IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

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| LEKKA,<br>Plaintiff,<br>v.<br>KILUWE (as CEO),<br>Defendant. | Civil Action No. 2019-046 |
| KONOU and LEHMAN,<br>Plaintiffs,<br>v.<br>KILUWE (as CEO) and KAWAKAMI (as AAG),<br>Defendants. | Civil Action No. 2019-069<br>OPINION ON REMOVED QUESTION |

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Associate Justices

CADRA, C.J., with whom SEEBORG, A.J., concurs; SEABRIGHT, A.J. concurring in result by separate opinion:

## I. INTRODUCTION

Pursuant to Article VI, Section 2(3) of the Constitution and Supreme Court Rules of Procedure, Rule 18 (a), the High Court has removed the following question for determination by the Supreme Court:

> Is there a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshall Islands national or local elections by postal ballots, or otherwise?[1]

* The Honorable J. Michael Seabright, Chief U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

The parties' briefing, to which we are referred by the High Court's removal order, addresses Public Law (P.L.) 2016-028 which is the underlying basis of the parties' dispute. We find it necessary to address that law in answering the removed question.

For the reasons set forth herein, we conclude that a qualified Marshallese voter residing outside the Marshall Islands has the constitutional right to vote in the Marshall Islands national or local elections but does not have the right to vote by postal ballot or by some other specific method unless authorized by Act or regulation. Because P.L. 2016-028 eliminates all practical means for plaintiffs and others similarly situated to exercise their constitutionally protected right to vote without providing some reasonable alternative method of exercising that right, we conclude P.L. 2016-028 presents an unreasonable burden on plaintiffs' right to vote and is unconstitutional.

We return this case to the High Court for such further proceedings which may be necessary to resolve this case.

## II. FACTUAL & PROCEDURAL BACKGROUND

We do not make findings of fact and are confined to the record as developed by the parties. The parties have stipulated to the following facts:

> 1. Plaintiffs are non-resident citizens of the Marshall Islands residing in the State of Hawaii and State of Indiana, United States of America.
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> 2. Plaintiffs are qualified registered voters entitled to vote in the electoral districts in which they are registered to vote, having land rights in such electoral district; and
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> 3. Each of the plaintiffs had applied for a postal ballot pursuant to the procedure set forth under Sec. 118 of the Elections and Referenda Regulations of 1993, and each application was denied based on the fact that postal ballot(s) for all RMI eligible voters permanently

[1] Amended Removal Order, filed August 22, 2019. The issue as originally referred was "Is there a constitutional right for a qualified Marshallese voter *permanently* residing outside the Marshall Islands to vote in the Marshall Islands national or local elections by postal ballots, or otherwise?" Removal Order, filed August 21, 2019.

residing outside of the Republic is no longer available under the Election and Referenda Act, 1980, as amended by P.L. 2016-028.[2]

We take notice of the uncontested legislative fact that the Nitijela created the right of qualified nonresident Marshallese voters to vote by means of postal ballot and that has been the historical practice up to the enactment of P.L. 2016-028.

## III. THE PARTIES' CONTENTIONS ON REMOVED QUESTION

### A. Plaintiff's Contentions

As summarized by the High Court, plaintiffs contend that P.L. 2016-028 is unconstitutional because it deprives them of the constitutional right to participate in the electoral process as voters, as guaranteed them under Article IV, Section 3 and Article II, Section 14(2) and (3).[3]

Plaintiffs argue that Article IV, Section 3, contemplates a system of "universal suffrage" which the government must accommodate by postal ballot or some effective alternative means to all eligible voters absent from the Republic on election day. Plaintiffs claim that the Nitijela's passage of P.L. 2016-028, which eliminates the historical practice of postal voting for all eligible non-resident voters, has the effect of depriving non-resident citizens who cannot afford to "buy an airplane ticket" to be present and vote in person of their right to participate in the electoral process. Further, plaintiffs contend that the requirement that such a voter "buy an airplane ticket" constitutes an impermissible fee on the voter in contravention of Article II, Sections 14(2) and (3) and Section 18(1). Plaintiffs assert P.L. 2016-028 violates equal protection under Article II, Section 12 because that law creates a class of voters outside the Republic who can still vote via postal ballot (temporarily absent voters meeting the requirements of P.L. 2016-028) and another class which cannot (non-resident off-island voters such as plaintiffs). Further, plaintiffs

[2] *Id.*

[3] Removal Order filed 8/21/19.

argue that the class of voters "temporarily absent" from the Republic is vague which, if allowed to stand, may result in many lawsuits. Because voting is a fundamental personal right, plaintiffs assert the applicable standard of review is "strict scrutiny."[4]

**B. Defendants' Contentions**

As summarized by the High Court, defendants deny plaintiffs' rights have been violated by P.L. 2018-028 because plaintiffs are not permanent residents of the Marshall Islands and have no constitutional right to participate in the electoral process as voters by means of a postal ballot.[5]

Defendants argue that P.L. 2016-028 does not deprive plaintiffs and others similarly situated from voting in the upcoming elections; that there is nothing in P.L. 2016-028 which affects plaintiffs' constitutional right to vote and nothing which takes away plaintiffs' right to vote under Article IV, Section 3. Defendants argue there is nothing in the Constitution that says a voter has a right to use a postal ballot or any other particular voting method other than the right to vote by secret ballot for elections of members of the Nitijela. Defendants argue that principles of "extraterritoriality" preclude application of Article II constitutional rights anywhere outside the Republic in the absence of an international or bi-lateral agreement with the United States or other nations to do so. Defendants further assert that plaintiffs' claims involve a "political question" which the courts cannot or should not consider in the exercise of its jurisdiction. Finally, defendants argue that plaintiffs have procrastinated, acting in a dilatory and stalling

[4] *See* Plaintiffs' (Evelyn Konou and Anna Lehman) Motion for Summary Judgment filed July 1, 2019; Plaintiffs' Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment filed August 2, 2019. Plaintiff's (Betwel Lekka) Motion for Summary Judgment filed June 13, 2019; Defendant's Opposition dated July 15, 2019; Plaintiff's Reply dated July 26, 2019.

