IN THE SUPREME COURT FOR 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 Case No. S-18292

Superior Court Case No. 3AN-21-06391CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT AT ANCHORAGE, THE HONORABLE HERMAN G. WALKER, JR., PRESIDING

BRIEF OF APPELLEE ALASKA LEGISLATIVE AFFAIRS AGENCY

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CONSTITUTIONAL PROVISIONS:

Alaska Const. art. III, § 16

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 24.20.050

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 24.20.061

All administrative services necessary to the operation of the legislature during and between sessions are provided by the legislative council. These services include procurement, storage, and maintenance of all supplies and equipment; interim control of legislative space; fiscal and personnel services except for the legislative budget and audit committee; supervision of duplicating, distributing, and mailing services; and budget preparation.

AS 24.20.140

(a) Appropriations for carrying out AS 24.20.010-24.20.140 shall be set out in the appropriation bill authorizing operating expenditures submitted to the legislature under AS 37.07.020(a)(2) or other bills as may be necessary. The council may direct the executive director to transfer amounts from one appropriation to another if the transfer is considered necessary to accomplish the work of the council. The council may not exceed the total amount of the authorized appropriation. All expenditures of the council are subject to an independent audit that shall be made annually.

(b) In addition to transfers under (a) of this section, the council may direct the executive director to transfer amounts from any appropriation to an office, agency, or committee in the legislative branch to an appropriation for another office, agency, or committee in the legislative branch. A transfer under this subsection may only be made with the written approval of the head of the legislative office or agency or the chair of the committee to which the appropriation was originally made, and the amount transferred from that appropriation may not exceed the amount indicated in the written approval.

ALASKA RULES OF CIVIL PROCEDURE:

Alaska R. Civ. P. 19

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsection (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties

before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. *Article III, section 16 of the Alaska Constitution*. "[A]rticle III, section 16 of the Alaska Constitution expressly forbids" a lawsuit that "is in substance an action brought in the name of the state against the legislature."[1] Where the lawsuit was in substance a suit in the name of the state against the Legislature, did the superior court err in dismissing it?

2. *Dismissal on other grounds, in the alternative.* Should the superior court's dismissal be affirmed where there was no justiciable controversy between the parties, and where the appellant (the "AG") failed to join necessary and indispensable parties?

3. *Mootness*. The AG admits that the underlying dispute is moot. Does the public interest exception to the mootness doctrine apply to this appeal?

4. *Attorneys' fees*. Did the superior court err when awarding attorneys' fees to the prevailing party where the AG failed to demonstrate that he was a constitutional litigant under AS 09.60.010(c)(2)?

II. INTRODUCTION

The principal issue raised in this appeal was already settled by this Court in *Legislative Council v. Knowles*. In that case, the Court held that an action that was in substance brought in the name of the state against the Legislature was prohibited by article III, section 16 (hereafter "section 16") of the Alaska Constitution.[2] The state

[1] *Legislative Council v. Knowles*, 988 P.2d 604, 605 (Alaska 1999) (hereafter "*Knowles*").
[2] *See id.* at 607–09.

cannot avoid this prohibition through artful pleading and formalistic distinctions (*e.g.*, suing the nonpartisan administrative services agency of the Legislature, instead of the Legislature directly) because the Court uses "substance rather than form as a measure of constitutional compliance."[3] Yet that is precisely what the state has again attempted to do here. While the suit was formally brought by the AG (as opposed to the governor) and against the Alaska Legislative Affairs Agency ("LAA") (as opposed to the Legislature), there was no mystery about the fact that the lawsuit was in substance an action brought in the name of the state against the Legislature. As the Court may recall, the governor submitted an *ex parte* letter to then-Chief Justice Bolger and Justice Winfree announcing his disagreement with the Legislature regarding the proper "effective date" for a budget bill, and also declaring that he had asked the AG to bring a lawsuit to address that dispute. [Exc. 54–55] The AG filed the instant suit the next business day. [Exc. 1–8] The superior court correctly applied *Knowles*, concluding that this was in substance an action by the state against the Legislature, and dismissed the lawsuit. [Exc. 207–22]

In an effort to evade section 16's prohibition, the AG argued below (and argues again now on appeal) that he was merely exercising his independent common law authority to bring a lawsuit to resolve a dispute over application of the budget to LAA. According to the AG, the then-existing budget in late June 2021 would only become

[3] *Id.* at 608.

effective in mid-September and a partial government shutdown would be required as of July 1, but LAA had purportedly announced that a "functional" budget would suffice for LAA's purposes and that its business would continue as usual after July 1.[4] Contending that "[t]he governor was stuck with a Hobson's choice" of proceeding with a shutdown (which two Alaska citizens participating as amici asserted was improper) or allowing LAA to expend funds after July 1 (which the AG believed was improper), the AG brought suit against LAA.[5] There are several fatal flaws with this analysis, however.

First, when addressing his (that is, the governor's) purported dilemma, "the *governor* asked the attorney general to seek judicial input" on these issues.[6] The fact that the AG's name appears in the signature block on the pleading does not change the character of the suit. If all that was required to avoid section 16's prohibition was to use the fig leaf of the AG's involvement as an intermediary, then that loophole would obviously eviscerate the constitutional protection. The Court's insistence on substance-over-form ensures that the constitution is not so easily violated. No matter how the AG tried to style the case, this was still an action in the name of the state against the Legislature, and it was thus prohibited by section 16.

Second, the AG's suit was predicated on a fallacy. Contrary to the AG's representations, LAA did not declare that it would expend state funds after July 1,

[4] Brief of Appellant, Treg R. Taylor, Attorney General ("Appellant's Br.") at 4.
[5] *See id.* at 4–5.
[6] *Id.* at 29 (emphasis added).

irrespective of whether a special "effective date" clause was included in the budget. Instead, LAA's executive director noted on June 18, 2021 that "[i]t will *likely* be *the Legislature's position* that a functional budget was passed which allows legislative personnel to continue employment on July 1." [Exc. 14 (emphases added)] LAA thus reported what it expected the Legislature may ultimately do *if* the budgetary language remained unchanged. In fact, LAA explicitly sought direction from legislators on June 23, 2021 regarding how to proceed if there was no special effective date in the budget bill. [Exc. 85–86] But no dispute ever ripened here because LAA never expended any funds in the way that the AG anticipated that LAA might. There was no justiciable controversy with LAA because LAA's statement simply described what it expected the Legislature may ultimately do under a hypothetical state of facts.

Third, the AG's suit targeted the Legislature itself, not LAA. The AG has repeatedly admitted that this lawsuit was meant to address a "conflict between the executive and legislative branches of the government."[7] This point was re-confirmed most recently when the AG attempted to expedite the briefing schedule in this appeal because a faster ruling may purportedly "help avert a government shutdown" in 2022 "either by confirming *the legislature's* interpretation of the law and allowing the executive branch to spend state money before the budget becomes effective or, in the

[7] *Id.* at 4; *see id.* at 6 (asserting that the superior court's decision "foreclosed any opportunity the executive and legislative branches had to resolve this dispute"); [Exc. 59 (noting in a press release about the litigation that it involves "a dispute between branches of government")].

alternative, by *pushing the legislature* to enact a special effective date" for the 2022 budget.[8] There is no conflict here with LAA. LAA cannot take any action to avert a government shutdown, nor does it offer any interpretation of the law regarding when an agency may expend funds, nor can it enact a special effective date for the budget. LAA takes direction from the Legislative Council as to the expenditure of funds. Further, the AG's Complaint did not seek relief limited to LAA's purported expenditures, but instead sought a declaration that "*any* expenditure of state funds without an effective appropriation" was unlawful.[9] The AG's suit is, and always has been, designed to affect the Legislature itself.

