REPUBLIC OF PALAU
Plaintiff,

v.

ALFONSO DIAZ, DEBORAH RENGIIL, MARGO LLECHOLCH, SHERRY TADAO, MARK REMELIIK, SANTORY BAIEI a.k.a SANTORY NGIRKELAU, STEVEN KANAI, NGIRAKESOL MAIDESIL, JULIUS TEMENGIL a.k.a. JULIUS BLAILES, and SEIKO KING,
Defendants.

Civil Action No. 13-008

Supreme Court, Trial Division
Republic of Palau

Decided: November 29, 2013

[1] **Constitutional Law**: Pardon Power

The Executive Clemency Act imposes imposes only procedural requirements and does not infringe upon the president's substantive pardon power.

[2] **Constitutional Law**: Statutes

One cannot challenge a statute's constitutionality on the ground that it might injure some hypothetical individual.

[3] **Constitutional Law**: Facial Challenge

A facial challenge to a statute requires a showing that the law always operates unconstitutionally.

[4] **Constitutional Law**: Equal Protection

To establish an equal protection violation based on selective enforcement of a statute, the plaintiff must establish that he was treated differently than others who were similarly situated and that the selective treatment was motivated by an intention to discriminate on the basis of an impermissible consideration or by malice.

Counsel for Plaintiff: AAG Timothy McGillicuddy
Counsel for Defendants: Siegfried Nakamura, Salvador Remoket, Yukiwo Dengokl, William Ridpath

The Honorable R. ASHBY PATE, Associate Justice:

Before the Court is the Republic of Palau's motion for summary judgment. For the following reasons, the Republic's motion is hereby **GRANTED**.

BACKGROUND

The Constitution gives the President the power to "grant pardons, commutations and reprieves subject to procedures prescribed by law." Palau Const. art. VIII, § 7(5). The Executive Clemency Act (Act), in turn, establishes the procedures by which the President may exercise that power. 17 PNC § 3201.

Under the Act, any person who has been convicted of a crime may file a petition for executive clemency with the Minister of Justice (Minister). 17 PNC §§ 3201. Alternatively, the President may initiate the

process himself by providing a notice of intent to exercise clemency directly to the Minister. 17 PNC §§ 3201. In either scenario, after the Minister receives the petition, or notice of intent, as the case may be, the Minister must distribute copies to the Attorney General, the Director of the Bureau of Public Safety, and the Parole Board. 17 PNC § 3204. Those entities then have 60 days to review it and submit written recommendations to the Minister. 17 PNC § 3204. Within five days of receiving all of the written recommendations, the Minister must prepare his own recommendation and submit the petition or notice of intent, along with all of the recommendations, to the President. 17 PNC § 3205. "Based on these documents, the President shall decide whether or not to grant executive clemency." 17 PNC § 3205.

This lawsuit arises out of former President Toribiong's decision to grant executive clemency to Defendants during the waning days of his administration. In late 2012 and early 2013, Defendants, who have been convicted of a variety of crimes, submitted petitions for executive clemency.[1] Fewer than 60 days after those petitions were filed, former President Toribiong granted them. The Attorney General's office never issued the required recommendations before the President granted executive clemency to Defendants.

On February 5, 2013, the Republic of Palau (Republic) filed this action seeking a declaratory judgment that Defendants' pardons are null and void because the President failed to follow the procedures prescribed by the Executive Clemency Act. Defendants timely filed their Answers.[2] The Republic then moved for summary judgment.

APPLICABLE STANDARDS

This Court has jurisdiction over "all matters in law and equity." Palau Const. art. X, § 5. "In a case of actual controversy within its jurisdiction, the court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." ROP R. Civ. P. 57. Declaratory relief may be "appropriate where it will serve a useful purpose in clarifying the legal relations of the parties or terminate the uncertainty and controversy giving rise to the proceeding." *Senate v. Nakamura*, 8 ROP Intrm. 190, 193 (2000).

[1] The record is unclear whether Defendant Mark Remeliik (Remeliik) submitted a petition for executive clemency or whether his clemency was initiated by former President Toribiong. Because the required procedures for obtaining and considering recommendations are the same under either scenario, the distinction is of no import in this case.