[5] Removal Order filed 8/21/19.

manner, waiting almost three years to bring their claims as the national elections are quickly approaching.[6]

## IV. ANALYSIS

### A. The Constitution, Article II, Section 14(2), and Article IV, Section (3) Guarantee The Right Of A Qualified Marshallese Voter Residing Outside the Marshall Islands To Vote But Does Not Guarantee The Right Of Such An Individual To Vote By Postal Ballot Or By Any Particular Method.

The Constitution, Article II, Section 14 (2) provides:

> (2) Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed by this Constitution and to election regulations which make it possible for all eligible persons to take part.

Article IV, Section 3, applicable to elections to the Nitijela, provides:

> (3) Elections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who have attained the age of 18 years, and who are otherwise qualified to vote pursuant to this section.

In the absence of some textual or logical support, we will not read into the Constitution a provision not contained therein. *In the Matter of the 19th Nitijela Session*, 2 MILR 134, 140 (1999.) The Supreme Court has previously made it clear that the courts may not rewrite the Constitution. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 120 (2009). If the constitutional language is clear, "judicial inquiry must cease." *Lekka v. Kabua, et al*, 3 MILR 168, 172 (2013)(addressing statutory interpretation) quoting *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012). Our analytical starting point thus begins with the clear text of the Constitution.

#### *1. The Constitution provides no textual basis for the right to vote by postal ballot.*

There is no language in the text of the Constitution which creates the right of qualified Marshallese voters to vote by postal ballots or by some specific alternative method. The

[6] *See* Defendant CEO Kiluwe Answer in Opposition to Plaintiffs' Motion for Summary Judgment.

methods and means of effectuating the constitutional right to vote is vested in the Nitijela by virtue of Article IV, Section 1(2), which includes the power "to repeal, revoke or amend any law, to confer, by Act, the authority to promulgate rules, regulations, orders or subordinate instruments to further stated purposes in such Acts; and to make laws that are necessary and proper for carrying into execution any of its other powers, including powers vested by the Constitution in any other government agency or public officer." The Constitution does not require the Nitijela to adopt any particular voting system such as postal balloting. The Nitijela can implement whatever balloting process it may deem appropriate to effectuate the right to vote so long as the constitutional right to vote is not denied to an individual or class of individuals who are qualified to vote.

Because the text of the Constitution does not mandate postal voting or any particular method of voting, the next analytical step is whether some specific method of voting can be logically inferred from the text.

### *2. A right to vote by postal ballot cannot be logically inferred from the Constitution.*

We cannot logically read into the Constitution any particular method, such as voting by postal ballot, in which the right to vote must be exercised. While the right to vote is fundamental the right to vote by any particular method, such as postal voting, is not. We look to decisional authority of the United States in reaching this conclusion.[7]

[7] When interpreting and applying the RMI Constitution, Article I, Section 3(1) of the RMI Constitution requires that the courts of the Marshall Islands look to the decisions of courts of countries having constitutions similar in the relevant respect. *In the Matter of P.L. No. 1995-118*, 2 MILR 105, 109 (1997). The right to vote in the United States is considered an "implicit right" not expressed in the text of the original Constitution but secured by later amendments and further protected by extensive voting rights legislation. *See, e.g., Harper v. Virginia State Bd. of Elections*¸ 383 U.S. 663, 665-66 (1966) (implied right to vote); U.S. Constitution, 14th and 15th Amendments; Voting Rights Act of 1965, 52 U.S.C. 10101, et seq. The RMI Constitution makes the right to vote "explicit." Regardless of whether the fundamental right to vote is implicit or explicit in the two constitutional texts, the issues raised by the parties have been addressed by United States courts. We find United States caselaw provides guidance

It has been established beyond question that there is a fundamental right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "Voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. Of Elections v. Socialist Workers' Party*, 440 U.S. 173, 184 (1979). Despite this principle, however, "there is no corresponding right to vote by absentee ballot." *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969.) Specifically, the Supreme Court of the United States has held that the right to vote in any manner is not absolute. *Burdick, supra*, at 433. State courts have similarly held that the opportunity to vote by postal or absentee ballot is a privilege extended by the legislature and is not an absolute right. *See, e.g., Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky 1963); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1192 (Ill. 2004).

We conclude that the right of a qualified person to vote is a fundamental right under the Marshall Islands Constitution but the right to vote by absentee or postal ballot is not. This conclusion bears on the level of scrutiny we apply to P.L. 2016-028 in plaintiffs' Equal Protection challenge as discussed below.