Fourth, the AG sued the wrong party. The Legislature has the power of appropriation, and the Legislative Council controls the relevant internal spending decisions. The AG's focus on the Legislature's position as to the effective-date provision and the Legislative Council's anticipated decisions regarding expenditures demonstrates that both parties are necessary under Civil Rule 19(a). Due to section 16's prohibition, neither the Legislature nor the Legislative Council can be joined to this action. As described below, both these parties are indispensable, and the lawsuit also would need to be dismissed on this alternative ground.

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[8] Emergency Motion to Expedite Appeal at 3 (filed April 19, 2022) (emphases added).
[9] [Exc. 8 (emphasis added)] The declaration sought certain exceptions to its broad application for health and safety issues and federal obligations, none of which is relevant here.

Fifth, the AG's lawsuit quickly became moot when, on June 28, 2021, the Legislature held a new vote on the budget bill's effective-date provision and passed it by a two-thirds supermajority. [Exc. 210] Since then, the budget was implemented, and all state agencies have properly expended appropriated funds. The AG's lawsuit was moot last summer and is even more so now.[10]

Following expedited briefing on the parties' cross-motions, the superior court correctly ruled that: (1) the AG's lawsuit against LAA was moot; (2) after applying the public interest exception to the mootness doctrine, the AG's lawsuit against LAA was prohibited by section 16;[11] and (3) as the prevailing party, LAA was entitled to 20% of its fees under Civil Rule 82.[12] As to this secondary fee issue, the AG did not dispute that LAA was the prevailing party and did not dispute the reasonableness of the fees sought. The AG did assert that it was a constitutional claimant but failed to demonstrate that it met the mandatory criteria during the briefing on these issues. The superior court's decision was correct and should be affirmed.

III. STATEMENT OF THE CASE

A. Factual Background.

On Friday, June 18, 2021, Governor Mike Dunleavy ("Governor") sent a letter

[10] On May 18, 2022, the Legislature passed the fiscal year 2023 operating budget with the two-thirds supermajority vote necessary to approve the special effective dates. *See* CCS HB 281, 32nd Alaska State Legislature. Thus, there again exists no threat of a government shutdown.
[11] [Exc. 216–20].
[12] [Exc. 249–58].

to Alaska Supreme Court Chief Justice Joel Bolger ("June 18 Letter"). [Exc. 54–55] In his June 18 Letter, the Governor explained that although the Legislature had passed a general appropriations bill, it had failed to obtain the requisite votes to authorize an effective date earlier than 90 days from enactment. The Governor alleged that unless a general appropriations bill with a July 1 effective date was resolved by June 30, state employees would be laid off. The Governor stated that "[b]ecause of the significant and serious consequences flowing from the lack of an effective date, I have asked my Attorney General to seek a determination of this issue through the Alaska Court System." [Exc. 54] The Governor requested that the Chief Justice "[p]lease address this issue in the most expedited way possible . . . [because] Alaskans need, and deserve, a budget that meets constitutional requirements." [Exc. 55]

The next business day, Alaska Attorney General Treg R. Taylor acting "in his official capacity" filed this lawsuit asking the superior court to "[d]eclare unlawful any expenditure of state funds without an effective appropriation[,] absent expenditure necessary to meet constitutional obligations to maintain the health and safety of residents or federal obligations." [Exc. 1, 8] In the press release issued by the Attorney General's office that same day, the Governor was quoted stating:

> "I agree with the Attorney General's decision to petition the court on this important matter[.]" . . . "We need the third branch of government to step in and resolve this dispute to ensure we all carry out our constitutional duties appropriately. I will not ignore the constitution. I, along with my legal team, believe the Legislature should not ignore the constitution. The Attorney General's actions are consistent with my goal of doing everything possible to avoid a government shutdown." [Exc. 59]

Starting that day, the State began a campaign of news articles, press releases, press briefings, Facebook and Twitter posts, and radio interviews, discussing the lawsuit and the ongoing budget debate between the executive and legislative branches.[13] The articles included statements made by the Governor, the AG, and Department of Law representatives who admitted this lawsuit was (1) at the behest of the Governor and (2) against the Legislature.[14] Indeed, in its briefing, the AG admits that the Governor asked him to bring this lawsuit.[15] But rather than sue the Legislature, the Governor (acting through the AG) sued LAA.

After the lawsuit was filed, the Legislature returned to Juneau for a second special session on June 23, 2021. At the same time, LAA's Executive Director Jessica Geary sent an email to legislative leaders — titled "FY22 Contingency Planning" — explaining that LAA was continuing "to receive questions from legislative staff concerned about

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[13] *See, e.g.*, Nathaniel Herz, Alaska Public Media – Anchorage, *With new lawsuit, Alaska Gov. Dunleavy's administration escalates budget feud with legislators* (June 22, 2021), https://www.alaskapublic.org/2021/06/22/with-new-lawsuit-alaska-gov-dunleavys-administration-escalates-budget-feud-with-legislators/; *see generally also* [Exc. 61–84 (excerpts from the Governor's public Facebook and Twitter pages)].

[14] *Alaska Attorney General Files Lawsuit Against Legislative Affairs*, KINY (June 22, 2021), https://www.kinyradio.com/news/news-of-the-north/alaska-attorney-general-files-lawsuit-against-legislative-affairs/ ("Taylor said, 'When there is a dispute between branches of the government, we need the courts to step in.'"); *see id.* ("[Department of Law spokesperson Grace] Lee said[:] . . . 'The lawsuit is meant to provide clarity and ensure the legislature and governor know what their constitutional obligations are.'"); *id.* ("According to the Alaska constitution a sitting governor cannot sue the Legislature. Lee stated that Monday's suit was filed by the attorney general, not the governor, as a public interest case.").

[15] Appellant's Br. at 29 ("the governor asked the attorney general to seek judicial input" through this lawsuit); [Exc. 131 (same)].

the status of their jobs come July 1" and requesting "some direction for contingency planning purposes of a possible government shutdown should a FY22 operating budget not be effective on or before June 30, 2021." [Exc. 85–86] Ms. Geary outlined "essentially three options" for the legislative leaders to consider: "**Complete Shut Down**," "**Business as Usual**," and "**Essential Services Only**." Ms. Geary asked legislative leaders to "[p]lease let [her] know which option you would like the Agency to follow." [Exc. 86]

Just five days later, Ms. Geary's questions — and this entire lawsuit — became moot when the Legislature passed a July 1, 2021 effective date for CCS HB 69.[16]

B. Procedural Background.

As noted above, the AG filed this lawsuit on June 21, 2021 and simultaneously filed a summary judgment motion and a request for expedited consideration. [Exc. 1, 21, 59–60, 208–09] LAA filed a motion to dismiss on June 25, 2021 and, in light of the highly expedited briefing schedule, included certain extrinsic evidence in the event that the superior court elected to convert the motion into a motion for summary judgment. [Exc. 22–86; Exc. 28 & n.19] Following the Legislature's passage of a special effective date for CCS HB 69, the parties then briefed whether the case should be dismissed as moot. [Exc. 144–54] After all briefing was complete, the superior court held oral

[16] [Exc. 210 (noting Legislature's passage of the effective-date provision on June 28, 2021)].

argument on July 23, 2021 and granted LAA's motion (after converting it into a summary judgment motion) on July 29, 2021. [Exc. 207–22]

As the prevailing party, LAA moved for attorneys' fees on August 9, 2021. [Exc. 223–30] After all briefing was complete on that motion, the superior court granted LAA's motion. [Exc. 249–56] Final judgment was entered on December 6, 2021. [Exc. 257–58][17]

IV. STANDARDS OF REVIEW

This Court reviews summary judgment rulings *de novo* and may affirm summary judgment on any basis appearing in the record.[18] The Court applies its independent judgment to interpret constitutional provisions.[19] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[20] The Court adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."[21]

[17] The Court will note that the amount of the attorneys' fees award in the final judgment differs from that listed in the superior court's order granting LAA's attorneys' fees. The superior court's August 9, 2021 order mistakenly only addressed LAA's in-house fees. This error was corrected through a motion for reconsideration, with the corrected fee award appearing in the final judgment.
[18] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).
[19] *See id.*
[20] *Id.* (quoting *Kochutin v. State*, 739 P.2d 170, 171 (Alaska 1987)).
[21] *Id.* (citation omitted).

