IBEDUL YUTAKA M. GIBBONS, individually and on behalf of the Palau Council of Chiefs and on behalf of other Palauan citizens who are similarly situated; and PALAU COUNCIL OF CHIEFS,
Plaintiffs,

v.

REPUBLIC OF PALAU, JOHNSON TORIBIONG, in his official capacity as President of the Republic of Palau; PALAU ELECTION COMMISSION; and SANTOS BORJA, in his official capacity as Chairman of the Palau Election Commission,
Defendants.

CIVIL ACTION NO. 11-135

Supreme Court, Trial Division
Republic of Palau

[1] **Civil Procedure:** Injunctions

In deciding whether to grant preliminary injunctions, the Court considers plaintiff's likelihood of success on the merits, possibility of irreparable injury, whether the threatened injury outweighs the threatened harm the injunction will cause, and the public interest.

Counsel for Plaintiffs: Siegfried Nakamura
Counsel for Defendants: Alexis G. Ortega

ARTHUR NGIRAKLSONG, Chief Justice:

On June 13, 2011, the plaintiffs, Ibedul Yutaka Gibbons and the Palau Council of Chiefs, filed a motion for expedited preliminary injunction concerning RPPL No. 8-22 (or "the Act"), which authorizes a national referendum[1] on whether to move forward on the establishment of casino gaming in Palau. The plaintiffs request that the Court enjoin the defendants, Republic of Palau, President Johnson Toribiong, the Palau Election Commission ("PEC"), and PEC Chairman Santos Borja (collectively referred to herein as "the Republic") from engaging in the following activities:

> (1) educational efforts under RPPL No. 8-22 to inform the public about the referendum;
> (2) using funds in furtherance of RPPL No. 8-22;
> (3) proceeding with the June 22, 2011 public vote on the following question: "Do you approve of the establishment of casino gaming in the Republic of Palau?";
> (4) and taking any other action relating to RPPL No. 8-22.

The Court ordered expedited briefing, and Republic filed its response on June 16, 2011. A hearing on the motion was held June 20, 2011 at the Courthouse in Koror. The court heard testimony from Santos Borja, Dilmei Olkeriil, Mark Rudimch, Santy Asanuma, and Roman Bedor.

ANALYSIS

[1] In deciding whether to grant a

[1] Plaintiffs believe that the term "referendum" is inappropriate, and they instead refer to the effort as a "ballot measure." RPPL No. 8-22 refers the effort as a "referendum" and the court uses the language from the authorizing Act.

preliminary injunction, the Court considers (1) the plaintiffs' likelihood of success on the merits; (2) whether the plaintiffs will suffer irreparable injury if the injunction is not granted; (3) whether the threatened injury to the plaintiffs outweighs the threatened harm the injunction will cause the defendants; and (4) the public interest. *See Shell Co. v. Palau Pub. Utils. Corp*., 15 ROP 158, 159–60 (Tr. Div. 2008); *Gibbons v. Etpison*, 5 ROP Intrm. 273, 276 (Tr. Div. 1992). The plaintiffs bear the burden of persuasion on all four elements. *Gibbons*, 5 ROP Intrm. at 276 (citing *Koshiba v. Remeliik*, 1 ROP Intrm. 65, 72 (Tr. Div. Jan. 1983)). Courts have discretion in balancing the relevant factors to determine whether injunctive relief is appropriate. *See* 42 Am. Jur. 2d Injunctions § 15; *see also Andres v. Palau Election Comm'n*, 9 ROP 289, 290 (Tr. Div. 2002) (noting that factors are weighed against each other such that a strong showing of success on the merits makes it more likely that injunctive relief is appropriate).

I. LIKELIHOOD OF SUCCESS ON THE MERITS

The plaintiffs put forward six arguments as to why they are likely to succeed on the merits. The Court has considered the arguments individually and together. Upon consideration of all the evidence, the Court finds that the plaintiffs have not met their burden in showing a substantial likelihood on the merits.

