Gibbons v. Seventh Koror State Legislature, 11 ROP 97 (2004)

JOHN C. GIBBONS and HOUSE OF TRADITIONAL LEADERS,
Appellants,

v.

SEVENTH KOROR STATE LEGISLATURE,
Appellee.

CIVIL APPEAL NO. 03-022
Civil Action No. 03-012

Supreme Court, Appellate Division
Republic of Palau

Argued: December 5, 2003
Decided: March 12, 2004
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⊥100
Counsel for Gibbons: Johnson Toribiong

Counsel for House of Traditional Leaders: Moses Uludong, T.C.

Counsel for Appellee: Mark Doran and Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

MICHELSEN, Justice:

This case stems from the enactment of Bill No. 7-23, Koror State's Budget Act for 2003 ("Budget Act"). The members of the Seventh Koror State Legislature ("Legislature") have a difference of opinion with Governor John C. Gibbons and the House of Traditional Leaders ("HOTL") concerning the proper interpretation of Article VI, Section 2(2) of the Koror State Constitution. Specifically, the parties disagree as to whether the purported line item vetoes or erasures of the HOTL, exercised in relation to the Budget Act, are subject to override. The Legislature brought this litigation to obtain a declaratory judgment that its view is correct, as well as to obtain related ancillary relief. The Trial Division issued a declaratory judgment in favor of the Legislature, but granted no other relief. The Governor and the HOTL appeal.

We hold that whichever interpretation of Article VI, Section 2(2) the Court adopts, the Governor's refusal to commit himself to spending all of the specific appropriations at issue here

is not a violation of the Koror State Constitution, the Budget Act, or any other provision of law. Thus, the Legislature has not shown an injury likely to be redressed by a favorable decision. We therefore remand the case with instructions to deny the pending motions for summary judgment.

FACTUAL BACKGROUND

On December 20, 2002, the Legislature enacted the Budget Act and transmitted it to the HOTL and Governor Gibbons for action. On December 31, 2002, the HOTL notified Governor Gibbons that, ⊥101 with their line item vetoes or erasures of certain items, (which erasures, in their view, did not constitute vetoes subject to legislative override[1]) the bill had become law as KSPL No. K7-137-02. That same day, notice of this action was transmitted to the Legislature.

The members of the HOTL explained that the changes were made as part of their commitment to the principle of performance budgeting. (Appellants' Br. Ex. 4). They objected to a $50,000 appropriation for generic "hamlet projects" without an identification of the particular projects, an indication of which hamlets were to be involved, or an explanation as to who was to benefit. They also objected to appropriating $292,000 for capital improvement projects ("CIP") without a justification of, or explanation for, the distribution formula that included "large amounts allocated for certain hamlets." *Id.* at 2. They therefore "deleted" the distribution formula and the specific hamlet allocations. In their view, "[d]esigns and [a] budget of each project should be done and it should be shown that the funds are enough to complete all these projects." *Id*. The HOTL did not object to a significant financial commitment to CIP in the state and indicated that "[t]he division and amount of the budget for CIP can be worked out and submitted to be enacted as [a] supplemental budget." *Id*.

Continued funding for some past, uncompleted projects was also targeted for a line item veto or "erasure" because

> [d]esigns and cost estimates of the unfinished projects should be made and can be included in the budget for 2003 as [a] supplemental [appropriation]. It is also not clear where the money for these projects will come from and that should be shown. This type of appropriation once again is inconsistent with performance budgeting.

Id. at 3.

Another "erased" item was an appropriation for a $7500 photocopier for the use and benefit of the Legislature. The HOTL could not understand the need for that copier, particularly since the government was now under one roof at the newly completed state government building. The HOTL believed that if the copying needs of the government had expanded to the point where two copiers were needed (a need that, in their minds, had not been proven) then the

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[1]The Koror State Constitution allows the HOTL to veto any bill and veto or erase a line item in any appropriation bill. *See* Koror Const. art. VI, § 2(2). The parties disagree as to whether all disapprovals of the HOTL regarding appropriations, whether categorized as "vetoes," "line item vetoes," or "erasures," are subject to override.

second copier should be available to all offices and not just earmarked for the Legislature.

Upon notification of the HOTL action, the Legislature chose not to address the concerns of the HOTL or meet in conference with them to attempt to reach a consensus. Rather, the Legislature simply voted to override the HOTL action in a 13-0 vote the very same day.

