IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

NGARCHELONG STATE GOVERNOR RICHARD NGIRATERANG,
Appellant,
v.
19TH NGARCHELONG STATE ASSEMBLY, Represented by its Speaker DWIGHT NGIRAIBAI,
Appellee.

Cite as: 2021 Palau 18
Civil Appeal No. 20-032
Appeal from Civil Action No. 20-006

Argued: April 14, 2021
Decided: July 7, 2021

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellee ..... Raynold B. Oilouch

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
GREGORY DOLIN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

NGIRAIKELAU, Chief Justice

[¶ 1] Before this Court are representatives from the executive and legislative branch of Ngarchelong State arguing the legality of the process leading to the enactment of the current version of the state's 2019 budget bill. Because the record below fails to contain sufficient evidence to determine the outcome of this case, we **VACATE** the decision below and **REMAND** for additional proceedings consistent with this decision.

BACKGROUND

[¶ 2] The Unified State Budget for Ngarchelong State for Fiscal Year 2019 initially followed the typical legislative process by first being introduced by the Governor, Richard Ngiraterang ("Appellant"), to the 19th Ngarchelong State Assembly ("Appellee"). Appellee made several amendments and passed an amended budget bill, known as NSGPL No. 19-01, D1, D2, D3 (the "Budget Bill"). This Budget Bill was then presented to Appellant but approval for the bill as drafted was not obtained.

[¶ 3] Rather, Appellant included "hashmarks deleting dollar amounts contained in the [Budget Bill] transmitted to him . . . along with typed new [reduced] dollar amounts." Decision and Orders on Motion for Summary Judgment at 5 (Nov. 25, 2020). Following these amendments, in parallel, Appellant signed this amended bill into law (the "Appealed Law") and sent a letter to Appellee with a list of the "itemized disapprovals and reductions" contained in the Appealed Law as compared to the Budget Bill. *Id*.

[¶ 4] Appellee sought to override the Appealed Law during its Fourth Special Session, which gathered ten members that unanimously voted against Appellant's "disapprovals and reductions" in the Budget Bill. Following notification to Appellant, Appellee's override was rejected and the Appealed Law remains to this day.

[¶ 5] In response, Appellee sought judicial relief in the Trial Division and prevailed on its motion for summary judgment against Appellant (then Defendant). The trial court issued a Judgment on December 3, 2020 (the "Judgment"), finding that Appellant violated the Constitution of Ngarchelong State (the "Ngarchelong Constitution") by signing into Law the revised Budget Bill with the disapproved and reduced items. The trial court further found that Appellee had authority to override amendments made by Appellant and did in fact do so during the Fourth Special Session. Therefore, Appellant also violated the Ngarchelong Constitution by refusing to acknowledge the override by Appellee.

[¶ 6] The Decision and Orders on the Motion for Summary Judgment and the Judgment are now on appeal in front of this Court based on the argument that the Ngarchelong Constitution does not provide the Assembly overriding

authority over the Governor's disapprovals or reductions of appropriation bills and in any event, Appellee did not muster the necessary number of votes to exercise its veto override power.

STANDARD OF REVIEW

[¶ 7] We review the trial court's conclusions of law, including questions of constitutional interpretation, de novo. *See Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4; *Otobed v. Palau Election Commission*, 20 ROP 4, 7 (2012). Furthermore, we review the trial court's ruling on a motion for summary judgment de novo, "employing the same standards that govern the trial court and giving no deference to the trial court's findings of fact." *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 158 (citing *ROP v. Reklai*, 11 ROP 18, 20-21 (2003)).

DISCUSSION

I.

[¶ 8] Before turning to the merits of the case, we must ensure that we have jurisdiction over the matter.[1] Indeed, "this Court is duty-bound to pay heed – sua sponte as the case may be – to this issue: '[A] court has the power and duty to examine and determine whether it has jurisdiction of a matter presented to it.'" *Rechetuker v. Ministry of Justice*, 17 ROP 25, 27 (2009) (quoting *Roman Tmetuchel Family Trust v. Ordomel Hamlet*, 11 ROP 158, 160 (2004)(quoting 20 Am. Jur. 2d Courts § 60 (1995)). For this, we look at jurisdiction both from the constitutional as well as the prudential limitations on our power.

A.

[¶ 9] Our judicial power is constitutionally granted under Article 5, which provides that: "[t]he judicial power shall extend to all matters in law and equity." Const., art. X, § 5. When determining the scope of our jurisdiction we are bound by the limits imposed by our Constitution. Based on our constitutional grant of power language, we have found that "the courts should exercise jurisdiction over all matters which traditionally require judicial

[1] This is not an issue raised by the parties but we raise it sua sponte as part of our obligation to ensure we have jurisdiction before hearing the merits of a case.

resolution." *Koror State Legislature v. KSPLA*, 2017 Palau 28 ¶ 8. Matters which traditionally require judicial resolution have been found to extend to "whether another branch of government has exceeded whatever authority has been committed to it," *Francisco v. Chin*, 10 ROP 44, 49-50 (2003) (quoting *Becheserrak v. Koror State*, 3 ROP Intrm. 53, 55 (1991)). This is the situation faced in the current dispute whereby the interplay of the Governor's veto power and the Assembly's override power under the Ngarchelong Constitution are questioned. Finding jurisdiction to address this claim therefore falls well within the four corners of our constitutional grant of power.

[¶ 10] We are not bound by the limiting words of foreign Constitutions and case law. *Compare* Const., art. X, § 5 ("The judicial power shall extend to all matters in law and equity"), *with* U.S. Const., art. III, § 2 (referencing cases and controversies, which is not found in the Palauan Constitution). While we acknowledge that they can provide persuasive authority, *see Kazuo v. ROP*, 1 ROP Intrm. 154, 172 n.43 (1984), we must first and foremost adhere to the constitutional principles and language that our Framers have set-out, *see Gibbons v. ROP*, 1 ROP Intrm. 634, 637 (1989). As discussed above, our Constitution grants us broad powers and does not include the same limitations as may be found for example in the U.S. Constitution. Our Constitution's language does not have any limitations requiring a finding of injury for standing. Just because it does not align with the U.S. approach, our Palauan rules are not to be dismissed. Indeed, while "we may look to analogous United States law for guidance" on our constitutional matters, *Republic of Palau v. Carreon*, 19 ROP 66 (2012), we are "not bound to mechanically embrace United States case law," or the rationale set forth therein, when Palau may have considerations specific to our country based on the history and practice herein, *Yano v. Kadoi*, 3 ROP Intrm. 174, 184 (1992). For this reason, we disagree with the dissent which looks to foreign law to justify limitations that are not applicable to our Palauan judiciary.

[¶ 11] Last, we have clear jurisprudence on the topic. *See Koror State Legislature*, 2017 Palau 28 ("KSPLA"). We are bound by "[t]he doctrine of stare decisis [which] requires that rules of law when clearly announced and established by a court of last resort should not be lightly disregarded and set aside but should be adhered to and followed." *Nakamura v. Sablan*, 12 ROP 81 (2005) (Ngiraklsong, C.J., concurring) (internal quotations omitted). While

we acknowledge the dissent's recitation of the legal history leading-up to KSPLA, this Court finds that this is the current guiding and binding authority and we decline to overturn its holding as it aligns with the constitutional grant of power to the judiciary as discussed above. *See Markub v. KSPLA*, 14 ROP 45, 49 n.5 (2007) ("In general, courts try not to overrule recent precedent. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled ….").

B.

[¶ 12] Beyond the constitutional limitations discussed above, we look to the issue of justiciability, whereby we look from a perspective of whether the case is justiciable for prudential reasons. *See Koror State Legislature*, 2017 Palau 28 ¶ 24. Namely, we look to ascertain whether the challenger "is a proper party to request an adjudication of this particular issue." *Id.* at 30. Here again we diverge from the dissent and find that this matter is within our purview. While we should shy away from opining in cases that are not "ripe, [] moot, would lead to an advisory opinion, or presents a political question," *id.* at 27, we will not shy away from resolving cases such as this one, where there is a blatant issue of constitutional interpretation between two branches of Ngarchelong state, leading to a breakdown in the legislative process. While the 2019 budget only ran through September 30, 2019, we do not find that the case is moot as this involves two branches of the state government where the actions taken and the issues posed remain unresolved. This power struggle between the two branches creates a climate for an ongoing issue, which will spur-up any time the Governor seeks to exercise their veto right, which the Assembly seeks to oppose. *Contra Ngirameketii v. Ngirarsaol*, 2021 Palau 1 (finding the legal issue surrounding impeachment moot because the former Governor of Ngiwal State was no longer in office and thus any reoccurrence was found too speculative). Left unresolved, the constitutional issue as to what constitutes a supermajority vote permeates through the constitution of the Assembly and/or Governor, newly elected or not. These constitutional issues need a resolution reflecting the intent of the Framers and should not create inconsistency in the application of the Ngarchelong Constitution depending on the whims of the elected government. Here, the parties represent the legislative branch (Plaintiff) on one side and the executive branch on the other side and are well positioned to gather the necessary evidence to ascertain this intent.

Because of these facts, we are assured in this case that "the plaintiff will bring concrete adversity to the presentation of the dispute and that it will not be asked to decide ill-defined questions" and thus this case is rightfully brought before the court. *Id.* at 30.

II.

[¶ 13] Turning to the merits of the case, Appellant argues that his actions related to the Budget Bill, resulting in the Appealed Law, did not constitute a "veto" as contemplated by Article VII, Section 6(b) of the Ngarchelong Constitution and thus did not trigger the veto override power of the Assembly.

A.

[¶ 14] Appellant claims that his actions fell under Section 6(d), which he alleges operates independently from Section 6(b), and does not give rise to the override power of the Assembly. In such situations, Appellant argues that the correct procedure would have been for the Assembly to pass a new law, reinstating the excluded line items, in the form of an amendment to the Appealed Law, rather than seek to exercise a veto override.

[¶ 15] We find this argument lacking and see it as a matter of semantics. Depending on how the Governor formulates the "amendment," he could prevent the action from falling within the veto process and associated checks and balances. Thus, becoming an unfettered right to amend a proposed bill from the Assembly, under the guise of being a 'reduction or disapproval' instead of a 'veto.' Furthermore, by this logic, the Governor and the Assembly could enter into an endless loop, whereby the new proposed bill amendment *ad infinitum* gets reduced after presentment, in effect depriving the Assembly of any override power as contemplated by the Ngarchelong Constitution. This is an untenable situation and goes against the principle of constitutional interpretation that each section has meaning and the interpretation of one should not render another obsolete. *See Otobed*, 20 ROP at 8 (2012) ("[H]armony in constitutional construction should prevail whenever possible . . . . Every effort should be made to construe constitutional provisions harmoniously, and no provision should be construed to nullify or impair another"). Therefore, we find that Appellant's acts amounted to a veto within

the meaning of the Ngarchelong Constitution and was subject to the checks and balances associated therewith.

B.

[¶ 16] While still giving effect to the plain meaning of the language in Section 6(d), we should read it in the context of Section 6 as a whole. *See The Senate v. Nakamura, et al*., 7 ROP Intrm. 212, 214 (1999). When looking at the workings of Section 6, governing as per its title the "Veto Procedure," once a bill has been presented by the Assembly to the Governor, there are three possible outcomes: (1) the Governor signs the bill into law as-is; (2) the Governor does nothing and the law automatically becomes the law as-is; or (3) the Governor vetos the bill and returns it or the "reduce[d] or disapprove[d]" items for an appropriation bill, to the Assembly.[2] This mechanism clearly indicates that the Assembly should have the final say on any changes, or, at least, an opportunity to reconsider any changes. This right would be directly impeded should the Governor be able to enact the Law directly. A notice right is obtained by the enactment itself and thus the Ngarchelong Constitution would not have needed to create this mechanism of return, that is expressly contemplated in both subsections (b) and (d), should notice have been the only purpose of the provision.