The Court also resolves issues of mootness using its independent judgment.[22] The determination of whether to review a moot question under an exception to the mootness doctrine is left to the discretion of the Court.[23]

The Court reviews awards of attorneys' fees for abuse of discretion, and it will only reverse a ruling for abuse of discretion when it is left with a definite and firm conviction, after reviewing the entire record, that the trial court erred.[24] The Court reviews *de novo* whether the trial court applied the law correctly in awarding attorneys' fees.[25] The Court may affirm the superior court's decision on any basis appearing in the record.[26]

V. ARGUMENT

A. The Superior Court Correctly Applied the *Knowles* Test in Determining That the AG's Suit Was in Substance a Suit by the Governor in the Name of the State Against the Legislature.

1. Alaska courts look to the substance of a proceeding to determine whether it is prohibited by article III, section 16.

Article III, section 16 of the Alaska Constitution provides that suit may not be brought by a governor in the name of the State against the Legislature:

> 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

[22] *See Young v. State*, 502 P.3d 964, 969 (Alaska 2022).
[23] *See id.*
[24] *See Lentine v. State*, 282 P.3d 369, 376 (Alaska 2012).
[25] *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 535 (Alaska 2015).
[26] *See In re Petition for Approval of a Minor Settlement T.V.*, 371 P.3d 599, 601 (Alaska 2016); *Atcherian v. State, Dep't of Revenue, CSED*, 14 P.3d 970, 974 n.8 (Alaska 2000).

> 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*.[27]

In *Knowles*,[28] the Alaska Supreme Court addressed whether the governor could bring a lawsuit against the Legislative Council (as opposed to the Legislature itself) given the constitutional prohibition in section 16. The superior court had held that the constitution did not prevent the governor's lawsuit because "'[p]laintiff brought this lawsuit in the name of the Governor as head of the executive branch of state government and not in the name of the State of Alaska'" and that "'[a] suit against the Legislative Council, a permanent interim committee with separate legal existence under Article II, § 11 of the Alaska Constitution, is not a suit against the Legislature.'"[29] The Legislative Council appealed, disputing both bases of the superior court's ruling.[30] The Legislative Council argued that "the governor should not be allowed to evade article III, section 16's restrictions by simply altering the form of his complaint . . . [and that] although the governor ha[d] sued in his own name as governor of Alaska, this [was] in substance an action brought in the name of the state."[31] The Legislative Council also argued that "by opting to proceed against a functional equivalent of the legislature—the Council—the governor . . . effectively sued the legislature itself."[32]

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[27] Alaska Const. art. III, § 16 (emphasis added).
[28] 988 P.2d at 607.
[29] *Id.* at 607 (brackets in original).
[30] *Id.*
[31] *Id.*
[32] *Id.*

This Court reversed, finding the Legislative Council's arguments persuasive.[33] The Court explained that "Section 1 of article III of the Alaska Constitution vests the executive power of the state in the governor. Article III, section 16 gives the governor broad power to sue in the name of the state but at the same time bars the governor from turning this power against the legislature."[34] Moreover, the court's holding established that the substance — rather than the form — of a lawsuit controls whether a suit is prohibited by section 16.

The Court explained that the substance of the governor's suit against the Legislative Council brought it within the bounds of article III, section 16's prohibition:

> This suit does not confine itself to internal matters concerning only the governor, the governor's office, or the executive branch of government. Rather, . . . it raises important constitutional questions of the allocation of powers among coordinate branches of government. Because the suit tests the basic constitutional structure of Alaska's tripartite system of government, it necessarily involves a matter of general public importance—one that transcends the executive branch's parochial interests and implicates interests common to all Alaska citizens. . . . *By any realistic measure, this suit involves the interests of the state as a whole*.
>
> Moreover, the governor asks for a ruling "that the Nineteenth Alaska Legislature . . . did not have authority under art. II, sec. 16 of the Alaska Constitution to consider a vote to override CSSB 162(FIN)," "that CSSB 162(FIN) cannot become law until the legislature properly exercises the veto override provisions of art. II, sec. 16 of the Alaska Constitution," and "that Governor Knowles'[s] veto of CSSB 162(FIN) remains in effect." By making these requests, the governor plainly seeks to enforce compliance with a constitutional mandate and to restrain violation of a constitutional power.

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[33] *Id.*

[34] *Id.* (footnote omitted).

> By so concluding, we necessarily reject the governor's suggestion that declaratory judgment actions are categorically exempt from the strictures of article III, section 16 because such actions merely seek judgments declaring the law without directly enforcing compliance or enjoining or compelling conduct. *To determine whether an action or proceeding is brought to enforce compliance with a constitutional provision or restrain violation of a constitutional power in violation of article III, section 16, we must consider the practical goal of the action rather than the procedural path it employs to attain that goal.*
>
> Using substance rather than form as a measure of constitutional compliance, we hold this suit to be an "action or proceeding brought in the name of the State [to] enforce compliance with . . . [a] constitutional . . . mandate, or restrain violation of [a] constitutional . . . power."[35]

The Court also looked at substance rather than form in deciding that the governor could not circumvent the constitutional prohibition on suing the Legislature by naming the Legislative Council and individual legislator-members as defendants.[36] The Court explained that "[b]y asserting that '[t]he legislature's vote to override the governor's veto . . . is in violation of art. II, sec. 16 of the Alaska Constitution,' the complaints aim beyond the Council, targeting an act of the legislature that is purely and quintessentially legislative."[37] The Court explained that

> [a]n action of this kind falls squarely within the originally intended scope of section 16's prohibition. Delegate Victor Rivers, Chairman of the Constitutional Convention's Committee on the Executive Branch, described the relationship between the broad grant of authority given to the governor under the second sentence of section 16 and the restriction

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[35] *Id.* at 607–08 (emphases added; first and second ellipses added; alterations in original).
[36] *Id.* at 608 ("Again, the question pits form against substance, and again, we conclude that substance must prevail.").
[37] *Id.* (brackets in original).

of that authority set out in the section's third sentence. He explained that despite the governor's

> power by appropriate actions or proceedings in the court, brought in the name of the state[] to enforce compliance with any constitution[al] or legislative mandate[,] . . . [the governor] has no authority . . . to act in that manner in any proceeding against the legislature. The legislature is the supreme elected body and as such [the governor] is answerable to [it] and to [its] interpretations and handling of matters of law.
>
> By directing against the legislature's interim alter ego an action questioning the propriety of a purely legislative act, the governor effectively seeks to hold the legislature itself "answerable" to him for its "interpretations and handling of matters of law." *The substance of this suit thus infringes upon the legislature's constitutional domain in precisely the manner that the Constitution's drafters intended to prohibit.*
>
> *. . . We would ignore the constitution's intended meaning if we held, in circumstances like these, that the governor could successfully evade section 16's restrictions by suing the Council instead of the legislature.*[38]

As in *Knowles*, the substance of this lawsuit infringes on the Legislature's constitutional domain in precisely the manner the Alaska Constitution prohibits.

2. The AG's lawsuit was an unconstitutional action brought in the name of the State against the Legislature.

Section 16 forbids the Governor from suing the Legislature. This is a straightforward prohibition, expansively applied in *Knowles*. The substance of the AG's lawsuit clearly falls within the prohibition, as an action effectively brought "in the name of the State" and "against the legislature"[39] seeking "to enforce compliance with a

[38] *Id.* at 609 (alterations in original; emphasis added; footnotes omitted).
[39] *Id.* at 608.

constitutional mandate and to restrain violation of a constitutional power."[40] The AG's lawsuit was unconstitutional on its face and was properly dismissed.

a. This action was brought in the name of the State against the Legislature in furtherance of the Governor's views.