On January 2, 2003, Governor Gibbons informed the Legislature that he concurred with the House of Traditional Leaders' version of the Budget Act, including their interpretation of the Koror State ⊥102 Constitution regarding "erasures." Nonetheless, he informed the Legislature that he would still consider spending the appropriations during the fiscal year, depending upon a number of factors, including the government's actual revenue. He wrote that

> [t]he line items removed from Sections 5(i) [the photocopier] and 10(e) [the generic "hamlet projects"] of the Bill are thoroughly and adequately discussed in the HOTL transmittal letter to me, attached for [your] review. As to the line items removed from Section 10(p), relating to CIP programs, each of these programs will be assessed and reviewed during the upcoming year and may be performed or constructed after further study, subject to the priorities and needs of the people of Koror. . . . Please be personally assured and tell your constituents that we will give each of the proposed projects a fair and reasonable evaluation as our fiscal year progresses. Lastly, the removal of the line items contained in Section 12 [the uncompleted projects] of the Bill is necessary under our current economic circumstances. Several of the expenditures referenced in Section 12 actually occurred last year as local funds became available. However, since we are relying on locally generated funds to complete these projects and those funds may or may not become available for these purposes in 2003, it is unreasonable to definitively allocate these expenditures in the FY2003 budget. We will continue to contemplate these projects, but will only move forward with them if and when we are able to collect or generate sufficient local funds necessary for their accomplishment and following careful assessment of out State's needs and priorities.

Letter from Governor Gibbons to Speaker Adachi of ½/03, at 2.

The Legislature took no further legislative action in response to the Governor's announcement and proceeded directly to court. The Legislature filed this action on January 17, 2003, in the Trial Division, naming both the HOTL and the Governor as defendants. The Legislature requested a declaratory judgment against the HOTL that would adopt the Legislature's interpretation of the amended Article VI, Section 2(2) of the Koror State Constitution. It also asked for judgment against the Governor that would require him to "disburse all funds based on [the] Budget Act" as passed by the Legislature. The defendants filed an answer, but did not raise the issue of whether the plaintiff had standing to sue. They also filed a counterclaim, requesting that the Court adopt their view of the constitutional provision concerning line item vetoes or erasures and enter a declaratory judgment in their favor. On May 6, 2003, the Trial Division ruled on the pending cross-motions for summary judgment in favor of

the Legislature to the extent that it issued a declaratory judgment concerning the meaning ⊥103 of Article VI, Section 2(2) of the Koror State Constitution. The judgment did not include any orders to the Governor. The defendants appealed. Appellate briefing was completed on September 12, 2003, and oral argument was held on December 5, 2003. The parties also filed post-argument briefs on the issue of standing. The Governor and the HOTL asserted that the Legislature did not have standing to sue, and the Legislature argued that it had standing. Briefing was completed on January 13, 2004.

STANDING

a. Standing and Subject Matter Jurisdiction

The Legislature has objected to the Appellants raising the issue of standing for the first time on appeal. The Legislature moved to strike the supplemental brief of Appellants that questioned its standing, arguing that the objection comes too late and that the issue should be considered waived or forfeited because the Appellants failed to raise the matter in the trial court. We denied the motion to strike the Appellant's supplemental brief and repeat the gist of our reasoning here.

"As an element of subject matter jurisdiction, the issue of standing should be raised by a motion to dismiss for lack of jurisdiction over the subject matter." 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 101.30[1] (3d ed. 1998). Nonetheless, ROP R. Civ. P. 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." This rule "expressly preserve[s] against waiver . . . a challenge to the court's subject matter jurisdiction." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1393 (2d ed. 1990).[2] Therefore, "not only is it impossible to waive this defense, but also a defect of subject matter jurisdiction never can be cured or waived by the consent of the parties." *Id*. "Furthermore, it may be interposed as a motion for relief from a final judgment under Rule 60(b)(4) or presented for the first time on appeal." *Id*. Consequently, the Appellants' current challenge to the standing of the Legislature, while late, cannot be deemed a waiver. Furthermore, as noted later in this opinion, the Court has a separate and independent duty to assure that the plaintiff has standing to sue.

The Legislature does not challenge the above analysis of this Court's rules but suggests that "the Restatements should prevail over the Rules of Civil Procedure," citing 1 PNC § 303. We disagree with this premise,[3] but in any event, there is no conflict between our consideration of subject matter jurisdiction on direct appeal and any provision of the Restatements of Law.