[¶ 17] We therefore support the lower court's finding that that Appellant and Appellee were acting within their constitutionally granted powers to veto a bill and subsequent attempt to override the veto to the bill. The next issue is whether the veto override was successful.

III.

[¶ 18] Having the constitutional right to take certain steps must be distinguished from meeting the necessary requirements to implement that right. Appellant argues that even if the veto override process contemplated under Article VII, Section (c) was permissible in this case (which we found it was), whether the disapproved items were returned under Section (b) or (d), Appellee failed to obtain the necessary two-third vote to override Appellant's

[2] A return of the vetoed items is contemplated both under the mechanism of return of Section 6(b) as well as Section 6(d). Anytime there is an objection to the bill presented by the Assembly to the Governor, the Governor is obligated to "return" the items of disagreement.

"veto" of the Budget Bill. Under this view, the denominator for the required votes should be calculated based on a fully empaneled Assembly, which contemplates 16 seats. *See* Ngarchelong Const., art. VII, § 2(a) (providing that "[e]ach municipality shall be represented by its chief and one elected representative"). This conflicts with Appellee and the trial court's reading of the Ngarchelong constitutional provision that the denominator for this two-third calculation should be calculated based-on the number of members seated at the time of the vote. Under this latter view, a lower number of votes may be required to reach the supermajority as vacancies would not be counted as a vote 'against' the override.

[¶ 19] When proceeding with the constitutional interpretation of a provision, we start with the plain meaning of the disputed provision. *See Republic of Palau v. Oilouc*h, 20 ROP 109, 111 (2013) ("We attempt to identify a plain meaning whenever we are tasked with defining a term or word within a statute or constitution. Where there is no ambiguity, we refrain from straying to other canons of interpretation"); *Otobed*, 20 ROP at 8 (2012) ("When analyzing a constitution, the Court begins its analysis with the language of the disputed provision itself"). The provision in question in this case reads as follows: "[t]he Assembly shall reconsider the original bill and may, within thirty (30) days of its veto, repass it by a *vote of two-thirds (2/3) of the members* whereupon it becomes law." Ngarchelong Const., art. VII, § 6(c) (emphasis added).

[¶ 20] The word "member" is not a defined term in this Constitution. Therefore, in our quest to ascertain the plain meaning we turn to the dictionary definition of "member," which is defined as "[o]ne of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization – including the right of making debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership." Black's Law Dictionary (11th ed. 2019).[3] While helpful, this definition does not

[3] Other dictionaries give varying meanings of the word "member," including "one of the individuals composing the group." Member, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); and "[1] a person, an animal or a plant that belongs to a particular group; [2] a person, a country or an organization that has joined a particular group, club or team." New Oxford Dictionary, available at

categorically cut in favor of either reading by the parties of the term and more information is needed to appreciate the meaning of this term.

[¶ 21] Part of our arsenal of interpretative tools provide that to "ascertain[] the plain meaning of a constitutional provision, the Court should read an article's sections together, not as parts standing on their own." *Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010). Looking at the context within which the term is contained, there are no qualifiers surrounding the term, unlike other provisions within this Constitution and even the Palau Constitution and other Palauan state constitutions that were drafted around a similar time. *See e.g.,* Const., art. IX, §15; Hatohobei Const. art. VIII § 9; Airai Const. art. VII § 12. This lack of delimitation or expansion of the language again adds to the vagueness and ambiguity of the presented language.

[¶ 22] To respect the separation of powers between the three branches, there are specific rules of interpretation for vague and/or ambiguous terms that apply to constitutional provisions. "The guiding principle of constitutional construction is that the intent of the framers must be given effect." *Ngerul v. ROP*, 8 ROP Intrm. 295, 296-97 (2001) (quoting *Palau Chamber of Commerce v. Ucherbelau*, 5 ROP Intrm. 300, 302 (Tr. Div. 1995)). This ensures that when giving a voice to the words of the Framers, the Court is not substituting its own, especially when the plain meaning tool of interpretation fails. Here, as the constitutional text is ambiguous on its face, we must look beyond the text of the Ngarchelong Constitution to determine the Framers' intent. *See Remeliik v. The Senate*, 1 ROP Intrm. 1, 5 (High Ct. 1981) ("[W]here the meaning of constitutional provisions is not entirely free from doubt, resort may be had to preceding facts, surrounding circumstances and other forms of extrinsic evidence, to ensure that the provisions are interpreted in consonance with the purposes contemplated by the Framers of the constitution and the people adopting it.").

[¶ 23] This Court is bound by the record from the proceedings in the court below. *See* ROP R. App. P 10(a); *Napoleon v. Children of Masang Marsil*, 17 ROP 28, 34 (2009). The record reflects that at the time of the vote on the amendments by Appellant to the Budget Bill, there were three vacancies at the

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https://www.oxfordlearnersdictionaries.com/definition/english/member (last visited June 8, 2021).

Assembly and of the 13 seated members, ten attended the vote. Neither party disputes these facts but only the calculation of the necessary number of votes to obtain the required supermajority vote. The decisions from the trial court do not reflect how the judge came to the conclusion that the supermajority vote should be calculated based on the 13 members then seated nor does the record contain such evidence which we can look to. There is no explanation as to why the vacant seats were not filled according to the procedure set-out by the Constitution or why such seats should be disregarded from the count.

[¶ 24] In front of us, we merely have the Ngarchelong Constitution in both its English and Palauan form. We have discussed the English version and its ambiguity above and despite that being the prevailing version, *see* Ngarchelong Const. art. XIV § 1, the Court has a duty to "harmonize the English and Palauan versions of a constitution," *Otobed*, 20 ROP at 8. Here, the Palauan reads as follows: "A State Assembly *era di chelsel a okedei* (30) *el klebesei, a kirel el muut el mo omes er sel mle kot el uldasu e sebechel el muut el kongei er ngii lokiu erung-era-edei-tiud* (2/3) *meng mo llach*," which simply refers to the "State Assembly," omitting entirely the word "member" ("chedal" or "chad era" in Palauan). Where a constitution has both English and Palauan versions, a court "should not lightly conclude that there is a conflict between the two versions [of the Constitution] but should rather strive, if possible, to find a single interpretation that gives effect to both." *Seventh Koror State Legislature v. Borja*, 12 ROP 206, 208 (Tr. Div. 2005)). This further indicates that extrinsic aids are needed to discern the framers' intent.[4]

[¶ 25] As no further evidence is provided in the record in aid of this quest, to ascertain the Framers' intent, additional fact finding is required and a remand is required. *See Imeong v. Yobech*, 17 ROP 210, 215 (2010) ("If the evidence before the trial court is insufficient to support its findings, we should therefore remand rather than determine unresolved factual or customary issues on appeal."). This would include amongst others, obtaining evidence such as records and committee reports of the Constitutional Convention and evidence

[4] We do not look to U.S. case law in the interpretation of this provision even though they also have the concept of a veto override. This is because such case law is heavily driven by local history and practices to come to the outcome on the meaning of the supermajority vote requirements. Rather, we should look to our own history and practice to determine the Ngarchelong Constitution Framers' intent.

of practice regarding past calculations for veto overrides. *See e.g.*, *Ngerul*, 8 ROP Intrm. at 297 (2001). Knowledge about how other states have construed similar language in their constitutions would also be informational. This exercise is the exclusive purview of the Trial Division and in the instant case, both parties, representing the Assembly and the Governor, are best positioned to obtain the necessary evidence to clearly establish the intent of the Framers when drafting the veto override provision of the Ngarchelong Constitution.

CONCLUSION

[¶ 26] The Decision and Orders on the Motion for Summary Judgment, dated as of November 25, 2020, and the Judgment, dated as of December 3, 2020, are **VACATED**. The matter is **REMANDED** to the trial court for it to conduct further proceedings consistent with the above.

DOLIN, Associate Justice, dissenting:

[¶ 27] Regretfully, I am unable to join the majority's opinion and judgment in this case, because in my view, we lack jurisdiction over this case. I am therefore constrained to respectfully dissent.

[¶ 28] To begin with, this case is moot. The dispute between the parties concerns a spending bill for the period between October 1, 2018 and September 30, 2019. That period has long since expired, and whatever money was appropriated at that time has long since been spent (or withheld), and no judgment we give can change these facts. Not only that, but the Plaintiff-Appellee, the Nineteenth Ngarchelong State Assembly has disbanded in October 2020, and no longer being in existence cannot be a party to this appeal or any other case. *See Salii v. House of Delegates*, 1 ROP Intrm. 708 (1989). Under such circumstances, our statutes and precedents require dismissal. *See* 14 PNC § 1001; *Micronesian Yachts Co. v. Palau Foreign Inv. Bd.*, 7 ROP Intrm. 128, 131 (1998) ("This Court does not address moot issues."); *Ngirameketii v. Ngirarsaol*, 2021 Palau 1 ¶ 4 ("Faced with a moot appeal, 'the general practice is for the appellate court to reverse or vacate the judgment below and dismiss the case.'") (quoting *Mesubed v. Ninth Kelulul a Kiuluul*, 10 ROP 104, 105 (2003)).

[¶ 29] Furthermore, this case was never appropriate for judicial resolution because it calls upon the Judiciary to resolve an ultimately political, mostly abstract dispute between two branches of the Ngarchelong State Government. Because I believe that the better course of action is to allow political actors to use political tools to solve political problems, I would hold that this matter is not only moot, but not justiciable, decline to reach the merits of the arguments, vacate the judgment below, and remand with instructions to dismiss the case.

I.

A.

[¶ 30] As with every case, prior to proceeding to the merits, we must assure ourselves that we have jurisdiction over the matter. *See Espangel v. Diaz*, 3 ROP Intrm. 240, 241 (1992). "The lack of subject matter jurisdiction is a defect that cannot be waived." *Pac. Sav. Bank, Ltd. v. Ichikawa*, 16 ROP 1, 3 (2008). We have long adhered to the view that "[u]nnecessary decisions by a court are to be avoided." *Pac. Sav. Bank v. Llecholch*, 15 ROP 124, 126 (2008) (quoting 20 Am. Jur. 2d Courts § 46 (2005)); *see also Leleng Lineage v. Rekisiwang*, 2020 Palau 5 ¶ 10 ("[I]f it is not necessary to decide more, it is necessary not to decide more.") (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment)). When developments make it impossible to give meaningful relief to parties, the proper procedure is to dismiss the case as moot. *Llecholch*, 15 ROP at 126. Indeed, under our statutes, an "actual controversy" is a prerequisite for the issuance of a declaratory judgment. 14 PNC § 1001. This is not a mere prudential consideration. It is a statutory and mandatory limit on our jurisdiction. We should not ignore it so cavalierly.

