evading review.[66]

C. The constitutionality of AS 24.05.100(b) is a matter of public interest so important as to justify overriding the mootness doctrine.

In *Legislative Council*, the Alaska Supreme Court held that a question that went "to the heart of the delicate constitutional balance between the powers of two coordinate branches of government" was "unquestionably an issue of great public importance."[67] Even so, the Defendant argues that the issue before the court is not sufficiently a matter of public interest to warrant judicial review. First, the Defendant argues that the public interest "affirmatively favors the court staying out of this dispute between the political branches of government." and "notions of respect for the coordinate branches of government caution against unnecessary judicial intervention."[68] Second, the Defendant attempts to distinguish the present case from *Legislative Council*, arguing that this case does not involve a matter of public interest because the public has its own recourse through political measures, "including the ballot box, protests, and contact with legislators and the Governor's office."[69]

The Alaska Supreme Court has held that matters involving the doctrine of separation of powers and determining the scope of a public official's power are significant matters of public interest to justify overriding the mootness doctrine.[70] The case before the court clearly raises questions regarding the separation of powers and the scope of a public official's power. First, this matter raises an issue of separation of

[66] AS 24.05.100(b); Alaska Const. art. III, § 16.
[67] *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).
[68] Motion at *7.
[69] Reply at *4.
[70] *Legislative Council*, 988 P.2d at 606; *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995); *see also Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (review of constitutionality of governor's exercise of line-item veto matter of public interest) .

powers regarding the Governor's authority to dictate where the Legislature is required to meet without the Legislature's consent.[71] Whether AS 24.05.100(b) impermissibly delegates a legislative power to the executive branch clearly raises a question regarding the doctrine of separation of powers. In *Legislative Council*, the court held that a dispute regarding the Governor's authority to sue the Legislature raised a separation of powers question that easily satisfied the third requirement of the public interest exception to the mootness doctrine.[72] Like in *Legislative Council*, because the issue before the court raises a question as to whether AS 24.05.100(b) impermissibly allows the Governor to infringe on the autonomy and self-governance of the Legislature, the case raises a separation of powers issue that qualifies as a matter of public interest such that the overriding of the mootness doctrine is warranted.

Plaintiff's challenge to AS 24.05.100(b)'s grant of authority to the Governor to unilaterally designate the meeting location of the Legislature without their consent also creates a question regarding the scope of the Governor's power and authority. In *Kodiak Seafood Processors Association*, the court held that questions as to the scope of authority of the Commissioner of the Alaska Department of Fish and Game to issue exploratory fishing permits was a matter of public interest significant enough to override the mootness doctrine.[73] Like in *Kodiak Seafood Processors Association*, here, this matter raises a question regarding the scope of the Governor's power and satisfies the third requirement of the public interest exception to the mootness doctrine.[74]

---

[71] AS 24.05.100(b).
[72] *Legislative Council*, 988 P.2d at 606.
[73] *Kodiak Seafood Processors Ass'n*, 900 P.2d at 1196.
[74] *Id.*

This matter is not sufficiently distinguishable from *Legislative Council* to persuade this court to decline to review it. In *Legislative Council*, the separation of powers issue raised dealt with the "unique nature of the protection embodied in Article III, § 16."[75] The State argues that the court's decision to override the mootness doctrine was based on the fact that the public did not have a political remedy, such as heading to the ballot box, meeting with legislators, or protesting.[76] But the court's determination that the issue in *Legislative Council* was a matter of great public importance was because the matter "[went] to the heart of the delicate constitutional balance between the powers of two coordinate branches of government,"[77] not because it did not involve determination of the constitutionality of a statute.[78]

This court is not persuaded by the Defendant's argument that "notions of respect for the coordinate branches of government" weigh against judicial review of an issue that is otherwise a matter of great public importance. As the Defendant concedes, the constitutionality of the statute or its application does not present nonjusticiable political questions.[79] In this case, the Governor called the special session in Juneau after attempting to direct the session be held in Wasilla.[80] But the question as to whether AS 24.05.100(b) is constitutional remains and does not turn on action by the Governor or the Legislature. A decision by a court regarding the constitutionality of the statute does