### *3. There is no right of a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot or by any other specific means.*

Having found that neither the text of the Constitution nor a logical inference from the text creates the right to vote by postal ballot or by any other specific method, our inquiry ceases and we answer, in part, the question posed by the High Court's referral order in the negative:

> "There is not a constitutional right of a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot."

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in interpreting the Marshall Islands Constitution and provides a workable framework for resolving Equal Protection and Due Process challenges to the voting laws and regulations of the Marshall Islands.

The issue remaining to be addressed by the High Court's removed question is whether a qualified Marshallese voter residing outside the Marshall Islands has a right to vote by some reasonably practical means "otherwise" than by postal ballot.

## B. The Constitution Requires That Some Practical Method Be Provided Enabling Qualified Marshallese Voters Residing Outside The Marshall Islands To Vote.

### *1. While there is no Constitutional right to vote by postal ballot or other specific method, the Constitution contemplates that there must be some means for all eligible voters, regardless of residence, to exercise their right to vote because the Constitution contemplates a system of universal suffrage for all eligible Marshallese citizens.*

The Constitution should be construed so as to give effect to the intent of the framers and the people who adopted it. *See, generally,* 16 C.J.S., Constitutional Law, Sec. 20. In arriving at the intent and purpose of a Constitutional provision the construction should be broad, liberal, or equitable, rather than technical. *Id*. In construing the Constitution, the court should make "value judgments" rather than apply strict technical rules of statutory construction.

> The very nature of constitutional interpretation calls more for the making of value judgments than for the application of specific rules, principles, conceptions, doctrines or standards.

*Zeller v. Donegal School District*, 517 F.2d 800, 804 (3rd Cir. 1975) citing to Pound, Hierarchy of Sources & Forms In Different Systems of Law, 7 Tul. L. Rev. 475, 482-486 (1933).

The right to participate in a representative democracy through the elective franchise granted by the Constitution is fundamental.[8] The framers of the Constitution placed such a high value on the right of eligible Marshallese citizens to vote that they characterized that right as "universal" available to "all citizens;" at least as applied to national elections. Article IV, Section 3(1) provides:

> Elections of members of the Nitijela shall be conducted by secret ballot under a system of *universal* suffrage for *all citizens* of the Republic of the Marshall Islands who have

[8] See discussion above.

attained the age of 18 years, and who are otherwise qualified to vote pursuant to this Section. (Emphasis by italics added).

The framers' use of the word "universal"[9] and the phrase "all citizens"[10] evidences the framers' intent that all qualified voters, regardless of residence within or without the Republic, have not only the right to vote for members of the Nitijela but also that a "system" for effectuating that right be provided. Although the parties dispute when voting by postal ballot was first made available to non-resident eligible voters, the Nitijela implemented the intent of the framers of the Constitution that a system be provided for universal suffrage for all eligible Marshallese voters when it passed the Elections and Referenda Act as amended in 1983.[11] That Act provided for postal ballot voting by nonresident qualified Marshallese voters. Postal ballot voting by nonresident qualified Marshallese voters has been the norm since that time.

### *2. The voting franchise once granted to plaintiffs and those similarly situated has been withdrawn by P.L. 2016-028 with no alternative practical means being provided to exercise the right to vote.*

With appropriate protections, the Nitijela may well be within its power to eliminate postal ballot voting by non-resident eligible Marshallese citizens. The voting franchise, however, once granted cannot later be withdrawn by disparate treatment of one class of qualified voters over that of another. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). There must be some alternative system provided so that one class of qualified

[9] "Universal" is defined as "of, affecting, or done by all people or things in the world or in a particular group; applicable to all cases. 'universal adult suffrage.'" Oxford on-line dictionary https://www.lexico.com/en/definition/universal.

[10] "All" is defined as "used to refer to the whole quantity or extent of a particular group or thing." https://www.lexico.com/en/definition/all.

[11] As previously noted, the parties cannot seem to agree as to legislative fact. Plaintiffs contend the right to postal balloting existed from Trust Territory administration. Defendants represent "the original Elections and Referenda Act of 1980, P.L. 1980-20, did not provide separate postal votes in the statute. Since postal ballot voting was created in 1983, the Elections and Referenda Act has been amended by Nitijela on eleven (11) occasions including the present Section 162." It is not necessary to resolve this factual dispute because we find the framers' intent was to create a system of universal suffrage. It is irrelevant for purposes of resolving the removed question exactly when that system was actually implemented. The fact is that the Nitijela did grant the franchise to nonresident qualified Marshallese voters to vote by postal ballot and that has been the historical practice ever since.

voters is not disenfranchised. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974)(The procedure of disallowing absentee ballots to individuals in prison would be unconstitutional, if no other means were offered to allow them to vote.)

With the elimination of the postal vote for non-resident eligible Marshallese citizens, such as plaintiffs, there is no alternative system in place to comply with the framers' intent of universal suffrage of all qualified Marshallese voters. In the absence of some practical alternative system providing for universal suffrage, the voting franchise originally granted to "all" eligible nonresident Marshallese voters has, effectively, been withdrawn because no practical means of exercising the right to vote has been provided. We find it unreasonable for qualified nonresident Marshallese voters to incur the time and expense of flying into the Marshall Islands to cast their vote. With no practical means for such voters to exercise their right to vote, plaintiffs have been disenfranchised of their constitutional right to vote.

