IN THE SUPREME COURT OF THE STATE OF ALASKA

Treg R. Taylor, in his official capacity as Attorney General for the State of Alaska, Appellant, v. Alaska Legislative Affairs Agency, Appellee.	)	Supreme Court No.: S-18292

Trial Court Case No.: 3AN-21-06391CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE HERMAN G. WALKER, JUDGE

REPLY BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS:

Article II, section 6. Immunities

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

Article III, section 16. Governor's Authority

> The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

ALASKA STATUTES:

AS 09.60.010. Costs and attorney fees allowed prevailing party

> (c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court
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> > (1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;
> >
> > (2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

AS 24.20.050. Executive director and staff

The council hires an executive director and determines the director's salary. The executive director shall serve as the executive officer for the council in the accomplishment of its functions through the Legislative Affairs Agency. The executive director serves at the direction and at the pleasure of the council. The executive director is authorized to employ and determine the compensation of the members of the professional and clerical staffs of the agency within the limitation of the budget approved by the council. The executive director and the members of the professional staff shall maintain the integrity of the council's functions and services on behalf of the legislative branch by

refraining from joining or supporting any partisan political organization, faction, or activity that would tend to undermine the essential nonpartisan nature of their functions and services. However, this section does not restrict the executive director or members of the professional staff from expressing private opinion, registering, or voting.

AS. 44.23.020. Duties; and powers; waiver of immunity

(a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(1) defend the Constitution of the State of Alaska and the Constitution of the United States of America;

(2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) represent the state in all civil actions in which the state is a party;

(4) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(5) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

(6) draft legal instruments for the state;

(7) make available a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office; and

(B) on needed legislation or amendments to existing law;

(8) prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law before publication; and

(9) perform all other duties required by law or which usually pertain to the office of attorney general in a state.

. . .

INTRODUCTION

The Legislative Affairs Agency spends a majority of its brief rehashing the political discourse surrounding this litigation to convince the Court of notions that the attorney general does not dispute. The attorney general acknowledges that he serves at the pleasure of the governor, that the governor asked him to bring this lawsuit, and that this litigation arose in the context of a dispute between the executive and legislative branches. These underlying factual circumstances should not, however, dissuade the Court from performing its core responsibility. It is this Court that is "entrusted with the 'constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution" and "[t]his sometimes requires [it] to answer constitutional questions surrounded by political disagreement."[1]

To be sure, the constitution prohibits suing the legislature for a legislative act.[2] This is true when the governor (or the attorney general) sues in the name of the State, as the Court held in *Legislative Council v. Knowles*,[3] and it is true when a private citizen sues to challenge "core legislative activities" as the Court explained in *State v. Haley*.[4] But here, the attorney general challenges a non-legislative act—the Legislative Affairs Agency's declaration that it would spend money under an enacted but not yet effective

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1 *Wielechowski v. State*, 403 P.3d 1141, 1142-43 (Alaska 2017) (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982)).

2 Alaska Const. art. II, § 6; Alaska Const. art. III, § 16.

3 988 P.2d 604, 609 (Alaska 1999).

4 687 P.3d 305, 319 (Alaska 1984).

budget. This is far different than the governor attempting to challenge the legislature's decision to override a veto. As the attorney general explained in his opening brief, suits challenging the "administrative acts" of the legislature do not run afoul of legislative immunity. [*See* At. Br. 25-26] An administrative act is a "specific application of a particular policy" where a legislative act is an act with "general applicability" that involves policymaking.[5]

Recognizing the likely reception should it argue that it is above the law, the Legislative Affairs Agency ignores the distinction between legislative and non-legislative acts and advocates for a world where a private citizen can pursue a lawsuit to challenge the agency's specific application of a law, but the very same lawsuit, if brought by the attorney general, is barred by article III, section 16. It also relies on mootness and ripeness to discourage the Court from even considering this issue and the attorney general's underlying claim. The world as the agency sees it makes no sense. The legislature granted the attorney general broad authority to act in the public interest.[6] If a member of the public could have brought this action, then the attorney general should be allowed to do the same.

Moreover, mootness and ripeness are matters of judicial policy, not constitutional law.[7] A court is not required to sit on the sidelines—in the name of ripeness—and watch

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5 *Breck v. Ulmer*, 745 P.2d 66, 71 (Alaska 1987).

6 *See* AS 44.23.020(b)(9) ("The attorney general shall perform all other duties required by law or which usually pertain to the office of attorney general in a state.").

