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**KOSRAE STATE COURT
TRIAL DIVISION**

GERSON JACKSON, <i>Plaintiff,</i>)	
)	Civil Action No. 76-02
vs.)	
)	Plaintiff Jackson's Reply to
)	Defendant's Opening Brief;
)	Certificate of Service
KOSRAE STATE ELECTION COMMISSION, <i>Defendant</i>)	

PLAINTIFF GERSON JACKSON'S REPLY TO DEFENDANT'S OPENING BRIEF

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I. INTRODUCTION.

This reply memorandum is submitted pursuant to this Honorable Court's Order establishing a schedule to expedite the handling of this case and in response to the Opening Brief filed September 16, 2002 by the Defendant Kosrae State Election Commission. The expedited procedure is required by the October 1, 2002 filing deadline for candidates running in the November 2002.

The Election Commission's Opening Brief asserts that the language in Article V of the Kosrae Constitution is not clear, and argues therefore that it is appropriate to examine the "intent" of the drafters of the language. But this Opening Brief does not engage in any such examination of the intent, and instead simply attaches an unsigned and privileged March 26, 2002 memorandum of the Legislative Counsel for the Kosrae State Legislature as its Exhibit C. The Legislative Counsel's memorandum is instructive in several respects:

(A) It says at page 6 that: *"The plain language of Article V, Section 6 sets no term limitation for the Lt. Governor."* (Emphasis added.)

(B) It reviews the legislative history of the 1983 Kosrae Constitutional Convention, saying at page 4 that the key committee report (SCREP No. 1-83-10 of the Committee on Government Structure and Functions) *"makes no reference to the Lt. Governor"* and with reference to Article V, Section 6 *"is silent about term limits for the Lt. Governor,"* thus concluding that *"the history of the 1983 Constitution provides little guidance."* (Emphasis added.)

(C) It says at page 6, with regard to the 1995 Kosrae Constitutional Convention, that one

committee report (SCREP No. 2-95-059 of the Committee on Government Structure and Functions) “present[s] an argument in favor of applying the consecutive term limits to the Lt. Governor,” but also that the “Committee Reports for Section 6 are, once again, silent about consecutive term limits for the Lt. Governor,” and, most importantly, that “*explicit language was never adopted.*” (Emphasis added.) The Legislative Counsel’s Memorandum thus concludes that it would be logical for a court to conclude that “the [1995] Constitutional Convention Delegation would have included the same explicit language in Article V, Section 6 [as that governing the Governor in Article V, Section 3] if they had intended the term limit to apply to the Lt. Governor.”

In light of the attachment of this report to the Election Commission’s filing, it is appropriate to assume that the Commission concurs with these understandings of the legislative history.

But it is also significant to note that in its attempt to identify the constitutional provision that is unclear or ambiguous (thus allowing examination of the legislative history), the Commission’s Opening Brief refers *to different words in a different sentence* than those identified by the Legislative Counsel. The Legislative Counsel had suggested that the words “same term” in the second sentence of Article V, Section 6 could be thought of as subject to two different interpretations. But the Election Commission, by contrast, focuses on the words “same qualifications” in the first sentence, and suggests that these words may possibly “be read to require that the same ‘qualifications’ include the qualifications that the candidate not serves more than two consecutive terms.” Defendants’ Opening Brief, para. [7] n.5. Even this suggestion is offered only tentatively, because “[t]he Kosrae State Election Commission has not

reached this conclusion with certainty.” *Id.*

This Honorable Court has not, therefore, been provided with any specific identification of which constitutional provision is thought to be unclear. The Election Commission has also failed to provide the Court with any guidance regarding its view of the appropriate interpretation of the legislative history. Especially because fundamental constitutional rights are at stake in this case, this Honorable Court must be bound by the language as it appears in the Kosrae Constitution, and both parties agree that the language itself nowhere states that the Lieutenant Governor is bound by any term limits.

II. THE ELECTION COMMISSION HAS ACKNOWLEDGED THAT NO TERM LIMIT FOR THE LIEUTENANT GOVERNOR WAS ESTABLISHED IN THE 1983 CONSTITUTION.

In its Opening Brief, the Election Commission makes no argument or assertion that term limits for the Lieutenant Governor were established in the original 1983 Constitution. The text of its Brief does not discuss the 1983 Constitutional Convention, and its Exhibit C (the Legislative Counsel’s memorandum) reports, as explained above, that “the history of the 1983 Constitution provides little guidance.” If term limits have been established for the Lieutenant Governor, therefore, they must have been established by the decision of the voters after the 1995 Constitutional Convention.

III. THE ELECTION COMMISSION HAS NOT PROVIDED ANY PERSUASIVE ARGUMENT THAT THE APPROVAL BY THE VOTERS OF THE AMENDMENTS PROPOSED BY THE 1995 CONSTITUTIONAL CONVENTION ESTABLISHED A TERM LIMIT FOR THE LIEUTENANT GOVERNOR.

Although the Election Commission asserts, in paragraph [7] of its Opening Brief, that “there was intent to limit not just the Governor but also the Lieutenant Governor to two consecutive terms of service,” it fails to provide the basis for this assertion. It attaches as Exhibit

C the Legislative Counsel's memorandum, but that explains that *the actions of the delegates to the 1995 Con Con do not lead to a definite result one way or the other* and that these actions can be viewed as "expressing an implicit intent by the entire delegation to exclude such a limitation on the Lt. Governor." Exhibit C, page 6.

According to the submission of the Election Commission, therefore, "[t]he plain language of Article V, Section 6 sets no term limitation for the Lt. Governor," Exhibit C, page 6, *and, in addition*, the legislative history is confusing and does not decisively indicate that the delegates sought to impose such term limits. *Id.* In such circumstances, particularly in light of the fundamental constitutional rights at stake for the Plaintiff and his supporters, it would be inappropriate to rule that the Lieutenant Governor is bound by a term limit.