In his June 18 Letter, the Governor explained that the executive branch had a disagreement with the legislative branch regarding whether funds could be expended prior to an appropriations bill's effective date. [Exc. 54] He then confirmed that he had asked the AG to file a lawsuit to address the issue. The AG promptly complied with the Governor's request by filing the instant lawsuit. Through a contemporaneous press release, the Governor reiterated that the lawsuit was brought at his direction and that the goal was to have the courts resolve the dispute between the executive and legislative branches. [Exc. 59] This action clearly is brought "in the name of the State" under section 16.[41] The fact that the lawsuit was brought by the AG in his official capacity does not change this, just as the lawsuit being brought in the Governor's name in *Knowles* was immaterial in that case.[42]

The AG argues that the superior court mistakenly failed to acknowledge the AG's independent authority to bring suits in the public interest, and that this suit was simply

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[40] *Id.*

[41] *Knowles*, 988 P.2d at 607–08; [Exc. 7 ("Resolving this dispute is in the public's interest . . . .")]; *see also* AS 44.23.020(a) ("The attorney general is the legal advisor of the governor and other state officers.").

[42] *See Knowles*, 988 P.2d at 607 ("Although filed by Tony Knowles, as 'Governor for the State of Alaska,' this suit is an action brought in the name of the state.").

an exercise of that power.[43] The undisputed facts — including the AG's own admissions — tell a different story. This was not simply an exercise of the AG's independent statutory authority. As the AG repeatedly concedes, *he brought this suit at the Governor's express direction*. There was nothing "independent" about this. The Governor told this Court that he had instructed the AG to file the instant lawsuit [Exc. 54], the AG immediately complied with that request [Exc. 1–8], and then the AG admitted that the suit was filed at the Governor's request.[44] As the superior court correctly recognized, the AG's theory would create a "constitutional loophole" that would eviscerate section 16's protections. [Exc. 218] Indeed, this is precisely why the Court uses substance rather than form as a measure of constitutional compliance. If the Governor could evade section 16's prohibition simply by asking or instructing a third party to do what the Governor cannot do personally, then section 16 serves no purpose. When considering the substance, there is no doubt — and the AG admits — that the Governor was behind this lawsuit.

In addition, this suit is unambiguously an effort to exercise the affirmative power granted the executive branch by section 16 — *i.e.*, it is an action to "enforce compliance with [the governor's view of] a constitutional mandate and to restrain [what the governor believes is a] violation of a constitutional power."[45] "To determine whether an action or

[43] *See* Appellant's Br. at 27–29.
[44] Appellant's Br. at 29 ("the governor asked the attorney general to seek judicial input" through this lawsuit); [Exc. 131 (same)].
[45] *Knowles*, 988 P.2d at 608; *see also* Alaska Const. art. III, § 16.

proceeding is brought to enforce compliance with a constitutional provision or restrain violation of a constitutional power in violation of article III, section 16, [the court] must consider the practical goal of the action rather than the procedural path it employs to attain that goal."[46] The Governor's press release makes it clear that the lawsuit's practical goal was to enforce what he believed to be a constitutional mandate and to restrain the Legislature from purportedly violating a constitutional power. The Governor explicitly confirmed that the goal of seeking declaratory relief about the legality of expenditures of state funds in this context was "to ensure we all carry out our constitutional duties appropriately." [Exc. 59] In other words, it was to enforce compliance with his view of a constitutional mandate.[47] He went on to say that the lawsuit was intended to ensure that the Legislature would not "ignore the constitution" or, put differently, to restrain the Legislature from violating a constitutional power.[48]

If the Governor's own words left any doubt about the practical goals of the lawsuit, the Complaint's allegations remove that doubt. Through the Complaint, the executive branch repeatedly confirms that its goal with this lawsuit is to force compliance with its interpretation of the Alaska Constitution. The Complaint asserts that LAA's notice regarding the Legislature's likely position on the effective-date

[46] *Knowles*, 988 P.2d at 608.
[47] *See also* Appellant's Br. at 4–5 (asserting that Article IX, section 13 mandates that agencies may only expend state funds after a valid and effective appropriation).
[48] [Exc. 59]; *see also* Appellant's Br. at 5 (claiming that the lawsuit's expedited timing was necessary in order to get a decision "before one branch violated the constitution").

provision "is not consistent with the constitutional provisions" cited in the Complaint.[49] It further asserts that LAA and legislators took the position that LAA (or the government as a whole) would be able to spend money authorized by CCS HB 69 even in the absence of an effective appropriation.[50] The Complaint alleges that LAA's position was at odds with constitutional requirements:

> 23. Article IX, section 13 limits spending of state funds without an appropriation by the legislature, and article II, section 18 provides that, unless agreed to by third-thirds [sic] of membership of each house, a law passed by the legislature becomes effective ninety days after enactment.
>
> 24. Given these constitutional provisions, CCS HB 69 may become effective no earlier than mid-September, yet the Legislative Affairs Agency has informed its employees and the legislature that it will have the authority to spend state funds authorized by the FY 2022 budget without limitation.
>
> 25. Accordingly, an actual controversy has arisen and now exists between the Attorney General and the Legislative Affairs Agency regarding the Legislative Affairs Agency's authority to expend funds without an effective appropriation from the legislature.[51]

There can be no legitimate doubt that this lawsuit's practical goal is to "enforce compliance with a constitutional mandate and to restrain violation of a constitutional power." It therefore violates section 16.

b. This lawsuit was brought against the Legislature.

The lawsuit names the Legislative Affairs Agency (LAA) as defendant. But as the Alaska Supreme Court held in *Knowles*, section 16's prohibition on suing the

[49] [Exc. 4 (Complaint ¶ 14)].
[50] [Exc. 5 (Complaint ¶¶ 15–16)].
[51] [Exc. 77 (Complaint ¶¶ 23–25)].

Legislature cannot be circumvented by simply naming an alter ego.[52] The AG nevertheless insists that his lawsuit was directed solely at LAA's "service-related acts," rather than at the Legislature, and therefore should not be subject to the section 16 defense.[53] The AG's contention fails both factually and legally.

In both his public statements and his pleadings in this case, the AG repeatedly confirms that this lawsuit was brought against the Legislature in order to resolve a dispute between the executive and legislative branches. In his June 21, 2021 press release, the AG explained that this lawsuit was brought against the Legislature:

> "When there is a dispute ***between branches of government***, we need the courts to step in," said Attorney General Treg Taylor. "The executive and legislative branches need clarity now from the courts as to whether the governor can, if the bill is enacted, spend money immediately despite HB 69 not taking effect until 90 days after enactment."[54]

The Governor echoed this sentiment when he called on "the third branch of government to step in and resolve this dispute to ensure we all carry out our constitutional duties appropriately" and stated that "the ***Legislature*** should not ignore the constitution." [Exc. 59 (emphasis added)] The clear implication of the Governor's remarks is that there is a dispute between the first two branches of government which requires resolution by the judiciary, and he then specifically calls out the Legislature as a

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[52] 988 P.2d at 608 ("The remaining question is whether by naming the Council and its individual legislator-members as defendants, the governor evades section 16's third sentence, which prohibits him from bringing actions in the name of the state 'against the legislature.' Again, the question pits form against substance, and again, we conclude that substance must prevail.").
[53] Appellant's Br. at 22–26.
[54] [Exc. 59 (emphasis added)].

body — not LAA — for allegedly failing to comply with the Alaska Constitution. The AG's spokeswoman, Assistant Attorney General Grace Lee, confirmed as much to the press:

> "What we're trying to do is get an answer to a question that everybody has, and since ***the Legislature*** and executive branch disagree, we're looking to the courts to get an answer," said assistant attorney general Grace Lee, a spokeswoman for the Alaska Department of Law.
>
> . . . .
>
> Alaska's constitution prohibits a sitting governor from suing the Legislature. THe [sic] suit was filed by the attorney general, not the governor, as a "public interest case," Lee said.[55]

None of these facts are disputed. The AG's focus on the legislative branch was reiterated repeatedly in the Complaint[56] and even in the AG's recent request to expedite this appeal.[57]

In addition to these public declarations that the Legislature was the real target of the lawsuit, the AG's Complaint goes one step further in confirming that this lawsuit

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[55] *See* James Brooks, Alaska Daily News, *Governor's office seeks court ruling over budget bill* (June 22, 2021), https://www.alaskajournal.com/2021-06-22/governors-office-seeks-court-ruling-over-budget-bill (emphasis added).

