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-21-0639CI**

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

BRIEF OF APPELLANT, TREG R. TAYLOR, ATTORNEY GENERAL

TREG R. TAYLOR
ATTORNEY GENERAL

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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 II, section 18. Effective Date

Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.

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.

Article IX, section 13. Expenditures

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

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

(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. 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.

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JURISDICTIONAL STATEMENT

The superior court entered a corrected final judgment on December 6, 2021. [Exc. 257-58] This Court has jurisdiction pursuant to AS 22.05.010(b) and Alaska Rule of Appellate Procedure 202(a).

PARTIES

Treg R. Taylor, in his official capacity as the Attorney General of the State of Alaska, is the appellant. The Legislative Affairs Agency is the appellee.

ISSUES PRESENTED

1. *Mootness*. The Alaska Constitution requires a two-thirds majority of the House and the Senate to pass a bill with a special effective date. Last June, the attorney general and the Legislative Affairs Agency disagreed about the effect of that constitutional provision on the operating budget, something set annually by the legislature. Although the dispute is now moot, it may be repeated any year a legislature fails to act with a two-thirds majority. And should it occur again, the consequences are significant in that it may result in a partial government shutdown of up to 90 days. Does the public interest exception to the mootness doctrine warrant the Court resolving this appeal and the attorney general's underlying action?

2. *The attorney general's ability to pursue this lawsuit*. Exercising authority granted to him under the common law, the attorney general brought this lawsuit in the public interest to resolve a dispute over the application of a specific law—the FY 2022

operating budget—to the Legislative Affairs Agency. In *Legislative Council v. Knowles*,[1] this Court held that article III, section 16 of the Alaska Constitution prevented the governor from challenging the legislative acts of the legislature. Did the superior court err in dismissing this lawsuit, when the attorney general relied on his independent authority to challenge the non-legislative acts of the legislature's service agency?

3. *Attorneys' Fees.* Did the superior court err in awarding the Legislative Affairs Agency attorneys' fees under Civil Rule 82 without considering whether the attorney general was a constitutional litigant entitled to the protection afforded by AS 09.60.010(c)(2)? Alternatively, do the fee shifting provisions apply to intragovernmental conflicts?

INTRODUCTION

Every year the Alaska legislature sets the State's funding priorities through the budget appropriation process.[2] The legislature can pass the budget bill with a simple majority; that law becomes effective 90 days after enactment.[3] Or, if the legislature has the required two-thirds vote in both the House and the Senate, it can pass a budget bill with a special effective date.[4] Whether to pass a budget bill with a special effective date

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1 988 P.2d 604 (Alaska 1999).

2 *Sonneman v. Hickel*, 836 P.2d 936, 939-40 (Alaska 1992); *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) ("[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs." (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1998)).

3 Alaska Const. art. II, § 18.

4 *Id.*

is within the sole purview of the legislature.[5] Neither the governor nor the attorney general can sue the legislature for passing a budget with or without a special effective date, nor could the governor or the attorney general sue the legislature to force it to pass a budget at all.[6] The power of appropriation includes the power to shut down the government by failing to appropriate the money necessary to run the government.[7] But the legislature's power of appropriation is not what is at issue in this case. This case is about the attorney general's authority to bring an action to enforce the legislature's budget bill when the opposing party is an agency within the legislative branch.

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[5] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) ("[The Alaska Constitution grants] the legislature the power to legislate and appropriate." (footnotes omitted) (citing Alaska Const. art. II, §§ 1 & 13)).

[6] Of course, the constitution requires the legislature to pass an annual budget. Alaska Const. art. II, § 13. Indeed, it is the only type of legislation expressly referenced in the constitution. *See id.* The legislature's failure to enact an operating budget would create a constitutional crisis and force each of the three branches of government to expend state funds without an effective appropriation to satisfy their respective constitutional obligations.

[7] Legal precedent from other states and the tripartite constitutional structure of Alaska's government suggests that the governor has inherent authority to maintain some level of government operations even without valid spending authority. Courts have regularly held, for example, that the judicial branch of government has the inherent authority to fund its own operations as necessary to fulfill its basic constitutional duties. *See e.g.*, *Matter of Alamance Cnty. Ct. Facilities*, 405 S.E.2d 125, 132-34 (N.C. 1991); *State ex rel. Metro. Pub. Def. Servs., Inc. v. Courtney*, 64 P.3d 1138, 1139 (Or. 2003); *In re Clerk of Ct.'s Comp. for Lyon Cnty. v. Lyon Cnty. Comm'rs*, 241 N.W.2d 781, 784-86 (Minn. 1976) (citing Carrigan, *Inherent Powers of the Courts* (published by National College of the Judiciary)); Gary D. Spivey, Annotation, *Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes*, 59 A.L.R.3d 569, and cases cited.

In late June 2021, the Alaska legislature passed a budget that, at the earliest, would become effective two-and-a-half months later, in mid-September.[8] Heeding the legislature's action, the executive branch prepared for a partial government shutdown by, among other measures, notifying all non-essential personnel that they would either be laid off or furloughed as of July 1. [Exc. 9-12] The Legislative Affairs Agency, the support agency of the legislature, took a noticeably different approach. Unlike every executive branch agency, the Legislative Affairs Agency decided it did not need an effective budget—that a "functional" budget would do—and notified its employees that business would continue as usual. [Exc. 14]

This conflict between the executive and legislative branches of the government resulted in a constitutional dilemma. Article IX, section 13 requires a valid and effective appropriation before state funds are spent, and article II, section 18 requires a super majority in both houses to make an enacted law immediately effective. If the Legislative Affairs Agency continued to spend state money after July 1, it would violate these constitutional provisions. The alternative—partially shutting down the government—would harm Alaskans, who rely on a myriad of state programs and services, as well as the state's workforce. It would also lead to allegations, as evidenced by what occurred in this case, that the governor was not "faithfully executing" the law. For instance, two Alaska citizens impacted by the impending government shutdown filed an amicus brief before

[8] *See* C.C.S. H.B. 69, 32nd Legis., 1st Spec. Sess. (Alaska 2021); 2021 House Journal 1317-19; 2021 Senate Journal 1287-90.

the superior court arguing that "the governor's refusal to implement the legislature's validly-enacted budget violates the constitution's separation of powers doctrine and infringes on the legislature's appropriation power." [Exc. 98]

The governor was stuck with a Hobson's choice; no matter what he did, he would be accused of violating the Alaska Constitution. Moreover, under either scenario, the public interest and the public's trust in its system of government would be negatively impacted. Recognizing such, the attorney general used his independent authority to act in the public's interest and brought this lawsuit against the only state agency with which the executive branch had adversity—the Legislative Affairs Agency. [Exc. 1-9] He did so on an expedited basis, seeking a decision before one branch violated the constitution and before a partial government shutdown had to occur. [Exc. 209]

Fortunately for Alaska, the legislature averted a government shutdown by subsequently passing a July 1 effective date for the budget bill with the constitutionally-mandated two-thirds majority.[9] Nevertheless, with the agreement of both parties,[10] the superior court relied on the Court's holding in *Legislative Council v. Knowles*[11] to conclude that the public interest exception justified overriding the mootness doctrine. [Exc. 214-16] It then relied on that same case to grant the Legislative Affairs Agency's

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9 2021 House Journal 1360.

