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IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

In Re: Interpretation of Section 6, Article XIII of the Constitution of the Republic of the Marshall Islands By: Halferty and Kabua Petitioners-Appellants v. Republic of Marshall Islands Respondent-Appellee	Supreme Court No. 2025-00211

BEFORE: CADRA, Daniel, C.J.; J. Michael Seabright, A.J.;[1] Richard Seeborg, A.J.[2]

SEEBORG, A.J. with whom CADRA, C.J. and SEABRIGHT, A.J. concur.

I. INTRODUCTION

In this appeal, two members of the Nitijela (Petitioners) ask for a declaration that, under Section 6 of Article XIII of the Constitution of the Republic of the Marshall Islands, a plebiscite was required to approve the most recent amendments to the Compact of Free Association (COFA) between the Republic of the Marshall Islands (RMI) and the United States. The High Court dismissed the suit for want of jurisdiction, concluding that Petitioners lack standing to sue because their asserted injury was merely a generalized grievance. We affirm.

We also reject Petitioners' spurious claim of judicial bias against Justice Philippo. The decisions that Petitioners attribute to bias were, in fact, the product of the weakness of their

[1] Hon. J. Michael Seabright, United States District Judge, District of Hawaii.
[2] Hon. Richard Seeborg, United States District Judge, Chief Judge, Northern District of California.

submission in the High Court. Therefore, the judgment of the High Court is ***affirmed*** in its entirety.

II. BACKGROUND

The relationship between the RMI and the United States is governed by a Compact of Free Association. The first COFA was signed in 1983 and became effective in 1986. Under the COFA, the United States "secured unprecedented and unmatched security and defense rights based in [the RMI]" and, in return, gives the RMI defense guarantees, economic assistance, and migration rights. *See* H. Rept. 118-785 (Compact of Free Association Amendments Act of 2023), at 3. The initial COFA was approved by a plebiscite in the RMI. The COFA was amended in 2003 (COFA 2). Those amendments were not approved through a plebiscite.

In 2023, the United States and the RMI signed an agreement to amend the compact (COFA 3). That agreement mostly extended economic aid programs with some modest modifications to, for example, the funding schedules and use of funds. *See* H. Rept. 118-785 at 5. As the House report put it, "[r]enewing economic assistance and continuing federal programs and services to [the RMI] reaffirms the United States' commitment to its allies and reliabilities as a partner" and is "essential to counter [China's] malign influence and to maintain the United States' capacity to secure its interests." *Id.* at 7.

During negotiations over COFA 3, the Nitijela sought two legal opinions on whether a plebiscite was required to approve the agreement. Lawrence Tribe—an American legal scholar—opined that a plebiscite is required under the Plebiscite Clause. RMI Attorney General Bernard Adiniwin disagreed. He advised the Nitijela that a plebiscite was only necessary where the COFA amendments were in some way "inconsistent" with the RMI Constitution, and, here, they were not. Ultimately, the Nitijela passed Resolution 11ND1, which empowered the Cabinet to negotiate COFA 3 without submitting it to a plebiscite. COFA 3 was negotiated, signed, and ratified. *See* U.S. State Dept., *Marshall Islands (24-501.2)—Agreement to Amend the Compact of Free Association, as Amended* (available here). No plebiscite was ever held.

Petitioners brought this suit for declaratory relief, arguing that the Plebiscite Clause required a plebiscite to approve COFA 3. The government moved to dismiss, and the High Court granted the motion. Applying the familiar three-part test articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the High Court held that Petitioners lacked standing to sue. First, it concluded that Petitioners did not identify a particularized injury because they did not explain which of their legally protected rights or interests were invaded—they merely asserted they were members of the Nitijela. The High Court also held that Petitioners failed to satisfy causation and redressability, but those conclusions were really just repackaged versions of the no-injury conclusion. That is, the High Court determined that Petitioners failed to show causation because they identified *no injury* that was caused by the challenged conduct, and they failed to show redressability because they identified *no injury* that could be remedied by a favorable decision. *See* High Court Op. at 8–9. This appeal followed.