7 *Bowers Office Products, Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1096 (Alaska 1988).

a train wreck happen, only to get involved later to explain who is at fault. And, having encouraged the superior court to decide the issue, the Legislative Affairs Agency cannot now deprive the attorney general of appellate review because the issue has somehow become "more moot." If the agency's section 16 defense does not meet the public interest exception to mootness now, it did not meet the exception when the superior court considered the issue, and its order should therefore be vacated.

Last, even if the Court upholds the superior court's order on the merits, the Court should still reverse the fee award. The superior court mistakenly believed that it did not need to consider the attorney general's constitutional claimant status because it had denied the Legislative Affairs Agency's request for full fees. The agency makes no attempt to defend the superior court's decision, instead arguing the attorney general waived this argument when he did not address two elements the agency appeared to concede. This Court should not reward such gamesmanship. Nor should it participate in a pointless accounting exercise by requiring the Department of Law to seek an appropriation from the legislature to pay for the Legislative Affairs Agency's outside counsel.

ARGUMENT

I. *Legislative Council v. Knowles* did not resolve whether article III, section 16 precludes challenges of non-legislative acts.

The Legislative Affairs Agency relies heavily on the substance over form argument, claiming that *Legislative Council v. Knowles*[8] controls the outcome of this

[8] 988 P.2d 604 (Alaska 1999).

litigation. But "[m]ore significant" to the Court in *Knowles* than the substance over form issue was the fact that Governor Knowles "assert[ed] no particular service-related acts or functions as a basis for proceeding against the Council or its individual legislator-members."[9] Rather, he attempted to challenge the legislature's vote to override his veto, a vote that this Court concluded was "purely and quintessentially legislative."[10] Had Governor Knowles challenged a non-legislative act, the Court suggested or at least left open the possibility, that the lawsuit would have fallen outside the scope of article III, section 16.

Not until now has this Court had the opportunity to address the small opening it left in *Knowles.* It has on multiple occasions however addressed a related provision—legislative immunity under article II, section 6. In *Kerttula v. Abood*, the Court explained that two broad policies underlie legislative immunity.[11] First, there is a "historical policy . . . of protecting disfavored legislators from intimidation by a hostile executive."[12] Second, there is a policy of protecting "legislators from the burdens of forced participation in private litigation."[13] "Both policies share a common purpose furthering legislative effectiveness, while the historical policy is also concerned with legislative

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9 *Id.* at 609.

10 *Id.*

11 686 P.2d 1197, 1202 (Alaska 1984).

12 *Id.* (citing *Gravel v. United States*, 408 U.S. 606 (1972)).

13 *Id.* (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

independence."[14] Applying these principles, the Court concluded that legislative immunity extended to certain core legislative activities such as voting, introducing legislation, and testifying about the same.[15]

In *State v. Haley*, the Court applied the principles it laid out in *Kertulla.* There, Sharman Haley sought to challenge her allegedly unlawful dismissal and named the Legislative Affairs Agency and the legislative council as defendants.[16] In response, the State argued the litigation was barred by legislative immunity.[17] Rejecting this defense, the Court reasoned that Haley's termination "was an administrative rather than a legislative act" and therefore was "not within the scope of legislative immunity."[18]

Three years later, in *Breck v. Ulmer*, the Court reached a similar conclusion when it addressed the scope of legislative immunity for local officials.[19] It also further defined "legislative acts."[20] "In deciding whether an act is legislative, [the Court] must look at the nature of the act rather than simply at which institution acted."[21] That is because "not all governmental acts by a . . . legislator[] are necessarily legislative in nature."[22] Drawing

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14 *Id.*

15 *Id.*

16 687 P.2d 305, 319 (Alaska 1984).

17 *Id.* at 318.

18 *Id.*

19 *Breck v. Ulmer*, 745 P.2d 66, 70 (Alaska 1987).

20 *Id.* at 71.

21 *Id.* (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984)).