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[2]Interpretations of comparable United States federal rules are used for guidance when construing our rules. *Scott v. ROP*, 10 ROP 92, 95 n.3 (2003); *Doe v. Doe*, 6 ROP Intrm. 221, 223-24 (1997); *King v. ROP*, 6 ROP Intrm. 131, 135-37 (1997); *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85 n.1 (1997); *Gibbons v. ROP*, 1 ROP Intrm. 547MM, 547PP (1988).

[3]Because the Constitution provides that "[t]he Supreme Court shall promulgate rules governing . . . practice and procedure in civil and criminal matters," Palau Const. art. X, § 14, a statute authorizing the use of the Restatements as a fallback for those situations where Palau law is silent does not also operate as a restriction on this Court's constitutional authority to promulgate rules of court.

The Legislature directs our attention to Section 12 of the ⊥104 Restatement (Second) of Judgments, which discusses the limited circumstances when subject matter jurisdiction can be challenged "*in subsequent litigation*" (emphasis added). This appeal is not "subsequent litigation," but a direct appeal from the granting of summary judgment in this case. Therefore, Section 12 does not apply.[4]

The Legislature also objects to a consideration of this issue on appeal because if the issue had been raised below, it would have introduced additional evidence to demonstrate it has standing. But this case is before us on an appeal of the granting of summary judgment, and the issue is whether, on these facts, the Legislature was entitled to such a judgment. Our review of that decision is "*de novo* and plenary." *Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997). As part of that review, "all evidence and inferences [are] viewed in the light most favorable to the nonmoving party, to determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Dalton v. Borja*, 8 ROP Intrm. 302, 303 (2001) (citing *Tellames v. Congressional Reapportionment Comm'n*, 8 ROP Intrm. 142, 143 (2000)). Part of *de novo* review is a consideration of subject matter jurisdiction.

The question of standing is not an affirmative defense, but is a predicate that must be shown by a Plaintiff seeking relief. Since we are ultimately holding that summary judgment should not have been granted, we are vacating that judgment. If the Legislature has been keeping its powder dry on this issue, but is prepared to demonstrate that it has standing consistent with this opinion on remand, it may attempt to do so.

b. Overview

The Palau Constitution provides that "[t]he judicial power shall extend to all matters in law and equity." Palau Const. art. X, § 5. The phrase "matters in law and equity" is a specific legal term that had a settled meaning at the time of the adoption of the Constitution. The expression "matters in law and equity" is a reference (as it was in the United States Constitution) to "the two systems of jurisprudence as known and practiced at the time of [the] adoption" of the Constitution, and extends the jurisdiction of the court to "the very rights and remedies then recognized and employed," as well as to such other causes of action as may be later created by statute. *Ellis v. Davis*, 3 S. Ct. 327, 334 (1883) (discussing the expression in the context of the United States Constitution). In recognition of this broad language, this Court has construed this clause in the Constitution as a grant of jurisdiction over "any and all matters which traditionally require judicial resolution." *Gibbons v. ROP*, 1 ROP Intrm. 634, 637 (1989).

Although this language is an express grant of jurisdiction, it contains implicit limitations as well. Obviously, this Court should only offer opinions or enter judgments within the scope of authority traditionally reserved for the judiciary. The Court cannot accept for resolution every honest difference of opinion that parties may have concerning legal questions, because that

[4]For an example of the proper use of this Restatement provision to successfully challenge subject matter jurisdiction in subsequent litigation, see *United Church of Christ v. Hamo*, 4 FSM Intrm. 95 (App. 1989).

would include ⊥105 abstract or hypothetical questions,[5] disputes over issues where the parties have no personal stake in the outcome,[6] and would require the Court to ignore the question of whether the Court could grant any meaningful relief.[7] Time consumed by such matters delays the Court's review of the claims of those parties who have actual disputes with real, not imagined or theoretical, injury. The Court, in fairness to litigants with disputes that "traditionally require judicial resolution," must not accept cases falling outside those parameters. This is not to suggest that this issue is simply about time management. "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." *The Senate v. Nakamura*, 7 ROP Intrm. 8, 9 n.1 (1998) [hereinafter *Senate*].

> To summarize:
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> [t]he 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.

Id. at 9.