[75] *Legislative Council*, 988 P.2d at 606-07.
[76] Reply at *4.
[77] *Legislative Council*, 988 P.2d at 606.
[78] In any event, both the Alaska Constitution and the Alaska Statutes can be modified by the Legislature, albeit by different processes. Alaska Const. art. II, § 14; Alaska Const. art. XIII, § 1. The fact that a constitutional amendment requires more legislators and Alaskans to agree than does the passage of a bill does not render the ballot box a deficient remedy.
[79] *See Abood v. Gorsuch*, 703 P.2d 1158, 1160 (Alaska 1985) (courts will decline to adjudicate questions involving coordinate branches of government where there is a textually demonstrable commitment of the issue to a coordinate political department, it is impossible for a court to undertake an independent review of the case without expressing lack of respect due coordinate branches of government and a need to adhere to a political decision already made).
[80] Motion at *2.

not fail to accord the respect due the coordinate branches of government. Accordingly, the court denies the Motion to Dismiss on the grounds that the matter is moot.

2. <u>The Plaintiffs have standing as citizen-taxpayers.</u>

In Alaska "standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue....'"[81] Standing in Alaska courts is "not a constitutional doctrine; rather it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."[82] The concept of standing has been interpreted broadly in Alaska. We have "departed from a restrictive interpretation of the standing requirement."[83] The Alaskan courts have adopted an approach "favoring increased accessibility to judicial forums."[84] At the heart of the standing inquiry "is whether the litigant is a proper party to seek adjudication of a particular issue" and that the parties have an "adversity of interests."[85]

There are two established types of standing in Alaska – interest injury standing and citizen-taxpayer standing.[86] Here, the Plaintiffs claim citizen-taxpayer standing. Citizen-taxpayer standing is "a sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern."[87] There are two criteria that litigants must satisfy in order to establish citizen-taxpayer standing: 1) the case must be one of public significance; and 2) the plaintiff must be "appropriate." [88] In the Motion to Dismiss, the Defendant does not contest whether this case is one of public

---

[81] *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976)(quoting *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968)).
[82] *Trustees for Alaska v. State* 736 P.2d 324, 327 (Alaska 1987).
[83] *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973).
[84] *Moore*, 553 P.2d at 23.
[85] *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010).
[86] *Trustees for Alaska*, 736 P.2d at 327.
[87] *Id.* at 329.
[88] *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 985 (Alaska 2008).

significance.[89] But Defendant argues that these plaintiffs are not appropriate because other potential plaintiffs, specifically legislators, are more directly affected.

To be an appropriate plaintiff: 1) the plaintiff must not be a "sham plaintiff" with no true adversity of interest; 2) the plaintiff must be capable of competently advocating his or her position; and 3) the plaintiff may be denied standing if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit.[90] The Defendant has not argued that the Plaintiffs here are sham plaintiffs or that they are not capable of competently advocating their position.[91] The Defendant's argument focuses on the third factor.

Defendant argues that these Plaintiffs do not have standing because there are plaintiffs more directly affected by the challenged conduct. The Alaska Supreme Court has held that "if another party is more directly affected by the outcome, the plaintiff may be denied standing."[92] Plaintiffs may be denied standing "when a more directly affected plaintiff had already filed suit based on closely related claims, even though the claims were not identical."[93] But "the mere possibility that another party might sue...does not necessarily justify a denial of standing."[94] The crucial inquiry is "whether the more directly concerned potential plaintiff has sued or seems likely to sue in the foreseeable

---

[89] *See id.* (implementation of new taxes on tobacco products by the Matanuska-Susitna Borough is a matter of public significance); *see Baxley v. State*, 958 P.2d 422, 427-28 (Alaska 1998) (alleged violations of the Uniform Application Clause and the Public Notice Clause of the Alaska Constitution constituted matters of public significance for citizen-taxpayer standing purposes).