III. ISSUE ON APPEAL

Petitioners' Opening Brief present two issues for appeal, which are recited below:

1. Whether the High Court erred in stating that Petitioners . . . lack standing?
    a. Whether Petitioner has personal jurisdiction?
    b. Whether this Court has subject matter jurisdiction?
    c. Whether [a] Plebiscite is required to pass a Compact of Free Association?
2. Was [the] Trial Judge "conflicted" [because] he was a Minister during President Kessai Note's term where COFA 2 was passed without a plebiscite?

This articulation of the issues aside, there is no genuine contest over personal jurisdiction. Personal jurisdiction concerns the Court's ability to assert power—consistent with bedrock principles of fairness and due process—over the *defendant*. Personal jurisdiction does not have to be established over the *plaintiff* because he chooses the forum. The defendant here—the

RMI—does not argue that it is somehow unfair for this Court to adjudicate a dispute in which it is involved.

IV. STANDARD OF REVIEW

Whether Petitioners have standing to sue, and thus whether this Court has subject-matter jurisdiction over this lawsuit, is a question of law which we review de novo. *See Jack v. Hisaiah*, 2 MILR 207, 209 (2002).

V. DISCUSSION

A. Standing

Article I, Section 4(a) of the RMI Constitution provides, in relevant part, that "all persons directly affected by an alleged violation of this Constitution, whether by private individuals or public officials, shall have standing to complain of such violation in a case or controversy that is the subject of an appropriate judicial proceeding." In interpreting the bounds of that provision, Article I, Section 3(1) of the Constitution directs this Court to "look to the decisions of courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Republic of the Marshall Islands," even though those foreign precedents are not binding.

The "case or controversy" requirement in the RMI Constitution mirrors that in Article III of the United States Constitution, so it not surprising that RMI courts, including the High Court in this case, look to the canonical standing cases from the United States Supreme Court to understand the contours of constitutional jurisdiction. As the United States Supreme Court explained in *Lujan*, "the irreducible constitutional minimum of standing contains three elements." 504 U.S. at 560. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* (cleaned up). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly

. . . trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976)). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

This case starts and ends with injury. At bottom, Petitioners' complaint is that the RMI government did not comply with the law. That is a generalized grievance—a complaint common to all citizens—that is insufficient to create standing. *See United States v. Hays*, 515 U.S. 737, 743 (1995) ("[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power."); *Lujan*, 504 U.S. at 576–78 (rejecting the proposition that "the public interest in proper administration of the laws . . . can be converted into an individual right" to sue).

Petitioners make three arguments to overcome this basic defect. First, they assert that the diverging advisory opinions submitted to the Nitijela suffice to create a "controversy" capable of judicial resolution. Without question, a difference of opinion among legislators can create a "controversy" in some colloquial sense, but it does not create a controversy in a constitutional sense. The case or controversy requirement in the RMI Constitution, as in the Constitution of the United States, requires *adversariness* between the parties. It is not enough that there is a difference of opinion; it must be a difference of opinion that is of *genuine consequence* to the parties. As Justice Scalia famously explained, to establish standing, the party bringing suit must be able to answer a basic question: "What's it to you?" A. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 882 (1983). The answer here appears to be, well, nothing.

Second, Petitioners contend Article I, Section 4(b) of the RMI Constitution relaxes the jurisdictional requirement. That provision gives "any court of general jurisdiction, resolving a case or controversy implicating a provision of this Constitution," the "power to make all orders necessary and appropriate to secure full compliance with the provision and full enjoyment of its benefits." RMI Const. Art. I, § 4(b). In Petitioners' view, the phrase "all orders necessary and appropriate" gives this Court (and the High Court) the authority to render a definitive interpretation of the Constitution. That interpretation is unpersuasive. The better reading of that phrase is that it speaks to RMI courts' *remedial* power. That is, once a court is presented with a justiciable case or controversy, the courts have broad powers to craft relief for the parties at least where the case or controversy stems from the RMI Constitution. That is not dissimilar from the powers that American courts have in equity.

Petitioners' construction also ignores the use of the term of art "case or controversy" in the preceding phrase. Read as one cohesive provision, Article I, section 4(b) thus incorporates the jurisdictional limitation present in Article 1, section 4(a)—a suit must be a "case or controversy" (*i.e.*, the plaintiff must have standing) to get the relief that section 4(b) permits. Reading section 4(b) in this fashion is the only way to harmonize the entirety of the Constitution and the only avenue to give due respect to the repeated use of the term "case or controversy" throughout the document.