[¶ 31] There is no "actual controversy" in the present case because it is doubly moot. First, the Nineteenth Ngarchelong State Assembly is no longer in existence. Elections for the Twentieth Assembly took place in August of 2020, and the new members took their seats in October of the same year. Thus, there is simply no longer a plaintiff in this case. There is no one left to whom we can provide any meaningful relief. Second, the Act only governs appropriations for the period that ended on September 30, 2019. Lacking the ability to turn back the clock, we are simply unable to provide meaningful relief to the parties. Even if we were to conclude that Governor Ngiratrang

unlawfully ignored Legislature's veto override, we will not be able to force him to spend money *in 2019*. For these two reasons we should instead do what we always do when a case becomes moot — "reverse or vacate the judgment below and dismiss the case." *Ngirameketii*, 2021 Palau 1 ¶ 4 (quoting *Mesubed*, 10 ROP at 105).

[¶ 32] This case is squarely governed by one of our earliest decisions — *Salii v. House of Delegates*, 1 ROP Intrm. 708 (1989) — an opinion by our first Chief Justice Mamoru Nakamura. In *Salii*, then-Delegate Carlos H. Salii challenged the decision of the Second Olbiil Era Kelulau to expel him from the House of Delegates. However, by the time the matter was before our Court, Second Olbiil Era Kelulau's term had expired. We held that the case became moot because having disbanded, Second Olbiil Era Kelulau was no longer "a proper party to the appeal." *Id.* at 711. The same principle holds here. The Nineteenth Ngarchelong State Assembly is no longer in existence, and therefore is "not a proper party to the appeal," and "[t]here are, therefore, no current issues remaining," *id.*, for us to decide.

[¶ 33] We reaffirmed *Salii* just six months ago, when we dismissed an appeal by the former Governor of Ngiwal State who challenged the attempt by that State's Legislature to impeach him. We wrote that because the Legislature that began the impeachment proceedings "no longer even exist[ed] as a body," it was "no longer proper part[y] to th[e] case" making neither injunctive nor declaratory relief appropriate. *See Ngirameketii*, 2021 Palau 1 ¶ 3. There is no reason why a different outcome should not obtain here.

[¶ 34] Moreover, this case is a mirror image of our decision in *Mesubed*. There, the Governor of Ngiwal State challenged the "validity of Ngiwal State's budget for fiscal year 2002-03" on the grounds "that the legislative session during which the bill was passed lacked a quorum necessary to pass legislation." 10 ROP at 104. However, by the time the matter was appealed to our Court, a new Legislature enacted a new budget bill that ratified all prior expenditures. Though we did not reach a definitive conclusion and instead remanded the matter to the Trial Division "to determine whether, because of the alleged subsequent ratification, its partial summary judgment should be vacated." *Id.* at 105. On remand, however, the Trial Division dismissed the matter. This case is no different. Here, neither the now-expired Nineteenth

Assembly, nor the newly constituted Twentieth Assembly have attempted to restore the Governor Ngiratrang's cuts into a new budget only to be stymied by him. That the Legislature apparently did not see fit to again appropriate the money that in its view has been unlawfully withheld, despite two new fiscal years having come and gone since the dispute arose, indicates that the Legislature has no live ongoing interest in having the withheld money spent. Instead, the most likely conclusion is that this lawsuit was brought so as to cause this Court to issue an advisory opinion that can be then used in future battles with the Governor. We should not fall into this trap. Instead, we should adhere to the statutory limit on our jurisdiction, 14 PNC § 1001, and our consistent view that "[a] declaratory judgment is not appropriate where the dispute between the parties has been rendered moot." *Nebre v. Uludong*, 15 ROP 15, 22-23 (2008). Because the only relief the Nineteenth Ngarchelong State Assembly was declaratory judgment, *see* Complaint at 4-5, and because such relief is neither appropriate nor permissible in when a case is moot, we should do nothing more beyond vacating the judgment below and remanding the case with instructions that it be dismissed.

[¶ 35] As stated above, there is yet another reason why this case is moot. The Act in question, by its own terms appropriated money "for Fiscal Year 2019, commencing on October 01, 2018 through September 30, 2019." All appropriations under that Act expired at the stroke of midnight on October 1, 2019. We are now nearly two years past that date. Any decision that this Court reaches will not require the Governor to actually spend the funds that he withheld (even if unlawfully) because the authorization to spend those funds itself has expired. All we would be doing is issuing an advisory opinion, something we have never been in the habit of doing, and for which I see no reason to start now. *See KSPLA v. Meriang Clan*, 6 ROP Intrm. 10 (1996) ("We do not render advisory opinions.").

B.

[¶ 36] The majority gets around the mootness issue by apparently holding that this case is governed by the "capable of repetition, yet evading review,"

see 13C Fed. Prac. & Proc. Juris. (Wright & Miller) § 3533.8 (3d ed.),[5] exception to the mootness doctrine. *See ante* ¶ 12.[6] However, I fail to see why that is so.

[¶ 37] The "capable of repetition, yet evading review" doctrine has been described as applying only in 'exceptional situations.'" 13C Wright & Miller § 3533.8 (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016)). The doctrine is properly invoked when "the dispute can be expected to recur, whe[n] it will evade review in the event of recurrence, and whe[n] the individual plaintiff will be affected in the event of repetition." *Id.* Furthermore, "doctrine will not revive a dispute which became moot before the action commenced." *Renne v. Geary*, 501 U.S. 312, 320 (1991). None of the required criteria are met in this case.

[¶ 38] To begin with, the Legislature did not file the present case until January 16, 2020, or nearly four months after the relevant fiscal year had expired and new Budget Bill began to govern Ngarchelong State's expenditures. In other words, the case was moot even before it began. Nothing prevented the Legislature from at least beginning this litigation as soon as the Governor Ngiratrang informed it that it viewed its attempt to override his veto as unconstitutional. Yet, the Legislature waited for more than eight months after receiving the Governor's letter. No plausible justification for such a delay is apparent from the record. This is yet another indication that what the parties are doing is seeking an advisory opinion from this Court rather than attempting to resolve any supposed "breakdown in the legislative process." *Ante* ¶ 12.

[¶ 39] Nor is there a showing that "the dispute can be *expected* to recur." 13C Wright & Miller § 3533.8 (emphasis added). The majority correctly points out that leaving the present dispute unresolved may lead to more controversy

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[5] Our Court has not explicitly recognized the doctrine, but the Trial Division relied on in in *Seid v. ROP*, Civ. Action 12-031 (Tr. Div., Aug. 2, 2012) (Decision and Order Denying Defendants' Motion to Dismiss) (Ngiraklsong, C.J.).

[6] The majority doesn't explicitly cite the doctrine and merely states that "power struggle between the two branches creates a climate for an ongoing issue, which will spur-up any time the Governor seeks to exercise [his] veto right." *Ante* ¶ 12. However, since the "the issues posed remain[ing] unresolved," *id.*, is not a recognized exception to the mootness doctrine, I can only assume that the "capable of repetition, yet evading review" is the basis for the majority's decision.

"any time the Governor seeks to exercise [his] veto right, which the Assembly seeks to oppose." *Ante* ¶ 12. However, mere "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).[7] It is simply wrong to presume that such cases will arise in the future and substitute such a presumption for the "requir[ement] that the allegations of future injury be particular and concrete." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). Nothing in the record indicates why we should *expect* this dispute to arise again, especially given that in nearly forty years since Ngarchelong State adopted its Constitution, no such dispute ever arose. As we have previously held, "a party seeking declaratory relief must demonstrate the existence of a 'substantial controversy, between parties having adverse legal interests, of *sufficient immediacy* and reality to warrant issuance of a declaratory judgment.'" *The Senate v. Nakamura*, 8 ROP Intrm. 190, 193 (2000) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.* , 312 U.S. 270, 273 (1941) (emphasis added). Even if the dispute *may* arise in the future, there is no evidence that there is any "immediacy" to such an eventuality.

[¶ 40] It is also clear that "the *individual plaintiff* will [not] be affected in the event of repetition" of the present controversy. 13C Wright & Miller § 3533.8 (emphasis added). The Plaintiff here — the Nineteenth Ngarchelong State Assembly — is no more. It has ceased to be. That non-existent body will therefore not be affected even if there is a repetition of the present dispute between a new Governor and a new Legislature. True enough, a *new* Ngarchelong State Assembly could be affected by some new Governor's refusal to recognize and honor an override of his vetoes, but we have no way of knowing whether in such hypothetical future scenario that newly convened Legislature would pursue litigation or political solutions. We have no reason to presume that it would prefer the former to the latter route.

[¶ 41] Finally, it is not even certain that this issue "will evade review in the event of recurrence." 13C Wright & Miller § 3533.8. Generally speaking, "[t]he calculation whether a dispute is likely both to recur and to evade review

[7] Injunctive and declaratory relief are governed by the same standard. *See Whipps v. Idesmang*, 2017 Palau 24 ¶ 43.

may focus on a prediction that the time available after any repetition will again be too short for full review." *Id.* A fiscal year lasts for only one year, and it is possible that it may take longer to resolve any dispute arising from such short-term appropriations. Therefore, I could perhaps be persuaded that this case (had it been filed prior to September 30, 2019) was not mooted by the conclusion of FY 2019. However, it is worth noting that at no point did the Legislature seek to expedite the matter, or seek an injunction, a temporary restraining order, or a writ of mandamus. Had it done so, the Trial Division's decision would have been immediately appealable, *see ROP v. Black Micro Corp.*, 7 ROP Intrm. 46, 47 (1998), thus allowing us to resolve the matter on an expedited basis. That Legislature that did not avail itself of these options should not cause us to keep alive its complaint. Furthermore, even if I were convinced that the expiration of the fiscal year should not serve as a bar to resolving the dispute between the Governor and the Legislature over the proper veto procedures, the expiration of Legislature's term is another matter entirely and presents insurmountable difficulties. Under the Ngarchelong Constitution, each Assembly serves for two years. *See* Ngarchelong Const. art VII, § 2(b). In our small Republic, two years is sufficient amount of time to resolve any future-arising disputes, especially if such disputes are processed on an expedited basis. I would therefore do what the Declaratory Judgment Act, 14 PNC § 1001, requires us to do — dismiss the present matter on mootness grounds, and stay our hand until this controversy recurs (should it do so) and is presented to us as a live matter.

II.

A.

[¶ 42] Mootness however is not the only reason why this case is inappropriate for judicial resolution. In my view, we lack jurisdiction over this case because the Ngarchelong State Assembly, Appellee herein, lacks standing to bring the case.[8]

[8] As should be evident from the discussion below, in reaching my conclusion I am relying on the Palauan caselaw and legal doctrine. I accept that "we are 'not bound to mechanically embrace United States caselaw," or the rationale set forth therein." *Ante* ¶ 10 (quoting *Yano v. Kadoi*, 3 ROP Intrm. 174, 184 (1992)). However, neither are we bound to embrace prior decisions that lacked sufficiently clear *ratio decidendi* and were in conflict with earlier decisions of our Court. I therefore do not look "to foreign law to justify limitations that are

[¶ 43] The debate over "standing" in Palau has spanned several decades with pendulum swinging from a fairly restrictive to a quite liberal regime. *See Koror State Legislature v. KSPLA*, 2017 Palau 28 ¶¶ 10-14 (recounting the history of the doctrine in Palau) (hereinafter "*KSPLA*"). The *KSPLA* Court effectively abolished the standing doctrine in Palauan law, taking the view that under the Palauan Constitution our jurisdiction is not "limited to cases in which a plaintiff demonstrates injury, causality, and redressability." *Id*. at 19. In so doing, the *KSPLA* Court overruled a line of cases that took the opposite view and required plaintiffs to demonstrate standing in order to invoke the Trial Division's, and ultimately our, jurisdiction. I harbor grave doubts that that decision was correct.