The plaintiffs' arguments are addressed in turn.

A. Failure of the Senate to Follow Senate Rule 8(H)

The plaintiffs' first argument is that the Senate failed to follow Senate Rule of Procedure 8(H) (2009) in passing HB 8-69-5, HD1, SD1, CD1, PD1 (referred to herein as HB 8-69-5), which was signed into law as RPPL No. 8-22.

The Senate Journal of December 22, 2010, reflects that HB 8-69-5 was put to a roll call vote. The voting results show four "yes," five "no," and two "abstain" (one senate vacancy existed at the time and one senator was excused from voting). Following the vote, the Senate President declared HB 8-69-5 "has passed the third and final reading of the Senate, Eighth Olbiil Era Kelulau by roll call votes of 6 'Yes' and 5 'No.'" (Pls.' Ex. 5.) This is confirmed by the Senate "Voting Record" of December 22, 2010, which was completed by hand. (Pls.' Ex. 4.)

From this, it appears that the Senate President relied on Senate Rule 8(H) in declaring the two senators recorded as "abstain" as having voted in the affirmative. Senate Rule 8(H) reads as follows:

> Non-Voting: No member present in the Senate shall refuse to vote unless excused in accordance with Section 1 of this Rule. A member who is present who fails to respond to the call of his name upon a call of the roll shall be instructed by the President to respond "Aye" or "No" and if he still fails to vote, the President shall order the Clerk to record his vote in the affirmative.

(Pls.' Ex. 4, 5) The plaintiffs contend that Senate President Tmetuchl never instructed the two abstaining senators, Senators Akitaya and Rudimch, to respond "Aye" or "No" prior to recording their votes as in the affirmative.

The plaintiffs go on to argue that because the Senate did not follow its own rules, the court should look to the common law, which instructs that abstentions are generally considered to follow the majority of votes (in this case, the "no" votes). However, the plaintiffs provide no authority indicating that the Court should look to the "common law" where the Senate fails to follow its own rules—this is not a situation where there Court should employ 1 PNC § 303, and the U.S. cases cited by the plaintiffs are not on point.[1] The assertion that the Court should employ the "common law" is more dubious given that the result the plaintiffs seek is in direct conflict with the intention of Senate Rule 8(H). The Senate Rules of Procedure, including Rule 8(H), were promulgated pursuant to the Senate's constitutional authority. *See* ROP Const. art. IX, §§ 12, 14. In the absence of evidence to the contrary, senators may be presumed to know the Senate Rules, and that under Rule 8(H) "abstentions" are counted as "Yes." This was confirmed Senator Mark Rudimch, who testified that he understood, based on the Senate Rules and past practices, that his abstention would be counted as a "Yes" vote. Further, the record indicates that Senator Akitaya called for the vote on HB 8-69-5, yet for whatever reason, abstained from casting a "Yes" or "No" vote. There were no objections to the voting results.

In addition, the plaintiffs do not articulate how the alleged omission of Rule 8(H)'s "warning" rendered passage of HB 8-69-5 unconstitutional. The OEK is a co-equal branch of government vested with the legislative authority. Article IX, Section 14 of the Constitution governs the lawmaking process:

> The Olbiil Era Kelulau may enact no law except by bill. Each house of the Olbiil Era Kelulau shall establish a procedure for the enactment of bills into law. No bill may become a law unless it has been adopted by a majority of the members of each house present on three (3) separate readings, each reading to be held on a separate day.

Pursuant to this authority, the Senate has established a procedure for the consideration and adoption of bills. Further, the Senate Rule 2 provides that the Senate President is charged with deciding all questions of order. As for the enactment of RPPL No. 8-22, the OEK concluded that all necessary procedural rules for the passage of a bill were satisfied. There are no grounds for the Court to find otherwise at this time.