### *3. P.L. 2016-028, in effect, creates a residency requirement not found in the Constitution.*

As applied to plaintiffs and those similarly situated, P.L. 2016-028 in effect creates a residency requirement not found in the Constitution. The government may not by indirect means eliminate a Constitutional right or impose a condition, not found in the Constitution, which unreasonably burdens the exercise of a Constitutional right. The financial and time burden imposed on plaintiffs to travel to the Marshall Islands to exercise their Constitutional right to vote is unreasonable given the intent of the framers that a system be in place affording universal suffrage to all qualified Marshallese voters. P.L. 2016-028 allows those qualified voters "temporarily" absent from the Republic the right to vote by postal ballot whereas another class of voters including plaintiffs is denied that right. As expressed in the Bill Summary, discussed below, the intent of that legislation appears to be that the right to vote be restricted to those

voters who are taxpayers residing within the Republic. The Constitution, Article II, Section 14(3) sets forth no requirement of residency within the Republic as a qualification for voting. As applied, P.L. 2016-028 creates a residency requirement because no practical means for voting is afforded to plaintiffs and those similarly situated who may be unable to afford the cost of travelling to the Marshall Islands to cast their votes.

## C. P.L. 2016-028 Is Unconstitutional Under An "Equal Protection" Analysis.

### *1. P.L. 2016-028 is presumed constitutional but that presumption is rebuttable.*

The basic principle of constitutional adjudication is the presumption of constitutionality; the strong presumption that all regularly enacted statutes are constitutional. *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Parham v. Hughes*, 441 U.S. 347 (1979); *Robinson v. Marshall*, 66 F.3d 249 (9th Cir. 1995). This Court has previously stated that "[t]he presumption of constitutionality is a strong one, and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution." *In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 34 (1995). This presumption of constitutionality, however, is not irrebuttable. Plaintiffs have raised equal protection and due process challenges to P.L. 2016-028 which we address below.

### *2. Plaintiffs' "Equal Protection" Challenge.*

#### a. We adopt an intermediate level of scrutiny under *Anderson-Burdick* in analyzing plaintiffs' equal protection claim.

Plaintiffs argue P.L. 2016-028 violates equal protection under the laws as guaranteed by the Constitution, Article II, Section 12, because that law restricts voting by postal ballot to those "temporarily" out of the Republic on the day of the election. Thus, P.L. 2016-028 creates one class of voters outside of the Republic who can still vote via postal ballot whereas another class of citizens outside the Republic cannot.

When a statute classifies by race, alienage or national origin, or impinges on personal rights protected by the Constitution, it will be subjected to "strict scrutiny" and will be sustained only if suitably tailored to serve a compelling government interest. *In the matter of P.L. Nos. 1993-56 and 1994-87, supra*, at 39.

P.L. 2016-028 does not classify qualified voters on the basis of race, alienage or national origin. That law, however, does impinge on the right to vote, a personal right, secured by the Constitution. A distinction between the right to vote and the right to vote by a particular manner not granted by the Constitution must be made in analyzing an Equal Protection challenge. Although plaintiffs have the right to vote, the right to vote by absentee or postal ballot is not a personal right secured by the Constitution. Therefore, strict scrutiny of P.L. 2016-028 is not required under the rule announced in *In the matter of P.L. Nos. 1993-56 and 1994-87, supra*.

It is well settled that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Equal Protection clause applies when voters are classified in disparate ways (*see, e.g., Bush v. Gore*, 531 U.S. 98, 104-05 (2000)) or when a law places restrictions on the right to vote (*see, e.g., League of Women Voters v. Brunner,* 548 F.3d 463, 478 (6th Cir. 2008) (voting system that burdens the exercise of the right to vote violates equal protection)). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000). "Having once granted the right to vote on equal terms, the State may not, by later and disparate treatment, value one person's vote over that of another." *Bush, supra,* 104-05. *See also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

If a plaintiff alleges that he or she has been treated differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. *See, e.g., McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 – 09 (1969) (applying rational basis to a statute that prohibited plaintiff's access to absentee ballots where no burden on the right to vote was shown); *Biener v. Calio*, 361 F.3d 206, 214-15 (3rd Cir. 2004) (applying rational basis where there was no showing of an infringement on the fundamental right to vote). On the other extreme, when a classification severely burdens the right to vote, as with poll taxes, strict scrutiny is the appropriate standard. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1996) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

In this case, the uncontroverted evidence is that postal ballot voting by all eligible citizens residing outside the Republic, without classifications, has been the historical norm. P.L. 2016-028 creates a classification denying non-resident eligible voters not "temporarily absent" from the Republic from voting by the previously established method of postal ballot. The burden identified by plaintiffs is that their right to vote, as a practical matter, is denied because they must travel to the Marshall Islands to exercise that right, thus incurring the expense of airfare or other means of transportation. We also note that there is the extra burden of time expended to exercise plaintiffs' constitutional right to vote which is not incurred by resident eligible voters or members of the class of "temporarily" absent voters. Additionally, there is the factual issue of whether an influx of flying voters can be accommodated by the air carrier(s) servicing the Marshall Islands.