[2] Defendants Remeliik, Julius Temengil, a.k.a. Julius Blailes (Temengil), and Seiko King (King) have not filed answers to the Republic's complaint. On November 21, 2013, observing that no proofs of service for these Defendants appeared on file and that they had failed to appear in the action, the Court ordered the Republic to show cause by or before November 25, 2013, why the Court should not dismiss the action without prejudice as to these Defendants pursuant to ROP R. Civ. P. 4(l) and (m). In response, the Republic submitted proofs of service for all three Defendants indicating that they were served with the complaint on February 7-8, 2013. Defendants Remeliik, Temengil, and King surprisingly attended the scheduling conference on November 25, 2013, but made no representations as to their failure to file an answer or as to their intentions going forward. The Republic did not serve these Defendants with its motion for summary judgment and these Defendants did not file responses thereto. To date, the Republic has not requested entry of default against these three Defendants pursuant to ROP R. Civ. P. 55(a).

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ROP R. Civ. P. 56(c). A factual dispute is "material" if it must be resolved before the fact-finder can determine whether an element of the claim has been established. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995). Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a question as to a material fact on which that party will bear the burden of proof at trial. *Becheserrak v. Eritem Lineage*, 14 ROP 80, 82 (2007). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Wolff*, 5 ROP Intrm. at 110.

DISCUSSION

The Republic's position is simple. It is undisputed that former President Toribiong neglected to follow the procedures prescribed by the Executive Clemency Act when he granted Defendants' pardons without receiving or considering any recommendations from the Attorney General and before the time for submission of those recommendations had expired.[3] Accordingly, the Republic asks this Court to declare the pardons to be null and void.

Defendants offer several arguments in response. First, they argue that this Court has no jurisdiction to review a facially valid pardon because the pardon power is entrusted solely to the President's discretion. Second, they assert that the Executive Clemency Act's recommendation requirement is unconstitutional because it intrudes on the President's pardon power. Third, they argue that the Republic is estopped from bringing this lawsuit because other presidents have issued pardons without following the procedures prescribed by the Executive Clemency Act. And, finally, they argue that this suit violates their right to Equal Protection because the Republic has refrained from pursuing similar suits to enforce the Act after other presidents neglected to follow the proper pardon procedures.

I. Reviewability

The threshold question is whether this Court may review the grants of executive clemency issued by former President Toribiong to determine whether he followed the statutorily prescribed procedures in the Executive Clemency Act. The Court concludes that it may.

It is clear that decisions committed to the sole discretion of the President are unreviewable as to their merits. This Court could not entertain a claim that the President acted unwisely in granting a particular pardon. *See Kruger v. Doran*, 8 ROP Intrm. 350, 351 (Tr. Div. 2000) (observing that the Constitution "affords the President broad, unreviewable discretion to grant pardons");

[3] Attorney General R. Victoria Roe's affidavit, which is attached to the Republic's reply brief, contains her sworn statement, made with personal knowledge, that the Office of the Attorney General did not issue the required recommendations before former President Toribiong signed each of the Defendants' orders of pardon and commutation. Defendants have introduced no evidence contradicting Ms. Roe's affidavit. The Court has afforded Defendants sufficient time to request to file a sur-reply in response to Ms. Roe's affidavit, but they have not done so.

United States v. Carpenter, 526 F.3d 1237, 1242 (9th Cir. 2008) (noting that the Court may not review claims that a member of the executive branch "exercised his discretion poorly"); 59 Am. Jur. 2d *Pardon and Parole* § 43 (2012) ("Even for the grossest abuse of this discretionary power, the law affords no remedy; the courts have no concern with the reasons for the pardon.").[4] In other words, the merits and wisdom of any presidential pardon are unreviewable by this Court, or any court, save the oldest and least forgiving court of all—the court of public opinion.

It is equally clear, however, that it is "the Court's province and duty . . . to decide whether another branch of government has exceeded whatever authority has been committed to it by the Constitution." *Francisco v. Chin*, 10 ROP 44, 49-50 (2003). Thus, even when an action is committed to the absolute discretion of another branch of government, this Court may review whether that entity "exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Guadamuz v. Bowen*, 859 F.2d 762, (9th Cir. 1988); *see also Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (holding that the Secretary of State's discretionary immigration decisions may be reviewed for the limited purpose of determining whether the "Secretary compl[ied] with her statutory and regulatory obligations"); *Jamison v. Flanner*, 116 Kan. 624 (1924) (reviewing an exercise of executive clemency to determine whether it complied with a statutorily prescribed notice requirement); 59 Am. Jur. 2d *Pardon and Parole* § 43 (2012) ("[T]he courts have jurisdiction to determine the validity of a pardon as affected by the question whether the official granting it had the power to do so.").[5]

Here, the Republic is not asking the Court to inquire into the merits of granting pardons to these Defendants. Instead, the Republic asserts that former President Toribiong exceeded his legal authority by granting pardons without following the procedures prescribed by the Executive Clemency Act. That question falls within the province of the Court.