[1] For instance, none of the cases cited to by the plaintiffs involved a standing rule in which an abstention is counted as an affirmative vote. *See Rockland Woods Inc v. Village of Suffern*, 40 A.D. 2d 385 (N.Y. 1973) (finding that abstention did not qualify as affirmative vote); *Prosser v. Village of Fox Lake*, 438 N.E. 2d 143 (Ill. 1982) (noting that while the municipality was free to determine its own rules for the adoption of ordinances, it had not done so); *Springfield v. Haydon*, 288 S.W. 337 (Ky. Ct. App. 1926).

B. HB 8-69-5 Did Not Receive the Approval of the Majority of the Senate Members Present

Relatedly, the plaintiffs argue that even if the Senate complied with Senate Rule 8(H), Senate Rule 8(H) is unconstitutional because it counts abstentions as affirmative votes. The plaintiffs point to Article IX, Section 15 of the Constitution, which provides in relevant part

> The Olbiil Era Kelulau, by the approval of a majority of the members present of each house, may pass a bill referred by the President in accordance with the President's recommendation for change and return it to the President for reconsideration.

Plaintiffs argue that the phrase "approval of a majority of members" requires affirmative action on the part of senators to "approve" the bill. This argument is not persuasive.

As noted earlier, ROP Const. art. IX, § 14 specifically provides that "Each house of the Olbiil Era Kelulau shall establish a procedure for the enactment of bills into law." Senate Rule 8 governs voting, and Rule 8(H) provides that abstentions will be counted as "Aye" votes. The Senate could have created any procedure it saw fit for the passage of bills. Plaintiffs point to no provision of the Constitution that requires an "affirmative action" or "authoritative approval" for the passage of bills. Plaintiffs' references to dictionary definitions of "abstention" are unhelpful given the constitutional grant of authority to the OEK. Moreover, the U.S. cases cited to by the plaintiffs interpreting the phrase "concurrence" in statutes are not directly on point.[2]

C. The Ballot Language is Misleading

The plaintiffs also argue that the ballot language is confusing and misleading and does not reflect the substance of RPPL No. 8-22. RPPL No. 8-22 requires a "national referendum on the question of whether to allow for the establishment of Casino Gaming in the Republic of Palau." According to the Act, "[t]he referendum should be worded as follows:

> DO YOU APPROVE OF THE ESTABLISHMENT OF CASINO GAMING IN THE REPUBLIC OF PALAU
> ☐ YES
> ☐ NO

Section 2(i) of the Act discusses the consequences of the vote:

> If a majority of votes cast on the referendum question . . . are in the affirmative, the Olbiil Era Kelulau may proceed to enact legislation establishing a Casino Gaming Commission including but not limited to its organization, authority, function, responsibilities, and duties. Any enactment shall be in accordance with constitutional,

[2] *See e.g., In re Reynolds*, 749 A.2d 1133 (Vt. 2000) (finding that word "concurrence" as used in the statute requires something more than silent acquiescence).

> statutory, and procedural requirements. If a majority of the votes cast on the referendum question are negative, the Olbiil Era Kelulau will not again consider the establishment of casino gaming in the Republic.

The plaintiffs argue that (1) the language is unclear because it does not necessarily lead to the creation of casino gaming (only the possible creation of casino gaming); (2) the language is unclear because it does not inform the voter that a positive vote may result in the creation of a Gaming Commission; (3) the language is unclear because it does not inform the voter that a negative vote will bar the OEK from ever considering the establishment of casino gaming in the future; and (4) the language is unclear because the definition of "casino gaming" is vague—the Act does not define "casino" or "gaming." Roman Bedor testified on this point for the plaintiffs, stating that the Council of Chiefs remains uncertain as to what will occur following a positive or negative vote on the referendum.