We find that the time and expense required of plaintiffs in traveling to the Republic is a substantial burden on exercising their right to vote which requires a more exacting standard of review than the mere rational basis test. On the other hand, we find that the cost of travel and associated expenses does not rise to the level of a "poll tax" or similar governmentally imposed burden on exercising plaintiff's right to vote which would require the most exacting standard of strict scrutiny.[12] An intermediate standard between strict scrutiny and rational basis should be employed in evaluating plaintiff's Equal Protection claim. We therefore adopt the *Anderson-Burdick* "flexible standard" as adopted by the United States Supreme Court in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). "To evaluate a law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process – we use the approach set out in *Burdick* …"(*Crawford, supra,* at 204, Scalia, J. concurring.). The *Burdick* Court stated the standard as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forth by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.

*Burdick, supra,* at 434 (quoting *Anderson,* 460 U.S. at 789.) There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford, supra,* at 190 (Stevens, J., announcing the judgment of the court).

**b. Weighing the burdens imposed on Plaintiffs against the justifications offered for P.L. 2016-028.**

[12] Plaintiffs argue the cost of airfare or some alternative means of transportation constitutes an impermissible fee on the right to vote in contravention of Art. II, Sec. 14(2),(3) and Sec. 18(1). This cost, however, is not imposed by the government.

Having adopted the *Anderson-Burdick* intermediate level of review, we weigh the burdens imposed on plaintiffs against the burdens imposed on the Republic. Plaintiffs do not need to show that they are legally prohibited from voting, but only that "burdened voters have few alternate means of access to the ballot." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (citing *Burdick*, 504 U.S. at 437-37).

Plaintiffs are not legally prohibited from voting by P.L. 2016-028 as they can travel to the Republic to cast their votes. Travel to the Republic, however, undeniably places a substantial financial burden on individual plaintiffs and other non-resident or "off-island" eligible voters. Defendants do not deny this burden exists. Under the *Anderson-Burdick* analysis, we find a substantial burden on plaintiffs' right to vote with *no alternative means* of exercising their right to vote other than to incur the expense of travel.

The individual financial and time burdens imposed on plaintiffs to exercise their *only* practical manner of exercising their right to vote must be weighed against the specific or "precise" interests identified by the Republic. We must weigh "the character and magnitude of the asserted injury" against the "precise interests put forward by the State … taking into account the extent to which those interests are necessary to burden the plaintiff's rights." *Burdick*, *supra,* at 434. The Republic must propose an "interest sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

The "Bill Summary," Bill No. 06, identifies 4 objectives of the proposed legislation which was to become P.L. 2016- 028:

1. allow Marshallese citizens who are tax-payers and residing on the Islands to determine the person or persons to represent them in their Constituencies;

2. to eliminate improper filing of postal affidavits in order to safeguard the authenticity of the voters ballot;

3. to expedite the counting and tabulation of ballots, to avoid prolonging the election process; and

4. to lessen the expenses for elections in the Marshall Islands.

The first interest identified by the Bill Summary to "allow Marshallese citizens who are tax-payers and residing on the Islands to determine the persons or persons to represent them in their Constituencies" does not survive an intermediate level of scrutiny under *Anderson-Burdick* or even a less demanding "rational basis" test because the Constitution does not impose any qualification that a voter be either a "taxpayer" or "reside on the Islands." This interest is insufficient to justify an imposition on plaintiffs' right to vote because it suggests the purpose of P.L. 2016-028 is to disenfranchise constitutionally qualified voters who are no longer residents of the Marshall Islands which is a constitutionally impermissible purpose.

The second objective identified by the "Bill Summary," to safeguard the authenticity of the voter's ballot, might be a legitimate and compelling government interest surviving an intermediate or even strict scrutiny analysis under *Anderson-Burdick's* sliding scale. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Burdick, supra,* at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The government has a "compelling interest in preserving the integrity of the election processes, including an interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992). In *Purcell v. Gonzalez*, 549 U.S. 1(2006), the Court observed:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage

> can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Thus, fraudulent voting effectively dilutes the votes of lawful voters. By instituting requirements to guard against abuse of the elective franchise, a state protects the right of lawful voters to exercise their full share of this franchise.

Defendants argue "it is *possible* that the Nitijela took the action they did in the 2016 amendment because of numerous reports of fraud that it received regarding in the delivery, administration, casting and tabulating of overseas postal ballots in national elections" stating, further, that "virtually all election cases filed with the Court appealing a decision of the Chief Electoral Officer over the past several elections involve problems with overseas postal voting." Plaintiffs counter that "there is no credible evidence of fraud but there were spoiled ballots because voters did not follow procedures." This problem, according to plaintiffs, can be easily fixed by clear instructions given over social media.

Whether fraud actually exists in overseas postal ballot voting is an issue of fact on which the present record is silent.[13] The absence of proof of fraud in overseas voting might make the Nitijela's asserted justification of preventing fraud pretextual or illusory. The United States Supreme Court has explicitly stated that "elaborate, empirical verification of the weightiness of the State's asserted justifications" is *not required*. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Rather, the government may take prophylactic measures to respond to potential electoral problems:

> To require States to prove actual [harm] as a predicate to the imposition of reasonable restrictions would invariably lead to endless court battles over the sufficiency of the evidence marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than

[13] One of the draw-backs of filing these claims several years after passage of the challenged law and immediately before the scheduled elections is the obvious lack of a developed factual record. There has been no legislative history provided other than the Bill Summary, there is no factual support as to whether fraud does or does not exist, there is no evidence as to the cost of affording voters access to a postal ballot, etc.

> reactivity, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

*Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986). Therefore, the Republic is not required to provide proof, much less significant proof, of individual overseas voter fraud before the Nitijela may take steps to prevent it.