10 The Legislative Affairs Agency argued that the public interest exception applied only to its claim that article III, section 16 barred the attorney general's lawsuit, but not the claim that the attorney general brought regarding the effective date. [Exc. 144-47; 155-57]

11 988 P.2d 604, 606 (Alaska 1999) (applying the public interest exception to decide whether article III, section 16 forbid the governor's challenge of a veto override).

motion to dismiss, finding that the attorney general's action was the functional equivalent of the governor suing the legislature and therefore barred by article III, section 16 of the Alaska Constitution. [Exc. 216-17] That provision grants the governor broad authority to sue in the name of the State, but also provides that this authority "shall not be construed to authorize any action or proceeding against the legislature."[12] In reaching its decision, the superior court ignored the unique circumstances of this case and expanded the scope of the protection. It gave no consideration to the attorney general's independent authority, separate from that of the governor, to sue in the public's interest. [Exc. 218-20] It also ignored the narrow exception this Court carved out in *Knowles*, when it suggested that article III, section 16 did not extend to protect the service-related actions of the legislature's support agency. [*Id.*]

The superior court's decision effectively foreclosed any opportunity the executive and legislative branches had to resolve this dispute short of a government shutdown. The only state agency with which the attorney general had adversity was the Legislative Affairs Agency. With no other option, the attorney general was left with advising the governor to shut down the government—needlessly harming Alaskans—and wait for the legislature or a negatively impacted private citizen or organization to bring a separate lawsuit. This is not what the framers intended when they enacted article III, section 16. Instead, as this Court recognized in *Knowles*, this constitutional provision protects the legislature as it engages in a legislative function from a lawsuit brought by the governor.

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[12] Alaska Const. art. III, § 16.

Once the legislature acts, all state agencies, including the legislature's service agency, can be held accountable for non-legislative acts that do not comply with the law. This Court should reverse the superior court, and affirmatively adopt the narrow exception it left open in *Knowles*.

The other issue on appeal has to do with attorneys' fees. In awarding the Legislative Affairs Agency attorneys' fees, the superior court failed to recognize that AS 09.60.010(c)(2) protected the attorney general, as a constitutional litigant, from a fee award. [Exc. 253] What is more, awarding attorneys' fees in these circumstances amounts to an exercise in futility. The attorney general will pay any fee award with state funds appropriated to it by the legislative branch. Because article IX, section 13 requires an appropriation for any expenditure of state funds, an award in favor of the Legislative Affairs Agency is the equivalent of the court ordering the legislature to pay itself for its full reasonable attorneys' fees. Courts should decline to participate in such a pointless exercise or to reward this unnecessary use of judicial time and resources.

STATEMENT OF THE CASE

I. The operating budget initially passed by the legislature would not become effective until mid-September 2021.

After the legislature failed to pass a FY 2022 operating budget by the end of its regular session in May 2021, the governor called a special session.[13] On June 15, the House passed a conference committee substitute for HB 69 (the operating budget) and a

[13] Executive Proclamation by Governor Mike Dunleavy dated May13, 2021; available at http://w3.legis.state.ak.us/docs/pdf/proclamations/32-Special-Session-1-and-2-Proclamations.pdf.

day later the Senate passed the same version.[14] Although the Senate approved an immediate effective date for the operating budget by the required two-thirds super majority, that same motion failed in the House by a vote of 23-16 (with one member excused).[15]

A bill is enacted when it is signed by the governor, allowed to become law without signature, or when the legislature overrides the governor's veto.[16] An enacted law does not become effective until 90 days after enactment unless the legislature by two-thirds of the membership of each house provides for another effective date.[17] At the time the attorney general filed this lawsuit, the legislature had not yet transmitted the operating budget to the governor. [Exc. 3] Consequently, if the legislature did not take any additional action, the operating budget would not have become effective until mid-September 2021 at the earliest.[18]

II. All executive branch agencies prepared for a partial government shutdown while the Legislative Affairs Agency prepared for business as usual.

The passage of the operating budget without an immediate effective date constituted a legislative action—the legislature decided to partially shut down the government for two-and-a-half months until the bill became effective. This set every executive branch agency into action to prepare for the impending shutdown.

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14 2021 House Journal 1317-19; 2021 Senate Journal 1287-90.

15 *Id.*

16 Alaska Const. art. II, §§ 14-17.

17 Alaska Const. art. II, § 18.

18 *Id.*

A partial government shutdown would impact the lives of all Alaskans.[19] As the amici argued to the superior court, a shutdown disrupts a myriad of government services and programs such as: (1) public assistance; (2) DMV services, like driver's license renewals; (3) the ability to obtain fishing and hunting licenses; (4) starting new corporations or filing for natural resource permitting; (5) recording real property transactions; and (6) critical infrastructure to support Alaska's tourist industry. [Exc. 99] A loss of or even a slight disruption in these services or any of the many others offered by the government is felt by all Alaskans. Still, no group is impacted more than the State's workforce.

On June 17, the Division of Personnel and Labor Relations notified all executive branch employees of a potential government shutdown. [Exc. 12] Should the legislature fail to pass an annual budget with a special effective date, the Division warned that the following would occur on July 1: (1) all non-essential permanent and probationary employees in classified service would be laid off;[20] and (2) all non-essential partially

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[19] *See Atlas Brew Works, LLC v. Barr*, 391 F. Supp. 3d 6, 8 (D.D.C. 2019) ("The 34-day government shutdown that began in December 2018 and ran through most of January 2019 disrupted the lives of hundreds of thousands of federal employees and countless others who depend on their services."); *see also id.* (noting that, in addition to the impact on the federal workforce, the shutdown had "myriad other, more surprising consequences" such as preventing the shipment of beer in interstate commerce).