II. Constitutionality

Defendants acknowledge that former President Toribiong's exercise of executive

[4] "In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law." *Becheserrak v. ROP*, 7 ROP Intrm. 111 (1998); *see also* 1 PNC § 303 ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the Courts of the Republic of Palau . . . .").

[5] Defendants rely heavily on *In re: Hooker*, 87 So.3d 401 (Miss. 2012) for the proposition that this Court lacks jurisdiction to review whether the President complied with the applicable procedural requirements in granting the pardons. That case, which provoked vigorous dissents from several Mississippi Supreme Court Justices, is an outlier. The majority opinion relies on antiquated precedent and "fails to consider decisions of other states; fails to consider legal encyclopedias confirming that conditions precedent to granting a pardon have repeatedly been found reviewable; contradicts learned treatises and encyclopedias on Mississippi law; and fails to consider that the United States Supreme Court has reviewed whether pardons were within the President's power on numerous occasions." *Id.* at 421-22 (Randolph, J., dissenting). Moreover, *In re: Hooker* concerned a constitutional provision that itself established procedural requirements for the exercise of the pardon power, not a statutory provision enacted by the legislature, as is the case here. Thus, the separation-of-power concerns in this case are distinguishable from those presented by *In re: Hooker*. This Court is unconvinced that *In re: Hooker* is either correct or analogous to this case.

clemency did not conform to the procedures prescribed by the Executive Clemency Act. They argue, however, that he did not exceed his constitutional authority because the Act itself is unconstitutional. More specifically, they assert that the Act impermissibly intrudes on the President's discretion to exercise the pardon power entrusted to him by the Constitution. Defendants' argument fails.

The Palau Constitution explicitly contemplates the enactment of legislation establishing procedures by which the President must exercise his pardon power. *See* Palau Const. art. VIII, § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law*.") emphasis added). And, "[w]here a constitution directs that the pardoning power shall be vested in the [executive], under regulations and restrictions prescribed by law, the legislature may make such regulations and restrictions[.]" 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012). Accordingly, the plain text of the Constitution empowers the legislature to enact laws establishing procedural requirements for the exercise of executive clemency. *See Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010) ("The first rule of construing a statute or constitutional provision is that we begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written.").

The question, then, is whether the Executive Clemency Act imposes legitimate procedural requirements, as expressly sanctioned by the Constitution, or whether it goes too far by imposing substantive restrictions on the President's pardon power. In answering this question, "[t]his Court presumes that the legislature intended to pass a valid act and construes an act to be constitutional, if possible." *Nicholas v. Palau Election Comm'n*, 16 ROP 235, 239 (2009).

[1] "The purpose of [the Executive Clemency Act] is to set procedures by which the President may exercise his power pursuant to Article VIII, Section 7(5) of the Palau Constitution." 17 PNC § 1301. The Act requires the President to obtain and consider recommendations from the Attorney General, the Bureau of Public Safety, the Parole Board, and the Minister of Justice. 17 PNC §§ 3204-05. The President need not heed those recommendations; he must simply consider them. *See* 17 PNC § 3205. Nothing prevents the President from issuing a pardon even when all four entities recommend that the pardon be denied. The Act thus imposes no substantive limits on the President's power to grant pardons—indeed, his discretion to pardon any person he pleases for whatever reason remains wholly unfettered. *See Makowski v. Governor*, 299 Mich.App. 166, 175 (App. Ct. 2012) (holding that statutory provisions requiring the governor to consider recommendations from the parole board before granting commutations "in no way limit the Governor's absolute discretion with regard to commutation decisions"). Instead, the Act only requires that the President follow certain procedures to ensure that his decision to grant or deny a pardon is properly informed.