[56] [Exc. 4–5, 7] Complaint ¶¶ 14 (noting that AG is taking issue with "the Legislature's position that a functional budget was passed which allows authorized legislative personnel to continue employment on July 1"), 15 (positioning the dispute as a dispute with "the executive branch" regarding legal interpretations), 16 (disputing legislators' statements suggesting "that the government may spend money" without the type of appropriation sought by the governor).

[57] Emergency Motion to Expedite Appeal at 3 (filed April 19, 2022) (asserting that the lawsuit and appeal could "confirm[] the legislature's interpretation of the law and allow[] the executive branch to spend state money before the budget becomes effective or . . . push[] the legislature to enact a special effective date by confirming that the executive branch interpretation was correct"); *see also* Appellant's Br. at 31 (same).

was directed at the Legislature as a body and not at LAA or LAA's conduct. The Complaint's request for relief was not limited in any way to LAA. Instead, the AG asked the superior court to "[d]eclare unlawful *any expenditure of state funds* without an effective appropriation [aside from certain required expenditures]."[58] The AG thus was not merely seeking to address LAA's potential expenditures of funds for service-related activities, but rather *any* expenditure of any *state funds* by anyone. This is a broad challenge to the Legislature as a whole, not merely to LAA's administrative acts. The AG's pleadings and public statements belie any assertion that this lawsuit is directed solely against LAA in its service-agency capacity, rather than as a substitute for the Legislature.[59]

Even if the AG was suing only LAA for decisions and conduct actually within its control, the case should be dismissed because, for purposes of the subject of this suit, LAA is not a separate entity from the Legislature or the Legislative Council. LAA operates as the nonpartisan administrative agency of the Legislature and the Legislative Council. It does not make decisions independent from the Legislative Council. In fact, under AS 24.20.050, "[t]he executive director [of LAA] shall serve as the executive

[58] [Exc. 8 (prayer for relief ¶ 1) (emphasis added)]; *see also* [Exc. 7–8 (Complaint ¶ 27) (seeking a declaratory judgment that "without an effective appropriation, *no* expenditure of state funds is authorized by law [except certain required expenditures]" (emphasis added))].

[59] *See Knowles*, 988 P.2d at 608 (rejecting governor's assertion that his suit was not subject to the section 16 defense because it was only directly directed at a substitute organization in its service-agency capacity, noting that "the governor's pleadings belie this assertion").

officer for the [Legislative] council in the accomplishment of its functions through the Legislative Affairs Agency." The Legislative Council is responsible for the oversight and direction of LAA.[60] The Legislative Council is also responsible for directing the executive director to carry out appropriation decisions.[61] This includes directing the expenditure of fiscal year 2022 funds.[62] In other words, LAA is not an independent actor. It is a part of the Legislature and acts as directed by the Legislative Council.

LAA also is the wrong entity to sue because, as the AG insists, the nature of the controversy in this case is a political one. LAA and its staff are intentionally and necessarily apolitical. Under Alaska's law, "[t]he executive director [of LAA] and the members of the professional staff [of LAA] shall maintain the integrity of the [Legislative] 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."[63] LAA thus does not operate outside the direction it receives from the Legislative Council. In short, the Legislature directs LAA's actions and makes all

[60] AS 24.20.061 states "*[a]ll* administrative services necessary to the operation of the legislature during and between sessions are provided by the legislative council." (Emphasis added.) *See also* Alaska State Legislature Uniform Rule 5 ("The Legislative Council is responsible for providing administrative services necessary to the operation of the legislature through the Legislative Affairs Agency.").
[61] AS 24.20.140.
[62] [Exc. 85–86].
[63] AS 24.20.050.

political decisions, including the decisions in controversy in this suit. The Governor's dispute is with the Legislature, not with nonpartisan LAA.

The AG acknowledges the undeniable fact that this suit is barred by section 16 when admitting that, generally speaking, section 16 allows only the Legislature to seek judicial intervention if there is a dispute between the executive and legislative branches about the meaning of the Alaska Constitution.[64] The executive branch may not do so, and instead must carry out the law and wait to see whether either the Legislature or another third party brings a legal challenge.[65] Unsatisfied with the plain meaning and the clear requirements of section 16, the AG asks this Court to rewrite the constitutional provision to enable the executive branch to sue the Legislature if the executive thinks there has been an alleged violation of a constitutional mandate. But that is precisely the opposite of what the Alaska Constitution's drafters intended by section 16. While the governor generally has broad authority to bring appropriate actions in court in the name of the state to enforce compliance with constitutional mandates, the governor "has no authority . . . to act in that manner in any proceeding against the legislature."[66] In short,

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[64] Appellant's Br. at 31–32.

[65] *See id.* at 31.

[66] The content of the material now appearing as part of article III, section 16 was not the subject of extensive discussion during the constitutional convention and its last sentence appears not to have been debated at all. However, the purpose and limitations of the exercise of the "enforcement" provision appears in the preliminary summary explanation of Committee Proposal 10a by the Committee on the Executive, as offered by the committee chairman, Delegate Victor Rivers:

the Alaska Constitution specifically prohibits the governor and the AG from bringing suit to challenge the Legislature's interpretations and handling of matters of law. The AG concedes, as he must, that this litigation arose as part "of a dispute between the executive and legislative branches over the proper interpretation of the constitution's effective date provision and the budget's effective date."[67] Such disputes — which go to the heart of the Legislature's "interpretations and handling of matters of law" — may not be addressed by the executive branch through the courts.[68]

Allowing the AG to proceed with this suit would give the governor a method to circumvent section 16; the protection would be eviscerated. If the Governor were allowed to proceed here, it would forever open an avenue for the governor to obstruct the work of the Legislature by targeting LAA for suit in the Legislature's stead. There can be no legitimate dispute that this is in substance a case brought on behalf of the State

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> In order to enforce the strong executive and to bulwark his power we have given him power by appropriate actions or proceedings in the court, brought in the name of the state, to enforce compliance with any [c]onstitution[al] or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive. **He has no authority however to act in that manner in any proceeding against the legislature.** The legislature is the supreme elected body and as such he is answerable to them and to their interpretations and handling of matters of law.

3 Proceedings of the Alaska Constitutional Convention at 1986 (Jan. 13, 1956) (emphasis added).

[67] Appellant's Br. at 31.

[68] *Knowles*, 988 P.2d at 609 (citation omitted) (rejecting the governor's attempt to "hold the legislature itself 'answerable' to him for its 'interpretations and handling of matters of law'" (citation omitted)).

and against the Legislature. It risks disrupting the Legislature's essential work by targeting its nonpolitical administrative arm, in direct conflict with the language and intent of article III, section 16.[69] Accordingly, the superior court's decision should be affirmed.

B. In the Alternative, the Superior Court's Decision Should Be Affirmed Because There Was No Justiciable Controversy with LAA and the AG Failed to Join Indispensable Parties.

The superior court's decision should also be affirmed because the AG's lawsuit was defective in at least two other fundamental respects. First, there was no justiciable controversy between the AG and LAA. Second, the AG failed to join the Legislature and the Legislative Council, both of which are indispensable parties.

1. The lawsuit was not justiciable. There was no case or controversy between the AG and LAA, and the matter was not ripe.