[20] The State's ability to place classified employees on furlough requires an agreement with their unions. At the time the attorney general filed the litigation, an agreement had not been reached. [Exc. 10, 141] Had the State been unable to reach an agreement, it would have needed to cash out the leave for any unrecalled laid off employee. [Exc. 10] The total leave liability for all state employees was in excess of $190 million. [*Id.*] Once leave is cashed out, it cannot be reinstated. [*Id.*]

exempt, exempt, and non-permanent employees would be placed on furlough. [*Id.*] Although state employees' health insurance would extend through July, employees would likely need to cover the portion of the premium normally deducted from their paychecks. [Exc. 10] If the shutdown extended into August, all laid off employees would lose their health insurance. [*Id.*]

In its answering brief, the Legislative Affairs Agency will likely try to minimize the impact of the legislature's action—and the attorney general's claim about the import of the effective date—by pointing out that some critical services would continue. [*See* Exc. 87-96] To be sure, although Alaska courts have not yet addressed this issue, a government shutdown would functionally become a partial government shutdown as the State has a constitutional obligation to protect the health and safety of its residents.[21] For example, state troopers and officers would still continue with their patrols, indigent criminal defendants would still be appointed an attorney, and rural Alaskans would still have an emergency broadcast system.[22] [Exc. 87] But, while the State takes the position that some services must be maintained, the legislature's decision not to make the operating budget effective immediately must also have consequences. Consistent with the

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21 *See supra* n.7.

22 The attorney general's office has long taken the position that the State has constitutional obligations to protect the health and safety of its residents which cannot be ignored, even if the legislature fails to timely enact an annual budget bill. For example, a 1981 attorney general opinion relied on the "rule of necessity" to justify spending prior to an effective appropriation, but counseled that "you may and must expend or incur *the minimum amount* required to carry out the duties and functions prescribed to your department by law." [Exc. 20-21] Of course, this position, as well as which services the executive branch identified as critical, would likely face litigation.

warnings sounded by the amici, non-critical services would shut down or would operate at a limited capacity. [*See* Exc. 87-96] Services like those offered by the Alaska Public Offices Commission, the Office of Administration Hearings, and the Alaska Police Standards Council would shut down. [*Id.*] And services like those offered by the Department of Administration, Division of Retirement and Benefits, and the Division of Motor Vehicles, would operate at reduced staff levels. [*Id.*]

In contrast to the executive branch agencies, the Legislative Affairs Agency did not make the necessary hard choices to determine critical services and declined to recognize the action taken by the legislature. [Exc. 14] On June 18, Jessica Geary, the director of the Legislative Affairs Agency, notified its employees that the agency would not be issuing lay-off notices. [*Id.*] Her email provided, in part:

> By now, many of you have heard that Executive Branch employees received layoff notices yesterday. It will likely be the Legislature's position that a functional budget was passed which allows authorized legislative personnel to continue employment on July 1. Based on past practice and Legal Services interpretation, the retroactivity clause enables the work of the Legislature to continue, despite the House not passing the effective date clause. Therefore, at this time, assuming the governor will sign the budget, the Legislative Affairs Agency will not be issuing layoff notices on behalf of the Legislative Branch.

[*Id.*]

The "Legal Services interpretation" referenced by Ms. Geary in her email was a memorandum provided by the director of Legal Services, Megan Wallace, and dated June 16. [Exc. 16-19] She noted that the operating budget passed by the legislature contained a retroactivity provision making "*all* of the provisions retroactive to their corresponding intended effective dates." [Exc. 16] Although she recognized that a

"retroactive clause does not amount to a special effective date," she nevertheless opined that state agencies may rely on the retroactivity clause to continue spending until an enacted appropriation becomes effective. [Exc. 16-17]

This left the governor and the attorney general in an unenviable position. The governor could, as the attorney general advised, faithfully execute the law and shutdown the government. [*See* Exc. 124-25] Or the governor could, as the Legislative Affairs Agency chose to do, ignore the enacted law and spend state money without an effective appropriation. The governor decided, as is his constitutional responsibility, to faithfully execute the law and directed all executive branch agencies to partially shut down on July 1.[23] The attorney general, using his common law authority to protect the public interest, filed this lawsuit to obtain a judicial ruling on the correct application of the constitution's effective date provision to the operating budget. A judicial ruling, whatever the outcome, would serve the public interest. If the attorney general was correct, the legislature would know the constitution requires an operating budget to have an immediate effective date to authorize the expenditure of state funds. If the Legislative Affairs Agency was correct, then the executive branch would not be obliged to partially shut down.

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[23] *See* Alaska Const. art. III, § 16.

III. Concluding that the Legislative Affairs Agency was immune from suit, the superior court dismissed the attorney general's complaint and awarded the Legislative Affairs Agency attorneys' fees.

Relying on his common law authority to protect the public interest, the attorney brought this lawsuit and sought a declaratory judgment to establish whether the operating budget passed by the legislature authorized state spending before its constitutional effective date. [Exc. 7-8] Simultaneous to filing his complaint, the attorney general also filed a motion for summary judgment and a motion for expedited consideration. [Exc. 209]

The Legislative Affairs Agency responded with a motion to dismiss. [Exc. 22-51] Rather than address the constitutional question pertaining to the effective date, the agency used extrinsic evidence, namely the political discourse surrounding the budget process, to turn this lawsuit into a political dispute between the governor and the legislature. [*Id.*] Among other correspondence, the agency cited the governor's letter to then-Chief Justice Bolger [Exc. 53] as well as the attorney general's statement describing this as a "dispute between branches of government" [Exc. 5] to tie the facts of this case to those found in *Legislative Council vs. Knowles*, where this Court held that then-Governor Knowles's lawsuit against the legislative council was "in substance an action brought in the name of the state against the legislature" and barred by article III, section 16.[24] The Legislative Affairs Agency argued further that, even if the agency was not the functional equivalent of the legislature or the legislative council, article III, section 16 still barred this lawsuit

[24] *See* 988 P.2d at 605.

because the legislature and the legislative council were necessary parties under Alaska Rule of Civil Procedure 19. [Exc. 41-45]

Last, if the superior court was not persuaded by *Knowles*, the Legislative Affairs Agency argued the court should dismiss the attorney general's lawsuit because it was not ripe—that is, the attorney general had to wait until the lives of thousands of Alaskans had been negatively impacted before he could bring this suit—and because this case did not present an actual case or controversy between the attorney general and the Legislative Affairs Agency. [Exc. 46-50] The latter argument rested on the claim that it is the legislature and not the Legislative Affairs Agency that determines how the agency implements the operating budget.

As the parties briefed the motion to dismiss, the House passed an immediate effective date for the FY 2022 operating budget with the constitutionally-mandated two-thirds majority, thereby averting a government shutdown and alleviating the emergency nature of these proceedings. [Exc. 210] In response to the superior court's request for supplemental briefing, both parties agreed that the public interest exception to mootness applied to at least determine whether article III, section 16 barred this lawsuit.[25] [Exc. 144-54]

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[25] The Legislative Affairs Agency argued that the public interest exception applied only to its defense that article III, section 16 barred the attorney general's lawsuit, but not the claim that the attorney general brought regarding the effective date. [*See* Exc. 144-47] The superior court addressed only the article III, section 16 defense. [Exc. 216-220] If the Court rules in the attorney general's favor, it should allow the superior court to, in the first instance, consider the attorney general's underlying claim.