[90] *Baxley*, 958 P.2d at 428.

[91] *See Trustees for Alaska*, 736 P.2d at 329-30 (holding that plaintiffs had standing because they were not sham plaintiffs as their sincerity in opposing the challenged action was unquestioned and there were no questions regarding their capability of competently advocating the position they asserted); *see also* Plaintiffs' Submission of Materials Supporting Requests for Judicial Notice, Ex. A (filed 10/23/2019).

[92] *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 640 (Alaska 1993).

[93] *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009) (citing *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004)).

[94] *Baxley*, 958 P.2d at 429.

future."[95] "The mere possibility that [a more appropriate plaintiff] may sue does not mean that appellants are inappropriate plaintiffs."[96]

In *Trustees for Alaska v. State*,[97] the court concluded that even though the Attorney General of the United States had a statutory right to bring an action against the State, it did not preclude other plaintiffs from bringing a claim on the basis that they were not the most directly affected potential plaintiff. The court held that other less directly concerned plaintiffs, specifically a coalition of environmental, Native and fishing groups were sufficiently "appropriate" within the citizen-taxpayer framework.[98] The lack of evidence indicating that the Attorney General was likely to file suit weighed in favor of the plaintiffs' appropriateness.[99] In *Fannon v. Matanuska-Borough*,[100] the court held that even though retailers and distributors of tobacco products were more directly affected by the excise tax enacted by the Borough, their failure to file suit did not preclude the plaintiffs, Borough residents who were taxpayers and tobacco users, from being considered appropriate plaintiffs.[101] In *Baxley v. State*,[102] the court held that even though a competing oil company, rather than a citizen-taxpayer, may have been a more directly affected plaintiff in a suit challenging the constitutionality of the adjustment of net profit shares governing oil leases in the Northstar Oil Field did not require the court to find that the citizen-taxpayer plaintiff was an inappropriate plaintiff.[103]

---

[95] *Trustees for Alaska*, 736 P.2d at 330.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 329-30.
[99] *Id.*
[100] *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982 (Alaska 2008).
[101] *Id.* at 986.
[102] *Baxley v. State*, 958 P.2d 422 (Alaska 1998).
[103] *Id.* at 429-30.

By contrast, in *Keller v. French*,[104] the court held that the plaintiffs, a group of five state legislators, investigating the Governor's dismissal of the Public Safety Commissioner, were not appropriate plaintiffs because a separate group of seven state employees (the Kiesel plaintiffs) that were actively being investigated brought identical claims in a separate lawsuit against the same defendants as the Keller plaintiffs.[105] Similarly in *Ruckle v. Anchorage School District*,[106] the court held that a plaintiff who filed identical claims after another plaintiff who filed suit that was more directly affected by the Anchorage School District's alleged violation of the Alaska Procurement Code did not have citizen-taxpayer standing.[107]

A. The Plaintiffs are "appropriate plaintiffs."

The Defendant argues that because the Legislature or its members are more directly affected by action taken pursuant to AS 24.05.100(b), Plaintiffs are not appropriate and lack standing.[108] But these plaintiffs do not lack standing because no other potential plaintiff that may be more directly affected by the conduct at issue has filed similar or identical claims as the Plaintiffs. Nor is there any indication that a more directly affected party is likely to bring suit in the near future. While it is at least arguable that the Alaska Legislature or its members itself may be more directly affected by the alleged unconstitutionality of AS 24.05.100(b) than the current Plaintiffs, this does not preclude the Plaintiffs from attaining citizen-taxpayer standing. Unless the Alaska Legislature or legislators bring similar or identical claims in a separate lawsuit or there is reason to believe that they will, there is no basis for this court to consider

[104] *Keller v. French*, 205 P.3d 299(Alaska 2009).
[105] *Id.* at 302-03.
[106] *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004).
[107] *Id.* at 1037.
[108] Motion at *8.

whether those hypothetical plaintiffs are more directly affected. Even assuming Plaintiffs are not the most directly affected potential plaintiff to bring a suit alleging the unconstitutionality of AS 24.05.100(b), McCoy and Geddes are citizens and taxpayers of the State of Alaska who are affected by constitutional issues concerning the separation of powers doctrine.