For support, the plaintiffs point to *Koshiba v. Remeliik,* 1 ROP Intrm. 65 (Tr. Div. 1983), in which the court found that the language on the ballot did not comply with the authorizing Act. That case concerned voter approval of the Compact of Free Association. To approve the Compact, voters had to specifically approve Section 314, which concerned radioactive, chemical, and biological materials. The authorizing Act made this clear, but the ballot language read "Do you approve the agreement under Section 314 of the Compact which places restrictions and conditions on the United States with respect to radioactive, chemical and biological materials?" The court found that this language "suggests that by voting yes, the voter wishes to impose restrictions and conditions on the United States with respect to certain harmful substances." In fact, approval of Section 314 would actually lessen already-in-place restrictions on harmful substances. The court found that the misleading ballot language infringed with the constitutional the right to vote.

The *Koshiba* case is distinguishable from the present situation. In *Koshiba*, the referendum was put to the people as part of the approval of the Compact of Free Association. Approval would have amended the Constitution. Here, the referendum called for in RPPL No. 8-22 does not amend the Constitution and may not change the law at all—the plaintiffs refer to it as an "opinion poll." And unlike *Koshiba*, the ballot language at issue in this case does not appear to conflict with RPPL No. 8-22—the Act requires a referendum on the question of whether voters approve of the establishment of casino gaming, and the ballot language conforms. *See Gibbons v. Etpison*, 3 ROP Intrm. 398, 416 (Tr. Div. 1993) ("Only in a clear case of legislation resulting in misleading language should ballot language held insufficient." (citing *Epperson v. Jordan*, 82 P.2d 445, 448 (Cal. 1938)). Upon an affirmative vote, the OEK may further consider the question of casino gaming, and any action must comply with the legislative process.

The plaintiffs also argue that the language is deceptive because while a voter may not approve of gaming now, he does not

know that his vote will bar the OEK from considering gaming in the future. However, the Act itself is clear as to the consequences of a vote, and the Court may presume some voter knowledge of the law. *See generally Gibbons*, 3 ROP Intrm. at 416 (noting that the public is presumed to know the law and cast informed ballots). And, PEC is charged with educating the public regarding the vote, and it has moved forward on this effort. Plaintiffs' Exhibit 3 is a public notice issued by the PEC that explains the Act, the definition of "casino gaming," and the consequences of a positive or negative vote as provided for in the Act.

Finally, the plaintiffs contend that RPPL No. 8-22's definition of "casino gaming" is too vague. Section 1 of RPPL No. 8-22 defines "casino gaming" as "wagering, within a casino, of money upon the outcome of a game of chance with the intent of winning additional money in the event of a certain outcome as specifically permitted by law." Plaintiffs argue that the word "casino" is unclear—it could mean a stand alone facility or a corner store. (Pls.' Br. in Supp. 12.) In fact, Roman Bedor testified that he believes the Palauan interpretation and English interpretation of "casino," as used in the PEC public notice, slightly differ. Plaintiffs also argue that "gaming" is unclear because it does not state whether it includes poker or slot machines or both. (*Id*.)

The plaintiffs are correct that "casino" and "gaming" are broad terms, but they ignore the fact that RPPL No. 8-22's definition includes all "games of chance." The language appears intentionally broad, so the plaintiffs and the voters may understand that an affirmative vote could open the door to all types of "casinos" and "gaming." As noted, any laws providing for the actual establishment of casinos or authorizing gaming must pass the regular legislative process. Without more, the plaintiffs have not provided a sufficient showing that the ballot language is inappropriate. *See Gibbons*, 3 ROP Intrm. at 416 ("The action of the legislature in fixing the ballot language is presumed to be valid." (citing *Say v. Baker*, 322 P.2d 317, 318 (Colo. 1958)).

D. The Public Education Done by PEC is Not Comprehensive

Moving on, the plaintiffs contend that the public education efforts of PEC have been insufficient and therefore the court should enjoin the referendum until more comprehensive education can occur.

With regard to public education, Section 3 of RPPL No. 8-22 provides that PEC

> shall conduct, organize, supervise, and oversee a community education program to inform the citizens of Palau in an impartial manner about casino gaming and the referendum, so as to enable the people to make an informed choice in the referendum . . . . In doing so, the Commission may hold panel or town hall discussions, create, translate, print and distribute explanatory materials, or take such other steps as may be necessary to adequately educate the public on this issue.