22 *Id.* (quoting *Cinevision Corp.*, 745 F.2d at 580).

from federal precedent, the Court then held that the acts of "legislators are legislative only if their acts have general applicability or involve policymaking, as opposed to being a specific application of a particular policy."[23] Applying this principle to the specific facts of that case, the Court concluded that the assembly members were not entitled to absolute immunity from suit because Breck challenged administrative, rather than legislative acts.[24]

In its appellee's brief, the Legislative Affairs Agency fails to respond to this line of cases or explain why the legislative versus administrative act distinction should not define the scope of article III, section 16. Perhaps that is because there is no persuasive reason to interpret article III, section 16 more broadly than article II, section 6. In drafting the Alaska Constitution, the framers included article II, section 6 to protect legislators engaged in a legislative activity and to preserve the effectiveness of the legislature.[25] The framers also unquestionably wanted a strong executive[26] and through article III, section 16, they granted the governor broad authority to sue on behalf of the State. But in doing so, they made clear that the governor could not turn this power against the legislature.[27] Simply put, by including that limitation in section 16, the framers made

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23 *Id.*

24 *Id.*

25 *Kerttula*, 686 P.2d at 1202.

26 *See Bradner v. Hammond*, 553 P.2d 1, 3 n.3 (Alaska 1976) ("There is no dispute that our constitution was designed with a strong executive in mind.").

27 *Knowles*, 988 P.2d at 607.

clear the governor's broad power to sue in the name of the State did not undermine the immunity afforded to legislators through article II, section 6.

II. The attorney general challenged the "administrative acts" of the Legislative Affairs Agency.

Sticking to its form over substance argument, the Legislative Affairs Agency contends that the attorney general's complaint "was not limited in any way to [the agency]" because it asked the superior court to "declare unlawful *any expenditure of state funds* without an effective appropriation aside from certain required expenditures." [Ae. Br. 21 (cleaned up; emphasis in original)] The agency again attempts to compare this situation to *Knowles*, where the complaint challenged the legality of the legislature's veto override.[28]

Here, in contrast, the attorney general's complaint alleges "particular acts" by the agency that form the "basis for proceeding against" it—specifically its declared intention to continue operations at normal levels despite the absence of an effective appropriation. [*See* Exc. 4-5] The complaint does not allege that the legislature has taken any action that violates Alaska law or the Alaska Constitution. The fact that the superior court's decision would have implications for other state agencies as well as the Legislative Affairs Agency does not transform the complaint's challenge to the agency's administrative acts into a challenge to the legislature's legislative acts.

Moreover, the attorney general named the Legislative Affairs Agency as a defendant rather than the legislative council to highlight that the lawsuit is aimed only at

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[28] *Id.* at 609.

administrative acts, not legislative ones. So, even if the Court accepts the agency's argument that it is not independent of the council or that the attorney general's requested relief extends beyond the agency to the council, [Ae. Br. 21-22] the lawsuit nevertheless falls within *Knowles*'s allowance for a claim against the council in its service-agency capacity. There is nothing "quintessentially legislative" about spending money on administrative support; indeed, there is nothing legislative about this at all.

III. The legislature and the legislative council are not indispensable parties.

Neither the legislature nor the legislative council are necessary parties, let alone indispensable parties. The Legislative Affairs Agency argues that the legislature and/or the legislative council are necessary parties because it is the legislative council, not the executive director, who controls the day-to-day spending decisions of the agency and it is the legislature, not the agency, who has the power of appropriation. [Ae. Br. 5, 31-32] The first argument is contrary to the legislature's statutory delegation of authority in AS 24.20.050, and the second argument misconstrues the scope of the attorney general's complaint.

Under AS 24.20.050, although the executive director "serves at the direction and at the pleasure of the council," she is authorized to manage the day-to-day operations of the Legislative Affairs Agency. This delegated authority includes the ability "to employ and determine the compensation of the members of the professional and clerical staffs of the agency within the limitation of the budget approved by the council."[29] Conversely,

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[29] AS 24.20.050.

and relevant here, this authority also includes the authority to layoff or furlough the professional or clerical staff as required by a budget passed by the legislature. As such, by passing AS 24.20.050, the legislature itself has disavowed the argument that the agency is now attempting to make. It is the agency's executive director, not the legislative council, who determines how the agency will function without an effective operating budget. Moreover, even if the legislative council was really the decision-maker it did not need to be named as a party. A suit against the executive branch may name a division of a state department without risking dismissal for failure to join as a party the department in which that division is housed.