For a case to be justiciable, there must be an actual controversy between the parties.[70] "A 'controversy' in this sense must be one that is appropriate for judicial determination."[71] "The [declaratory judgment] statute's reference to an 'actual controversy' encompasses considerations of standing, mootness, and ripeness."[72] A controversy must be "one that is appropriate for judicial determination" because it is

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[69] *Id.* ("We would ignore the constitution's intended meaning if we held, in circumstances like these, that the governor could successfully evade section 16's restrictions by suing the Council instead of the legislature.").
[70] *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1100 (Alaska 2014).
[71] *Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969) (citation omitted).
[72] *State v. Am. Civ. Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009).

"definite and concrete, touching the legal relations of parties having adverse legal interests."[73] "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[74] "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."[75]

There was no actual case or controversy between the parties to this litigation. The AG asserts that LAA made a choice to "ignore" the provisions of CCS HB 69 "and spend state money without an effective appropriation."[76] In support of this assertion, he cites to a June 16, 2021 legal memorandum prepared by Megan Wallace, the Legal Director of LAA, and a June 18 letter sent by Ms. Geary to Legislative staff, arguing that these documents required the AG to seek a declaratory judgment to resolve the "controversy."[77] But nothing in these documents provides more than a possible hypothetical difference of opinion between the Legislature (not LAA) and the executive branch, and this difference of opinion never actually materialized. In particular, Ms. Geary stated that "[i]t will *likely be the Legislature's* position that a functional budget was passed which allows authorized legislative personnel to continue

[73] *Jefferson*, 458 P.2d at 999 (citation omitted).
[74] *Id.* (citation omitted).
[75] *Id.* at 998–99 (citation omitted).
[76] Appellant's Br. at 12.
[77] *See id.* at 11–12; [Exc. 4–5, 7 (Complaint ¶¶ 14, 15, 25)]; [Exc. 14–19].

employment on July 1."[78] Ms. Geary's email was clearly reporting on a "likely" position that might be taken by the Legislature — not LAA — based on a hypothetical state of facts.[79] That is, *if* the budget bill ultimately did not contain a special effective-date clause, then it was *possible* that the Legislature may decide that no layoffs were required. But neither of those things happened. The Legislature passed a special effective-date clause promptly thereafter, and the Legislature was never required to decide whether layoffs were necessary. Through his lawsuit, the AG was seeking an advisory opinion about a dispute of a hypothetical character based on a hypothetical state of facts that never actually came into existence. In short, there was no case or controversy on June 18 when the Governor wrote his letter to Chief Justice Bolger, on June 21 when the AG filed his Complaint, or when the superior court issued its decision. And there certainly is no such controversy today about the 2021 budget cycle. This Court should decline the AG's improper invitation to answer a hypothetical dispute.

The AG's lawsuit also was not ripe. The rule of ripeness is the judicial recognition "that a case is justiciable only if it has matured to a point that warrants decision."[80]

The concept of ripeness can be explained in both abstract and practical

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[78] [Exc. 14 (emphasis added)].
[79] *See Exxon Mobil Corp. v. Dep't of Revenue*, 488 P.3d 951, 958 (Alaska 2021) (reaffirming the case and controversy requirement for entry of a declaratory judgment and explaining that "Exxon's claim is not fit for judicial decision because there is no existing tax dispute between the parties, and any injury Exxon eventually may suffer is speculative").
[80] *Am. Civ. Liberties Union of Alaska*, 204 P.3d at 368.

> formulations. The abstract formulation is that ripeness depends on "whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." On a more practical level, [the court's] ripeness analysis fundamentally "balances the need for decision against the risks of decision."[81]

The Court examines "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'"[82] "Issues are not fit for judicial decision if an injury is too speculative."[83]

The AG's suit was not fit for judicial decision because its alleged injury was entirely speculative and, in point of fact, never occurred. Alaska courts have previously declined to consider hypotheticals that have not ripened into a true controversy:

> ADP's exhibits attached to its motion and memorandum for declaratory relief **make clear that ADP's rule change allowing Independent and non-affiliated candidates to run in the Democratic primary is only a *proposed* rule change at this point in time**. Any such rule change, if voted on, passed, and implemented, will not be known to the parties or the Court until the upcoming state convention, taking place in May of 2016. Furthermore, the Court has no way of knowing if the rule change is implemented, if Lt. Governor Mallot's opinion on the enforcement of AS 15.25.030(a)(16) would be consistent with the opinion set forth in February of 2016.
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> Given that the deadline for candidates to be placed on the Democratic primary ballot is June 1, 2016, it is possible that this issue will become ripe in between the upcoming state convention and the June 1 deadline for registration. However, at this current time, any alleged conflict between ADP's rule and the relevant state statute is purely hypothetical. The Court has no way of knowing if ADP will pass and implement the proposed rule change, if the State will choose to enforce AS 15.25.030(a)(16) at that point in time, or if any aggrieved party will

[81] *Id.* at 369 (ellipsis in original; footnotes omitted).
[82] *Id.* (citation omitted).
[83] *Exxon Mobil Corp.*, 488 P.3d at 958.

> exist and be unable to run under changed ADP rules. What ADP is asking this Court to do amounts to a request for an advisory opinion. For these reasons, the Court grants the State's motion to dismiss for lack of subject matter jurisdiction as it finds that there is no actual controversy at this point in time meeting the ripeness requirement.[84]

The same analysis applies here. There was no certainty to anything the AG alleged in his lawsuit. The AG was guessing (wrongly) about what terms the ultimate budget bill would contain and how the Legislature would direct LAA to expend funds under that budget. Even while the suit was pending, LAA was seeking guidance "for contingency planning purposes" from legislative leaders about how they may wish to proceed, depending on the outcome of the budget negotiation process. [Exc. 85–86] Because that budget was still being formulated and modified, the dispute simply never ripened into an actual controversy and was promptly mooted by a legislative vote.

2. The AG failed to join indispensable parties.

For the reasons stated above, the AG's lawsuit was functionally against the Legislature and thus must be dismissed under section 16. Even if the suit was actually directed solely against LAA, however, it still should be dismissed. It fails under Civil Rule 19 for failure to join indispensable parties — the Legislature and/or the Legislative Council.

A finding of indispensability requires a three-part analysis.

> First, the court must determine whether the parties are "necessary," according to the standards set forth in Civil Rule 19(a). Second, only if the parties are found to be necessary, the court must then determine if they

[84] *Alaska Democratic Party v. State*, No. 1JU1600533, 2016 WL 3405157, at *3 (Alaska Super. Ct. Apr. 18, 2016) (emphasis added).

> can be joined. Finally, if the court concludes that the parties are necessary and cannot be joined, it must determine whether they are "indispensable" by weighing the factors provided in Civil Rule 19(b).[85]

All three elements are satisfied here.

LAA "is the Legislature's non-partisan support agency."[86] LAA "was established by the Legislative Council . . . to assist it in providing the legislature with research on and analysis of proposed legislation as well as other general administrative services."[87] "[T]he Alaska Legislative Council oversees the work of the [LAA], which performs day-to-day administrative functions for the legislature . . . ."[88] LAA's executive director looks to members of the Legislative Council to determine whether to expend any funds in the event that the budget does not include an effective-date provision. [Exc. 85–86] Indeed, that was the same course of action taken by LAA in 2017 when a question arose about the approval of a budget. [Exc. 195–96] In other words, when the AG complains that an entity "chose" to "spend money without an effective appropriation,"[89] the AG is complaining about choices of the Legislative Council — not LAA. Further, the AG asserts a fundamental disagreement with "the

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[85] *Matter of Pac. Marine Ins. Co. of Alaska in Liquidation*, 877 P.2d 264, 268–69 (Alaska 1994).
[86] [Exc. 1 (Complaint ¶ 2)]; *see also* AS 24.20.050.
[87] *State v. Haley*, 687 P.2d 305, 309 (Alaska 1984).
[88] Gordon Harrison, Alaska's Constitution – A Citizen's Guide at 59 (5th ed. Jan. 2021), http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.
[89] Appellant's Br. at 12; *see also* [Exc. 7 (Complaint ¶ 25 (asserting that there is a dispute regarding LAA's "authority to expend funds without an effective appropriation from the legislature")]. This "authority" is exercised by the Legislative Council. [Exc. 85–86].