The evidence presented at the hearing shows that PEC drafted and issued one public notice. The notice indicated the date of the referendum, the law authorizing the referendum, the definition of "casino gaming" as stated in the Act, and the consequences of a "yes" or "no" vote as provided for in the Act. It also stated that anyone may direct questions to PEC and provided a phone number. (*See* Pls.' Ex. 3.) That notice was published three times in the *Tia Belau* and *Island Times* newspapers, and broadcast several times on two television stations and two radio stations. PEC sent copies to all of the state governors and had it posted at the Post Office and Courthouse.

Plaintiffs contend that this is insufficient. However, the Court has no standard by which to determine whether the efforts were sufficient. RPPL No. 8-22 does not mandate any specific means of public education, and PEC's efforts are limited to what is stated in the Act. Thus, the plaintiffs have not shown a substantial likelihood of success on this point.

E. The Effect of the Referendum is an Unconstitutional Limitation on Legislative Power

Next, the plaintiffs attack RPPL No. 8-22's instruction that "If a majority of the votes cast on the referendum question are negative, the Olbiil Era Kelulau will not again consider the establishment of casino gaming in the Republic." The plaintiffs interpret this language to mean that the OEK can never again consider the establishment of casino gaming in Palau if the majority votes "no" on the referendum. They contend that this is unconstitutional because the OEK cannot be bound by the referendum.

Assuming the plaintiffs' interpretation to be correct, it is true that a negative vote on the referendum cannot bind the OEK from considering casino gaming in the future. Article IX, Section 5 of the Constitution provides the OEK with the authority "to enact any laws which shall be necessary and proper for exercising the foregoing powers and all other inherent powers vested by this Constitution in the government of Palau." A negative vote on the referendum does not limit the constitutional powers of the OEK. Relatedly, even assuming RPPL 8-22 may amend current statutes regarding gaming if the referendum vote is negative, the OEK reserves the right to amend statutes at any point. Without more, the plaintiffs have failed to show a substantial likelihood of success on this point.

F. The Legislature Does Not Have the Authority to Ask for a Vote on RPPL No. 8-22

Finally, the plaintiffs argue that RPPL No. 8-22 is an opinion poll, and while the OEK has the power to pass legislation in which citizens are polled for their opinions, it cannot use the referendum or initiative process to do so. The plaintiffs spend considerable time distinguishing referendums from initiatives (no one argues that this is an initiative) and note that the Constitution provides for each. Article XIII, Section 3 provides for the initiative process, through which citizens may enact or repeal laws. Article II, Section 3 provides for national referendums on the delegation of powers to another nation. Article XIV provides for popular votes on constitutional amendments.

The plaintiffs appear to contend that because RPPL No. 8-22 does not fit into any of the above categories, the OEK lacked authority to require a vote on the question of casino gaming.

Importantly, the plaintiffs point to no constitutional authority that bars the OEK from having a public vote on the question of whether voters approve of casino gaming. If the OEK believes that a public vote on an important question of policy is appropriate, that would appear to fall under its constitutional authority. *See e.g.,* ROP Const. art. IX, § 5. It is true that RPPL No. 8-22 refers to the vote as a "referendum," but the fact that some U.S. authorities have interpreted "referendum" to refer to approval or disapproval of a law does not mean RPPL No. 8-22 is invalid.

II. IRREPARABLE INJURY IF THE INJUNCTION IS NOT GRANTED

In their memorandum in support of the motion for preliminary injunction, the plaintiffs provide one sentence to the issue of irreparable harm: the referendum would be "an enormous waste of the Republic's financial resources."[3] This is insufficient.