Petitioners' third argument is that they suffered unique injury as members of the Nitijela. As a threshold matter, that argument appears to have been waived. Petitioners raised it during oral argument in the High Court but omitted it from their submission to this Court. In any event, it is unpersuasive because it is unclear how the failure to submit COFA 3 to a plebiscite had any impact on Petitioners' ability to represent their constituents as legislators. If anything, that

decision vested *more* authority in the Nitijela, not less. Nothing about COFA 3 divests the Nitijela of authority over the internal affairs of the RMI or imposes any barrier to effective representation.

More fundamentally, legislators do not acquire standing to sue every time legislation passes that they do not like, even if that legislation is unconstitutional. In *Raines v. Byrd*, members of the Congress of the United States who voted "no" to the Line Item Veto Act sued various members of the Executive Branch arguing that the legislation was unconstitutional. *See* 521 U.S. 811 (1997). The Supreme Court of the United States, however, determined that those legislators lacked a sufficient "personal stake" in the alleged illegality to maintain suit. *See id.* at 830. The Court explained that the plaintiffs "alleged no injury to themselves as individuals . . . the institutional injury they allege is wholly abstract and widely dispersed . . . and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829. We adopt that persuasive reasoning here. Petitioners think the failure to submit COFA 3 approval to a plebiscite was unconstitutional, but they have no more reason to complain about that illegality than any other citizen of the RMI.

Because Petitioners have not established that they suffered any injury-in-fact, they lack standing to sue. Their constitutional challenge is therefore dismissed for lack of jurisdiction. Without jurisdiction over this challenge, any analysis of the underlying constitutional question would be an impermissible advisory opinion. *See Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868).

B. Judicial Bias

Next, Petitioners argue that the decision below must be vacated because Justice Philippo was biased against them. This claim is justiciable notwithstanding Petitioners' lack of standing to bring their constitutional claim because it is collateral to the merits of that claim.

Petitioners' claim of judicial bias stems from two sources. First, they argue that because Justice Philippo served as the Minister of Justice when COFA 2 was approved without the use of a plebiscite, he had a vested interest in finding that no plebiscite was necessary here. The intuition appears to be that finding for Petitioners in this case would have cast some legal doubt on his role in approving COFA 2. This is insufficient to show bias or the appearance of bias. Any interest that Justice Philippo has in the outcome of this litigation is highly attenuated. Most obviously, this litigation is about COFA 3, not COFA 2, and invalidating COFA 3 on these grounds would not automatically undermine the validity of COFA 2. Challenging COFA 2 would require additional litigation and present its own unique challenges, especially considering it has been in effect for nearly 22 years. Second, Justice Philippo's service as the Minister of Justice creates a minimal investment in the continued validity of COFA 2. Petitioners do not assert that Justice Philippo has some direct, personal stake—such as a financial interest—in COFA 2 remaining effective. Moreover, his reputational interest in the matter is relatively small. As Minister of Justice, he was just one member of the Nitijela that approved COFA 2. He has since moved on from the legislature to a successful career in the judiciary, and no outcome of this litigation or any hypothetical litigation over COFA 2 would impact his ability to execute the duties of his current office.

Second, Petitioners contend that Justice Philippo's conduct in the proceedings below evidence bias. They point to (1) his decision to allow submission of a tardy amicus brief, and (2) heavier questioning of Petitioners during oral argument. Neither of these observations are

abnormal, and certainly neither comes close to demonstrating bias. Judges enjoy wide discretion in permitting late filings, and Justice Philippo's decision to accept a late brief more likely suggests that he found the brief helpful in adjudicating the case than that he was endeavoring to rule against Petitioners. Tellingly, Petitioners do not explain what that brief said, whether he relied on it, and whether they even objected to its consideration.

It is also normal—even desirable—for a judge to spend more time asking questions of the party with the weaker argument. The point of oral argument is to permit the parties to assuage the judge's concerns; the more concerns, the more assuagement required. As evidenced by the standing analysis above, there were significant flaws in Petitioners' contentions, so it is perfectly appropriate that Justice Philippo had more questions for Petitioners than he did for the government. In sum, Petitioners have failed to show Justice Philippo was biased against them or that there was an appearance of bias.

VI. CONCLUSION

For the foregoing reasons, the judgment of the High Court is affirmed in its entirety.