The superior court, having converted the Legislative Affairs Agency's motion to dismiss into a motion for summary judgment, agreed to decide the issue and ruled in favor of the agency. [Exc. 207-22] It relied on *Knowles*, both to conclude that the public interest favored deciding whether article III, section 16 applied and then to conclude that it did. [Exc. 214-21] At the urging of the Legislative Affairs Agency, the superior court used the political discourse surrounding the budget to reject the notion that the attorney general brought the suit under his common-law powers to preserve the public interest. [Exc. 216-17] Noting that the attorney general serves under the supervision of the governor and at his pleasure, the court relied on statements by the governor and the attorney general to conclude that the attorney general's suit was a "suit by the governor 'in the name of the State.' " [Exc. 217]

After dismissal, and despite the fact that the attorney general brought this lawsuit to enforce the constitutional obligation not to spend money without an effective appropriation, the Legislative Affairs Agency filed a motion for full reasonable attorneys' fees under AS 09.60.010(c). [Exc. 223-30] Anticipating the attorney general's response, the agency argued that he was not a constitutional claimant because (1) the attorney general "violated the constitution by the simple act of bringing his suit;" and (2) because the attorney general aimed this lawsuit at the "administrative act" of spending state funds unconstitutionally. [Exc. 227-28] Alternatively, the Legislative Affairs Agency sought fees under Civil Rule 82. [Exc. 229]

The superior court denied the Legislative Affairs Agency's request for full fees, but awarded it fees under Rule 82. [Exc. 251-55] It held that the agency was not entitled

to fees as a constitutional claimant because it was "not a plaintiff, counterclaimant, cross claimant, or third-party plaintiff as required by the statute." [Exc. 253] The court then granted the Legislative Affairs Agency fees under Civil Rule 82, rejecting the attorney general's argument that this was a "pointless exercise" because each arm of the government has its own budget and the Legislative Affairs Agency's budget "does not care who stands on the other side of the litigation—it only cares about what money comes in and what money comes out." [Exc. 255] In making its ruling, however, the superior court declined to consider the attorney general's argument that he was a constitutional claimant under AS 09.60.010(c)(2), concluding it was unnecessary because it had denied the agency's request for full fees. [Exc. 253]

This appeal followed.

STANDARDS OF REVIEW

The interpretation of the Alaska Constitution is a question of law to which this Court applies its independent judgment.[26] In deciding what the constitution means, the Court "first look[s] to the intent of the framers of the constitution"[27] and "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[28]

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[26] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

[27] *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (citing *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975)).

[28] *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 192 (Alaska 2007).

The Court also applies its independent judgment to determine mootness and whether an exception to the mootness doctrine applies.[29] Although it generally reviews attorneys' fee awards for an abuse of discretion, the Court applies its independent judgment when interpreting AS 09.60.010(c)(2) and the constitutional litigant exception.[30]

ARGUMENT

I. This case warrants application of the public interest exception to the mootness doctrine.

Both parties agree that the public interest exception justifies the Court deciding whether article III, section 16 bars this litigation. It is how the parties reach that conclusion that differs. The Legislative Affairs Agency will likely persist with its argument that the public interest exception applies only to its defense, but not the underlying claim that the attorney general brought regarding the effective date of the operating budget. But the public interest exception applies to the merits of the attorney general's claim even more clearly than it does to the Legislative Affairs Agency's proffered constitutional defense. Therefore, this Court should not dismiss this litigation as moot.

This Court "has long recognized a 'public interest' exception to the mootness doctrine," considering three factors: "1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine if applied, may repeatedly circumvent

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29 *Akpik v. State, Office of Mgmt. and Budget*, 115 P.3d 532, 534 (Alaska 2005).

30 *Manning v. State, Dep't of Fish & Game*, 420 P.3d 1270, 1278 (Alaska 2018).

review of the issues and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[31] "None of the individual factors is dispositive; rather, [the Court uses] discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate."[32]

The issue of the legal effect of the failure of a special effective date for the operating budget is certainly capable of repetition. Before the superior court, the Legislative Affairs Agency suggested that the historical record showing the legislature's long-standing practice of adopting a special effective date for the operating budget "belies the application" of the public interest exception in this case. [Exc. 146] But the agency misconceived both the first factor and the historical record.

This Court has explained that when considering the first factor, it has "refused to apply the public interest exception to unusual factual circumstances that were unlikely to repeat themselves or situations where the applicable statute or regulation was no longer in force and was unlikely to be reinstated."[33] Here, the applicable law is a constitutional provision that remains in force; and although the legislature has typically enacted a July 1 effective date for the operating budget, it has not always done so. [R. 237-38]

Moreover, the inquiry is a forward-looking one, not a backward-looking one—the factor is not: has the issue arisen before, but rather: is it capable of repetition? Nor are the

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31 *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)).

32 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002).

33 *Id.* (footnote omitted).

factual circumstances here "unusual" and "unlikely to repeat themselves."[34] Indeed, all the elements that led to this litigation appear likely to persist in the future, with the potential that this exact situation could repeat at any time including as soon as this year.

With respect to the second factor—whether application of the mootness doctrine will prevent review of the issues—the Legislative Affairs Agency argued that "should the effective date issue arise in the future…, it seems highly unlikely it would evade review." [Exc. 146] But the opposite is true. *By definition*, any controversy about the legal effect of a statute before the constitutionally-provided default effective date will become moot within 90 days of enactment. Similarly, any dispute over the legal effect of an operating budget will be mooted by the end of the fiscal year. And the second factor is not: could the issue be resolved before it becomes moot if the parties and court pursue an extremely expedited briefing schedule? Instead, the court compares the time it typically takes to litigate with the time it takes for the issue to become moot.[35] And in making this comparison, this Court has held, for example, that the "*five-year* life span" of an oil discharge prevention and contingency plan was not long enough to guarantee judicial review before the plan expired.[36] Here, there can be no real dispute that the 90-odd days

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34 *Id*.

35 *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009) ("We have previously analyzed the second prong—whether an issue is likely to repeatedly evade review—by comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot.").