The problem with the Bill Summary's second justification is not that the Nitijela is precluded from taking prophylactic steps to prevent voter fraud but, rather, that the method of doing so is not reasonably calculated to accomplishing that goal. P.L. 2016-028 allows those qualified voters "temporarily" residing outside the Republic to vote by postal ballot whereas the class of voters including plaintiffs are prohibited from doing so. There is no factual or logical basis for assuming that fraud is more prevalent among the class of voters residing outside the Republic from the class of those "temporarily" absent. This "fraud" justification appears purely pretextual and designed to disenfranchise that class of qualified Marshallese voters not "temporarily" absent.

The third and fourth justifications provided by the Bill Summary do not survive intermediate scrutiny. The fundamental right of qualified Marshallese voters to participate in the electoral process outweighs whatever delay in tabulating ballots may be caused by postal voting and whatever minimal expense may be imposed on the Republic by making postal ballots available.[14]

Finally, as discussed above, the class of nonresident qualified Marshallese voters including plaintiffs was previously granted the franchise to vote by postal ballot. Nonresident voters, whether temporarily absent or not, were afforded equal access to the ballot as resident voters. The franchise once granted to all nonresident qualified voters has now been withdrawn

[14] Again, the record is devoid of any facts regarding delay or undue expense caused by affording nonresident qualified Marshallese voters the right to vote by postal ballot.

by operation of P.L. 2018-028, thus, valuing the votes of "temporarily" absent voters and resident voters over those votes of the class of nonresident voters not temporarily absent, including plaintiffs.

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later and arbitrary and disparate treatment, value one's person vote over that of another. *Bush, supra,* 531 U.S. at 104-05.

We conclude P.L. 2016-028 is unconstitutional under an equal protection analysis because it disenfranchises that class of nonresident voters, including plaintiffs, previously granted the right to vote by postal ballot from voting on equal terms with that class of voters who are "temporarily" absent. Defendants have offered no constitutionally permissible explanation for the disparate treatment. The reasons advanced by the Bill Summary do not survive intermediate scrutiny under *Anderson-Burdick*.

***3. Defendants' "extraterritoriality" argument.***

Defendants argue that "the Constitution and laws of the Marshall Islands do not follow a citizen of the Marshall Islands who resides in another sovereign nation (in this case the United States) and do not apply with extraterritoriality in the other sovereign country. There is nothing in the Constitution or laws of the Marshall Islands which remotely suggest[s] that they are applicable anywhere other than solely within the Marshall Islands."

We summarily reject defendant's extraterritoriality argument because common sense dictates that expatriate Marshallese citizens do not lose their constitutional rights as Marshallese citizens *vis a vis* the Marshall Islands simply because they happen to be outside the geographical jurisdiction of the Marshall Islands.

The presumption against extraterritoriality has to do with respect for the rights of sovereign nations. A state's sovereignty is built on the idea of autonomy and the ability to

regulate conduct within its borders. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (discussing the importance of sovereignty and the ability of nations to govern their own laws). Extraterritorial jurisdiction can infringe upon a nation's sovereignty and deny a nation its full rights. *Id.* Extraterritoriality is defined as the exercise of enforcing a law beyond the nation's boundaries. *See, e.g.,* Extraterritorial Confusion: The Complex Relationship Between Bowman And Morrison And A Revised Approach To Extraterritoriality, 47 Val.U.L. Rev. 627, notes 7, 9 (explaining definition of extraterritoriality). There appears to be an expansion of extraterritorial application of a nation's laws, at least as those laws pertain to crimes, as the world has become more global and the substance of many crimes have connections to more than one country. *Id.* Issues regarding extraterritoriality most often arise in the areas of international commerce or enforcement of criminal laws against actors outside the jurisdiction of the nation but which acts effect that nation. *See, e.g., United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (extraterritoriality addressed in context of criminal law); *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2867 (2010) (extraterritoriality addressed in context of international trade, securities regulation); *United States v. Bowman*, 260 U.S. 94 (1992).

Defendants have cited no decisional authority for the proposition that the presumption against extraterritoriality somehow precludes plaintiffs from asserting their rights as Marshallese citizens in a Marshall Islands court and/or that the allowance of external voting by postal ballot implicates a violation of the sovereignty of either the Marshall Islands or the nation in which the expatriate Marshallese voter may reside. External voting by Marshallese citizens residing in the United States by postal ballot imposes no burden on the United States implicating its sovereignty.[15] Defendants have cited no case, and we are unaware of any, which has applied the

[15] Other than providing use of the United States Postal Service (USPS) on an equal basis to other persons residing within the geographical boundaries of the United States and other areas serviced by the USPS, there is no

presumption against extraterritoriality in the context of voting rights of expatriates of other nations residing within the United States or, conversely, expatriate United States citizens residing in some other nation. We observe that the United States allows postal voting in national elections for expatriate citizens residing abroad. *See, e.g,* The Uniformed and Overseas Citizens Absentee Voting Act, 52 USC, Ch. 203, *et seq*. As of 2007, it was reported that there are 115 United Nations member countries and territories with provisions for external voting, including the United States, Australia, Mexico, Canada, the Philippines, the Marshall Islands and its neighboring jurisdictions of Cook Islands, Fiji, Federated States of Micronesia, Palau, Nauru, Vanuatu and New Zealand.[16] While it is not possible to perform a global search of decisional authority, it appears that there has been no challenge on extraterritoriality grounds to any of these external voting provisions.