To further support its position that the attorney general sued the wrong party, the Legislative Affairs Agency attempts to make this lawsuit about something that it is not—the legislature's power of appropriation. [Ae. Br. 33] But that is not a fair reading of the attorney general's complaint. The attorney general does not challenge the legislature's actions at all, let alone its power of appropriation. This dispute is over the agency's ability to keep offering services—and expending state funds—as if the operating budget passed by the legislature was effective. These services include "accounting; information technology; personnel and payroll; legal; research; maintenance; printing and document distribution; supply and procurement; security; and the statewide teleconference network, including 22 Legislative Information Offices (LIOs) throughout Alaska." [Exc. 42] The question is not whether the legislature can appropriate money for these services or whether it can enact retroactive effective dates or supplemental budgets—which it has—the question is whether the Legislative Affairs Agency can offer services unabated

without an effective appropriation. The legislative council has delegated that decision to the agency's executive director and neither it nor the legislature are necessary parties to this lawsuit.

An unnecessary party is not an indispensable party. But even if the Court concluded that either the legislature or the legislative council were necessary parties, the Legislative Affairs Agency still cannot make a showing that they were indispensable such that dismissal is required. The agency cannot show prejudice without misconstruing the attorney general's complaint. The attorney general is not asking for a judgment "regarding the Legislative Council's authority to control its budget, or the Legislature's ability to set retroactive effective dates in bills, appropriations, or supplemental budgets." [Ae. Br. 33] The requested declaratory judgment is only that CCS HB 69 would not be effective until 90 days after enactment and would not constitute an effective appropriation authorizing the expenditure of state funds other than as necessary to meet the State's constitutional obligations. [Exc. 7-8] Such a judgment says nothing about the legislature's authority to do anything; it speaks only to the legal effect of what the legislature did in passing CCS HB 69 without a special effective date. The legislature is not a necessary party whenever a lawsuit raises the proper interpretation of a law.

And, although the agency claims that the executive branch has "adequate alternative remedies" if the Court dismisses the attorney general's complaint, its explanation of those remedies merely reveals its utter disregard for the public interest that the attorney general seeks to protect. Remarkably, the agency argues "the Governor could always veto any budget bill he found lacking or decide to fund the government and then

defend that decision if necessary." [Ae. Br. 34] But the attorney general filed this lawsuit seeking clarification of the legal effect of the budget bill passed by the legislature in an attempt to avoid a constitutional crisis and government shutdown because of the tremendous harm such a shutdown would cause to the general public. Planning for a shutdown, signing the budget bill and then violating its terms and the Alaska Constitution—and likely being sued for doing so—or vetoing the budget, which would also lead to a shutdown, are not "alternative remedies," they are different paths to essentially the same constitutional crisis. The Legislative Affairs Agency may not care if there is a shutdown, but the attorney general and the people of Alaska do.

IV. There was an "actual controversy" between the attorney general and the Legislative Affairs Agency.

The "actual controversy" language in AS 22.10.020(g) reflects a general limitation on the power of courts to entertain cases, and encompasses a number of more specific reasons for not deciding cases, including lack of standing, mootness, and lack of ripeness.[30] In the event the Court agrees with the attorney general on the scope of article III, section 16, the Legislative Affairs Agency argues the Court should nevertheless affirm the superior court because the attorney general lacked an actual controversy with the agency and because the controversy was not yet ripe. Both arguments lack merit.

First, the Legislative Affairs Agency continues its effort to reframe this case as a lawsuit between the attorney general and the legislature to cloak itself in the protection of article III, section 16. It goes so far as to rely on an email drafted by the executive

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30 *Brause v. State, DHSS*, 21 P.3d 357, 358-59 (Alaska 2001).

director *after* the attorney general filed his complaint to suggest it was the legislature who would determine whether to furlough or lay off employees in response to a delayed operating budget. [Ae. Br. 8-9; Exc. 85-86] But not only was this email clearly posturing in response to litigation, it is directly contrary to the delegated authority the legislature granted to the agency's executive director in AS 24.20.050. Once a budget is approved, that statute gives the executive director the authority to employ—as well as lay off and furlough—members of the professional and clerical staffs of the Legislative Affairs Agency. Ms. Geary recognized as much in her June 18 email when she informed legislators and legislative staff that, "assuming the governor will sign the budget, the Legislative Affairs Agency will not be issuing layoff notices on behalf of the Legislative Branch." [Exc. 14] She further explained what the agency would do in the event the governor did not sign the bill by July 1 or vetoed the bill. Again, on behalf of the Legislative Affairs Agency, Ms. Geary informed both legislators and legislative staff that "[the agency would] be forced to implement a contingency plan that place[d] nonessential staff on furlough status." [Exc. 14]

Ms. Geary's email does two things. First, consistent with the authority delegated to her under AS 24.20.050, it shows that she would decide whether to lay off or furlough legislative branch employees. Second, it demonstrated the actual controversy between the agency and the attorney general. Where the Legislative Affairs Agency believed that it would only have to furlough employees if the operating budget did not become law on July 1, [Exc. 14] the attorney general believed that the deciding factor was not whether CCS HB 69 became law, it was whether it became an *effective* law.