[¶ 44] In assessing our jurisdiction, I begin, as we must, with the words of the Constitution itself. *See Gibbons v. ROP*, 1 ROP Intrm. 634, 637 (1989) (hereinafter "*Gibbons*"). Our constitution commits to our power "all matters in law and equity." ROP Const. art. X, § 5. As early as 1989, even before achieving independence from the United States, we held that "the use of the term 'all matters' is much broader in scope than the terms 'cases' or 'controversies' used in Article III, Section 2, of the United States Constitution." *Gibbons*, 1 ROP Intrm. at 637.[9] It should, however, be noted that the Court did

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not applicable to our Palauan judiciary," *id.*, but rather to our own experience spanning nearly three decades between 1989 and 2017.

[9] I am unprepared to reexamine this conclusion, though I admit that it is not necessarily "obvious[]," *Gibbons*, 1 ROP Intrm. at 637, that the term "matters" is broader than "cases or controversies." For example, the very next sentence of Section 5 states that "[t]he trial division of the Supreme Court shall have original and exclusive jurisdiction over all matters affecting Ambassadors, other Public Ministers and Consuls . . . ." ROP Const. art. X, § 5. This mirrors the language of the United States Constitution that vests the U.S. Supreme Court with the original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls . . . ." U.S. Cosnt. art. III, § 2. It is hard to imagine what "matter[] affecting Ambassadors" would be entrusted to Trial Division for resolution other than a *case* brought by (or perhaps against) such an Ambassador. And if in the Ambassador Clause the term "matter" is coextensive with the term "case," then it is quite likely that the same equivalency exists in other Clauses of Section 5. If so, then the use of the term "matters" rather than "cases" in our Constitution is merely a stylistic choice without any legal implications. Nevertheless, this issue has long been settled, and though arguments for *stare decisis* are at their nadir in constitutional cases, *see KSPLA*, 2017 Palau 28, ¶ 17, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 856

not conclude that there are no limits on our jurisdiction, though broad it may be. Rather, our jurisdiction extends only to those matters that "*require* judicial resolution." *Id.* (emphasis added). This stands in contrast to some other constitutions that vest courts with power to issue advisory opinions on request of other branches or officials, even where the resolution of a contested matter is not yet "required." *See, e.g.*, Fl. Const. art. V, § 3(b)(10); Mass. Const. pt. II, ch. III, art. II. Thus, our constitutional grant of jurisdiction has been interpreted to tread a middle ground between the very restrictive provisions of the U.S. federal Constitution, and much more liberal state Constitutions of jurisdictions like Massachusetts and Florida.

[¶ 45] Recognizing the broad nature of our jurisdiction, the *Gibbons* Court concluded that "the Constitution . . . compels us to adopt a very liberal approach in determining whether a plaintiff has standing to bring a particular action." *Gibbons*, 1 ROP Intrm. at 637. At the same time, recognizing that the grant of jurisdiction is not unbounded, the Court did not dispense with the standing requirement altogether. Instead, the Court held that "[t]he resolution of the standing issue requires the court to determine . . . (1) whether the plaintiff was injured in fact and (2) whether the injury was to a legally protected right." *Gibbons* involved "taxpayer standing," *i.e.*, the Court was asked to determine whether an individual could bring suit against the government alleging no injury beyond being forced, through his tax contributions, to support an allegedly unlawful government expenditure. The Court concluded that "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally," but only "if he can show that he has suffered or will suffer some injury in fact from the contested action." *Id*. at 640. Because the allegedly unlawful expenditures had to rely, in part, on the money that the plaintiff contributed to the national treasury, the requirement of "injury in fact" was satisfied. Furthermore, a favorable decision would have redressed the injury complained of.

[¶ 46] In *Becheserrak*, we reiterated the proposition that a litigant must have standing to bring suit, and that "[t]he key to standing is an actual or threatened injury." *Becheserrak v. ROP*, 5 ROP Intrm. 63, 67 (1995) (quoting

(1996)). Accordingly, I proceed in my analysis on the understanding that the Constitution's grant of jurisdiction is indeed as broad as the *Gibbons* Court found it to be.

Gibbons, 1 ROP Intrm. at 637-38). The injury, of course, need not be severe and even "slight injury" will be sufficient to satisfy the standing requirement. *Id.* Accordingly, we allowed the plaintiff in that case to bring suit in order to enforce a provision in the National Public Service System Act which required that all new positions in the national service "shall be filled from a list of five persons who scored highest in the most recent test for the position or by promoting any regular employee in the department." *Id.* at 69 (quoting 33 PNC § 403). Although the plaintiff was a beneficiary of the Government's violation of § 403, as he was transferred to the job in question without taking any tests, we nonetheless held that he suffered an "injury" in the constitutional sense, because the transfer was accompanied by a termination from a prior position which the plaintiff preferred. Accordingly, we concluded that the plaintiff alleged a sufficient injury to permit him to challenge agency's actions.[10] Again, the Court did not permit a person who merely sought an abstract determination of some future right to invoke the court's processes, but rather concluded that a person who had a specific and identifiable injury could challenge certain governmental actions that on the surface inured to his benefit, but in reality caused him to lose something of value.

[¶ 47] We next addressed the standing doctrine in *Senate v. Nakamura*, 7 ROP Intrm. 8 (1998). That case was a mirror-image of the present dispute. In *Nakamura* the Senate attempted to sue "President [Kuniwo Nakamura] and other members of the executive branch for allegedly spending funds that the Olbiil Era Kelulau had not appropriated." *Senate*, 7 ROP Intrm. at 8. Chief Justice Ngiraklsong (who was skeptical of the standing doctrine, *see post* ¶ 51) wrote the opinion for the unanimous Court. That opinion again adhered to the view that "the allegations of the complaint must show that the defendant has caused the plaintiff to suffer an injury in fact and that the injury was to a legally protected right." *Id.* at 9. The Court then concluded that the Senate, as a body, suffered a "concrete injury" to its lawmaking powers because "the Senate has lost the ability to determine how the $644,000 spent by appellees should be appropriated. Its powers with respect to the $644,000 have been completely nullified by executive action." *Id.* at 11. The Court expressly cautioned that it

[10] Justice Beatty dissented in part, because he concluded that the National Public Service System Act did not apply to the plaintiff's situation. However, nothing in Justice Beatty's dissent suggests that he disagreed with the majority's standing analysis.

is not "opening the floodgates to a slew of interbranch lawsuits" and that the decision "will not mean that the legislative branch will have free rein to challenge all executive actions with which it disagrees." *Id*. In other words, the Court was clearly and expressly recognizing that our jurisdiction can be invoked not merely when a plaintiff disagrees with a decision of a government official, but only when such a plaintiff can "show that the defendant has caused the plaintiff to suffer an injury in fact and that the injury was to a legally protected right." *Id.* at 9.

[¶ 48] Chief Justice Ngiraklsong also wrote the opinion for the unanimous decision in *ROP v. Koshiba*, 8 ROP Intrm. 243 (2000). That case was somewhat unusual in that there was no question that plaintiffs had standing to bring the suit against the Republic for failing to adequately fund the National Civil Service Pension Plan. Once the underlying dispute was settled by consent decree, plaintiffs petitioned the Trial Division to tax the attorney fees to the Pension Plan "as a means of spreading fees proportionately among those benefitted by the suit." *Id.* at 243 (internal quotations omitted). When the Republic appealed the Trial Division's order granting the requested relief, plaintiffs argued that "the ROP does not have standing to appeal the fee award because the fees are to be paid by the Plan, not by the ROP." *Id.* at 244. The Court ultimately, concluded that the Republic had standing to appeal, but that conclusion was hardly surprising. It was undisputed that the consent decree obliged the Republic "to maintain the actuarial soundness of the Plan," and therefore it followed that "an assessment of fees against the Plan's funds affect[ed] the ROP and its liability to the Plan." *Id.* at 245. Given these facts, *Koshiba* did not represent any departure from the prior Palauan caselaw, nor even a deviation from the American standing jurisprudence as the Court itself recognized. *Koshiba*, 8 ROP Intrm. at 245-46 (and U.S. cases cited therein).

B.

[¶ 49] This review of over a decade of caselaw shows that the Court was consistent in its understanding of the scope of our jurisdiction and clear in formulating the requirements, including standing, for the invocation of that jurisdiction. There was an unbroken line of cases, by unanimous panels staffed by numerous Justices, all of which held that:

> The Palau Constitution imposes limitations on the rights of litigants to bring claims in courts of law. These limitations, commonly known as the "standing" doctrine, require a court to verify that a party has suffered an injury that the court is capable of redressing before allowing the party to proceed with a lawsuit.

Nakamura, 7 ROP Intrm. at 9. The Court was also clear that the requirement is much easier to satisfy than the same requirement in the American federal courts. *Compare Gibbons*, 1 ROP Intrm. at 639 (holding that "[i]n Palau, the interest of the individual taxpayer to moneys in the treasury is not so 'minute and indeterminable' as to require a distinct and separate injury in order to have standing to bring a taxpayer action"), *with Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (reaching the opposite result when analyzing taxpayer standing under U.S. Constitution). At the same time, at no point did we ever suggest that standing is not a Constitutional requirement. To the contrary, we reaffirmed, time and again, that standing is a "threshold issue" for any party before its claims can be entertained. *Gibbons*, 1 ROP Intrm. at 636.

[¶ 50] This decades-long understanding began to fray in 2004, when we decided *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103 (2004) (hereinafter "*Koror State*"). The issue in that case was, in all material respects, identical to the ones we face today. In *Koror State*, the Legislature challenged certain line-item vetoes exercised by Governor John Gibbons and the House of Traditional Leaders. The parties disputed whether these line-item vetoes or "erasures" were subject to a legislative override. With parties at loggerheads over the proper interpretation of the Koror State Constitution, the State's Legislature filed suit seeking a declaratory judgment that the State Constitution permitted the Legislature to override these line-item vetos. Governor Gibbons did not argue that the Legislature lacked standing while the case was pending at the Trial Division, nor in their principal briefs on appeal. *See Nakamura v. Sablan*, 12 ROP 81, 84 (2005) (Ngiraklsong, C.J., concurring) (discussing the procedural history of *Koror State*). Despite the parties' failure to address the issue, we held that because standing is "an element of subject matter jurisdiction . . . not only is it impossible to waive this defense," but also the lack of standing "never can be cured or waived by the consent of the parties." *Koror State*, 11 ROP at 103.

[¶ 51] Addressing the issue of standing directly we concluded that:

> unlike previous cases where the Legislature's appropriations powers were completely nullified by executive spending, [*see, e.g.*, *Nakamura*, 7 ROP Intrm. 8], the funds of the government in this case have not been spent, and unlike [*Reklai v.*] *Aimeliik State Legislature* [7 ROP Intrm. 220 (1999)], funds are not being withheld from [legislators] who have a legal right to them. Consequently, the Legislature's powers were not nullified. It retained its full powers to legislate after it was informed of the position of the HOTL and the Governor. As a result of the Governor's actions, it may have had to negotiate or compromise, but the inconvenience of engaging in the very acts that legislators are elected to do when making difficult decisions about the public fisc cannot be the kind of "injury" that confers standing.

Id. at 108. We therefore held that the Koror State Legislature "has failed to show any injury" to any of its legally cognizable interests, and consequently lacked standing to bring suit, which in turn meant that we had no jurisdiction to hear it.