We conclude that the presumption against extraterritoriality has no relevance to the issues before us.

#### *4. The "political question" or "justicibility" doctrine does not preclude the courts from considering and ruling upon plaintiff's claims.*

Defendants argue plaintiff's claims cannot be considered by the courts under the "political question" doctrine. We disagree.

The "political question" or "justiciability" doctrine does not bar the courts from hearing cases involving an individual's constitutional rights to due process or equal protection of the laws. The seminal case of *Baker v. Carr*, 369 U.S. 186, 217 (1962) set forth six criteria in

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burden on the United States and no threat to its sovereignty by the allowance of postal voting by Marshallese expatriate voters residing in the United States. Defendants have identified no threat to either Republic of the Marshall Islands or United States sovereignty or to the Marshall Islands' ability to regulate conduct within its borders by a Marshallese citizen's exercise of their right to vote, by postal ballot or otherwise.

[16] *See* Instituto Federal Electoral, Voting From Abroad, the International IDEA Handbook, https://www.idea.int/sites/default.

determining whether a case is non-justiciable under the "political question doctrine": whether there is (1) a textually demonstrable commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.

The first *Baker* factor whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is not met. The Constitution, Article I, Section 4, charges the courts of general jurisdiction with the duty of "resolving a case or controversy implicating a provision of this Constitution" subject only to "express limitations on the judicial power" found elsewhere in the Constitution. The Constitution, Article VI, dealing with "the judicial power" contains no express limitation on the power of the courts to consider claims brought under the equal protection and due process rights of individuals, such as plaintiffs, as guaranteed under Article II's Bill of Rights. The power to legislate is clearly vested in the Nitijela pursuant to the Constitution, Article IV. This case, however, does not implicate the power of the Nitijela to legislate election procedures. It may clearly do so under Article IV, Section 1. Rather this case involves the issue of whether election procedures adopted by P.L. 2016-028 violate the fundamental constitutional rights of plaintiffs. It is the province of the courts to resolve that issue. The judiciary is clearly discernable as the primary means through which an individual's constitutional rights may be enforced by virtue of Article I, Section 4(b).

The Marshall Islands Bill of Rights closely mirrors that of the United States. James Madison in presenting the Bill of Rights to the United States Congress stated:

> "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789) quoted in *Davis v. Passman*, 442 U.S. 228, 241-42 (1979).

While the Nitijela may enact laws, the courts remain the ultimate arbiter of whether those laws violate the rights of individuals secured by the Marshall Islands' Bill of Rights. The issue of whether an individual's constitutional rights are violated by a particular law, such as P.L. 2016-028, is vested in the courts, not the legislature. Plaintiffs' claims do not present a political question.

Political question abstention is not required under any of the other *Baker* factors. The standard of resolving the constitutional issues posed by plaintiffs is the Constitution itself. The court is not being asked to make a policy decision which is clearly of a kind of nonjudicial discretion. Again, it was the framers of the Constitution who made the policy decision of universal suffrage for all qualified Marshallese voters. The court is merely being asked to enforce that intent of the framers. To evaluate a challenged law under the Constitution is not a disrespect to any coordinate branch of government and it is hard to imagine some "unusual need for adherence to a political decision already made." As we note in our conclusion, our decision has prospective application only so as not to affect the rapidly approaching November 2019 elections. Finally, there is "no potential for embarrassment from multifarious pronouncements by various departments on one question." It is the role of the courts to pronounced whether a particular law passes constitutional muster, not some other department of government.

We conclude the "political question" or "non-justiciability" doctrine does not require that we refrain from addressing the constitutional issues posed by plaintiffs.

## V. CONCLUSION

We answer the High Court's removed question and associated issues raised by the parties in their briefing as follows:

1. There is a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshall Islands national or local elections;

2. There is not a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote by postal ballot;

3. The Constitution does not create the right to vote by any particular method (other than by secret ballot for members of the Nitijela);

4. The Constitution vests the power to prescribe the manner of exercising the right to vote with the Nitijela;

5. The political question or justiciability doctrine does not preclude the courts from addressing the impact of legislation, such as P.L. 2016-028, on a parties' individual rights granted under the Constitution, such as the fundamental and constitutionally protected right to vote;

6. P.L. 2016-028 is unconstitutional because its effect is to deprive plaintiffs and those similarly situated from exercising their constitutional right to vote because (a) that law eliminates the franchise once granted to all qualified Marshallese voters residing outside the Marshall Islands to vote by postal ballot and fails to provide plaintiffs a reasonable, practical alternative means of exercising their constitutional right to vote; and because (b) it creates disparate

treatment among classes of voters similarly situated without adequate justification for the disparate treatment.

7. P.L. 2016-028 is an unreasonable restriction on plaintiffs' constitutional right to vote. If not by postal ballot, plaintiffs have the right to vote "otherwise" by some method authorized by Act or regulation.

We further find that plaintiffs' claims are not barred by a statute of limitations or by the equitable doctrine of laches. We do find, however, that the timing of the filing of plaintiffs' claims in close proximity to the upcoming November 2019 elections presents an unreasonable burden on the government in attempting to comply with this decision by either making postal ballots available on short notice or by providing some alternative method of voting to that class of qualified non-resident Marshallese voters such as plaintiffs. We, therefore, make our decision prospective in application only after the November 2019 elections.