Legislative history supports the conclusion that the Act imposes only procedural requirements and does not substantively infringe upon the President's pardon power. In fact, the first procedural rules governing the exercise of executive clemency were created by former President Haruo I. Remeliik himself, in Executive Order No. 27. The Senate bill that would eventually become the Executive Clemency Act was modeled on former President Remeliik's

Executive Order. *See* Stand. Com. Rep. No. 3-19 (Apr. 11, 1989) (noting that "[t]his bill is very similar in substance and form to Executive Order No. 27"). The Senate Committee on Judiciary and Government Affairs (Committee) recommended that "the procedures set forth in this Executive Order should be statutory, so as to ensure consistency in the application of the pardon authority." *Id.* Accordingly, the Committee translated the basic requirements established by the Executive Order into a legislative act. In doing so, the Committee observed that "this bill does not restrict the authority of the President to grant pardons." *Id.* Instead, "[t]hese established procedures will ensure that the President is properly informed regarding any proposed clemency action." Stand. Com. Rep. No. 21 (Jul. 25, 1989). The legislative history thus confirms that the Olbiil Era Kelulau intended to codify preexisting procedures governing executive clemency and did not intend to substantively restrict the President's pardon power.

Defendants insist that, although the Act may appear to place only procedural limitations on the exercise of executive clemency, in practice it may substantively limit the President's pardon power. In particular, Defendants take issue with the fact that the Act allows the Attorney General, Parole Board, and Bureau of Public Safety up to 60 days in which to issue their recommendations after they receive a petition for executive clemency. That provision, Defendants argue, would allow the Attorney General to "effectively suspend the President's pardon power for at least 60 days, by withholding his or her recommendation until the 60 day period expires." Defendants worry that individuals sentenced to fewer than 60 days' imprisonment may thereby be effectively barred from obtaining commutation of their sentences.

[2][3] The specter raised by Defendants does not haunt the facts of this case. None of the Defendants here was forced to wait 60 days to receive executive clemency, and many of them petitioned for and received their pardons after they had already served their sentences. Defendants cannot challenge the Act's constitutionality on the ground that it might injure some hypothetical individual. *See* 16 Am. Jur. 2d *Constitutional Law* § 137 (2009) ("As a general rule, no one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others."). Nor can Defendants successfully argue that the Act is unconstitutional on its face simply because Defendants can imagine some scenario in which the Act might operate unfairly—a facial challenge requires a showing that "the law, by its own terms, always operates unconstitutionally." 16 Am. Jur. 2d *Constitutional Law* § 137 (2009). This Court need not decide whether the Act might infringe upon the constitutional rights of persons sentenced to fewer than 60 days' imprisonment whose petitions for executive clemency languish until their sentences have been served, because that issue is simply not presented here.[6] *See Nebre v. Uludong*, 15 ROP 15, 23 (2008) (observing that this Court may decline "to enter into speculative

[6] Defendants' hypothetical is highly speculative. A person sentenced to fewer than 60 days' imprisonment might apply for a commutation while out on bond awaiting the determination of the appeal. Or, the President might request that the Attorney General expedite the recommendation process to ensure that the petition could be decided before the expiration of the sentence. Finally, many of the Defendants here were pardoned after serving their sentence, proving that an individual who has already served his or her sentence can still obtain significant benefits from the exercise of executive clemency.

inquiries of matters that lack concrete factual situations, fully developed and properly presented for determination") (quotation marks and citation omitted)). It is enough that Defendants have failed to show either that the Act always operates unconstitutionally or that it operates unconstitutionally as applied to them.

Accordingly, the Court holds that the Executive Clemency Act is neither unconstitutional on its face nor unconstitutional as it applies to these Defendants. It is undisputed that former President Toribiong failed to comply with the procedural requirements established by the Act in issuing Defendants' pardons and commutations. "A pardon or commutation of sentence issued by the [executive] without compliance with the regulations and restrictions prescribed by law is void." 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012); *see also Jamison v. Flanner*, 116 Kan. 624 (1924) (holding that, when a governor issues a pardon without providing the statutorily required notice, the pardon is void). Defendants' pardons and commutations are therefore null and void unless Defendants can establish some other affirmative defense.

III. Estoppel

Defendants argue that the Republic should be equitably estopped from enforcing the Executive Clemency Act with respect to their pardons because other presidents have routinely issued pardons to other convicted criminals in violation of the Act.[7] Defendants' argument is undeveloped and somewhat confusing, but the gist appears to be that the Republic may not seek to enforce strict compliance with the Act when other presidents, including current President Remengesau, have allegedly flouted the procedural requirements with impunity.

"The government may not be estopped on the same terms as any other litigant."[8] *ROP v. Akiwo*, 6 ROP Intrm. 283, 293 (1996). Indeed, "a private party trying to estop the government has 'a heavy burden to carry.'" *United States v. Grap*, 368 F.3d 824, 831 (8th Cir. 2004) (citation omitted). "To establish equitable estoppel against the government, a party asserting the affirmative defense must, at a minimum, establish the traditional elements of estoppel and also show (1) affirmative misconduct by the government and (2) that the public's interest will not suffer undue damage as a result of the application of the doctrine." *Akiwo*, 6 ROP Intrm. at 293.