36 *Id.* at 1202 (emphasis added); *see also, id*. ("[I]t is unreasonable to assume an opponent to an approved contingency plan would be able to appeal the agency decision within the five-year duration of the plan.").

between the occurrence of an effective date dispute like this one and the moment when it will become moot is too short for litigation and, therefore, that application of the mootness doctrine would mean the issue would repeatedly evade review.[37]

The final factor is also easily met here. This Court has applied the exception in cases "where the legal power of public officials was in question."[38] Here, the attorney general's complaint challenges the authority of the Legislative Affairs Agency to spend appropriations in the operating budget before the budget's effective date. Moreover, the state's near miss with a government shutdown further demonstrates the public interest in a resolution of the underlying issues.

Although this case was mooted by the adoption of a special effective date for the operating budget, this Court should nevertheless conclude that the attorney general's claim satisfies the public interest exception to the mootness doctrine, because the issue is capable of repetition, will repeatedly evade review if the mootness doctrine is applied, and is of substantial public interest.

II. This lawsuit is not prohibited by the Alaska Constitution.

The Legislative Affairs Agency seeks to shield itself from liability for violating the law under the auspices of article III, section 16 of the Alaska Constitution, which provides:

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[37] In contrast, as the Court recognized in *Knowles*, the issue of whether an attorney general can sue the Legislative Affairs Agency would not necessarily evade review because what would moot that issue would depend on the claims brought by the attorney general. 988 P.2d at 607-08.

[38] *Fairbanks Fire Fighters*, 48 P.3d at 1169.

> 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.

In the agency's view, the attorney general is merely a stand-in for the governor suing in the name of the State and the agency is similarly a stand-in for the legislature. The agency argues that the use of such stand-ins is prohibited by this Court's decision in *Legislative Council v. Knowles.*[39]

But the Legislative Affairs Agency's argument fails because it extends the protections of article III, section 16 beyond reason and beyond the framers' intent. The attorney general's complaint was directed against the "service-related acts" of the agency, not a legislative act within the "legislature's constitutional domain."[40] Moreover, both Alaska law and this Court's recent precedent recognize the attorney general's broad common law authority to bring lawsuits to protect the public interest. The attorney general used his authority—not the governor's—to bring suit not against the legislature, but against the Legislative Affair Agency for its declared intent to continue its service-related operations at normal levels on July 1 despite the absence of an effective appropriation.

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39 988 P.2d 604 (Alaska 1999).

40 *Id.* at 609-09.

A. Article III, section 16 protects the legislature's legislative function.

This case presents an issue left open in *Knowles*: does article III, section 16 protect non-legislative actions taken by the legislative branch? The Legislative Affairs Agency argues that the Court "expansively applied" section 16 in *Knowles* and advocates for a rule that prohibits any lawsuit brought by any part of the executive branch against any part of the legislative branch. [Exc. 34] Such a rule, however, would exceed the intended scope of section 16.

In *Knowles*, the Court suggested that the scope of section 16 was not unlimited. It referred to a statement made by Delegate Victor Rivers, Chairman of the Constitutional Convention's Committee on the Executive Branch, describing the relationship between the grant of authority given to the governor in the second sentence and the restriction of that authority contained in the third sentence. Delegate Rivers 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.[41]

Rather than use this language to conclude that the legislative branch was above the law, as the Legislative Affairs Agency now argues, this Court read it as a protection of the "legislature's constitutional domain," restricting the governor's ability to challenge

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[41] *Knowles*, 988 P.2d at 609 (quoting 3 Proceedings of the Alaska Constitutional Convention 1986 (January 13, 1956) (alterations in original)).

"legislative acts" or restrict legislative power, but left open the possibility that the executive branch could challenge non-legislative actions, such as the "service related acts" of the legislative council or the Legislative Affairs Agency.[42]

An interpretation of section 16 that allows the executive branch to hold the legislative branch accountable for non-legislative acts is consistent with this Court's jurisprudence on the separation of powers. Although the legislature may be the "supreme elected body," it is not the ultimate arbiter of the constitution. It is the judicial branch that has "the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature."[43] Therefore, it is this Court—not the legislature—that must decide whether the Legislative Affairs Agency can constitutionally spend state funds without a valid *and effective* appropriation.

The problem with the Legislative Affairs Agency's understanding of article III, section 16 is that it deprives the judicial branch of the opportunity to resolve the dispute over the budget's effective date and therefore infringes on the Court's constitutional mandate. To escape the hole its analysis creates, the agency suggests that the attorney general should have sued a commissioner within the executive branch rather than bringing this claim against a legislative branch agency. [Exc. 163] For support, it noted this Court's reference in *Knowles* to *State ex rel. Hammond v. Allen*[44] and the Court's suggestion that an alternative to Governor Knowles's lawsuit against the legislative

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42 *Knowles*, 988 P.2d at 609.

43 *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982).

44 625 P.2d 844 (Alaska 1981).

council was a lawsuit brought by the State against the commissioner charged with the responsibility to enforce the law.[45]

But *Hammond* does not help the attorney general here because he lacks the necessary adversity with any of the commissioners in the executive branch.[46] In *Hammond*, the State brought a declaratory judgment action to determine the effect of a referendum to repeal the statute creating the Elected Public Officers' Retirement System.[47] In most cases, the governor suing a commissioner would not produce the necessary controversy: it worked in *Hammond* because the sixty-one elected officials also named as defendants had an interest adverse to the governor—they wanted to stay in the now-repealed retirement system.[48] The same circumstances do not exist here. Each executive branch agency recognized their constitutional obligations and began preparing for a partial government shutdown. The only agency with which the attorney general had adversity was the Legislative Affairs Agency. Therefore, to preserve this Court's constitutional mandate, article III, section 16 cannot be as broad as the Legislative Affairs Agency suggests.

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45 *Knowles*, 988 P.2d at 609 n.22.

46 *State v. ACLU of Alaska*, 204 P.3d 364, 369-70 (Alaska 2009) (stating that the declaratory judgment statute encompasses normal justiciability requirements, including adversity).

47 625 P.2d at 845.

48 The Legislative Affairs Agency recognizes as much when it questions the attorney general's ability to act independently from the governor. [Exc. 159 ("It is undisputed that (1) the [attorney general] operates under the supervision of the governor and (2) the governor exercised that supervisory authority in directing the [attorney general] to sue the [l]egislature.")].

There is a more meaningful reading of section 16, one that protects the constitutional domain of both the legislature and the judiciary. That is to limit the protections of section 16 to legislative functions and legislative actions and allow the attorney general to challenge non-legislative actions when in the public's interest. This reading preserves the separation of powers, and is also consistent with how this Court interprets legislative immunity under article II. Article II, section 6 provides in part that "[l]egislators 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." This Court has held this provision does not extend to "administrative rather than [] legislative act[s]."[49] Therefore, although a legislator cannot be called before the judiciary to answer for "core legislative functions such as voting, introducing legislation, and questioning witnesses in legislative hearings,"[50] an employee of the legislative branch can be required to answer for an unlawful firing.[51] This would presumably be as true if the suit was brought by the executive branch—through the Alaska State Commission for Human Rights—as when brought by the employee personally.