> "[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

*Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

We return these cases to the High Court for such further proceedings as may be necessary to resolve any pending issues before it.

Dated: October 2, 2019

*/s/ Daniel N. Cadra*
Daniel N. Cadra

Chief Justice

Dated: October 2, 2019

*/s/ Richard Seeborg*
Richard Seeborg
Associate Justice

SEABRIGHT, A.J., concurring in result:

I begin with my agreement with the majority opinion—under the RMI Constitution, "the right of a qualified person to vote is a fundamental right." This conclusion stems naturally from at least two Constitutional provisions: 1) Article II, Section 14(2) which insures that, "[e]very person has the right to participate in the electoral process . . . subject only to the qualifications prescribed by this Constitution and to election regulations which make it possible for all eligible persons to take part;" and 2) Article IV, Section 3(1) which provides that "[e]lections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who" are at least 18 years old and qualified to vote.

But after stating this general principal, my colleagues address the wrong question. That is, the question isn't—as asked by my colleagues—whether the text of the RMI Constitution creates a right for a qualified voter to vote by postal ballot. Instead, the question we should ask is whether P.L. 2016-28, which eliminates the right to vote by postal ballot,[1] is unconstitutional under the RMI Constitution's universal right to suffrage.[2] And, correctly worded, the answer to the question is yes—P.L. 2016-28 is unconstitutional.

Even under a system of universal suffrage, the Nitijela has the ability under the Constitution to "enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign- related disorder." *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (quoting

[1] P.L. 2016-28, in relevant part, amends § 161 of the Elections and Referenda Act, and limits postal ballots to a registered voter who: 1) is confined due to illness or physical disability from voting at a polling place; or 2) is "temporarily" out of the RMI on the day of the election. Previously, there were no such restrictions on postal ballots.

[2] The High Court, as well, asked the wrong question. The High Court's removed question asks: "[i]s there a constitutional right for a qualified Marshallese voter residing outside the Marshall Islands to vote in the Marshall Islands national or local elections by postal ballots, or otherwise?" Nevertheless, Article I, Section 2(1) of the RMI Constitution, stating that "[a]ny existing law and any law made on or after the effective date of this Constitution, which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void" requires us to address whether P.L. 2016-28 is unconstitutional.

*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). But this ability isn't absolute. While the Nitijela may impose restrictions, those restrictions must be *reasonable* taking into account the interest of the restriction. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004); *Short*, 893 F.3d at 679. Thus, I would find as a matter of law that any restrictions on voting in the RMI by a qualified voter, given the fundamental right to vote in the RMI Constitution, must be reasonable given the interest and nature of the restrictions.

And in context, P.L. 2016-28 is unreasonable given the large number of RMI citizens living outside of the country coupled with the RMI's geographic remoteness.[3] According to the World Bank, the total RMI population in 2018 was 58,413. *See* The World Bank, https://data.worldbank.org/country/marshall-islands?view=chart) (last visited October 2, 2019).[4] And the 2010 United States census reports 22,434 RMI citizens living in the United States, with an estimated 27,823 living in the United States as of 2015. *See* Levin, Marshallese Migrants in the United States in 2015: A Statistical Profile Based on the American Community Survey, http://www.rmiembassyus.org/images/pdf/Marshallese-Migrants-in-the-United-States-in-201570.pdf (last visited October 2, 2019).

These census numbers show that a sizable minority of RMI citizens live in the United States, and thus will not be able to exercise their constitutional right to vote because of P.L. 2016-28. As should be obvious, travelling from the United States to the RMI to vote in person

[3] This is true regardless of whether P.L. 2016-28 permits a limited class of citizens to vote by postal ballot. The problem with P.L. 2016-28 is not that it discriminates against one class of voters; instead, the law is unconstitutional because it conflicts with the Constitution and is not a reasonable restriction on voting rights.

[4] According to the RMI 2011 census, the RMI's population was 53,158. *See* Secretariat of the Pacific Community, Republic of the Marshall Islands 2011 Census Report at 13 (2012), http://prism.spc.int/images/census_reports/Marshall_Islands_Census_2011-Full.pdf (last visited October 2, 2019).

would be a tremendous financial burden and require a significant amount of time. In essence, P.L. 2016-28 disenfranchises over 25,000 RMI citizens living outside the country.

Further, the stated objectives of the legislation do not support such a draconian restriction in voting. In fact, three of the reasons given for the legislation—to permit taxpayers residing in the RMI to elect their representatives, to expedite the counting of ballots, and to lessen expenses—are either inconsistent with the Constitution or fails to provide an otherwise legitimate basis for the legislation. And the fourth basis—to eliminate improper filing of postal affidavits and to safeguard the authenticity of the ballot—is simply too conclusory to justify the banning of postal ballots for those living outside the RMI.

In sum, I would not reach the equal protection claim based on the fact that P.L. 2016-28 allows those "temporarily" out of the RMI to vote by postal ballot, but denies the right to a postal ballot to those living outside the RMI (and thus, in reality, denies the right to vote). Instead, I would find that the law acts to ban a large minority of RMI citizens in a manner inconsistent with the fundamental right to vote, and that this restriction is unreasonable. P.L. 2016-28 is unconstitutional.

Dated: October 2, 2019

*/s/ J. Michael Seabright*
J. Michael Seabright
Associate Justice