[¶ 52] Chief Justice Ngiraklsong dissented. He argued that it is unclear whether standing is a jurisdictional issue, or "an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Id.* at 110 (Ngiraklsong, C.J., dissenting) (quoting *Greer v. Ill. Housing Dev. Auth.*, 524 N.E.2d 561, 582 (Ill. 1988)). In any event, according to Justice Ngiraklsong, because "the record was devoid of a factual basis for determining the issue of standing," at the very least the case should have been remanded to the Trial Division "to allow the parties to develop the record as it relates to standing . . . ." *Id.* at 111.

[¶ 53] The following year, in *Nakamura v. Sablan*, 12 ROP 81 (2005), Justice Ngiraklsong further explicated his views on standing, and again excoriated the majority in *Koror State* for the decision reached in that case. In his concurring opinion, he (rather curiously) argued that "[t]he holding in the *Koror State* case has no precedential value." *Id.* at 86 (Ngiraklsong, C.J., concurring). The argument is doubly odd not only because it attacked a duly issued opinion of this Court which, as we have noted on more than one occasion, is binding authority on all courts in Palau, unless and until overruled.

See, e.g., *Olikong v. ROP*, 8 ROP Intrm. 250, 254 (2000). Justice Ngiraklsong's statement is all the more surprising in that it was made in a case where standing was not even at issue. Furthermore, the concurring opinion, though purportedly relying on *Gibbons*, actually rejected the foundational holding of that case which construed our jurisdiction to extend only to those "matters which traditionally *require* judicial resolution," 1 ROP Inter, at 637 (emphasis added), and argued that our jurisdiction is "yet to be fully defined." *Sablan*, 12 ROP at 86 (Ngiraklsong, C.J., concurring). Whatever the merits of this view (more on which later, *see post* ¶¶ 65-71), it doubtless represented a sharp break with a decade of consistent precedent.

[¶ 54] It is also noteworthy, that notwithstanding his dissent in *Koror State*, and in spite of his concurring opinion in *Sablan*, three years after the latter case was decided, Chief Justice Ngiraklsong joined a unanimous Court in holding that "[s]tanding is 'an element of subject matter jurisdiction'" and the Court holds "a separate and independent duty to assure that the plaintiff has standing to sue." *Pac. Sav. Bank, Ltd. v. Ichikawa*, 16 ROP 1, 3 (2008) (quoting *Koror State*, 11 ROP at 103). The holding in *Ichikawa* squarely rejected Chief Justice Ngiraklsong's contention that "the *Koror State* case has no precedential value." *Sablan*, 12 ROP at 86 (Ngiraklsong, C.J., concurring). To the contrary, *Ichikawa* reaffirmed the holding of *Koror State*, further entrenching it as a precedent of our Court. Thus, but for the Court's subsequent opinion in *KSPLA*, the present case would be little more than *Koror State* redux, and would likewise call for dismissal for lack of standing.

C.

[¶ 55] The law of standing as set forth in the *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* line of cases continued unchallenged for the next decade until 2017. It was not until then that the Court did a *volte face*, adopted Chief Justice Ngiraklsong's views as expressed in his concurring opinion in *Sablan*, and in one fell swoop abrogated nearly three decades worth of an uninterrupted precedent. *See KSPLA*, 2017 Palau 28. I am of opinion that not only was *KSPLA* wrongly decided, but that even if it had been correctly decided, no justification for the overruling of prior cases existed. Because *KSPLA* is an anomaly in our jurisprudence, I would decline to follow it, and

instead revert to the unbroken line of cases that interpreted our Constitution as granting this Court broad, but not unlimited jurisdiction.

1.

[¶ 56] "Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2004)); *see also Leleng Lineage v. Rekisiwang*, 2020 Palau 5 ¶ 21 ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.") (quoting *Sablan*, 12 ROP at 83 (Ngiraklsong, C.J., concurring)). Adhering to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Leleng Lineage*, 2020 Palau 5 ¶ 21 (quoting *Olngebang Lineage v. ROP*, 8 ROP Intrm. 197, 203 (2000) (Michelsen, J., concurring)). Of course, *stare decisis* is not "an inexorable command," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019), but "the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). To be sure, *stare decisis* is at its weakest "in constitutional cases, because in such cases correction through legislative action is practically impossible," *KSPLA*, 2017 Palau 28 ¶ 17 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)), but "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000). In other words, mere conviction that a prior constitutional case was wrongly decided is, in and of itself, generally an insufficient ground for overruling precedent. *See Leleng Lineage*, 2020 Palau 8 ¶ 22 ("Respecting *stare decisis* means sticking to some wrong decisions. . . . Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.") (quoting *Kimble*, 576 U.S. at 455). In short, "it is not alone sufficient that we would decide a case differently now than we did then." *Kimble*, 576 U.S. at 455.

[¶ 57] These considerations are particularly important for a court such as ours that, though it has more than three authorized judgeships, *see* 4 PNC § 201, always sits in a panel of three Justices and has never sat *en banc*.[11] We should therefore take particular care to ensure that the resolution of cases does not depend on the composition of any given panel, and that absent truly extraordinary circumstances each panel of this Court views itself as bound by decisions of prior panels. *See, e.g.*, *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018) ("It is common ground that in a multi-panel [court], newly constituted panels are, for the most part, bound by prior panel decisions closely on point.") (internal quotations omitted). This approach

> provides stability and predictability to litigants and judges alike, while at the same time fostering due respect for a court's prior decisions. Without th[is] . . . doctrine, the finality of appellate decisions would be threatened and every decision, no matter how thoroughly researched or how well-reasoned, would be open to continuing intramural attacks.

Id.

[¶ 58] Adherence to the rule of *stare decisis* is doubly important on our Court where the power to select Justices to serve on any given panel is reposed in the Chief Justice. ROP Const. art. X, § 12. I, of course, do not mean to intimate that any Chief Justice has abused this power in order to "stack" panels with like-minded Justices. Nevertheless, we must strive not only to do right, but to be seen as doing right. Faithfully applying precedent, even when we disagree with it, "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). Conversely, when a different panel of this Court overrules prior precedent, it might, inadvertently, send the message to the public that the Court exercises "force []or will" rather than "judgment." *See* The Federalist No. 78 (Alexander Hamilton). To be crystal clear, I do not believe that that is what the Court was doing in *KSPLA*. I do, however, worry that given the differences in panel

[11] This is unlike the Supreme Court of the United States and courts of last resort in most American states that always, or nearly always, sit *en banc*.

compositions[12] such seeds of doubt can be sown in the public's perception of our work.

[¶ 59] We are, of course, not the only court that sits in panels rather than *en banc*. The most obvious example can be seen in the U.S. federal circuit courts which, by law, must adjudicate cases in panels of three judges. *See* 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . ."). Given the paramount need to adjudicate like cases alike, all circuit courts have adopted a "prior panel precedent rule, [under which the court is] bound by earlier panel holdings . . . unless and until they are overruled *en banc* or by the Supreme Court." *United States v. Fred Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997); *see also Hardy v. United States*, 381 F.2d 941, 943 (D.C. Cir. 1967) ("Obviously, no panel of the court has any right whatsoever to overrule the holdings of another panel of the court. To engage in this process is to bring chaos to the court's rulings."). True enough, we cannot be so limited because we ourselves are a court of last resort, and none of our decisions can be overruled by anyone besides ourselves. In these situations some courts have adopted an "expanded panel" approach. For example, the Supreme Court of the United Kingdom which is composed of twelve Law Lords, but usually sits in a panel of five, has, by rule, designated instances where "the Court is being asked to depart, or may decide to depart from a previous decision," as a circumstance being worthy of an "expanded panel." *See* U.K. Supreme Court, *Panel Numbers Criteria*, https://www.supremecourt.uk/procedures/panel-numbers-criteria.html. In contrast, we have not adopted a similar approach though our laws permit us to sit in a panel of more than three Justices. *Compare* ROP Const. art. X, § 2 ("All appeals shall be heard by *at least* three justices.") (emphasis added), *with* 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of *not more than* three judges . . . .") (emphasis added).

[12] At the time *KSPLA* was decided, Justice Michelsen who authored *Koror State*, and Justice Salii, who joined in that opinion were still serving on the Court, but neither was part of the *KSPLA* panel. The absence of Justice Salii is easily explainable by the fact that she sat as a Trial Division Justice in the *KSPLA* case and it was her judgment that was being reviewed. The reason for the absence of Justice Michelsen from the panel is less clear. Though there is no reason to suspect any nefarious machinations, it is precisely the opaqueness of the panel assignments that should make us particularly chary of overruling prior precedent by a differently composed panel.

Whether we should adopt procedures for *en banc* or expanded panel hearings is a discussion best left for another day. However, in the absence of such procedures, overruling of prior precedents should be an extraordinary matter indeed, and the step should not be taken lightly.

2.

[¶ 60] None of this is to say that "an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted [a majority of] votes" on a panel of this Court. *Payne*, 501 U.S. at 834 (Thomas, J., concurring) (emphasis in original). But we must exercise care before overruling prior decisions. Thus, "[b]efore overturning a long-settled precedent . . . we require 'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (quoting *Dickerson*, 530 U.S. at 443); *see also Sablan*, 12 ROP at 83 (Ngiraklsong, C.J., concurring) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification.") (quoting *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991)).

[¶ 61] The question then, is whether by the time our Court considered *KSPLA* such "special" and "compelling" justifications were present. The *KSPLA* decision itself does not claim so. *See KSPLA*, 2017 Palau 28 ¶¶ 17-19. Nor do I believe that such justification existed then or exists now. In deciding whether to overrule prior cases, courts of last resort must balance competing considerations. On the one hand, we always strive to get the law right and to correct errors to the extent they may have crept into our prior decisions; but on the other hand, we also seek to decide cases in a way that would "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." *Leleng Lineage*, 2020 Palau 5 ¶ 21 (internal citations omitted). "To balance these considerations, when . . . revisit[ing] a precedent this Court [should] consider[] 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)). None of these factors

counseled in favor of overruling the *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* line of cases.

[¶ 62] There is little question that the law of standing prior to 2017, whatever else may be said of it, was *consistent* from decision to decision. *See ante* ¶¶ 48-52. Though Chief Justice Ngiraklsong was critical of that development and thought that *Becheserrak*, *Nakamura*, and *Koror State* gave short shrift to the language of the foundational decision in *Gibbons*, *see Sablan*, 12 ROP at 85-86 (Ngiraklsong, C.J., concurring), he did not, nor could he identify any *inconsistency* between the cases spanning over a decade. Nor did the *KSPLA* Court. To the contrary, in overruling all of these cases, *see KSPLA*, 2017 Palau 28 ¶ 19, the Court necessarily acknowledged the consistency between all of them.

[¶ 63] Neither did the *KSPLA* Court suggest that "legal developments since the [*Becheserrak*, *Nakamura*, and *Koror State*] decision[s]," *Hyatt*, 139 S. Ct. at 1499, eroded their foundation. To the contrary, these decisions were reaffirmed by a unanimous Court (with Chief Justice Ngiraklsong presiding) in *Ichikawa*. *See ante* ¶ 53. The only developments in law that were in any way critical of these cases were the Chief Justice's dissent in *Koror State* and concurrence in *Sablan*.[13] Of course, neither dissenting nor concurring opinions, however thoughtful or learned they may be, constitute binding authority. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 878 (4th Cir. 1999) (*en banc*) (The "views [expressed] in [a] dissent, of course, are not binding authority, any more than are [the views expressed] in [a] concurrence."), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000). The law of standing in 2017 stood exactly as it did in 2008 when the Court decided *Ichikawa* in an opinion which Chief Justice Ngiraklsong joined.