In an earlier case, *Bank of Guam v. Semes*, 3 FSM Intrm. 370 (Pon. 1988), the FSM Supreme Court struggled with legislative history from the 1975 FSM Con Con regarding the meaning of Article XI of the FSM Constitution and examined in detail the statements of a concerned delegate. Ultimately, however, the Court concluded that "[t]he words of one delegate concerning his own views can not be accepted as dispositive of the meaning of the Constitution. Rather, *it is the words of the Constitution which must prevail.*" 3 FSM Intrm. at 377 (emphasis added). This same result must be reached in the present case.

The Election Commission also argued that the legislative history may be difficult to unravel because Kosraean and English are both used in the State. But the Commission makes no effort to explain how the interplay of the two languages might affect the proper understanding of the legislative intent relevant to this controversy.

Finally, the Commission pointed to the "similar, recent experience" regarding the

creation of a “unified system” or “system” for personnel management. Opening Brief at paras. [14]-[16]. But that experience does not provide any guidance for the present controversy, because it was resolved by a joint stipulation agreed upon by the parties, and did not lead to any relevant court ruling. In the present case, by contrast, the parties have not been able to agree on the proper interpretation of the language in Article V of the Kosrae Constitution, and thus have turned to this Honorable Court for its ruling. Plaintiff asks the Court to apply the plain language of the Constitution, and thus to rule that the Constitution contains no term limit governing the Lieutenant Governor.

IV. IT IS IMPORTANT TO INTERPRET AND APPLY ARTICLE V IN A MANNER THAT PROTECTS THE FUNDAMENTAL CONSTITUTIONAL RIGHTS AT STAKE IN THIS DISPUTE.

All parts of a constitution must be read together so that they will all have meaning. *Seymour v. Kosrae*, 3 FSM Intrm. 537, 540 (Kos.S.Ct.Tr. 1988)(“the court should also consider all provisions of the Constitution because other sections may touch on the same subject area, thus giving the questionable provision added meaning”); *Tafunsak Municipality, v. State of Kosrae*, 7 FSM Intrm. 344, 347 (1995)(same); *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 377 (Pon. 1988)(any part of a constitution should be interpreted and considered against the background of other provisions in the same constitution”). As explained in Plaintiff’s Opening Brief, this case involves the fundamental voting rights and rights of association of the Plaintiff’s supporters, as well as Plaintiff’s fundamental right to be a candidate for elective office. The right to vote is protected in Article III, Section 1 of the Kosrae Constitution and in Article VI of the FSM Constitution. The freedoms of expression and association are protected in Article II, Section 1(a) of the Kosrae Constitution and Article IV, Section 1 of the FSM Constitution. Such

rights can only be restricted if the government is serving a precise interest and has chosen a mechanism that burdens the rights only to the extent strictly necessary. *Anderson v. Celebrezze*, 460 U.S.780, 789 (1983); *see also In re Iriarte (I)*, 1 FSM Intrm. 239, 247-48 (Pon. 1983)(recognizing the freedom of expression as a fundamental right). If, therefore, the voters had clearly established a term limit, such a precise limitation would prevail over the general right to seek elective office. But if the intention of the voters is not clear, as in the present case, it would be inappropriate for a Court to limit the important rights of voters and candidates. In a situation where the government's intention is unclear or ambiguous, the Court must act to protect the crucial constitutional rights that are at stake. *See, by analogy, FSM v. Edward*, 3 FSM Intrm. 225, 235 (Pon. 1987), and *In re Iriarte (II)*, 1 FSM Intrm. 255, 264-65 (Pon. 1983)(both saying that waivers of fundamental rights may not be presumed in ambiguous circumstances).

V. CONCLUSION.

Plaintiff has brought this cause of action to protect his fundamental right to seek elective office, as well as the fundamental right of his supporters to cast their vote for him. These rights are central elements of the rights to free expression and association, all of which are explicitly protected by the Kosrae and FSM Constitutions.

The parties both agree that the Kosrae Constitution does not contain any explicit language imposing a term limit on the Lieutenant Governor. The Election Commission contends, without elaboration, that such a limit should be deemed to be part of the Kosrae Constitution because of the "intent" of the delegates to the 1995 Con Con. This "intent" did not lead to any proposed language that was offered to the voters. In approving the amendments proposed by the 1995 Con.Con, therefore, the voters were not made aware of this "intent," nor

can they be said to have approved it. It would, therefore, require a huge stretch to conclude that the Kosrae Constitution now includes such a term limit.

In matters involving ambiguity, courts must act to protect fundamental constitutional rights, and, in the end, of course, "*it is the words of the Constitution which must prevail.*" *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 377 (Pon. 1988)(emphasis added). For these reasons, Plaintiff Gerson Jackson respectfully asks this Honorable Court to issue a declaration that he is entitled run for the office of Lieutenant Governor in the November 2002 election and an injunction requiring the Kosrae State Election Commission to list his name as a candidate in the November 2002 election;

DATED: Honolulu, Hawaii, September 18, 2002.

Jon M. Van Dyke
Andrea Hillyer
*Attorneys for Plaintiff
Gerson Jackson*

CERTIFICATE OF SERVICE

This is to certify that the undersigned served a copy of this document and accompanying affidavits and exhibits to the following attorneys representing parties in this matter:

Mr. Ron Bickett
Mr. Ed Buckingham
Office of the Attorney General
State of Kosrae
Attorneys for the Kosrae State Election Commission

JON M. VAN DYKE
Attorney for Plaintiff Jackson.