Reading article III, section 16 to have similar guideposts to those used for legislative immunity in article II allows the executive branch to hold the legislative branch accountable for noncompliance with the law it imposes on others, just as a private

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49 *State v. Haley*, 687 P.2d 305, 319 (Alaska 1984).

50 *Id.* (citing *Kerttula v. Abood*, 686 P.2d 1197, 1202 (Alaska 1984)).

51 *Id.* (concluding that the termination of a Legislative Affair Agency employee was "an administrative rather than a legislative act, and that it was therefore not within the scope of legislative immunity").

citizen might.[52] It makes no sense to allow an employee to sue the legislative council and the Legislative Affairs Agency for a "misguided application of AS 24.20.050 to a specific situation,"[53] or to allow a private corporation to sue the Legislative Affairs Agency for its failure to comply with the procurement requirements found in AS 36.30.083(a),[54] but dismiss the attorney general's complaint in this case.

Putting aside for now whether the attorney general and the Legislative Affairs Agency are merely stand-ins for the governor and the legislature, the Court should allow this lawsuit to proceed because it challenges the application of the operating budget to a specific situation and does not infringe on the legislature's internal workings or its legislative function.[55]

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[52] *Id.* ("The application of legislation to specific situations is generally not within the scope of legislative immunity."); *see also Gravel vs United States*, 408 U.S. 606, 615 (1972) (stating that implicit within the narrow scope of immunity afforded by the speech and debate clause is the notion that "legislators ought not stand above the law they create but ought generally to be bound by it as are ordinary persons.") (citing T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92–1, at 437 (1971)).

[53] *Id.*

[54] *See Alaska Bldg. Inc. v. 716 Fourth Avenue, LLC*, 2016 WL 5408056, at *5 (Alaska Superior Court March 24, 2016) (concluding that the Legislative Affairs Agency failed to comply with AS 36.30.083(a) by entering into a lease "extension"), *reversed on other grounds by Alaska Bldg, Inc. v. Legislative Affairs Agency*, 403 P.3d 1132 (Alaska 2017).

[55] *See e.g. Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982) (declining to address whether the election of the Speaker of the House of Representatives was unlawful under AS 24.10.020 because it "relates solely to the internal organization of the legislature"); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 337 (Alaska 1987) ("[O]ut of respect owed to the coordinate branch of state government, [the Court] must defer to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." (internal quotation marks omitted)).

B. The attorney general is not the governor and had independent authority not granted to any other commissioner.

Article III, section 16 applies to the governor. It "authorizes the governor to sue in the name of the state, [but] it confers no express power to sue in any narrower capacity."[56] As this Court said in *Knowles*, "[n]o other provision in article III expressly empowers the governor to raise issues of general public importance by suing in the name of the governor's office or the executive branch."[57] But the attorney general does have the authority to act in a narrower capacity and he invoked that authority in this case.

The attorney generally has common law authority to file suit to protect the public interest. The statutes creating the department of law expressly provide that the attorney general shall, in addition to a variety of specifically enumerated duties, "perform all other duties required by law or which *usually pertain to the office of attorney general in a state*."[58] This Court has interpreted this language to grant to the attorney general "those powers which existed at common law except where they are limited by statute or conferred upon some other state official."[59] Alaska law does not provide a comparable grant of authority to any other department head.[60] Moreover, the Court has further

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56 *Knowles*, 988 P.2d at 608.

57 *Id*.

58 AS 44.23.020(b)(9) (emphasis added).

59 *Public Defender Agency v. Superior Ct., Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975).

60 *See* AS 44.21.010—.020 (commissioner of administration); AS 44.25.010—.020 (commissioner of revenue); AS 44.27.010—.020 (commissioner of education); AS 44.28.010—.020 (commissioner of corrections); AS 44.29.010—.020 (commissioner of health & social services); AS 44.31.010—.020 (commissioner of labor and workforce

defined the common law powers of the attorney general, noting that: "Under the common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce Alaska's statutes."[61] Thus, this lawsuit was brought under the attorney general's common law powers to enforce Alaska law and bring an action in the public interest, not in service of the governor's responsibility to faithfully execute the laws under article III, section 16.

The superior court erred in dismissing the attorney general's lawsuit because (1) it failed to acknowledge the attorney general's independent authority; and (2) it mistakenly believed that article III, section 16 bars any part of the executive branch from pursuing any litigation against any part of the legislative branch.

Turning to the court's first error: it failed to consider the breadth of the statutory authority granted to the attorney general. To be sure, the attorney general serves at the pleasure and under the supervision of the governor, [*see* Exc. 217] but it was the legislature—not the governor—that granted the attorney general broad independent authority to act in the public's interests.[62] That authority is not dependent on the

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development); AS 44.33.010—.020 (commissioner of commerce, community, and economic development); AS 44.35.010—.020 (adjutant general); AS 44.37.010, 44.37.020 (commissioner of natural resources); AS 44.39.010—.020 (commissioner of fish and game); AS 44.41.010—.020 (commissioner of public safety); AS 44.42.010—.020 (commissioner of transportation and public facilities); AS 44.46.010—.020 (commissioner of environmental conservation).

61 *Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001).

62 *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.").

governor's consent,[63] and the fact that the governor asked the attorney general to seek judicial input does not remove the attorney general's action from the authority granted to him by AS 44.23.020(b)(9). Article III, section 16 and AS 44.23.020(b)(9) are two separate and distinct grants of authority with separate and distinct limitations.

The superior court's second error was its conclusion that article III, section 16 precludes any action brought by the executive branch against the legislature. [*See* Exc. 216-17] Building from this understanding, the court reasoned that the attorney general could not have independent authority to sue the legislative branch because, as the attorney general's supervisor, the governor could then "evade Section 16's prohibition to sue the Legislature whenever he wished simply by directing the Attorney General to bring the suit himself." [Exc. 218]. This would create, the superior court warned, a "constitutional loophole." [*Id*.]

But it is the superior court's decision, not the attorney general's action, which creates the constitutional loophole. By depriving the executive branch of any mechanism to challenge a legislative branch agency's specific application of the law, the court created a vacuum whereby the legislative branch is allowed to stand above the law it creates. That is not what the separation of powers or article III, section 16 requires.[64] This Court is constitutionally mandated to ensure compliance with the Alaska Constitution,

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63 *Compare* AS 44.23.020(b)(9), *with* Ga. Code Ann § 89–920 (OCGA § 45-15-70) (1974) (limiting the attorney general's ability to act to "when required to do so by the Governor"); *See also Perdue v. Baker*, 586 S.E.2d 606, 613 (Ga. 2003) (describing changes to statutory authority of attorney general).