Defendants have failed to introduce evidence tending to show affirmative misconduct by the government. "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact." *Akiwo*, 6 ROP Intrm. at 293 (citation omitted). Mere negligence on the part of the Republic is not enough to establish misconduct. *Id.* Defendants have pointed to no

[7] Defendants Sherry Tadao (Tadao), Margo Llecholch (Llecholch), Alfonso Diaz (Diaz), and Santory Baiei, a.k.a. Santory Ngirkelau (Baiei), were the only Defendants to raise estoppel as an affirmative defense in their answers to the complaint. Accordingly, the remaining Defendants have waived the argument. *See* 28 Am. Jur. 2d *Estoppel and Waiver* § 149 (2008) (equitable estoppel is an affirmative defense that must be raised in the pleadings); *Mesubed v. ROP*, 10 ROP 62, 65 (2003) ("Affirmative defenses are matters for the litigant to raise, or not to raise, and may be waived.").

[8] Traditional estoppel requires the following elements: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989).

affirmative act of misrepresentation committed by the Republic. Moreover, nothing in the record proves that the Republic intentionally failed to enforce the Act in past instances in order to mislead Defendants or for some other improper purpose. *See Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126, 1130 (9th Cir. 1999) (holding that estoppel was not warranted where there was "no indication that the government delayed enforcement of this policy for any improper purpose or that the government otherwise engaged in affirmative misconduct").

More importantly, Defendants have failed to argue or to introduce any evidence tending to show that the public's interest will not suffer undue damage as a result of the application of the doctrine. To the contrary, application of equitable estoppel in this case would likely damage the public interest a great deal. Defendants' estoppel argument boils down to the contention that because the Executive Clemency Act has not been strictly enforced before, the Republic is powerless to enforce it now. But there is support in American case law for the position that estoppel may bar the government's enforcement of a statute in only the rarest of cases. *See Volvo Trucks of North America, Inc. v. United States*, 367 F.3d 204, 211-12 (4th Cir. 2004) ("If equitable estoppel ever applies to prevent the government from enforcing its duly enacted laws, it would only apply in extremely rare circumstances."); 28 Am. Jur. 2d *Estoppel and Waiver* § 130 (2011) (noting that "a public officer's failure to enforce a statute correctly" should not "inhibit correct enforcement of the statute or estop more diligent enforcement"). This position makes sense because estopping a government from enforcing a valid statute would violate the public interest in maintaining the rule of law. *See Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984) (observing that, if estoppel bars the government from enforcing a statute, "the interest of the citizenry as a whole in obedience to the rule of law is undermined"); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985) ("The possibility of harm to a private party inherent in denying equitable estoppel . . . is often (if not always) grossly outweighed by the pressing public interest in the enforcement of congressionally mandated public policy."). To hold otherwise would be to support the absurd proposition that, because a law may have been ignored in the past, it must forever be ignored. Accordingly, even viewing the evidence in the light most favorable to them, Defendants have not raised a genuine dispute as to whether equitable estoppel prevents the Republic from seeking to enforce the Executive Clemency Act.

IV. Equal Protection

Defendants also argue that the Republic's decision to enforce the Executive Clemency Act with respect to their pardons and commutations violates their equal protection rights.[9] Although it is undeveloped

[9] Only Defendants Tadao and Baiei raise an equal protection defense in their answers. Defendants Llecholch, Diaz, and Ngirakesol Maidesil (Maidesil) mention equal protection in their oppositions to summary judgment, but they fail to raise the issue in their answers. Defendants Steven Kanai (Kanai) and Deborah Rengiil (Rengiil) made no equal protection argument. Because Defendants Llecholch, Diaz, Maidesil, Kanai, and Rengiil failed to plead an equal protection violation, they have waived the argument. *See Mesubed*, 10 ROP at 65 (affirmative defenses not raised in pleadings may be waived). Although the Republic may consent to litigating an issue by responding to the merits, *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999), the Republic filed separate replies and never argued the merits of equal protection

at best, Defendants' equal protection argument essentially arises from the same contentions of unfairness that underlie their estoppel defense. That is, they assert that the Republic has not initiated suits to invalidate other procedurally deficient pardons, and this selective enforcement violates their right to equal protection. Defendants' argument fails here as well.