We take this requirement, identified in *Senate*, seriously. It is the Court that must verify that a party has suffered cognizable injury, because the interests served by the doctrine are such that the Court must consider the issue even if the parties, by collusion or negligence, fail to raise it. It is the non-waiveable duty of the Court to remain within its constitutional jurisdiction.

The issue of standing has most frequently arisen in this Court in three contexts. First, voters have, on a number of occasions, alleged personal injury to their right to vote, and such injury has been held to confer standing. *Yano v. Kadoi*, 3 ROP Intrm. 174, 180 (1992); *Becheserrak v. Koror*, 3 ROP Intrm. 53, 55 (1991); *Teriong v. Airai*, 1 ROP Intrm. 664, 678-79 (1989); *Olikong v. Salii*, 1 ROP Intrm. 406, 412 (1987); *Gibbons v. Salii*, 1 ROP Intrm. 333, 336 (1986); *Koshiba v. Remeliik*, 1 ROP Intrm. 65, 70-71 (Tr. Div. 1983). These cases can be generally summarized for the proposition "that voters have standing to bring suit when the election process is not carried out according to law." *Olikong*, 1 ROP Intrm. at 412. Nevertheless, from an early date in Palau's constitutional history, the Court made clear that plaintiffs who object to election procedures still must establish their standing. *Mechol v. Soalablai*, 1 ROP Intrm. 62, 63 (Tr. Div. 1982) ⊥106 (concluding that persons who have not registered as voters or established residency in a state have no standing to raise issues regarding

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[5]*See, e.g., Ngirchechol v. Triple J Enters.* , 11 ROP 58, 61 (2004) (dismissing an interlocutory appeal because it "would accomplish little . . . except rendering an advisory opinion on a question of law").

[6]*See, e.g., Rurcherudel v. PPLA* , 8 ROP Intrm. 14, 15 (1999) (holding that lineage had no standing to assert on appeal that, in the alternative, Land Court should have awarded parcel to Ngeong Village, not to PPLA).

[7]*See, e.g., Salii v. House of Delegates* , 1 ROP Intrm 708, 712 (1989) ("[A]ny injunctive and mandamus enforcement would be a meaningless gesture because the legislative body [that Plaintiff] was expelled from no longer exists.")

state election or to obtain an injunction preventing the election).

Individual taxpayers have also been afforded standing to sue. In *Gibbons*, the Court said that "[t]he issue of standing is determined by the courts as a matter of policy," 1 ROP Intrm. at 639, and 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, if he can show that he had suffered or will suffer some injury in fact from the contested action," *Id*. at 640. Once again, however, there must be injury to the plaintiff. Merely asserting the status of a taxpayer is not enough. An example is *Kruger v. Social Security Board*, 5 ROP Intrm. 91, 93 (1995), where the Court held that plaintiff, a social security taxpayer and Palau resident, had no standing to raise equal protection issues regarding a statute that terminated social security benefits to some non-residents after six months. In *Kruger*, both the Trial Division and the Appellate Division approvingly quoted from *Simon v. Eastern Kentucky Welfare Rights Org*., 96 S. Ct. 1917, 1924 (1976), which stated that the relevant inquiry concerning standing is whether the plaintiff has shown an injury to himself "that is likely to be redressed by a favorable decision." *Id.*

The subject of standing has also arisen with respect to a third category: legislatures. Legislatures have been granted standing to contest "the executive branch's constitutional authority to spend unappropriated funds." *Senate* at 12. In *Senate*, "[a]lthough the Senate had an opportunity to pass an appropriations law, 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. In other words, "the Senate is injured when its appropriation powers are taken away." *Id*.

Similar facts were present in *Sixth Kelulul a Kiuluul v. Ngiramekatii*, 5 ROP Intrm. 321 (Tr. Div. 1995) [hereinafter *Sixth KAK*]. There the Legislature sued the Governor for spending "Ngiwal funds in a manner not authorized by the 1993 and 1994 budgets." *Id*. at 322. The court found that the Governor was personally liable for $92,113 in unauthorized expenditures for 1993 and 1994. *Id*. at 326.

Using the same legal theory, the Seventh Peleliu Legislature obtained a judgment against Governor Ngiraingas in *Seventh Peleliu Legislature v. Ngiraingas*, Civil Action No. 171-97, slip op. at 2-4 (February 6, 2004) [hereinafter *Seventh Peleliu Legislature*]. The court found that the Governor was liable for unauthorized expenditures for the fiscal years 1995-1998.