In *Fannon*, where the Matanuska-Susitna Borough passed and implemented a new excise tax on tobacco products, the court held that even though the plaintiffs before the court, who were both residents, taxpayers, and tobacco users, were not the most affected potential plaintiffs, they still maintained citizen-taxpayer standing.[109] The court agreed with the Borough that the plaintiffs before the court were not the most directly affected plaintiffs.[110] However, the court held that because the most directly affected potential plaintiffs, the distributors and retailers of tobacco products in the Borough, had not yet filed suit and there was no indication that the distributors or retailers were going to file suit, the plaintiffs before the court were "appropriate plaintiffs" even though they were not the most directly affected by the tax.[111] Similarly, here, the Plaintiffs before the court are arguably not the potential plaintiffs that are the most directly affected by the alleged unconstitutionality of AS 24.05.100(b); the Alaska Legislature and its members are the potential plaintiffs that are likely the most affected. However, there has been no showing by either the Plaintiffs or the Defendant that the Legislature or any of its members has or will likely bring claims that are similar or identical to those brought by McCoy and Geddes.[112] Without such a showing, and the fact that the Plaintiffs are

[109] *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 986-87 (Alaska 2008).
[110] *Id.*
[111] *Id.*
[112] *See generally* Defendant's Reply to Opposition to Defendant's Motion to Dismiss.

residents and taxpayers of the State of Alaska who are inherently affected by a constitutional issue involving an alleged violation of the doctrine of separation of powers, McCoy and Geddes are "appropriate plaintiffs" and satisfy the third element of the "appropriate plaintiff" inquiry.

This case is distinguishable from *Keller*. In *Keller*, the court concluded that the plaintiffs were not the appropriate plaintiffs to bring suit because they were not the most directly affected plaintiffs.[113] The *Keller* plaintiffs, a group of state legislators that were not investigated by a legislative committee were less affected than people who were actually being investigated. The parties that were being investigated had filed a separate lawsuit from that of the plaintiffs before the court alleging similar, if not identical, claims against the same defendant.[114] The court ruled that the named plaintiffs were not appropriate plaintiffs because the most directly affected potential plaintiffs had filed suit alleging similar, if not identical, claims.[115] Unlike *Keller*, here, neither the Plaintiffs nor the Defendant has shown that the more directly affected potential plaintiffs, the Alaska Legislature or any of its members, are likely to file or have filed suit against the Defendant. McCoy and Geddes are appropriate plaintiffs.

Because the Plaintiffs have raised an issue of "public significance" and are "appropriate plaintiffs" McCoy and Geddes have satisfied both requirements for citizen-taxpayer standing. Accordingly, the court denies Defendant's Motion to Dismiss for lack of standing.

3. The Plaintiffs have stated a claim on which relief can be granted by the court in the form of a declaratory judgment.

[113] *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009).
[114] *Id. at* 303-04.
[115] *Id.*

Alaska Rule of Civil Procedure 12(b)(6) enables courts to dismiss a complaint "for failure to state a claim upon which relief can be granted." To survive a motion to dismiss pursuant to Rule 12(b)(6) a "complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action."[116] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief."[117] "The court 'must presume all factual allegations of the complaint to be true and [make] all reasonable inferences...in favor of the non-moving party.'"[118] "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and, '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, the motion should be denied."[119]

In the context of declaratory judgements "the test of sufficiency is not whether the complaint demonstrates that the plaintiff will succeed but rather whether the allegations disclose that he is entitled to a declaration of rights."[120] A plaintiff can show that his or her allegations are sufficient for declaratory relief by showing that the court has jurisdiction and that there is an actual case or controversy.[121] Such a showing is enough for a plaintiff's request for a declaratory judgment to survive as a 12(b)(6) motion to dismiss.