The second roadblock the Legislative Affairs Agency attempts to employ is ripeness. It argues that this dispute was not yet ripe because the injury—a partial government shutdown—could be and ultimately was avoided by a number of different events. It uses the fact that the dispute ultimately was avoided to support its argument. But the ripeness doctrine does not require this Court to wait for damage to the public interest to occur before acting to avert it. And this event is capable of repetition, something the Court considers in the mootness analysis, and an issue that the attorney general addressed in his opening brief with additional argument provided below. [*See* At. Br. 17-20]

"The ripeness doctrine requires a plaintiff to claim that either [an] . . . injury has been suffered or that one will be suffered in the future."[31] When considering a claim for declaratory relief, courts should "balance . . . the plaintiffs' 'need for decision against the risks of decision'"[32] "The 'need for decision' is judged as 'a function of the probability that [the plaintiff] will suffer an anticipated injury.'"[33] And the "'risks of decision' are measured 'by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision.'"[34]

The risk of a decision in this case is low. There is no need for additional factual

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31 *Metcalfe v. State*, 382 P.3d 1168, 1176 (Alaska 2016), *abrogated on other grounds by Hahn v. Geico Choice Ins. Co.*, 420 P.3d 1160 (Alaska 2018) (quoting *Brause v. State, DHSS*, 21 P.3d 357, 359 (Alaska 2001)).

32 *Id.* (quoting *Brause*, 21 P.3d at 359).

33 *Id.* (quoting *Brause*, 21 P.3d at 365).

34 *Id.* (quoting *Brause*, 21 P.3d at 365).

development; the sole issue for the Court to decide is whether the agency may expend funds pursuant to an appropriation prior to that appropriation becoming effective. And although one can argue that this issue is "difficult" or "sensitive" because it is surrounded—or was even created by—political disagreement, that is not a reason for the Court to step aside.[35]

Although the risk of a decision is low, the need for a decision is exceptionally high. Contrary to the Legislative Affairs Agency's argument, the alleged injury here was not "entirely speculative." [Ae. Br. 29] In *Metcalfe v. State*, this Court allowed a former state employee to challenge a statute repealing his right to be reinstated to his prior retirement status upon returning to state employment *before* he had actually returned to state employment and sought reinstatement.[36] The Court reasoned that the employee needed to know his rights before pursuing employment opportunities with the State.[37] Similarly here, the parties needed to know the effectiveness of CCS HB 69 before July 1 because, without that knowledge, the Legislative Affairs Agency would either unconstitutionally expend state funds or the executive branch would unnecessarily furlough and lay off thousands of state employees. [Exc. 9-10]

This was not an academic exercise. At the time this litigation was filed, the

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35 *Wielechowski v. State*, 403 P.3d 1141, 1142-43 (Alaska 2017) ("[O]f the three branches of our state government, [courts] are entrusted with 'the constitutionally mandated duty to ensure compliance with provisions of the Alaska Constitution.") (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982)).

36 382 P.3d at 1176-77.

37 *Id.*

executive branch had already identified specific government services that would shut down entirely on July 1, those that would run at reduced service levels, and those that were essential to comply with constitutional and federal mandates. [Exc. 87-96] Consistent with that process, the executive branch had also issued furlough and layoff notices to state employees who did not staff critical services. Many of these employees had already begun preparing for the potential shutdown by cashing in leave by the June 29 deadline. [Exc. 12] For classified employees, the impact may not have been felt until July 1, but it would have been substantial and irrevocable. Any classified employee who was laid off on July 1 would have had their leaved cashed out, an action the State could not reverse.[38] [Exc. 10]

Ripeness is a matter of judicial policy, not constitutional law. In the face of a government shutdown—which would severely harm the public interest—the Court should perform its constitutional function and not relegate itself to the sidelines.

V. This appeal meets the public interest exception to the mootness doctrine.

In a remarkable sleight of hand, having convinced the superior court to apply the public interest exception to mootness and grant it summary judgment, the Legislative Affairs Agency now contends that the Court should let the "superior court's well-reasoned decision" stand and dismiss the attorney general's appeal as moot. [Ae. Br. 37-40] In other words, the Legislative Affairs Agency seeks to deprive the attorney general

[38] The State continued to negotiate agreements with unions that would have allowed the State to place classified employees on furlough. [Exc. 12]

of appellate review by asking this Court to decline to fulfill its core function of deciding constitutional questions. This is not how the mootness doctrine works.