Legislature's position that a functional budget was passed which allows authorized legislative personnel to continue employment" in the absence of an effective-date provision. [Exc. 4] The Legislative Council and the Legislature therefore are the entities whose decisions and authority are being adjudicated in this case. They are necessary parties under Rule 19(a) because they claim an interest relating to the subject matter of this action and are so situated that the disposition of the action in their absence would as a practical matter impair or impede their ability to protect that interest.[90]

Because the Legislature and the Legislative Council are necessary parties, the Court must determine whether they can be joined to this action.[91] And, of course, they cannot be joined in this lawsuit because section 16 forbids actions by the executive branch against the Legislature.[92]

Because the Legislature and the Legislative Council are necessary parties that cannot be joined in this action, if this case was not dismissed under section 16, the Court must determine whether this action can proceed in their absence — *i.e.*, whether they are indispensable.

> An indispensable party is one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party. The determination of indispensability or lack of it involves a discretionary balancing of interests. On the one hand, consideration must be given to the possibility of rendering a judgment that will have an adverse factual effect on the interests of persons not before the court, and to the danger of inconsistent

[90] *See* Alaska R. Civ. P. 19(a).
[91] *See id.*
[92] *See Knowles*, 988 P.2d at 607–09.

> decisions, the desire to avoid a multiplicity of actions, and a reluctance to enter a judgment that will not end the litigation.[93]

Rule 19(b) directs the Court to weigh four factors in determining whether an action must be dismissed:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[94]

Here, all four factors weigh in favor of dismissal. First, if a judgment was entered 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, then the Legislative Council and the Legislature would be significantly prejudiced. Any decision in the absence of the Legislative Council or the Legislature could have dire impacts on the flexibility in operation that all three branches of government utilize regularly regarding spending decisions related to their respective budgets. Second, there are no available measures or accommodations that could lessen this prejudice. Third, any judgment entered in the Legislature's or the Legislative Council's absence would be inadequate because it would not consider their perspectives as the entities making appropriations or having a say in the expenditure of state funds. And finally, the executive branch has adequate alternative remedies if this action is dismissed for

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[93] *State, Dep't of Highways v. Crosby*, 410 P.2d 724, 725 (Alaska 1966).
[94] Alaska R. Civ. P. 19(b).

nonjoinder. Because the 2021 budget was passed with an effective-date provision, and therefore the AG's lawsuit was already moot, no alternative remedy is even required here. The AG is not harmed by a dismissal for nonjoinder. But even if some alternative remedy were appropriate, the Governor could always veto any budget bill he found lacking or decide to fund the government and then defend that decision if necessary.

If the Court determines that this case actually is against LAA and not the Legislature and the Legislative Council, therefore, it should be dismissed under Civil Rule 19 because indispensable parties exist that cannot be joined.

C. The Superior Court Properly Applied the Public Interest Exception to the Mootness Doctrine to LAA's Section 16 Defense.

The AG acknowledges, as he must, that this dispute has been moot for a very long time.[95] Nearly one year ago, on June 28, 2021, the Legislature voted on CCS HB 69's effective-date provision and passed it by a two-thirds majority.[96] This mooted the AG's claim.[97] The superior court nevertheless decided that the public interest exception to the mootness doctrine warranted addressing the dispute, and the superior court then granted LAA's cross-motion for summary judgment. That was nearly 11 months ago. Nearly all of the dollars at issue in that budgetary cycle have now been spent, LAA never expended any funds prior to an effective appropriation (as the AG purportedly feared might happen), and the instant lawsuit was dismissed because it ran afoul of section 16.

[95] Appellant's Br. at 17–20.
[96] [Exc. 210].
[97] [Exc. 221].

Despite all of this, the AG asks the Court to apply the public interest exception not only to LAA's section 16 defense, but also to the AG's request for declaratory relief regarding a hypothetical expenditure by LAA that never, in fact, occurred. Even if the Court decides that the public interest exception to the mootness doctrine applies to this appeal, it should be limited to LAA's section 16 defense.

As *Knowles* explains, there are three factors the Court considers when deciding whether to apply the "public interest" exception to the mootness doctrine: "1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[98] "None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue."[99] Applying these factors confirms that the AG's claim does not qualify for the exception.

Importantly, the AG describes the "disputed issue" as "the legal effect of the failure of a special effective date for the operating budget."[100] This is yet another reminder that the AG's claim concerns a substantive dispute with the Legislature, not any of LAA's proposed expenditures or other "service-related acts." The AG's focus is

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[98] *Knowles*, 988 P.2d at 606 (quoting *Dep't of Health & Soc. Servs. v. Alaska State Hosp. & Nursing Home Ass'n*, 856 P.2d 755, 766 (Alaska 1993)).
[99] *Young*, 502 P.3d at 970 (quoting *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 778 (Alaska 2001)).
[100] Appellant's Br. at 18.

on the Legislature's conduct, not on what LAA may or may not do. Nevertheless, if one takes the AG at his word — that is, if this case is really about "challenging the Legislative Affairs Agency's ability to keep offering services" when the budget lacks an effective-date provision[101] — then this situation clearly involves "unusual factual circumstances that were unlikely to repeat themselves."[102] In order for this circumstance to "repeat," not only must the Legislature fail to adopt a special effective date for the operating budget, but LAA must also expend state funds without what the AG deems to be an effective authorization. As to the former, all parties agree the Legislature routinely adopts a special effective date for the operating budget.[103] As to the latter, LAA made no such expenditure in 2021 when the AG brought this suit, and the AG has not identified any instance of LAA ever having acted in this way.

The AG seeks to downplay this exceedingly low likelihood by pointing out that it remains possible that these unusual circumstances could occur in the future,[104] but the technical possibility of an event occurring falls well short of the standard.[105] Here, the question is not even whether the disputed issues from 2021 are capable of repetition *because the disputed issues did not occur* in 2021: the budget included a special

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[101] *Id.* at 33.
[102] *Young*, 502 P.3d at 970 (citation omitted).
[103] [Exc. 146].
[104] *See* Appellant's Br. at 18–19.
[105] *Young*, 502 P.3d at 970 (noting that unlikelihood of repetition weighs against applying the public interest exception even if the issue is technically capable of repetition).

effective-date clause, and LAA did not expend any funds without proper authorization. This factor weighs against applying the public interest exception to the AG's claim.

With respect to LAA's constitutional defense under section 16, the likelihood of repetition is unfortunately dictated by the AG's (and, more importantly, the Governor's) willingness to file unconstitutional lawsuits. The fact that the last time this issue reached the Court was more than two decades ago, in *Knowles*, suggests that this circumstance is not particularly likely to repeat itself. One would expect that the superior court's well-reasoned decision in the instant case, in addition to *Knowles*'s clear holding, would make it even less likely that these unconstitutional lawsuits would be filed in the future.

As to the second factor, it appears highly unlikely that the issue would evade review if the effective-date issue actually arose. The AG suggests that the 90-plus days between the occurrence of an effective-date dispute and the moment that dispute becomes moot would be too short for litigation,[106] but the record in the instant case shows otherwise. The AG filed his lawsuit and summary judgment motion one business day after the Governor sent his improper *ex parte* letter to this Court. [Exc. 8, 209] LAA filed its motion to dismiss four days later. [Exc. 50] The AG opposed LAA's motion three days after that. [Exc. 143] After a brief delay, due to the intervening vote by the Legislature to adopt a special effective date and the parties' briefing on mootness, LAA filed its final brief on July 9, 2021. [Exc. 173] The briefing was thus completed in just

[106] *See* Appellant's Br. at 19–20.