Here, the Plaintiffs have asked this court to issue a declaratory judgment that AS 24.05.100(b) is unconstitutional and violates the doctrine of the separation of powers on

---

[116] *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 254 (Alaska 2000).
[117] *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001).
[118] *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).
[119] *Div. of Family and Youth Serv. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006).
[120] *Jefferson v. Asplund,* 458 P.2d 995,1002 (Alaska 1969).
[121] *Id.* (holding, inter alia, that the trial court erred in dismissing a claim that a statute giving the Anchorage Borough chairman veto power over actions of the assembly was illegal).

its face, as applied, and that the Governor's June 13, 2019 proclamation designating Wasilla as the site of the special session violated article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.[122] For the court to dismiss the Plaintiffs' claim pursuant to Rule 12(b)(6), the State must demonstrate beyond a reasonable doubt that the Plaintiffs have not made sufficient allegations for the court to grant any type of relief.

The Defendant asks this court to dismiss the Plaintiffs' complaint, arguing that he is entitled to dismissal because "plaintiffs are wrong on the merits."[123] In particular, the Defendant argues that AS 24.05.100(b) does not violate the constitutional doctrine of separation of powers because the "Governor's constitutional power to call a special session inherently includes the power to set a time and place for the session."[124] According to the Defendant, AS 24.05.100 merely "fleshes out procedural details" for the exercise of an authority implicitly vested in the Executive by virtue of article III, section 17 and article II, section 9.[125] For this argument the Defendant cites dictionary definitions, "common sense" and "ordinary speech."[126]

The Alaska Supreme Court has held that the "state does recognize the separation of powers doctrine."[127] The underlying rationale of the doctrine of the separation of powers is "the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers."[128] The doctrine of separation of powers provides that "the blending of

---

[122] First Amended Complaint for Declaratory Judgment at *6-7 (filed 7/22/2019).
[123] Motion at *9.
[124] *Id.*
[125] *Id.*
[126] Motion at *11, Reply at *8.
[127] *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).
[128] *Id.*

governmental powers will not be inferred in the absence of an express constitutional provision."[129]

In *Bradner v. Hammond*,[130] the Alaska Supreme Court held that a statute requiring that deputy heads of each executive department and nineteen directors of divisions appointed by the governor be subject to legislative confirmation violated the doctrine of separation of powers.[131] According to article III, section 1, "[t]he executive power of the State is vested in the governor." Article III, sections 25 and 26 provide for the governor's appointment and legislative confirmation of the head of each principal department and members of certain boards and commissions. The court analyzed the issue by asking a threshold question: whether appointment of executive officers is a legislative or executive function.[132] The court concluded that it was an executive function because the responsibilities conferred by article III, section 16 (which requires the governor to faithfully execute the laws) and the authority granted by article III, section 1 necessarily conferred on the governor the power to appoint subordinate executive officers.[133]

Next the court considered the nature of the legislature's confirmation power, concluding that it was "a specific attribute of the appointive power of the executive."[134] In other words, the confirmation authority of the legislature was not a distinct power of the legislature, but rather a constitutional delegation of an executive function. The court concluded that "Sections 25 and 26 mark the full reach of the delegated or shared,

---

[129] *Id.*
[130] *Id.*
[131] *Id.* at 3-8.
[132] *Id.* at 6.
[133] *Id.*
[134] *Id* at 7..

appointive function to Alaska's legislative branch of government."[135] The court's holding was based on its determination that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."[136]

Article II, section 1 of the Alaska Constitution provides that "[t]he legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty."[137] Article II, section 9 authorizes both the governor and the legislature to call special legislative sessions.[138] In addition, article III, section 17 provides that "[w]henever the governor considers it is in the public interest, he may convene the legislature, either house, or the two houses in joint session."[139]

Thus, the plain text of the Alaska Constitution grants convening authority to the governor.[140] The question presented by the Defendant's Motion to Dismiss is whether this grant of convening authority necessarily and inherently includes the authority to determine the location of legislative sessions convened pursuant to that authority. The Defendant's Motion to Dismiss does not establish that it does.