64 *See supra* II.A.

including compliance by the legislature.[65] A proper interpretation of section 16, and a recognition of the power granted to the attorney general by the legislature, provides an avenue where the attorney general can protect the public interest by holding the legislative branch accountable for non-legislative actions thereby closing the loophole.

C. The attorney general is challenging an action taken by the legislative branch, but he is not challenging a legislative action.

When interpreting the speech and debate clause of the federal constitution, the United States Supreme Court has said that "legislators ought not stand above the law they create but ought generally to be bound by it as are ordinary persons."[66] That principle should hold true here. If the legislature takes action to partially shut down the government for two-and-a-half months, that law should apply equally across state government.

The superior court, as urged by the Legislative Affairs Agency, made much of the political discourse surrounding this litigation. The superior court cited public statements made by the attorney general and the governor, noting that they "consistently framed the suit as a vehicle to resolve a dispute between the executive and legislative branches." [Exc. 219] The court then pointed to the attorney general's press release, where he said "[w]hen there is a dispute between branches of government we need the court to step in."

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65 *Malone*, 650 P.2d at 356.

66 *Gravel*, 408 U.S. at 615 (citing T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92–1, at 437 (1971)).

[Exc. 219-20] The governor made similar remarks to the press when speaking of the litigation. [Exc. 220]

The attorney general acknowledges that this litigation arose in the context 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. And the agency's defense highlights the predicament that article III, section 16's prohibition of lawsuits by the governor against the legislature creates for the executive branch. When the governor and the legislature disagree about the meaning of the constitution, it is the role of the judicial branch to decide who is right, but generally speaking, article III, section 16 allows only the legislature to ask the court to decide. The executive branch must do what it believes the law requires and see if the legislature—or some other party—wants to challenge its actions. This is far from a perfect situation for the executive branch at the best of times, but in the particular circumstances of this case, it was potentially disastrous for the state and its citizens because it would have involved a government shutdown, which no branch of government wanted.

In this context, the attorney general, exercising his common law authority to bring suit in the public interest, and relying on language in *Knowles* and the position taken by the Legislative Affairs Agency sought a judicial ruling that could avert a government shutdown—either by confirming the legislature's interpretation of the law and allowing the executive branch to spend state money before the budget became effective or, in the alternative, by pushing the legislature to enact a special effective date by confirming that the executive branch interpretation was correct. The Alaska Constitution should not be

read to foreclose the only avenue open to the executive branch to avoid the catastrophe of a government shutdown. Contrary to the claims of the agency, permitting this lawsuit to proceed would not create an all-purpose work around to avoid article III, section 16's prohibition of suits against the legislature. Instead, it would merely affirm the narrow exception suggested by the *Knowles* Court allowing the executive branch to challenge administrative service-related acts by the agency or the Legislative Council.

Moreover, litigation over such administrative acts is outside the scope and purpose of the constitutional prohibition, which protects the legislature from suit over legislative acts. In previous cases, this Court has defined "legislative actions" to include actions such as veto overrides,[67] the legislature's failure to follow its own legislative rules,[68] and the House's election of its Speaker.[69] Each of these actions fit squarely within the "legislature's constitutional domain."[70] They are more akin to an action by the attorney general to challenge the legality of the operating budget by arguing, for example, that the legislature had a constitutional mandate to pass an immediate effective date. Or the attorney general suing the Legislative Affairs Agency to challenge the services it

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

68 *Abood*, 743 P.2d at 338 (stating that it "it is the legislature's prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative").

69 *Malone*, 650 P.2d at 356 (declining to address whether a representative had violated AS 24.10.020 because, even if he had, the Court would not declare the election of the representative to the Speakership invalid because it would "be an unwarranted intrusion into the business of the House").

70 *Knowles*, 988 P.2d at 609.

identified as "critical" in the event of a partial government shutdown. But those are not the attorney general's allegations in this case. Here, he is challenging the Legislative Affairs Agency's ability to keep offering services 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]

Although brought in the context of a dispute between the executive and legislative branches, this lawsuit was more akin to the lawsuit in *Haley*, where a Legislative Affairs Agency employee sued for wrongful discharge[71] or *Alaska Building Inc. v. 716 West Fourth Avenue, LLC*, where a private corporation sued the agency for violating procurement requirements.[72] This challenge was about a specific application of the law, it impacted the entire state, and it involved a constitutional provision.[73] Because the attorney general's action did not infringe on the constitutional domain of the legislature, the superior court erred by not allowing it to proceed.

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71 687 P.2d at 305.

72 2016 WL 5408056 (Alaska Superior Ct. March 24, 2016).

73 *See Abood*, 743 P.2d at 338 (noting its reliance on *United States v. Smith*, 286 U.S. 6 (1932) and reiterating that "the only justiciable limitations on a legislative body's power to adopt rules of its proceedings are that the body may not by its rules ignore constitutional restraints or violate fundamental rights." (internal quotation marks omitted)); *see also id.* ("Except in extraordinary circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules" (quoting *Malone*, 650 P.2d at 359)).

The Legislative Affairs Agency is not above the law and nothing in the constitution prevents all lawsuits by the executive branch against the legislature. Although a judicial determination regarding when appropriations made by the operating budget may be spent would assist political actors to make more informed decisions, potentially averting a government shutdown, that fact does not transform the attorney general's claims into something they are not. If the attorney general's interpretation of the constitution and the budget bill is correct, the Legislative Affairs Agency's plan to treat the legislation as a "functional budget" and continue operations as normal was not a "political decision" that was somehow above the law. The agency should be just as interested as the attorney general in a judicial determination resolving this dispute.

III. The superior court erred in granting the Legislative Affairs Agency attorneys' fees.

The superior court erred by failing to consider AS 09.60.010(c)(2), which protects constitutional claimants such as the attorney general from an attorneys' fee award. The court also erred when it held Alaska's fee shifting provisions apply to intragovernmental disputes such as this dispute between the attorney general and the Legislative Affairs Agency.

A. The attorney general is a constitutional litigant entitled to the protection of AS 09.60.010(c)(2).

The attorney general brought this lawsuit in the public interest requesting a declaratory judgment that article II, section 18 prevents state agencies—including the Legislative Affairs Agency—from spending state funds appropriated in the FY 2022 operating budget before the effective date of that law. Because his complaint sought to

enforce a constitutional provision, he is entitled to the protection against an attorney fee award provided by AS 09.60.010(c)(2) to unsuccessful constitutional litigants.