18 days. Following oral argument, the superior court issued its decision 20 days later. [Exc. 222] This schedule could and would have been even faster if the dispute had not been mooted in the middle of the briefing schedule. Similar expedited briefing schedules for high-priority appeals are not uncommon.[107] The AG's suggestion that anything less than a five-year window is too short to allow for judicial review cannot be squared with the record in this case.

The final factor also weighs against application of the public interest exception to the mootness doctrine. The AG's claim here is that there would be a constitutional violation *if* the Legislature fails to adopt a special effective date for some unknown future budget, and *if* LAA then expended certain state funds prior to the budget becoming effective, and *if* those expenditures did not address health or safety issues or constitutional obligations.[108] It strains credulity to say that this speculative, conditional, and hypothetical issue is so important to the public interest as to justify overriding the mootness doctrine. Given that the Legislature has the constitutional and practical power to prohibit any such expenditures by LAA, this issue lacks the type of public interest as to warrant the Court's review despite its mootness. In *Hayes v. Charney*, several legislators brought suit against the executive director of the Legislative Council and

[107] *See Short v. Dunleavy*, No. S-18333 (Alaska 2022) (ordering all briefing to be completed within 32 days).

[108] The AG apparently concedes that, even in the absence of an effective budget, some expenditures by agencies or the Legislature are permitted so that health and safety issues or constitutional obligations can be addressed. *See* Appellant's Br. at 3 & nn.6–7, 10 & nn.21–22.

certain other defendants to challenge whether the Legislative Council had violated the Open Meetings Act or otherwise usurped the power of the Legislature to appropriate public funds.[109] The Court declined to consider the merits of the dispute because they were not so important as to justify invoking an exception to the mootness doctrine.[110] Noting that the Legislative Council is subject to the sole direction and control of the Legislature, the Court found that judicial review would do little to further the public interest.[111] Likewise, if the Legislature or the Legislative Council wishes to direct how and when LAA will expend funds in any particular circumstance, they may do so. Indeed, LAA specifically sought such direction in this case. [Exc. 85–86]

In *Knowles*, this Court found that the section 16 defense was a question of great public importance because it addressed an important constitutional balance between the two coordinate branches of government.[112] Certainly that was true in 1999 when *Knowles* was decided, and it was true enough last summer when the superior court elected to proceed with addressing the merits of the section 16 defense in the instant case. The Court may well decide that, after having clearly addressed the issue in *Knowles* and with the superior court's well-reasoned decision confirming the defense's application again here, it is less important now. The section 16 defense clearly applies to the AG's lawsuit, and no new important issues are addressed. With that backdrop,

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[109] 693 P.2d 831 (Alaska 1985).
[110] *Id.* at 834–35.
[111] *See id.* at 835.
[112] 988 P.2d at 606.

the Court may determine that the public interest exception does not require reiterating the *Knowles* holding in this appeal. Issues on appeal may become moot through the passage of time or where it becomes clear on appeal that the issues are now moot.[113] If the Court does decide that the public interest exception applies, however, it should only apply to consideration of LAA's section 16 defense.

D. The Superior Court Properly Granted Attorneys' Fees to LAA as the Prevailing Party.

LAA was the prevailing party in this matter. It was undisputed that the amount of LAA's fees request was reasonable and appropriate. LAA was thus presumptively entitled to 20% of its reasonable attorneys' fees in defending this lawsuit, and that is precisely what the superior court awarded here.[114] On appeal, the State presents two arguments as to why the presumptive fee award under Civil Rule 82 was improper. First, the State contends that it should be deemed a constitutional litigant, despite not having briefed the issue below. Second, the State asks the Court to manufacture a new

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[113] *See, e.g.*, 4 C.J.S. *Appeal and Error* § 63, Westlaw (database updated May 2022) ("Additionally, an issue may become moot through the lapse of time, or where the issue has become academic." (footnote omitted)); *Akpik v. State, Office of Mgmt. & Budget*, 115 P.3d 532 (Alaska 2005) (noting that the Court applies its independent judgment to determining mootness); *Ahtna Tene Nené v. State, Dep't of Fish & Game*, 288 P.3d 452, 457–60 (Alaska 2012) (finding subsequent events had rendered appeal moot and declining to apply public interest exception to mootness doctrine); *see also Snyder v. Am. Legion Spenard Post No. 28*, 119 P.3d 996, 1001 (Alaska 2005) ("[Court] may affirm a judgment on any grounds that the record supports, even if not relied on by the superior court.").

[114] Alaska R. Civ. P. 82(a), (b)(2); [Exc. 229–30, 258].

exception to Rule 82 so that no fee-shifting applies to intragovernmental litigation. Neither argument has merit.

The State failed to satisfy its burden to show that it was a constitutional claimant under AS 09.60.010(c)(2). Bringing a claim that concerns the enforcement of a constitutional right is a necessary, but not sufficient, qualification for anyone seeking the benefit of the statutory protection. "[A] litigant claiming the protection of the statute *must also prove* that 'the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action.'"[115] These are required elements of proof.[116] Despite this requirement, the State concedes that it did not attempt to satisfy these two conditions in its briefing. [Exc. 234–37] Instead, the State sought to address those conditions for the first time during the oral argument. By failing to satisfy its burden during the briefing, the State waived any claim that it was a constitutional claimant.[117] Given that new arguments are deemed waived when

[115] *Thomas v. State*, 377 P.3d 939, 952 (Alaska 2016) (emphasis added; citation omitted).
[116] *See Manning v. State Dep't of Fish & Game*, 420 P.3d 1270, 1283 (Alaska 2018) (noting that the statute "requires" the nonprevailing litigant to satisfy all three conditions to qualify for the exception); AS 09.60.010(c)(2).
[117] *See, e.g.*, *Edwards v. State*, 34 P.3d 962, 969–70 (Alaska Ct. App. 2001) (finding that claim was not briefed and "[b]ecause Edwards did not raise this claim until oral argument, he waived it"); *Brown v. State*, 127 P.3d 837, 847 (Alaska Ct. App. 2006) (same). The State complains that LAA's pointing out that the State failed to satisfy its burden of proof was a "gotcha" moment and "gamesmanship." The burden of proof is not a game. If anything, choosing to wait until oral argument before first articulating its theories for a statutory protection is the type of unfair gamesmanship that courts decline to countenance.

presented for the first time in a reply brief,[118] the State's failure to present these arguments *at all* during the briefing — and only springing them during oral argument — likewise constitutes a waiver. The superior court did not abuse its discretion by declining to consider these new arguments. Because these arguments were not properly raised before the superior court, they may not be considered here.[119] The superior court did not abuse its discretion in declining to find that the AG was a constitutional claimant when the AG failed to satisfy its burden of proof on that issue during the briefing.

Finally, the State argues that no fees should be awarded here because, in the State's view, it is a "pointless exercise." In other words, the State would like the Court to manufacture a new exception to Civil Rule 82's mandatory fee-shifting provision so that state agencies are immune from fee awards. The State offers no legal basis for its proposed exception, because none exists. The State's proposed exception is also bad policy. Agency budgets matter. LAA was forced to expend significant resources to respond to the State's misguided, expedited lawsuit. Obtaining a recovery from the State will help alleviate some of the budgetary damage that the State's lawsuit caused

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[118] *See Simpson v. State, Commercial Fisheries Entry Comm'n*, 101 P.3d 605, 611 (Alaska 2004).

[119] *Harvey v. Cook*, 172 P.3d 794, 802 (Alaska 2007). LAA declines the State's invitation to debate the merits of this waived issue, except to note that the State's contemporaneous press release makes it exceedingly clear that its goal with this suit was to clarify whether "money can be spent to keep state services open" as of July 1, 2021 — not to partially shut down the government. *Compare* [Exc. 59] *with* Appellee's Br. at 39. The State clearly had a sufficient economic incentive to pursue the lawsuit.

to LAA. LAA should not be deprived of its rights under Civil Rule 82 simply because the State decided to bring an unconstitutional lawsuit.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the superior court's Corrected Final Judgment dated December 6, 2021.