Another case where the plaintiff was a legislature was *Aimeliik State Legislature v. Reklai*, Civil Action No. 98-83A (November 9, 1998), *appealed*, 7 ROP Intrm. 220 (1999) [hereinafter *Aimeliik State Legislature*]. The question in that case was whether the Governor's refusal to release certain funds to the Legislature, based upon his opinion that he had exercised a line item veto of an appropriations bill, was legally justified. There 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 ⊥107 legislators and their staff.[8] Hence, the legislators had an undeniable direct and personal injury. If the Governor's purported line item

[8]*See Aimeliik State Legislature*, Speaker Ucherrengos Aff. of 5/1/98, attaching copy of Governor Reklai's line item veto.

veto was ineffective, he was withholding salary to which the legislators were personally entitled.

All of these cases indicate that the rule concerning standing remains the same for all litigants: plaintiffs must show an actual injury that would be redressed by a favorable court judgment.

c. Analysis

The facts in this current litigation differ from the *Senate, Sixth KAK*, and *Seventh Peleliu Legislature.* In those previous cases, government funds were expended without an appropriation. The facts also differ from *Aimeliik State Legislature*, because in this case the Governor is not, on the basis of an invalid line item veto, withholding appropriated funds that are the vested salary rights of the legislators and their staff. Here, the objection of the Legislature is not that the Governor has spent funds without a supporting appropriation law, but that he has *not* spent the funds.[9] However, *not* spending these specific appropriations is not a violation of the Budget Act. Although it appropriates money for certain subjects, the Budget Act does not impose a legal duty upon the Governor to spend the appropriations in these contested fund categories. As was noted in *Mesubed v. ROP*, 10 ROP 62, 66 (2003), "[a]n appropriation is a 'set[ting] apart for a specific purpose or use.' 'Appropriate' is not a synonym for 'expend,' 'certify,' or 'obligate.'" *Id.* (quoting *Random House Webster's College Dictionary* 68 (1996)). An appropriations bill is one that permits certain expenditures, but often (as in this case) the identification of categories where disbursements are authorized is not the equivalent of an order of disbursement, does not always create a vested right of payment, and is certainly not a certification of fund availability. Educated estimates must be made by both the legislative and executive branches regarding revenue for the fiscal year. Depending on the economy, government revenue may or may not be sufficient to permit expenditures in conformity with the appropriations. Consequently, the Governor was well within his executive authority to state, as he did in his letter of January 2, that

> [s]imple removal from the budget as line items does not extinguish the possibility that each respective [CIP] project will be constructed; all of the money allocated under this subsection will remain allocated and will be available as feasibility studies and prudent expenditure decisions are rendered by my office in ⊥108 consultation with the other governmental branches of our government.

Letter from Governor Gibbons to Speaker Adachi of ½/03, at 2.

Similarly, nothing in the wording of the Budget Act prevents the Governor from adhering to his view that the HOTL is correct–that there should be no expenditures on generic "hamlet

[9]The parties are not in agreement on some of the facts. The Legislature has suggested that the Governor now construes the action of the HOTL to allow CIP funds "to be spent without limitation and in the complete discretion of the Governor alone." (Legislature's brief at 25). The HOTL and the Governor disavow any such interpretation. The Legislature's argument is inconsistent with the correspondence admitted as evidence in this case and the representations of Appellants' counsel at oral argument. Because this appeal comes before us on summary judgment, our review is *de novo*, but we are still limited to the evidence presented below.

projects" without greater specificity from the Legislature and, regarding the past uncompleted projects, that he "will only move forward with them if and when we are able to collect or generate sufficient local funds." *Id*. He was also within his rights to defer purchase of a new $7500 photocopier until it was shown that there was a need for such additional equipment. Simply put, he could impound these funds until both the vagaries in the Budget Act were clarified, and it was certain that the revenues of the State were sufficient to support the expenditures.

The issue of impoundment of funds is not addressed in the Koror State Constitution, but impoundment was a recognized executive tool in Palau when that constitution was drafted.[10] Whether or not it is technically correct to categorize the Governor's action here as an impoundment, his failure to promise to spend all of the challenged appropriations during the year was neither a violation of the Budget Act, nor of the Koror State Constitution, regardless of which interpretation of Article VI, Section 2(2) is accepted. Therefore, the Legislature has not "shown an injury . . . likely to be redressed by a favorable decision," on the challenged constitutional provision. *Kruger,* 5 ROP Intrm. at 93 (quoting *Simon*, 96 S. Ct. at 1924).