Subsection (c)(2) shields certain constitutional litigants from an adverse attorney's fee award. It requires a nonprevailing party to show three conditions: (1) "the litigant must have brought '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'"; (2) "the action or appeal asserting the right was not frivolous"; and (3) the litigant "did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved."[74]

Anticipating the attorney general's response to its motion for attorneys' fees, the Legislative Affairs Agency made two arguments that he had not satisfied the first condition. These arguments not only lack merit, but if accepted would gut the protections provided to many constitutional litigants by the statute.

First, the agency argued that because the court did not reach the attorney general's underlying claim, whether it was a constitutional claim is "largely irrelevant." [Exc. 227] In its view because the "constitutional harm" upon which its defense relied "and the Court's ruling regarding it preceded any consideration of the merits of the [attorney general's] suit," the attorney general cannot be a constitutional claimant. [*Id.*] But the agency cited no authority for this novel argument, doubtless because it has invented this

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[74] *Manning v. State Dep't of Fish & Game*, 420 P.3d 1270, 1283 (Alaska 2018) (internal quotation marks omitted).

exception to the statute out of whole cloth. Neither the language of the statute, nor any Alaska precedent of which the attorney general is aware, supports the agency's contention that plaintiffs whose complaints fail to survive a motion to dismiss or whose claims are dismissed on jurisdictional grounds are not covered by the protections of AS 09.60.010(c)(2).

Second, the Legislative Affairs Agency suggested that a plaintiff who complains only about the administrative acts of a government agency is not covered by the statute, asserting: "The [attorney general] cannot be a constitutional claimant while simultaneously claiming that his lawsuit is 'aimed only at administrative acts." [Exc. 228] Once again, the agency cited no authority for this extraordinary proposition, likely because it is absurd to suggest that a government agency cannot violate the constitution or constitutional rights through solely administrative acts. If this were indeed the rule, the statute would offer little protection to the majority of constitutional litigants, who more often than not sue the State over administrative decisions and policies.

For example, this Court recently held that a person appealing the administrative revocation of his driver's license on the grounds that the Division of Motor Vehicles administrative proceedings violated his due process rights could be a constitutional litigant under AS 09.60.010(c)(2), if he did not have a sufficient economic incentive to pursue the appeal.[75] The administrative revocation of a driver's license is an administrative act, but administrative acts must still comply with the constitution.

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[75] *Barnebey v. Dep't of Admin., DMV*, 473 P.3d 682,692-93 (Alaska 2020).

Similarly, in *Alaska Conservation Foundation v. Pebble Partnership*, a case cited by the agency in its motion, [Exc. 226 n.6] the Court held that the Alaska Conservation Foundation was a constitutional litigant when it sued the Department of Natural Resources for violating constitutional notice requirements when it issued land and water use permits to Pebble Limited Partnership.[76] Issuing permits is an administrative function of the Department of Natural Resources, and the department must comply with the constitution in performing its administrative functions.

Employing staff and providing services to legislators are administrative functions of the Legislative Affairs Agency. Like any government agency, the agency must comply with the constitution, even in its administrative acts. And if a plaintiff alleges that an administrative act of the agency violates the constitution—as the attorney general did here—that plaintiff is protected from an award of attorneys' fees against him by the plain terms of AS 09.60.010(c)(2). Because the attorney general is a constitutional litigant, he satisfies the first condition required to invoke the exception under subsection (c)(2).

By challenging only the first requirement of the exception in its motion, the Legislative Affairs Agency appeared to concede that the attorney general did not have a sufficient economic incentive to bring this suit and that his claim was not frivolous.[77] Yet, in its reply and again during oral argument, the Legislative Affairs Agency argued that

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[76] 350 P.3d 273, 286 (Alaska 2015).

[77] *Cf. Manning*, 420 P.3d at 1283 ("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.").

the superior court should deny the attorney general's request because he had not met his burden of establishing all three conditions required to apply the exception. [Exc. 243-45; Tr. 7][78] For these reasons, the attorney general addressed those conditions during the oral argument before the superior court and will again here. [*See* Tr. 12-17]

When considering whether a claim is frivolous for purposes of the constitutional litigant exception, courts apply the same standard of frivolousness used in the Civil Rule 11 context.[79] That is an objective standard—one that allows room for creative advocacy and encourages litigants to pursue factual or legal theories that challenge and push the boundaries of the law.[80]

The Legislative Affairs Agency did not make a serious argument that the attorney general's claim was frivolous. [Exc. 244-45; Tr. 7-10] This was more of a "gotcha" moment. The agency argued that because the attorney general did not expressly say his claim was not frivolous in his opposition he did not meet his burden and therefore he is not entitled to the exception. Courts should not allow for such gamesmanship. This Court has not yet addressed whether state agencies can rely on a retroactivity clause to immediately implement an operating budget that is not yet effective under the plain language of the Alaska Constitution. Similarly, in *Knowles*, the Court left open the possibility that the executive branch could challenge the legality of a non-legislative action taken by the service arm of the legislative branch. It is obvious that the attorney

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78 *Citing Thomas v. State*, 377 P.3d 939, 952 (Alaska 2016).

79 *Manning*, 420 P.3d at 1283.

80 *Id.* at 1283-84.

general's claim was not frivolous and that he meets that requirement of AS 09.60.010(c)(2).

The attorney general also satisfies the third condition—he did not have a sufficient economic incentive to pursue this lawsuit. The Legislative Affairs Agency argued otherwise to the superior court, reimagining what the attorney general actually asked the court to do. [*See* Exc. 244] The attorney general did not, as the agency suggested, ask for a judgment allowing state agencies to spend money. [*Id.*] To the contrary, the attorney general brought this lawsuit to *enforce* the budget as it was passed by the legislature and prevent the Legislative Affairs Agency from unconstitutionally spending money. There is no economic incentive to enforcing a legislative action to partially shut down the government.

Because the attorney general meets each of the three conditions required to invoke the exception under AS 09.60.010(c)(2), the superior court erred in awarding the Legislative Affairs Agency partial attorneys' fees under Civil Rule 82.

B. Ordering the government to pay itself attorneys' fees is not what Alaska's fee shifting provisions require.

The Court should deny the Legislative Affairs Agency's motion for fees under either AS 09.60.010(c)(1) or Alaska Civil Rule 82 for another reason—it is an exercise in futility. The agency's motion asks this Court to participate in a wasteful bureaucratic accounting exercise whereby state money will be moved around on paper between one government agency and another. The motion ignores the reality that the agency is an agency of Alaska's state government and that the attorney general is also an agent of

Alaska's state government. Because the legislature already has the power to pay itself for its full reasonable attorney's fees, a court order is not required and the Court should not endorse such a pointless exercise.

CONCLUSION

For these reasons, the Court should reverse the superior court and remand the matter for further proceedings.