[¶ 64] Nor did the *KSPLA* take issue with the "the quality of [prior] the decision[s'] reasoning." *Hyatt*, 139 S. Ct. at 1499. Leaving aside the question of whether *Koror State* was *correct*, it is beyond peradventure that it was a scholarly, well written, and clear opinion. Its discussion of the standing

[13] To repeat, neither standing nor other jurisdictional questions were at issue in *Sablan*. In that sense, Chief Justice Ngiraklsong's concurrence that discussed the [non]-issue of standing is perhaps more correctly viewed as a learned law review article than a judicial opinion.

doctrine spanned six pages of ROP Reports, and included the analysis of both Palauan and U.S. precedents. For nearly a decade that opinion served as a guide to both our Court and the Trial Division. Given that, no objective observer would or could argue that "the quality of [*Koror State* and its progeny] reasoning" was anything but exemplary.

[¶ 65] The only factor that potentially counseled in favor of overruling the *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* line of cases was lack of sufficient "reliance" on them. In reality, of course, lack of reliance is not an independent argument in *favor* of overruling as it is merely an absence of a significant obstacle to doing so. Furthermore, reliance on decisions that interpret constitutional provisions in a restrictive, rather than permissive manner is almost always limited. For example, a decision that holds that independent agencies are constitutional, *see, e.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), engenders reliance because over the decades the U.S. political branches have created various administrative bodies to accomplish all sorts of tasks. Overruling this precedent would be no small matter, as such a step could result in significant changes to the structure of the U.S. federal government.[14] In contrast, "one does not arrange his affairs with an eye to standing." *Hein v. Freedom From Religion Found.*, Inc., 551 U.S. 587, 637 (2007) (Scalia, J., concurring); *accord KSPLA*, 2017 Palau 28 ¶ 19 ("[W]e find it difficult to conceive that individuals have ordered their daily lives and business in reliance on a particular interpretation of this Court's jurisdiction."). I agree with the *KSPLA* Court that reliance interest did not preclude the overruling of prior cases. However, neither did the lack of such interest, absent other important considerations, militate in favor of overruling the earlier line of cases. In short, no compelling justification existed from

[14] As a Justice of the Supreme Court of the Republic of Palau, I, of course, express no opinion on the merits of *Humphrey's Executor*, or the wisdom of overruling that decision, *see Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part). I merely point out that that because "a very large part of government has been developed in reliance on *Humphrey's* [*Executor*]," Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 Admin. L. Rev. 1, 5 (1995) (citations omitted), this factor would have to be considered should the U.S. Supreme Court ever choose to revisit that case. By analogy, if we were ever faced with a situation where our prior decisions resulted in creation of variety of governing institutions, we would be well advised to consider the effect of any potential overruling of such cases may have on the overall system of our government.

deviating from the standing doctrine as it was set forth in *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa*.

3.

[¶ 66] That our Court, in deciding *KSPLA*, failed to adequately weigh various arguments against overruling precedent, does not of course mean that the ultimate decision in that case was wrong. And had the Court reached a correct result, one could lament the procedural shortcuts, while contenting himself with the fact that at least the law was correctly settled. Unfortunately, *KSPLA*'s outcome was as erroneous as the process of reaching it.

[¶ 67] *KSPLA* is woefully short on analysis with the entirety of its critique of the standing doctrine spanning just two paragraphs. *See KSPLA,* 2017 Palau 28 ¶¶ 15-16. In essence, the only argument the *KSPLA* Court advanced in support of abrogating prior cases is that these prior cases "follow[ed] U.S. jurisdictional precedents." *Id.* at ¶ 16. But that assertion is demonstrably false. The understating that it is "[t]he jurisdictional language of the *Palau Constitution* [that] expresses the intent of the Framers that this Court exercise jurisdiction [to] any and all matters which traditionally *require* judicial resolution" is found in our very first decision on the matter. *Gibbons*, 1 ROP at 637 (emphasis added). In *Nakamura*, we relied on that language to make clear that "[t]he *Palau Constitution* imposes limitations on the rights of litigants to bring claims in courts of law." 7 ROP Intrm. at 9 (emphasis added) (opinion by Ngiraklsong, C.J.). And in *Koror State* we merely reaffirmed that "[w]e take th[e] requirement, identified in *Senate* [*v. Nakamura*], seriously." 11 ROP at 105. Indeed, *Koror State* did not cite a single U.S. case.[15] While the *KSPLA* Court may have disagreed with how the prior panels interpreted the Palau Constitution, there can be no denying that these prior decisions relied on their understanding of Palau's Constitution and Palau precedents.

[¶ 68] Furthermore, in advancing its own analysis of Article X, Section 5, the *KSPLA* Court essentially read the "all matters in law and equity" language out of that clause. Instead, it read the Palau Constitution as if it were the Constitution of the State of Illinois which vests its courts with jurisdiction over

[15] Though the case cited several U.S. treatises, it did so on the subject to waiver rather than standing. *Koror State*,11 ROP at 103.

"all justiciable matters."[16] Ill. Const. art. VI, § 8. But just like our Constitution's grant of jurisdiction is broader than the U.S. Constitution's grant of jurisdiction, it is also narrower than the grants encompassed in the Constitution of states like Illinois, Florida, or Massachusetts. And to the extent that it is objectionable for "our courts [to] follow U.S. jurisdictional precedents," *KSPLA*, 2017 Palau 28 ¶ 15, when the language of our Constitution differs from the U.S. Constitution, it is equally objectionable to follow the jurisdictional precedents of American states if their Constitutions don't mirror our own.

[¶ 69] The *KSPLA* decision also fails to grapple with significant separation of powers concerns that arise as a result of removal of all limits on our jurisdiction. On more than one occasion we recognized the importance of "separation of powers issues at stake" when different branches of government seek judicial resolution of their disputes. *See Nakamura* 7 ROP Intrm. at 9. Delving into such disputes "itself raises serious separation-of-powers concerns." *Id.* (quoting *Foreign Investment Board v. OEK*, Civ. Act No. 226-95 (Tr. Div. Mar 21, 1996) at 1-2 (unpublished)). It is, in part, because of these concerns that the standing doctrine exists. *Id.* at 9, n.1 ("The standing doctrine is designed to keep the judiciary from overstepping its constitutional authority, even when convenience and efficiency might lead the Court to want to decide a dispute immediately."). It is for this reason that we have declined to "grant . . . injunctive relief prohibiting the legislature from taking a particular legislative action," *ROP v. Ngarchelong State Gov't*, 2019 Palau 5 ¶ 22, though such relief would be a "matter" in equity.[17] Despite these concerns having animated our standing jurisprudence for close to three decades, the *KSPLA* Court, said not a word about them. Instead, by flinging the doors of our Court wide open for resolution of almost any issue, irrespective of whether such an issue "traditionally *require[d]* judicial resolution," *Gibbons*, 1 ROP Intrm. at 637 (emphasis added), it invited cases that would blur the "separation between

[16] In light of this limitless grant of jurisdiction to Illinois Courts, it is perhaps not surprising that Chief Justice Ngiraklsong's dissenting opinion in *Koror State* cited to Illinois caselaw. *See* 11 ROP at 110-11 (Ngiraklsong, C.J., dissenting).

[17] It is noteworthy that *Ngarchelong State* was decided two years after *KSPLA* and was joined by Chief Justice Ngiraklsong and Associate Justice Rechucher — both members of the *KSPLA* panel.

the judiciary and the two other branches," *Nakamura*, 7 ROP. Intrm. at 9, and made it more likely that "the judiciary [would] overstep[] its constitutional authority." *Id.* at 9, n.1. This fact alone strongly suggests that *KSPLA* was wrongly decided.

[¶ 70] In truth, however, it is fairly hard to criticize the reasoning of *KSPLA*, but not because the analysis it offers is compelling, but rather because the analysis is mostly lacking. Although the Court spent some time discussing the history of the standing doctrine, *see KSPLA,* 2017 Palau 28 ¶¶ 10-14, its rejection of that history is cursory at best. The pronouncement that the Constitutional text authorizes broader exercise of jurisdiction than prior cases would have permitted appears to be a mere *ipse dixit*. No citations to either Constitutional Convention debates or prior Palauan caselaw are offered in support of Court's conclusion.[18] This dearth of authority stands in sharp contrast to the *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* — all of which built on each other and provided ample support for their conclusions.

[¶ 71] Moreover, the *KSPLA* opinion is internally inconsistent and is a recipe for judicial chaos. On the one hand, the opinion not only held that our jurisdiction is broader than heretofore thought, but also that the exercise of that jurisdiction whenever we are seized of it, is essentially mandatory. *See KSPLA,* 2017 Palau 28 ¶ 16. But on the other hand, the Court proceeded to spend seven paragraphs over four pages suggesting that we are free to decline to adjudicate cases for "prudential" reasons even in situations where jurisdiction exists. *Id.* ¶¶ 25-31. Obviously, both of these statements cannot be true simultaneously. Even more problematic, the Court, though it spent some time discussing the theory of prudential standing, failed to give any definitive guidance to the public and the lower courts in how to determine which cases do and which do not call for abstention. The Court candidly acknowledged that it has not even "attempted to announce a comprehensive bright-line test for standing." *Id.* ¶ 31. Instead, the Court promised that the "our jurisdiction and justiciability doctrines will be refined slowly on a case-by-case basis over time." *Id.* Although "common law is not and was not as immutable as the law of the

[18] In fairness, the Court's analysis of what the post-*KSPLA* standing doctrine will look like is significantly more detailed. But the discussion of what will happen after the prior line of cases is overruled cannot substitute for argument as to why those cases should be overruled in the first place.

Medes and the Persians; [but rather] a gradual development of law which slowly changed to meet changing conditions," *Com. v. Ladd*, 166 A.2d 501, 508 (Pa. 1960) (Bell, J., concurring), decisions still must lay down some markers to permit the doctrine to develop in a logical fashion. *KSPLA* failed to do that. Instead, it promised a rather free-wheeling approach where each panel of this Court, when faced with a new case will simply decide for itself whether or not it is "prudent" to have the case decided by the courts or to leave it to resolution by other branches. I respectfully submit that we owe more to the public. The public deserves clarity not only because each citizen and each governmental entity should know the "rules of the game," but also because clarity and consistency in outcomes promotes respect for our adjudicative process.

[¶ 72] For all of the above reasons, I am convinced that *KSPLA* was wrong when it was decided and it remains wrong today.

D.

[¶ 73] Given my defense of *stare decisis*, *see ante* ¶¶ 55-57, it would be passing strange were I to advocate abrogating our decision in *KSPLA* merely because I "would decide [that] case differently now than [the Court] did then." *Kimble*, 576 U.S. at 455. Nor do I intend to take that route. Rather I believe that we should recede from our decision in *KSPLA* because "the quality of *KSPLA*'s reasoning" was poor; because of "its [lack of] consistency with related decisions;" because "legal developments since the decision" have undermined it"; and because there has been no "reliance on th[at] decision." *Ramos*, 140 S. Ct. at 1405 (internal quotations omitted).