"The judicial power to grant injunctive relief should be exercised only when intervention is essential to protect property or other rights from irreparable injury. In other words, there must be a showing that the plaintiff will suffer irreparable harm absent an injunction." 42 Am. Jur. 2d Injunctions § 35. "Irreparable harm, which has been called the most important requirement for an injunction, must be likely and not merely possible, and must be substantial harm." *Id.*

Here, the plaintiffs do not articulate how *they* will be irreparably harmed. As noted, the ballot language conforms with the authorizing Act; therefore, any comparison to *Koshiba v. Remeliik*, 1 ROP Intrm. 65 (Tr. Div. 1983), where the court found that the plaintiffs' right to vote would be harmed if the misleading ballot language remained, is weak.

III. WHETHER THE POTENTIAL INJURY TO PLAINTIFFS OUTWEIGHS INJURY TO DEFENDANTS

As to the balance of equities, the Court finds that the plaintiffs have not met their burden. In order to grant injunctive relief, "[t]he harm suffered by the plaintiff in the absence of injunctive relief must outweigh the harm that the defendant would endure on the granting of the injunction." 42 Am. Jur. 2d

[3] In arguing that a waste of public resources constitutes irreparable injury, the plaintiffs cite *Gibbons v. Etpison*, 5 ROP Intrm. 273, 279–80 (Tr. Div. 1992). While it is true that *Gibbons* referenced a waste of public resources in its discussion of irreparable injury, the point is more appropriately considered as part of the "balance of equities" or "public interest" inquiries. As noted above, the "irreparable harm" inquiry focuses on the harm to be suffered by the plaintiffs. This was true in *Koshiba v. Remeliik*, 1 ROP Intrm. 65 (Tr. Div. 1983), which *Gibbons* cited for support. In *Koshiba*, the court found irreparable harm in the plaintiffs being denied their constitutional right to vote under the circumstances. The likely waste of public resources favored the plaintiffs in the balance of equities. *See* 1 ROP Intrm. at 72; *see also Andres v. Palau Election Comm'n*, 9 ROP 289 (Tr. Div. 2002) (noting that if the plaintiffs are able to make a strong showing that the recall election is improper, then it would be in the public interest to avoid the expense of a likely invalid election).

Injunctions § 38. The balancing of hardships is a matter of judicial discretion. The Court can consider whether, in light of the likelihood (or unlikelihood) of success on the merits, going forward with the referendum would be a giant waste of public funds.

The plaintiffs argue that the only injury to be suffered by the defendants if the injunction is granted is that the vote may be delayed. They further argue that the cost of republishing the educational notice and reprinting ballots is insignificant compared the costs of holding an unconstitutional ballot measure. On the other hand, the Republic argues that the ballots have been printed, votes have been gathered from the Southwest Islands, and all arrangements have been made. Therefore, according to the Republic, it would be a large waste of resources to enjoin the referendum at this late date.

As noted, the plaintiffs have not shown a substantial likelihood of success on the merits and they have not demonstrated irreparable harm should the referendum go forward. In light of these findings, the Court cannot conclude that the balance of equities weighs in favor of the plaintiffs.

IV. THE PUBLIC INTEREST

The plaintiffs put forward the very general argument that "the public interest lies in having the constitution followed." The Republic responds that it has put forward significant time and resources toward holding the referendum on June 22, 2011, and that granting an injunction at this late date would have a very disruptive impact.

Upon consideration of all the evidence, there are no grounds at this point to conclude that the public interest favors an injunction.

CONCLUSION

A preliminary injunction is an extraordinary remedy. The Court has considered the parties' pleadings, briefs, and the evidence presented at the hearing. While the Court reserves ruling on the merits of the case, the plaintiffs have failed to show that, at this point, there is a substantial likelihood that they will succeed. Moreover, the plaintiffs have not met their burden in showing that they will suffer irreparable harm in the absence of an injunction.

With the above in mind, the plaintiffs' motion for a preliminary injunction is DENIED. The Republic may go forward with the referendum and other acts pursuant to RPPL No. 8-22. The defendants are to file their Answer or other response to the Complaint in accordance with the ROP Rules of Civil Procedure.