[4] To establish an equal protection violation based on selective enforcement of a law, Defendants must show that:

> (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995); *see also Rubinovitz v. Rogato*, 60 F.3d 906, 909-10 (1st Cir. 1995) (same).

Even assuming that Defendants have raised a question as to whether they have been treated differently from similarly situated persons, they have failed to offer any evidence whatsoever sufficient to raise a genuine issue of fact as to the second prong of the test. *See Zahra*, 48 F.3d at 684 ("The flaw in Zahra's equal protection claim is that Zahra assumes that to prevail he need only prove that he was treated differently from others."); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) ("Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection."). Defendants have neither argued nor provided any evidence that the Republic decided to enforce strict compliance with the Executive Clemency Act in this case because it wishes to discriminate against them on the basis of an impermissible consideration, such as race, social status, gender, or religion. *See* Palau Const. art. IV, § 5, cl. 1 (listing impermissible bases for discrimination). Nor have Defendants alleged that the Republic intended to punish or inhibit their exercise of constitutional rights. Finally, the record is entirely lacking in evidence that the Republic has acted with malice or bad faith intent to injure Defendants. *See Zahra*, 48 F.3d at 684 (holding that evidence suggesting an individual "was 'treated differently' from others does not, in itself, show malice"); *LeClair v. Saunders*, 627 F.2d at 608 ("[E]qual protection does not require that all evils of the same genus be eradicated or none at all."). Accordingly, Defendants' equal protection argument fails as a matter of law.

V. Equity

The Court feels compelled to consider whether it possesses the equitable power to uphold Defendants' pardons despite former President Toribiong's failure to comply with the Executive Clemency Act. That is, can the Court relieve Defendants from the consequences of having received invalid pardons through no fault of their own? After all, Defendants themselves have not violated the Executive Clemency Act. Apart from their underlying crimes, they appear to be guilty of no additional wrongdoing and there is no meaningful suggestion on the record that Defendants failed to comply with the procedures for petitioning for their various

as it relates to Defendants Llecholch, Diaz, Maidesil, Kanai, and Rengiil.

pardons. Having submitted their petitions, Defendants waited for the decision of the former President, which ultimately issued in their favor, and, upon receipt of facially valid pardons, likely relied upon them to rebuild their lives.

Even considering the above, it would be inappropriate to rely on equity to uphold Defendants' pardons for two reasons. First, it is a well-established maxim that equity follows the law. To allow Defendants' perceived reliance on legally invalid pardons to render their pardons somehow equitably valid would, at the same time, render the Republic's ability to enforce one of its duly enacted laws essentially toothless. To do so creates a perverse incentive to ignore the Act with impunity, tempting future administrations faced with eleventh-hour pardons to ignore the Act and allow their pardonees' subsequent reliance to wipe the slate clean. Equity must follow the law, not undermine it.

Second—and most importantly—transforming a legally invalid pardon into an equitably valid one would usurp a role expressly reserved for the President in our Constitution, which delegates the pardon power to the President and the President alone. Having declared at law that the pardons are null and void, the Court cannot then exercise what amounts to its own pardon power to uphold them. *See People v. Erwin*, 212 Mich. App. 55, 63–64 (App. Ct. 1995) ("[J]udicial actions that are the functional equivalent of a pardon or commutation are prohibited."). To do so would violate the separation-of-powers doctrine at a fundamental level.

A final and important distinction needs to be reiterated regarding the separation-of-powers doctrine. In declaring the pardons to be null and void, the Court does not question the wisdom or propriety of these pardons. To do so would be to act as an unappointed moral tutor and to superimpose its own discretion onto the discretion expressly reserved for the President by the Constitution. Rather, the Court has conducted a limited review to determine whether former President Toribiong exceeded his lawful authority by issuing pardons without following the procedures required by the Executive Clemency Act. Based on the above, the Court concludes that he exceeded his authority.

CONCLUSION

The issues presented by this case are of great importance both to the Republic and to Defendants, and swift resolution of the ongoing uncertainty regarding the validity of Defendants' pardons is vital to the rule of law in the Republic. The Court therefore concludes that declaratory relief is appropriate in this case. For the foregoing reasons, the Republic's motion for summary judgment is **GRANTED**. The pardons and commutations issued in favor of Defendants Diaz, Rengiil, Llecholch, Tadao, Baiei, Kanai, and Maidesil are null and void as a matter of law.