

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-23-52

WILLIAM CLARDY, et al.,
Plaintiffs,

v.

TROY D. JACKSON, in his official capacity
as President of the Maine Senate; RACHEL
TALBOT ROSS, in her official capacity as
Speaker of the Maine House of
Representatives; and JANET MILLS, in her
official capacity as Governor of the State of
Maine,
Defendants.

ORDER ON MOTION TO DISMISS

This case arises from Governor Mills’s March 31, 2023 proclamation convening a special session of the Legislature, pursuant to which President Jackson, Speaker Ross, and other members of the Legislature assembled. Plaintiffs—consisting of taxpayers, a non-profit organization, and two members of the Maine Legislature—challenge the constitutionality of Defendants’ actions, and have filed an Amended Complaint seeking declaratory and injunctive relief pursuant to the Declaratory Judgments Act, 14 M.R.S. § 5951, *et seq.* In the currently pending motion, Defendants ask the Court to dismiss the Amended Complaint in its entirety pursuant to M.R. Civ. P. 12(b)(1) and M.R. Civ. P. 12(b)(6). For the reasons that follow, Defendants’ motion is granted.

BACKGROUND

Maine legislators serve two-year terms, with the Legislature holding a session during each of these years. Me. Const. art. IV, pt. 1, § 2; art. IV, pt. 3, § 1. The “First Regular Session”

begins on the first Wednesday of December following the November general election. *See* Me. Const. art. IV, pt. 3, § 1. The statutory deadline for the end of the First Regular Session is the third Wednesday in June. *See* 3 M.R.S. § 2. The “Second Regular Session” begins on the first Wednesday after the first Tuesday in January of the subsequent year. *See* Me. Const. art. IV, pt. 3, § 1. The statutory deadline for the end of the Second Regular Session is the third Wednesday in April. *See* 3 M.R.S. § 2.¹

In addition to the First and Second Regular Sessions, “special sessions” may be called by the Legislature and the Governor. Me. Const. art. IV, pt. 3, § 1; art. V, pt. 1, § 13. A special session may be convened by the Legislature, “on the call of the President of the Senate and Speaker of the House, with the consent of a majority of the Members of the Legislature of each political party, all Members of the Legislature having been first polled.” Me. Const. art. IV, pt. 3, § 1. The Governor, meanwhile, may convene the Legislature “on extraordinary occasions.” Me. Const. art. V, pt. 1, § 13.

The events giving rise to the present action began on March 30, 2023. On that day, the First Regular Session of the 131st Maine Legislature passed an appropriations bill for the upcoming fiscal years. Pls.’ Am. Compl. ¶ 23. To assure the continuous funding of government operations, the appropriations legislation needed to take effect no later than July 1, 2023. Pls.’ Am. Compl. ¶¶ 28-30. While emergency legislation passed by a legislative supermajority takes effect immediately upon the Governor signing it into law (Pls.’ Am. Compl. ¶ 31; Me. Const. art. IV, pt. 3, § 16), nonemergency legislation passed by a simple majority takes effect 90 days after

¹ While the Maine Constitution does not limit the type of business that may be conducted during the First Regular Session, it limits the business of the Second Regular Session to budgetary matters, legislation in the Governor’s call, and other specifically enumerated items. *See* Me. Const. art. IV, pt. 3, § 1.

the legislature “recess[es],” i.e., adjourns *sine die*.² Me. Const. art. IV, pt. 3, § 16; *Opinion of Justices*, 2015 ME 107, ¶ 37, 123 A.3d 494.

The facts of what occurred are not really in dispute and are well described in Amended Complaint filed by Plaintiffs. The appropriations bill, which was passed by only a simple majority, was nonemergency legislation; thus, its effective date was dependent on the timing of the Legislature’s adjournment *sine die*. Pls.’ Am. Compl. ¶¶ 25-27; Me. Const. art. IV, pt. 3, § 16. As a practical matter, this meant that the Legislature needed to adjourn *sine die* sufficiently in advance of the commencement of the 2023-2024 fiscal year (that is, at least 90 days before July 1, 2023) in order to guarantee that the appropriations legislation would be in effect for the upcoming fiscal year. Pls.’ Am. Compl. ¶¶ 28-30.

Apparently mindful of this timeline, the Maine Legislature adjourned *sine die* on March 30, 2023 following its passage of the appropriations bill. Pls.’ Am. Compl. ¶¶ 43, 46. Their adjournment *sine die* was significant not only because of the resulting impact on the effective date of the appropriations legislation, but also because it officially marked the end of the First Regular Session. Pls.’ Am. Compl. ¶ 16. Prior to adjourning, the Legislature voted to carry over its unfinished business “to a subsequent special or regular session of the 131st Legislature in the posture in which they were at the time of adjournment of the First Regular Session of the 131st Legislature.” Pls.’ Am. Compl. ¶¶ 41-42.