Not only has the Legislature failed to show that its injury is redressible, it has failed to show any injury at all. Unlike previous cases where the Legislature's appropriations powers were completely nullified by executive spending, the funds of the government in this case have not been spent, and unlike *Aimeliik State Legislature*, funds are not being withheld from persons 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.

Negotiation and compromise are not the only alternatives. Another obvious possibility would be to pass legislation similar to the former 40 PNC § 352(b), which provided:

> The President or his duly authorized representative(s) may take action or inaction that defers, withholds, delays, or precludes the obligation, effectuation or expenditure of budget authority as established by the Olbiil Era Kelulau; provided, that the President immediately notifies the Olbiil Era Kelulau of the same, and ⊥109 within 30 days the Olbiil Era Kelulau passes a joint resolution approving said action. Failure of the Olbiil Era Kelulau to pass a joint resolution, or to pass a joint resolution [sic] within 30 days shall prohibit the President or his duly authorized representative(s) from deferring, withholding, delaying or precluding any prescribed budget activity as established by the Olbiil Era Kelulau.[11]

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[10]*See* Palau Const. art. IX, § 16 ("The Olbiil Era Kelulau, with the approval of not less than two-thirds (2/3) of the members of each house, may release funds appropriated by the Olbiil Era Kelulau but impounded by the President.")

[11]This statute was repealed and replaced by RPPL 6-11 as part of the revisions to chapter 3 of Title 40, and § 352 now simply reads as follows:

Certainly the above law is not the only approach. There are other legislative avenues that could surmount the obstacles to spending these appropriations that were put in place by the Governor and the HOTL. The point is that these available alternatives demonstrate that the powers of the Legislature were not nullified in this case.

At first blush, any discussion of a requirement of injury, or standing in general, appears to be an academic exercise. But that perspective fails to consider the cost of premature involvement of the Court. This case is a good example. The normal functioning of the political process was short-circuited. The very day that the HOTL returned the bill to the Legislature, an immediate vote to override was taken and passed unanimously. There was no consideration given as to whether the HOTL's concerns had merit. There was no effort to meet in conference so that reasonable compromises could be reached. No further legislation was considered. Instead, the Legislature wanted its view of the Koror State Constitution vindicated by the Court, and it filed this case only seventeen days after the override. The litigation has been fast-tracked since its filing, but contested litigation, followed by appeal and full briefing before the Appellate Division, cannot be expected to take less than a year.

If the members of the Legislature had chosen to attempt a political solution and negotiate, or even dug in their heels and passed additional legislation, the matter might have been resolved long ago. In any event, resort to the courts should only occur when a litigant has suffered a redressible injury. It is not an injury for a legislature to have to engage in negotiation and compromise with the executive branch, or consider remedial legislation, when addressing monetary issues.[12]

⊥110

CONCLUSION

In *Senate*, it was said that allowing the Senate standing in that case "will not mean that the legislative branch will have free rein to challenge all executive actions with which it disagrees. It suffices to say that while different fact patterns may require that lines be drawn, we are confident of our ability to draw such lines . . . ." *Senate* at 11.

We draw the line here. In a case where a legislature sues the chief executive concerning an appropriations law, and the legislature fails to plead and prove that the chief executive has either spent government funds for which there was no supporting appropriation, or alternatively has withheld payment to the legislators to which they are legally entitled, the legislature has not

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> Rescissions and deferrals. The President may, from time to time, take action to impound or otherwise prevent the obligation or expenditure of budget authority for the balance of the budget year, or the period of the appropriation authority, in order to prevent a budget deficit or revenue deficit or create government savings, budget surplus, or revenue surplus; provided that the President shall immediately notify the Olbiil Era Kelulau of any such action and the reasons thereof.

[12]We also note that resolving this dispute short of litigation would have one immediate economic benefit; it would have obviated the need to hire four private lawyers, paid with public funds, to argue with each other about the meaning of the Koror State Constitution over the last year.

been injured and has no standing to sue. The case is therefore reversed and remanded with instructions to deny the Legislature's summary judgment motion.

NGIRAKLSONG, Chief Justice, dissenting:

Because I believe that the issue of standing should not have been raised for the first time on appeal, I vote to affirm the judgment of the Trial Division or, at the very least, remand the case to the Trial Division to allow it to consider the standing issue in the first instance.