[¶ 74] I shall not repeat my criticism of *KSPLA*'s reasoning, nor once again highlight its lack of congruence with three decades worth of cases that came before it. It should also be understood that to the extent there was little reliance on the pre-*KSPLA* standing cases, there is equally little reliance on *KSPLA* itself.[19] I will however, highlight the problems that that case has created which have already been recognized by the Court.

[19] If anything, given the recency of our decision in *KSPLA*, any reliance on that case is even more attenuated than reliance on the preceding cases.

[¶ 75] One area where *KSPLA* has wreaked much havoc is the Court's involvement in adjudicating clan title controversies that are unconnected to disputes over land or other legal rights. Prior to *KSPLA* such cases were governed by *Matlab v. Melimarang* which held that because "the selection of a title bearer is not the courts' responsibility," a council of chiefs' decision to seat a particular individual as a member "is final and not amenable to review by declaratory action." 9 ROP 93, 97 (2002). While *Matlab* was not clear whether or not it was declining to resolve the matter for constitutional or prudential reasons, the import of the case was that we are not to interfere in clans' affairs unless these affairs touch on individuals' rights to property or other legal entitlements. *See id.* at 97-98. Following *KSPLA*, however, the Court had to abandon the *Matlab* approach. As a result, in *Ngarbechesis Klobak v. Ueki*, the Court decided that even claims seeking nothing more than declaratory relief with respect to internal clan operations are subject to adjudication. 2018 Palau 17 ¶¶ 19-24. What is more, the Court appears to have abandoned even the requirement that a "live controversy" continue to exist while the case is pending.[20] *Id.* ¶19. In light of *Ueki*, it is unclear what is left of *KSPLA*'s promise that the Court will retain the prudential standing and non-jurisdictional justiciability doctrines.

[¶ 76] The "everything is within our jurisdiction" approach has created problems in subsequent cases. Indeed, two panels of this Court have called for reexamination of the Court's involvement in naked title disputes. *See Demei v. Sugiyama*, 2021 Palau 2 ¶ 12 n. 6; *Id.* ¶¶ 13-16 (Dolin, J., concurring); *Lakobong v. Blesam*, 2020 Palau 28 ¶ 7, n.3; *see also Kebekol v. Ikluk*, Civ. Action No. 20-039 (Tr. Div. March 1, 2021) at 5-6 (unpublished order dismissing the case). Yet, faithful application of the *KSPLA/Ueki* doctrine would require us to adjudicate such title disputes. Our decisions in *Demei* and *Lakobong* suggest that members of this Court are (rightly) uncomfortable doing so. But the answer is not to manufacture *ad hoc* solutions to a problem of our own creation, but to confront the root of the problem head on.

[¶ 77] It should also not go unmentioned that despite the sweeping language in *KSPLA* and *Ueki*, we have not actually abided by these decisions.

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[20] This, of course, is inconsistent with the limitations imposed by 14 PNC § 1001. *See ante* ¶¶ 30-40.

Thus, although in *Ueki* we held that under our previous decision in *KSPLA* there is not even a requirement for a "live controversy" to continue to exist, in reality we have consistently dismissed cases once they have become moot. *See ante* ¶¶ 30-40. Again, we cannot be faithful to both *KSPLA/Ueki* doctrine and our forty-plus years of practice of dismissing moot cases.

[¶ 78] We thus have a choice. We can follow the consistent practice of this Court developed over four decades of adjudicating various cases and through the input of at least a dozen different judges. Alternatively, we can lash ourselves to a doctrine that was announced merely four years ago, that upset, without convincing explanation, *see ante* ¶¶ 65-71, settled understanding of the law, and which in its short life span has already caused problems for this Court and the litigants. I believe that the choice is obvious and I would follow "Justice Frankfurter's admonition that '*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. . . . This case . . . presents precisely the situation described by Justice Frankfurter in *Helvering*: We cannot adhere to our most recent decision without colliding with an accepted and established doctrine." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-32 (1995) (opinion of O'Connor, J.) (quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940)). I would therefore recede from our decision in *KSPLA* and apply the well-established standing doctrine as it was developed in *Gibbons*, *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* line of cases.

III.

[¶ 79] Identifying the proper doctrine to govern this appeal does not, in and of itself, resolve the issue underlying the appeal. It is to this issue that I now turn.

A.

[¶ 80] This case is simply a repeat of *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97 (2004). There too, the Legislature of Koror State sought a declaratory judgment that line-item vetos exercised by Governor Gibbons and the House of Traditional Leaders were unconstitutional. We held

that the Legislature did not have standing because it failed to show any injury at all. The key to our analysis was the notion that under our law, the *appropriation* of certain sums is not equivalent to the obligation to spend those sums. *See Mesubed v. ROP*, 10 ROP 62, 66 (2003) ("An appropriation is 'set[ting] apart for a specific purpose or use.' 'Appropriate' is not a synonym for 'expend,' 'certify,' or 'obligate.'") (quoting Random House Webster's College Dictionary 68 (1996)) (alterations in original). We differentiated legislative action that "appropriates" fund from an action that requires that the funds be "expended" or "obligated." *Id.* (To 'expend' means 'to pay out, spend.' To 'obligate' means, in this context, 'to commit (funds, property, etc.) to meet an obligation.'" *Id.* (quoting Random House Webster's College Dictionary at 933 and 222).

[¶ 81] Much like in the Koror State Constitution, "[t]he issue of impoundment of funds is not addressed in the [Ngarchelong] State Constitution." *Koror State*, 11 ROP at 108. But what we said in *Koror State* then remains true today — "impoundment was a recognized executive tool in Palau when that constitution was drafted." *Id.* Given that Ngarchelong State Constitution was also drafted with the same background understandings (after all, the State Constitution was drafted merely three years after the national Constitution was), we should conclude that the Ngarchelong State understood the differences between "appropriations" and "expenditures," and that it chose the words in the 2019 Ngarchelong State Budget Bill with that understanding in mind.

[¶ 82] It is undisputed that the 2019 Ngarchelong State Budget Bill only *appropriated* certain sums of money. It did not require the Governor to actually spend any money. It therefore follows that whether or not the Governor chose to sign the bill as a whole, veto it as a whole, or exercise his line-item veto powers, he was never obligated to "expend" the money. Had the Legislature wished to require, rather than merely authorize, the Governor to spend any sums of money, it could have phrased the bill differently. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35 (1975) (holding that when the statute directed that such "[s]ums authorized to be appropriated . . . shall be allotted" by the Administrator of the Environmental Protection Agency, the President was without authority to withhold the funds.). That the Legislature did not do so, precludes it from seeking relief in Court. Because by its own actions it failed

to require the Governor to spend any money, it cannot be heard to complain that the Governor may not spend some of the money the Legislature authorized (but did not require) him to spend. Not only has the Legislature not suffered any cognizable injury, nothing that we do will give it any redress. Irrespective of whether we conclude that the Governor's line-item vetos were or were not legal, and whether we conclude that the override was or was not successful, the "facts on the ground" will remain the same — the Governor will be under no obligation to actually spend the money appropriated (even assuming that he would be authorized to spend this money in 2021 despite the fact that the Budget Act only concerned FY 2019). The parties do not appear to dispute these facts. Indeed, the only allegation of injury in the Complaint is a statement that "the current disagreement between plaintiff and defendant as to the powers of respective branches is of utmost importance to Ngarchelong State and limits proper functioning of the State." Complaint at 4 ¶ 18. The Legislature's motion for summary judgment also does not allege *any* injury whatever beyond mere disagreement with the Governor's view of the Constitution.[21] It was only in its reply to the Governor's opposition to the motion for summary judgment that the Legislature (while denying that it needs to show any injury at all) alleged, in a conclusory fashion, that it "has been injured by the loss of its right to exercise the legislative function grated solely to it by the Ngarchelong Constitution."

[¶ 83] Mere "disagreement between plaintiff and defendant" is not sufficient grounds to invoke this Court's jurisdiction. *See Freedom from Religion Found. v. Chao*, 433 F.3d 989, 998 (7th Cir. 2006) (Ripple, J., dissenting), *rev'd sub nom*. *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007). Disagreements about the proper functioning of Government arise all the time. But not every disagreement is meant to be resolved by the Court. Rather, they are meant to be debated and argued over in the political arena, with people of good faith trying to convince their fellow citizens of the correctness of their view. It is only when someone's rights are infringed upon that the judiciary ought to step in. It is for that reason that we have agreed to adjudicate disagreements regarding the constitutionality of certain voting procedures, *see Olikong. v. Salii*, 1 ROP Intrm. 406 (1987) (holding that

[21] Perhaps this is not surprising given that the Legislature filed its complaint months after the fiscal year in which expenditures had to be made expired. *See ante* ¶ 16.

plaintiffs have standing to challenge, and we have jurisdiction to adjudicate, dispute regarding voting procedures because "[a]ny voter who discerns an illegal procedure in the election process which has the effect of distorting or nullifying the votes cast has standing."), disputes about the executive branch withholding legislators' salaries, *Reklai v. Aimeliik State Legislature*, 7 ROP Intrm. 220 (1999)[22], and cases challenging executive's expenditure of funds which were not appropriated, *see Nakamura*, *supra*; *see also Sixth Kelulul a Kiuluul v. Ngiramekatii*, 5 ROP Intrm. 321 (Tr. Div. 1995). In all of those cases plaintiffs suffered (or at least alleged) a direct injury. An election conducted not in accordance with law threatens to undervalue the votes of citizens who participated in such an election. *See Olikong. v. Salii*, 1 ROP Intrm. 406, 412 (1987). Expending funds that the legislature has not authorized directly injures that legislature's ability to carry out its constitutional functions and oversight responsibilities — an injury that only the legislature as a whole can vindicate. And failure to pay legislators' salaries is an injury to each legislator's individual right to receive compensation authorized by law. Judiciary's intervention is "required," *Gibbons*, 1 ROP Intrm. at 637, for the resolution of each of these types of disputes. In contrast, in the present case, "[t]he issues and arguments that [the Legislature] raises before this Court serve no purpose other than to seek an advisory opinion." *Pac. Sav. Bank v. Llecholch*, 15 ROP 124, 126 (2008). And we are simply not in the business of providing advice to litigants. *KSPLA v. Meriang Clan*, 6 ROP Intrm. 10, 13 (1996) ("We do not render advisory opinions."). Our job is to resolve actual legal disputes. *Gibbons*, 1 ROP Intrm. at 637 ("[T]his Court exercise[s] jurisdiction over any and all matters which traditionally *require* judicial resolution.") (emphasis added). Because the question presented to us here does not require judicial resolution, the better course of action would be to decline to resolve it. *See Leleng Lineage v. Rekisiwang*, 2020 Palau 5 ¶ 10 ("[I]f it is not necessary to decide more, it is necessary not to decide more.") (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment)). Our intervention in the present case truncates the debates that political branches and citizens of the Republic should be

[22] As the *Koror State* Court explained, "[t]here was no discussion of the issue of standing in the Appellate Division opinion, presumably because the challenged line-item veto included large cuts to the salaries of the legislators and their staff. Hence, the legislators had an undeniable direct and personal injury." 11 ROP at 106-07.

engaged in as the constitutional law in our country matures and takes fuller shape. We should not be tempted to do so.

B.

[¶ 84] There is yet another reason why, under the correct legal standard as announced in *Koror State*, we do not have jurisdiction to hear this matter.