Also on March 30, 2023, Defendants Ross and Jackson polled members of both houses, inquiring as to whether they wished to return for a special session. Pls.’ Am. Compl. ¶¶ 33-37; Me. Const. art. IV, pt. 3, § 1. Those polls revealed that a majority of only *one* political party

² “*Sine die*” is the Latin term for “without day.” *Opinion of Justices*, 2015 ME 107, ¶ 16 n.3, 123 A.3d 494.

consented to the convening of a special session, and thus, a special session could not be convened on the call of Speaker Ross and President Jackson as presiding officers of the Legislature. Pls.' Am. Compl. ¶¶ 36-37; Me. Const. art. IV, pt. 3, § 1.

On March 31, 2023, Governor Mills issued a proclamation declaring an extraordinary occasion and convening the Legislature for a special session. Pls.' Am. Compl. ¶¶ 48, 51; Ex A.

The proclamation stated:

WHEREAS, there exists in the State of Maine an extraordinary occasion arising out of the need to resolve many legislative matters pending at the time of the adjournment of the First Regular Session of the 131st Legislature of the State of Maine; and

WHEREAS, the public health, safety and welfare requires that the Legislature resolve these pending matters as soon as possible, and in any event prior to the date of the Second Regular Session of the 131st Legislature of the State of Maine, including but not limited to the state budget, pending legislation, pending nominations of state board and commission members, and pending nominations of judicial officers by the Governor requiring legislative confirmation;

NOW, THEREFORE, I, JANET T. MILLS, Governor of the State of Maine, by virtue of the constitutional power vested in me as Governor pursuant to Article V, Part I, Section 13 of the Constitution of the State of Maine, do convene the Legislature of this State, and hereby request the Representatives to assemble at ten o'clock and the Senators to assemble at ten o'clock in the morning in their respective chambers at the Capitol in Augusta on Wednesday, April 5, 2023, in order to receive communications, resolve pending legislation carried over from the First Regular Session of the 131st Legislature and act upon pending nominations and whatever other business may come before the legislature.

Pls.' Am. Compl. Ex A.

Pursuant to the Governor's call, the 131st Legislature convened its First Special Session on April 5, 2023. Pls.' Am. Compl. ¶¶ 63-64; *Opinion of the Justices*, 2023 ME 34, ¶ 6, 295 A.3d 1212. While in special session, the Legislature passed various laws and acted on "legislative items which had not been finally disposed of at the time of the March 30, 2023, adjournment *sine die*." Pls.' Am. Compl. ¶¶ 64, 66.

By Amended Complaint dated April 27, 2023, Plaintiffs contend that the special session of the Legislature ordered by the Governor and conducted by Defendants Jackson and Ross violates the Maine Constitution. In Count I, Plaintiffs ask the Court to declare the Governor's proclamation unconstitutional and enjoin the Legislature from convening pursuant to the Governor's call. Count II seeks declaratory and injunctive relief halting the legislative work of the First Special Session; nullifying the legislation passed during the special session; and requiring that all matters "not finally disposed of at the time of [the Legislature's] adjournment sine die . . . remain held over . . . until the legislature reconvenes in a manner consistent with the Maine State Constitution."

Defendants thereafter moved to dismiss the Amended Complaint in its entirety, raising issues regarding standing, legislative immunity, separation of powers, and the reviewability of the Governor's proclamation, *inter alia*. As this case raises a number of significant legal questions of first impression, the Court encouraged the parties to agree to a report of at least some of those questions directly to the Law Court pursuant to Rule 24 of the Maine Rules of Appellate Procedure. Ultimately, however, the parties could not reach an agreement to do so. Defendants' motion to dismiss is therefore in order for decision.

STANDARD OF REVIEW

To the extent Defendants challenge this Court's jurisdiction over Plaintiffs' claims pursuant to M.R. Civ. P. 12(b)(1), that presents a question of law. *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335. "When a motion to dismiss is based on the court's lack of subject matter jurisdiction, [the court] make[s] no favorable inferences in favor of the plaintiff." *Id.*

A motion to dismiss under M.R. Civ. P. 12(b)(6), meanwhile, "tests the legal sufficiency of the complaint." *Livonia v. Town of Rome*, 1998 ME 39, ¶ 5, 707 A.2d 83. "For purposes of a

Rule 12(b)(6) motion, the material allegations of the complaint must be taken as admitted.” *Id.* “In reviewing a dismissal, [the court] will examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* “A dismissal should occur when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claims.” *Id.* (quotation marks omitted).

DISCUSSION

Among other reasons, Defendants contend that dismissal is required because the Governor’s proclamation is not subject to judicial review and because principles of legislative immunity and separation of powers otherwise preclude the Court from granting the relief requested.³ For the reasons below, the Court agrees.