The general rule is that an issue that was not raised in the trial court is waived and may not be raised on appeal. *Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 9 (1999); *Ngermelkii Clan v. Remed*, 5 ROP Intrm. 139, 141 n.2 (1995); *Udui v. Temol,* 2 ROP Intrm. 251, 254 (1991) (citing 5 Am. Jur. 2d *Appeal and Error* § 709 (1962)). Therefore, absent compelling circumstances, the Appellate Division will not consider an issue unless the issue was first addressed by the trial court. *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998); *Omrekongel Clan v. Ikluk*, 6 ROP Intrm. 4, 5 n.1 (1996); *KSPLA v. Diberdii Lineage*, 3 ROP Intrm. 305, 312 n.3 (1993).

However, the Appellate Division has recognized exceptions to the rule that issues not raised below will not be considered on appeal. *Tell v. Rengiil*, 4 ROP Intrm. 224, 225-26 (1994). One exception permits a reviewing court to address an issue not raised below to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake. *Id.* Another exception, applicable when the general welfare of the people is implicated, affords the court the opportunity, in its discretion, to consider the public good over the personal interests of the litigants. *Id.* Although neither of these exceptions applies under the specific facts of this case, United States courts have also recognized that the issue of subject matter jurisdiction can be considered for the first time on appeal. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 83 S. Ct. 671, 675 (1963); *In re Davis*, 899 F.2d 1136, 1138-40 (11th Cir. 1990).

Therefore, the next step of the analysis requires a determination as to whether standing is or is not a jurisdictional issue. Instead of regarding standing as a jurisdictional prerequisite to a party's ability to bring suit, several courts have stated that "lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Ill. Housing Dev. Auth.*, 524 N.E.2d 561, 582 (Ill. 1988), *cited in In re Gen. Order of October 11, 1990*, 628 N.E.2d 786, 788 (Ill. Ct. App. 1993) (refusing to dismiss case for lack of standing where issue ⊥111 was not raised below and was waived); *see also Interstate Prod. Credit Assoc. v. Abbott*, 726 P.2d 824, 825 (Mont. 1986); *Coty v. Ramsey Assocs., Inc.,* 546 A.2d 196, 208 (Vt. 1988). The *Greer* court held that a party's failure to raise the issue of standing in the trial court constituted a waiver of the issue and precluded the appellate court from considering it on appeal. *Greer,* 524 N.E.2d at 582. Part of the rationale for this holding was that because the issue of standing was not presented below, the record was devoid of a factual basis for determining the issue of standing, and the appellees were not put on notice that such proof would be required. *Id*.

Here, not only have Appellants waived any objection they had to the Legislature's standing, I also believe that it is inappropriate for this Court to order the parties to raise an argument at the appellate level that was not raised in the trial court. The parties did not address the standing issue in the appellate briefing or at oral argument and only submitted supplemental briefing on the issue as ordered by the majority. This Court has previously stated that the issues on appeal are identified and chosen by the parties, and "an appellate court is limited in its deliberations by the record on appeal and the issues framed by the parties." *Nakatani v. Nishizono,* 2 ROP Intrm. 7, 12 (1990). Instead of raising the standing issue *sua sponte*, I believe that the Court should have proceeded to decide the case on the merits. At the very least, I believe that this case should be remanded to allow the trial court to consider the Legislature's standing in the first instance rather than deciding the issue on appeal. *See Lutz v. Jefferson Parish Sch. Bd.*, 503 So. 2d 106, 110 (La. Ct. App. 1987) (declining to consider an issue not presented below because the record did not contain the evidence necessary to resolve the issue). This Court has stated that issues that arose after the trial court's judgment and the filing of the notice of appeal, and, therefore, were not and could not have been presented below, are better addressed by the trial court on remand than by the Appellate Division in the first instance. *Ngeremlengui Chiefs v. Ngeremlengui Gov't,* 8 ROP Intrm. 178, 180 (2000) (citing 5 Am. Jur. 2d *Appeal and Error* § 486 (1995) and *Landy v. Fed. Deposit Ins. Co.*, 486 F.2d 139, 151 (3d Cir. 1973)). If not affirmed, this case should be remanded to allow the parties to develop the record as it relates to standing and fully brief and argue the issue in the Trial Division before the Appellate Division issues its opinion on the matter.