[¶ 85] Separation of powers is a foundation to the rule of law. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). Usually, the concern about separation of powers is directed towards keeping the power of making and enforcing of the laws in separate hands, because "wherever these two powers are united together, there can be no public liberty." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 73 (2015) (Thomas, J., concurring) (quoting William Blackstone, 1 Commentaries 142). However, the dangers in having an all-powerful judiciary are no less real. The "careful delineation of the Judicial Branch's appropriate role serves both to guard against the danger of judicial tyranny feared by Madison and to preserve the courts as a neutral forum for the resolution of disputes." *In re Sealed Case*, 838 F.2d 476 (D.C.Cir.), *rev'd on other grounds sub nom. Morrison v. Olson*, 487 U.S. 654 (1988). "Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947). By involving ourselves in a dispute between two coordinate and co-equal branches of government[23] we tread far beyond the ken to which our lawful power is confined.

[¶ 86] It is understandable that the political branches often disagree about the scope of each respective branch's power. That is indeed a feature, rather

[23] Technically speaking, the Governor and the Legislature of Ngarchelong State are not co-equal to us because we are a national Court, while they are state officers. However, because in this case we are tasked with interpreting the state, rather than the national, Constitution, we in effect operate as if we were the Supreme Court of Ngarchelong State. *See* Ngarchelong State Const. art IX, § 1. It is therefore appropriate to, under the present circumstances, treat the political branches of Ngarchelong State as co-equal partners of this Court.

than a bug of our tripartite system of government. It is through this disagreement and political give-and-take that compromises are reached, and individual liberty is protected. As James Madison wrote in Federalist 51, liberty will be protected by "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition." To the extent that Ngarchelong State's Legislature believes that the Governor has acted illegally, it has adequate tools at its disposal. It can do anything from passing a new bill which would not merely appropriate monies but require their expenditures; it can refuse to appropriate money for the Office of the Governor; or it can refuse to consent to any gubernatorial appointment until such time as the Governor stops sequestering appropriated funds. The Governor is also not without ability to protect his branch's interest. Not only is he able to sequester funds, but he is able to present the annual budget to the Legislature in such a way as to reflect his, rather than Legislature's priorities. It is precisely because both branches are meant to constantly be fighting for power that compromises can and will be reached. Governing by compromise is always desirable, but it is not a mere aspiration in Palau; rather, reaching decisions by consensus is in our society's DNA. *See Terekieu Clan v. Ngirmeriil*, 2019 Palau 37 ¶ 11 ("The most basic and fundamental tenet of Palauan custom is that disputes are settled by consensus . . . ."); ROP Const. art. V, § 2 ("Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.").

[¶ 87] Involving the judiciary into the tug-o-war between the political branches is often inimical to compromise and government by consensus. When parties know that almost no matter what the dispute is, the judiciary is always available to declare winners and losers, the incentive is not to compromise, but to go for a complete victory. *See Comm. on Judiciary v. McGahn*, 951 F.3d 510, 519 (D.C. Cir.), *vacated on reh'g en banc*, 968 F.3d 755 (D.C. Cir. 2020) ("Adjudicating these disputes would displace this flexible system of negotiation, accommodation, and (sometimes) political retaliation with a zero-sum game decided by judicial diktat. . . . But why compromise when the federal courts offer the tantalizing possibility of total victory? . . .

Letting political fights play out in the political branches might seem messy or impractical, but democracy can be a messy business . . . .").[24]

[¶ 88] True enough, "it is emphatically the province and duty of the judicial department to say what the law is." *Gibbons v. Salii*, 1 ROP Intrm. 333 (1986) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). But part of the law includes the limits not just on the powers of other branches, but also on our own power. And though an independent judiciary is necessary to the rule of law, *see Etpison v. Rechucher*, 2020 Palau 14 ¶ 15, the rule of law is not the same thing as rule of lawyers, *see Boumediene v. Bush*, 553 U.S. 723, 826 (2008) (Roberts, C.J., dissenting). We uphold, rather than shirk, our duty when we decline to adjudicate cases where parties present no actual or threatened injury and which are best resolved in the political arena. That has been our practice for thirty years prior to the decision in *KSPLA*, and we should return to it. Much like we did in *Koror State*, and for reasons in that opinion, as well as ones I have laid out, we should decline to get involved in the present dispute.

IV.

[¶ 89] Though I am of opinion that *KSPLA* was wrongly decided, is inconsistent with three decades of precedent, was inadequately reasoned, and therefore should not be followed as precedent, I would decline to resolve the present dispute even if I agreed that our jurisdiction is as broad as *KSPLA* holds it to be.

[¶ 90] For all its faults, *KSPLA* did not hold that every case brought before the Palauan courts must receive a judicial resolution. To the contrary, although the Court held that the Constitution does not limit our jurisdiction "to cases in which a plaintiff demonstrates injury, causality, and redressability," *KSPLA,* 2017 Palau 28 ¶19, it did caution that not every case over which we have jurisdiction is justiciable, *id.* ¶¶ 21, 23. A case is not justiciable when the Court is asked to opine on "subject matters that, while within the court's jurisdiction, may be inappropriate for [judicial] consideration for other reasons." *Id.* ¶ 23 (quoting *PCSPP v. Udui*, 22 ROP 11, 14 (2014)). One of such reasons is

[24] Indeed, the parties ultimately reached a compromise in the matter, and moved to have the case dismissed. *See Comm. on Judiciary v. McGahn*, No. 19-5331 (D.C. Cir., June 10, 2021) (Unopposed Motion to Dismiss the Case Voluntarily).

mootness, *see id.* ¶ 27, which I have already addressed. *See ante* ¶¶ 30-40. Another is lack of prudential standing. *KSPLA*, ¶¶ 21, 23. Prudential standing is a "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Sundel v. United States*, 985 F.3d 1029, 1030 (D.C. Cir. 2021) (quoting *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)); *see also KSPLA*, ¶ 28.

[¶ 91] This is precisely such a case. The dispute between the Legislature and the Governor is a generalized grievance over procedure and it is best left for resolution between political actors. It would be a different matter had a litigant brought a claim arguing that he is legally entitled to some disbursement from the Ngarchelong State treasury. But here, such specificity is lacking and instead the political branches seek to drag us into a resolution of a purely internal (and long-moot) conflict. If this case is justiciable, it is hard to imagine what case would not be.

[¶ 92] Our prior cases are consistent with this approach. Thus, in *Demei v. Sugiyama*, 2021 Palau 2, and *Lakobong v. Blesam*, 2020 Palau 28, we have suggested that when a decision of this court is unlikely to provide finality to litigants and when disputes over the litigated issue will continue to exist even in the face of a decision from this Court, prudence may dictate abstention. While *Demei and Lakobong* arose in the context of clan title disputes, the same logic should hold for political disputes. As I have said above, *see ante* ¶¶79-82, our resolution of the case (even assuming it were not moot to begin with) at hand will not end the dispute between the respective budgetary powers of the Legislature and the Governor. The Governor will still be empowered to sequester funds, and the Legislature will still be empowered to pass a bill restoring the funds previously vetoed by the Governor. No "real world" finality will attach to our decision. This alone should suggest that even if we have jurisdiction over the dispute, we ought not exercise it.

[¶ 93] There is another consideration that counsels abstention. Unlike in *Nakamura* or *Reklai*, where Legislature was the most logical party to bring a claim to our Court, here, better potential plaintiffs exist. In *Nakamura* we agreed to adjudicate the dispute between the Senate and the President when the latter attempted to spend money that the Legislature refused to appropriate. That made sense, because the injury was not to any specific person (after all,

people on whom the money was spent were likely beneficiaries rather than victims), but to Legislature's institutional prerogatives. No other individual or entity was likely to challenge the President's allegedly illegal actions.[25] Indeed, the United States courts have taken a similar position. Thus, in *United States House of Representatives v. Mnuchin*, which challenged President Trump's reallocation of funds appropriated by Congress from one purpose to another, the D.C. Circuit held that:

> the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing.
>
> ***
>
> The alleged Executive Branch action cuts the House out of the appropriations process, rendering for naught its vote . . . .

976 F.3d 1, 13 (D.C. Cir. 2020).[26]

[¶ 94] Similarly, in *Reklai*, because the Governor, in the belief that "he had exercised a line-item veto of an appropriations bill," was withholding legislators' salaries, "the legislators had an undeniable direct and personal injury." *Koror State*, 11 ROP at 106-07. Indeed, there was no one better to bring a claim against the Governor's unlawful withholding of fund and the Legislature was simply representing the interest of its members seeking to receive what, by law, belonged to them. *See, e.g.*, *Sierra Club v. United States E.P.A.*, 774 F.3d 383, 388–89 (7th Cir. 2014) ("An organization has standing to sue if (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit.") (internal quotations omitted).

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[25] It is possible that a taxpayer could have brought suit relying on "taxpayer standing" doctrine which we recognized in *Gibbons v. ROP*, 1 ROP Intrm. 634 (1989). However, it is not obvious that a taxpayer would have had any more of a concrete injury than the Senate.

[26] Whether that decision is correct as a matter of U.S. constitutional law is a hotly contested topic. But it fits squarely with Palauan constitutional doctrines which have a more capacious (though not unlimited) view of standing and injury. *See Gibbons*, *supra*.

[¶ 95] But the present case is quite different. Though Ngarchelong State Constitution also requires the Legislature's "key" to "unlock" the Treasury, once the Treasury is "unlocked," it is up to the Governor whether to walk through the door and withdraw money from the "deposit box." The Governor could decline to do so by vetoing certain expenditures or by impounding previously appropriated funds. In that sense, the Governor did not "cut[] the Legislature out of the appropriations process, rendering for naught its vote." *Mnuchin*, 976 F.3d at 13. Instead, the Legislature exercised all the power Ngarchelong State Constitution reposes in it, and with that exercise having been completed, the authority over the expenditures passed to the Governor.

[¶ 96] Nor is the Legislature seeking to vindicate individual interest of its members. Had it done so, then perhaps we would be presented with a more discrete issue and a better sharpened argument about the extent of each branch's powers. Instead, we are being asked to address a disagreement of the type more common in a law school exam than in a court of law.

[¶ 97] Of course, none of this means that the Governor's purported exercise of his veto power was legitimate. But to the extent it was not, it is not the Legislature that is injured, but those individuals and entities who, but for the Governor's actions, would have received the appropriated funds.[27] We can await, with no harm to the Legislature's or the Governor's legal position, a lawsuit by a citizen who believes himself entitled to funds that the Governor is withholding. Staying our hand now would allow a litigant with a more particularized claim and a sharper argument to focus our attention on the nuances of interactions between the power of the Executive and Legislative Branches, and the effect of that interaction on the citizens of the Republic, who are at the end of the day the only party that matters. Furthermore, a claim by such an individual or entity will likely overcome any mootness problem, because to the extent that the Governor was obligated to disburse funds to such a hypothetical plaintiff, the injury from not having received these funds would

[27] Given the Governor's power to impound, it is not clear that *anyone* has a legal entitlement to any funds until such time as the funds are actually obligated. *See Mesubed*, 10 ROP at 66. Nevertheless, the claim of injury that such individuals could advance is stronger, more particularized and less likely to be moot than the Legislature's claim.

survive the end of the fiscal year and the end of Nineteenth Ngarchelong State Assembly term of office.

CONCLUSION

[¶ 98] I regret that I cannot join with majority's disposition of the present appeal. For reasons I have stated, I would vacate the judgment below and remand with instructions to dismiss the matter. I respectfully dissent from the Court's failure to do so.