A. The Governor’s Proclamation is Not Subject to Judicial Review

In her proclamation, the Governor relied on her constitutional authority in Article V, Part I, Section 13 to convene a special session of the Legislature based on an “extraordinary occasion.” The Governor did not claim any constitutional authority to order an extension of the First Regular Session or otherwise alter the length of a regular session of the Legislature. The Amended Complaint acknowledges as much, recognizing that the Governor called for a special

³ Additionally, Defendants ask the Court to dismiss the Amended Complaint on the basis of standing and because the Declaratory Judgments Act (“DJA”) does not provide a cause of action. Given the Court’s disposition of this matter on the separate grounds discussed herein, the Court need not address the issues of standing raised by Defendants. Rather, for purposes of this motion, the Court assumes without deciding that at least one Plaintiff has standing to bring this action. Similarly, the Court need not conclusively resolve whether the DJA provides a cause of action, other than to note that Defendants’ position is seemingly at odds with recent decisions of the Law Court. *See, e.g., Avangrid Networks, Inc. v. Sec’y of State*, 2020 ME 109, 237 A.3d 882.

session after the First Regular Session officially adjourned *sine die*. Pls.’ Am. Compl. ¶¶ 46, 51. Plaintiffs furthermore do not deny the Governor’s constitutional authority to call a special session in certain circumstances, i.e., when an “extraordinary occasion” necessitates it. Me. Const. art. V, pt. 1, § 13. Rather, Plaintiffs assert that the Governor “contrived an ‘extraordinary occasion’” and that “unfinished legislative business” does not constitute an “extraordinary occasion” upon which to call a special session. Pls.’ Am. Compl. ¶¶ 76-78. Indeed, the notion that there was no *legitimate* “extraordinary occasion” is central to most of the claims in the Amended Complaint.

The Court, however, concludes that the critical premise underlying the Amended Complaint—that the Governor erroneously declared an “extraordinary occasion”—is not subject to judicial review, as the Governor enjoys plenary authority to determine when there is an extraordinary occasion for convening the Legislature. While there are few decisions addressing the Governor’s constitutional power to call a special session pursuant to Article V, Part I, Section 13, the Supreme Judicial Court (“SJC”) opined on the Governor’s authority in *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940). In that case, the Governor declared an extraordinary occasion and issued a proclamation convening a special session. *Id.* The question before the court was whether the Governor could revoke the initial proclamation by issuing a subsequent proclamation before the Legislature convened. *Id.* at 420. The SJC answered this question in the affirmative.

While the court acknowledged that there was no express constitutional provision authorizing the Governor to revoke a call, it reasoned that “such power [wa]s necessarily inferable from that clearly granted.” *Id.* Notably, the court looked to the clear grant of authority in Article V, Part I, Section 13, which provides that the Governor ““may, on extraordinary

occasions, convene the Legislature.” *Id.* (quoting Me. Const. art. V, pt. 1, § 13). The SJC continued: “*The Governor alone is the judge of the necessity for such action, which is not subject to review.*” *Id.* (emphasis added). In keeping with the Governor’s plenary authority in this regard, the SJC concluded that the Governor had the discretion to revoke his earlier call for a special session. *Id.* Moreover, “[s]uch revocation, if made, would not preclude the Governor from issuing a new Proclamation to convene the Legislature in Special Session at a date certain, if and when, in his judgment, occasion may require” *Id.*

While Plaintiffs seek to dismiss the above-italicized language as mere dicta, the notion that Article V, Part I, Section 13 vests absolute power in the Governor was critical to the SJC’s ultimate conclusion regarding the Governor’s discretion to revoke a call. And although *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940), constitutes a nonbinding advisory opinion, it nevertheless “provide[s] necessary guidance and analysis for decision-making by the other branches of government.” *Opinion of the Justices*, 2023 ME 34, ¶ 9, 295 A.3d 1212.

Even if the language is dicta, the Court finds no reason to reject it as unsound. In Article V, Part I, Section 13, the authority to convene the Legislature upon extraordinary occasions is textually committed to the Governor. Me. Const. art. V, pt. 1, § 13. The constitution does not define what constitutes an “extraordinary occasion,” nor does it refer the settlement of such a question to the judicial branch. *McConnell v. Haley*, 711 S.E.2d 886, 887 (S.C. 2011); *Farrelly v. Cole*, 56 P. 492, 498 (Kan. 1899). The text of the constitution therefore suggests that “[t]he Governor alone is the judge of the necessity for [calling a special session]” pursuant to Article V, Part I, Section 13. *In re Opinion of the Justices*, 12 A.2d 418, 420 (Me. 1940). Moreover, contrary to Plaintiffs’ suggestions, a conclusion in this regard does not mean that the Governor may abuse the power in Article V, Part I, Section 13 without recourse. Indeed, the Legislature’s

power to impeach places a necessary check on governors who abuse their authority. *See* Me. Const. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7.⁴

In short, the Court finds it appropriate to adhere to the principle articulated in *In re Opinion of the Justices*, 12 A.2d 418 (Me. 1940): The Court concludes that the Governor alone is the judge of what constitutes an extraordinary occasion for convening the Legislature, and her determination is not subject to judicial review. Accordingly, any error in the Governor's decision to call a special session does not provide a basis for judicial relief.