First, the Legislative Affairs Agency's understanding of the mootness doctrine is wrong. With no authority to support its position, the agency argues for a new version of this judicial policy—if the Court is inclined to agree with the superior court, then it should conclude the issue is "less important" and decline to engage in appellate review. The agency is essentially asking the Court to act like the United States Supreme Court and treat this as a petition for certiorari. This is nonsense. If the public interest exception applied such that the superior court properly issued a decision, then it certainly applies now. This Court is the ultimate arbiter of the constitution and should have the final say on an issue that is "unquestionably . . . of great public important, for it goes to the heart of the delicate constitutional balance between the powers of two coordinate branches of government."[39] As such, the Court should reject the Legislative Affairs Agency's suggestion that this issue is somehow "less important now" and review the superior court's decision on appeal.

Second, if the Legislative Affairs Agency is correct and this case no longer meets the public interest exception, then equity requires the Court to vacate the superior court's order.[40] In *City of Valdez v. Gavora*, *Inc.*, this Court adopted the practice used by federal

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39 *Knowles*, 988 P.2d at 606.

40 *City of Valdez v. Gavora, Inc.*, 692 P.2d 959, 961 (Alaska 1984) ("To preclude this extinguished judgment from operating in any future action between the parties, as res judicata, we adopt the federal practice which is to reverse or vacate the judgment below

courts, which at the time required not only dismissing the appeal but also vacating the judgment below.[41] Later, in *Peter A. v. State, Department of Health and Social Services, Office of Children's Services*, the Court acknowledged that the Supreme Court had "since clarified that not all moot claims require vacatur" but nevertheless said it would continue to require vacatur when application of the doctrine could prevent an appellant from obtaining appellate review "through no fault of his own."[42] That is the case here. The attorney general has neither acquiesced in the agency's request, nor caused this issue to become more moot than it was before. Should this Court accept the agency's invitation to dismiss this appeal, it should also vacate the superior court's order "to preclude this extinguished judgment from operating in any future action between the parties[] as res judicata."[43]

VI. The Court should vacate the fee award.

Unable to defend the reasoning behind the superior court's decision not to consider the attorney general's constitutional claimant status, the agency resorts to arguing the attorney general waived this argument by failing to address two of the required three conditions in his opposition to the fee award. As the attorney general explained in his opening brief, his opposition responded to the arguments raised by the

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and remand the case, with directions to dismiss the complaint." (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)).

41 692 P.2d at 961.

42 146 P.3d 991, 995 (Alaska 2006).

43 *City of Valdez*, 692 P.2d at 961.

Legislative Affairs Agency in its initial motion. And, anticipating the attorney general's response to its motion, the agency expressly challenged only the first requirement of constitutional claimant exception. In doing so, the agency appeared to concede the other two requirements—those being that the action was not frivolous and that the attorney general did not have a sufficient economic incentive to bring the action regardless of the constitutional issue.[44]

Considering those conditions in light of the circumstances of this case, it is even more understandable why the attorney general believed the Legislative Affairs Agency had conceded these issues. First, the attorney general brought this litigation; he obviously did not think it was frivolous. Other than restating his arguments on the merits, there was nothing more for him to say. Second, having brought this lawsuit to prevent the Legislative Affairs Agency from unconstitutionally spending money and to confirm that a partial government shutdown was necessary, it is hard to imagine an argument that the attorney general had a sufficient economic interest to pursue this litigation regardless of the constitutional issue. Because the attorney general meets the three conditions required to invoke the exception under AS 09.60.010(c)(2), the Court should reverse the superior court's order and vacate the fee award.

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[44] *Cf. Manning v. State Dep't of Fish & Game*, 420 P.3d 1270, 1283 (Alaska 2018) ("Here, the State offers no argument that Manning had an economic incentive to sue, and we accordingly assume that the State concedes this requirement is satisfied.").

In the alternative, the attorney general continues to assert that an order requiring him to seek an appropriation from the legislature to reimburse the Legislative Affairs Agency is a needless and futile exercise not required by Civil Rule 82.

CONCLUSION

For these reasons, the Court should vacate the judgment of the superior court and remand to allow the superior court to address the attorney general's declaratory judgment action in the first instance.