The Defendant argues that *Bradner* does not govern this court's analysis because the constitutional provisions at issue here do not establish "a clear line in the constitution like the line between department heads and subordinate officials."[141] The Defendant argues that because the constitution does not expressly establish the

---

[135] *Id.*
[136] *Id.*
[137] Alaska Const. art. II § 1.
[138] *See id.* art. II § 9.
[139] *See id.* art. III § 17.
[140] *See also Abood v. Gorsuch*, 703 P.2d 1158, 1164 (Alaska 1985).
[141] Motion at *10.

location of special sessions or who may determine it, the governor's constitutional power to call a special session implicitly includes that authority as a matter of common sense.[142] In addition, the Defendant argues that even if the constitution's grant of authority to the governor to convene a special session is ambiguous, the legislature voluntarily ceded its authority by passing AS 24.05.100(b).[143]

This court cannot conclude that the Plaintiffs have demonstrated that there is no actual controversy whether the Governor's convening authority authorizes him to direct the legislature where to meet in special session. The shared power of convening the legislature could not exist independent of the legislative function and is thus an attribute of the legislative functions of article II. While convening authority is textually delegated to the Governor, this court cannot conclude, based on the briefing before this court, that such authority implicitly and necessarily includes the authority to determine the location of the session.[144] The Defendant has cited no precedent or constitutional history to support this argument. Article XV, section 20 of the Alaska Constitution establishes Juneau as the state capital. And *Bradner* cautions that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision"[145] Given the foregoing, this court cannot conclude that "common sense" compels the conclusion that the Governor's convening authority includes establishing the location of a special session.

In addition, this court cannot conclude that simply because the legislature passed the statute at issue, arguably ceding legislative authority, rather than attempting to

---

[142] *Id.* at *10-11.
[143] *Id.*
[144] *Bradner v. Hammond,* 553 P.2d 1, 6-7 (Alaska 1976).
[145] *Id* at 7.

capture executive authority, it does not violate separation of powers.[146] While it is not clear that the delegation of authority contained in AS 24.05.100(b) is as sweeping as that rejected in *State v. Fairbanks North Star Borough*,[147] the Defendant's argument on this point is not sufficient to convince the court that there is no controversy presented by the Plaintiffs' complaint.[148]

The allegations made by the Plaintiffs in the present case satisfy the threshold that claims seeking declaratory judgments need to meet in order to survive Rule 12(b)(6) motions to dismiss. Here, the Plaintiffs' allegations disclose that they are entitled to a declaration of rights because their allegations show jurisdiction and the presence of an actual justiciable controversy.[149] Therefore, the Defendant's motion to dismiss pursuant to Rule 12(b)(6) is denied.

Conclusion

For the foregoing reasons the court DENIES the Defendant's Motion to Dismiss.

DATED at Anchorage, Alaska, this 22nd day of November 2019.

JOSIE GARTON
Superior Court Judge

[146] Motion at *11.
[147] *See State v. Fairbanks N. Star Borough*, 736 P.2d 1140 (Alaska 1987) (holding that statute authorizing governor to reduce appropriations when anticipated revenues appeared inadequate to meet appropriation levels violated separation of powers).
[148] *Jefferson v. Asplund,* 458 P.2d 995, 1002 (Alaska 1969).
[149] *See id.*

I certify that on 11.22.2019 a copy was mailed to each of the following at their address of records:
m.geddes; K.mccoy; L.Fox
Deputy Clerk / Administrative Assistant
mPatni-Walsh; DBorghesan