B. Legislative Immunity and Separation of Powers

To the extent Plaintiffs seek relief based on the actions of Speaker Ross and President Jackson—including their assembling of the Legislature pursuant to the Governor's proclamation and their consideration of “legislative items which had not been finally disposed of at the time of the March 30, 2023, adjournment *sine die*” (Pls.’ Am. Compl. ¶ 64)—overlapping principles of legislative immunity and separation of powers prevent the Court from granting the relief requested.

Under the Maine Constitution, governmental powers are “divided into 3 distinct departments, the legislative, executive and judicial.” Me. Const. art. III, § 1. The separation of powers provision provides that “[n]o person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.” Me. Const. art. III, § 2. The Law Court has held that the “Legislature acts within its constitutional sphere of activity when it exercises discretion to reject

⁴ That the Governor enjoys plenary authority to determine what constitutes an “extraordinary occasion” is likewise consistent with the prevailing view articulated by courts in other jurisdictions. *See, e.g., McConnell*, 711 S.E.2d at 887; *In re Platz*, 108 P.2d 858, 863 (Nev. 1940); *Bunger v. State*, 92 S.E. 72, 73 (Ga. 1917); *Farrelly*, 56 P. at 496-500.

or enact legislation.” *Lightfoot v. State of Me. Legislature*, 583 A.2d 694, 694 (Me. 1990). Thus, “[t]o preserve legislative independence within this sphere of legitimate legislative activity[,] the Legislature enjoys absolute common law immunity from” actions seeking declaratory and injunctive relief. *Id.*

Moreover, as a matter of justiciability, the Court must be satisfied that its adjudication of an issue observes constitutionally-mandated separation of powers. *Maine Senate v. Sec’y of State*, 2018 ME 52, ¶ 27, 183 A.3d 749 (“the requirement of justiciability demands that our authority to decide a matter is limited by that most basic tenet of our governmental structure—the constitutionally-mandated separation of powers”). Article III, Section 2 “does not require that the Judicial Branch shrink from a confrontation with the other two coequal branches.” *Id.* ¶ 28. However, the Court should “refus[e] to adjudicate matters where the adjudication ‘would involve an encroachment upon the executive or legislative powers.’” *Id.* The relevant inquiry is whether the particular power has been “explicitly granted to one branch of state government, and to no other branch.” *State v. Hunter*, 447 A.2d 797, 800 (Me. 1982). If the answer is yes, “article III, section 2 forbids another branch to exercise that power.” *Id.* This approach is akin to a standard used by federal courts to ascertain whether an issue is nonjusticiable as a “political question”; that standard asks “whether there is a ‘textually demonstrable constitutional commitment’ of the issue to another branch of the government.” *Id.* at 800 n.4.

Here, in keeping with separation of powers principles, the Court concludes that Speaker Ross and President Jackson are entitled to legislative immunity, and in any event, Plaintiffs’ challenges to their actions are nonjusticiable. Speaker Ross and President Jackson acted within the sphere of legitimate legislative activity, both in convening a special session pursuant to the

Governor's proclamation and in passing laws regarding matters carried over from the regular session.

The Maine Constitution does not dictate how the Legislature must respond to a Governor's call for a special session or describe any circumstances warranting repudiation of such a call. Nor does it limit the scope of the Legislature's power upon being called into session by the Governor. Rather, the constitution states that the Legislature "shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." Me. Const. art. IV, Pt. 3, § 1. There is no constitutional language limiting this "full power and authority" to a regular session or prohibiting the Legislature's consideration of material carried over from a prior session. Under these circumstances, the Court concludes that Speaker Ross and President Jackson are entitled to legislative immunity, as their actions were within the sphere of legitimate legislative activity.


Under the Maine Constitution, the authority to respond to a Governor's call for a special session and to legislate during it are demonstrably committed to the Legislature. Therefore, where such a commitment exists, the Court cannot encroach upon the functions of the Legislature. Accordingly, the Court separately concludes that the challenges directed at Speaker Ross and President Jackson are nonjusticiable.

CONCLUSION

The entry is: Based on the foregoing, Defendants' motion to dismiss the Amended Complaint is GRANTED.

The clerk is directed to incorporate this order on the docket by reference pursuant to M.R.
Civ. P. 79(a).

Date: October 13, 2023


Michaela Murphy
Justice, Maine Superior Court