IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

OCHEDARUCHEI CLAN,
OBIL-TELUK KAMILLA ELECHESEL KAZUO HOLDER,
and ADELBAI RAMSON JULIO,
Appellants,
v.
RAYNOLD OILOUCH, in his individual capacity and in his official capacity as VICE PRESIDENT and MINISTER OF JUSTICE of the Republic of Palau, and the REPUBLIC OF PALAU,
Appellees.

Cite as: 2021 Palau 33
Civil Appeal No. 20-026
Appeal from Civil Action No. 20-034

Argued: August 13, 2021
Decided: November 11, 2021

Counsel for Appellants	Rachel A. Dimitruk
Counsel for Appellee Republic of Palau	Ernestine K. Rengiil
Counsel for Appellee Raynold Oilouch	Pro Se

BEFORE: JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Justice, presiding.

OPINION

BENNARDO, Associate Justice:

[¶ 1] This case arises out of negotiations of a lease between Ochedaruchei Clan and the Republic of Palau for land in Angaur to be used by the United States' Aerial Domain Awareness ("ADA") program. Ochedaruchei Clan alleges that the Republic and then-Vice President Raynold Oilouch—the Republic's principal negotiator and the Clan's former attorney—misrepresented information related to the size of the ADA site in the course of the lease negotiations. The Trial Division dismissed the Clan's complaint. For the reasons set forth below, we **AFFIRM IN PART**, **REVERSE IN PART**, and **REMAND** to the Trial Division for further proceedings.

BACKGROUND

[¶ 2] In 1998, the Land Court awarded Ochedaruchei Clan ownership of several lots in Angaur. Oilouch represented the Clan in that proceeding. The next year, Oilouch allegedly drafted a deed transferring that land from the Clan to the Children of Orrenges Thomas (a member of the Clan), and the Land Court later awarded the land to the Children of Orrenges Thomas based on that deed. In 2017, Ochedaruchei Clan filed a new action in the Land Court challenging the Children of Orrenges Thomas's ownership of the land.

[¶ 3] Around the same time—with the litigation between the Clan and the Children of Orrenges Thomas still pending—the United States began planning to build radio towers and radar sites in Angaur as part of its ADA program. Oilouch, as vice president, negotiated with the United States on behalf of the Republic regarding the size and location of the ADA site. The Republic, through Oilouch, was also separately negotiating with the Clan and the Children of Orrenges Thomas to lease part of the disputed land in Angaur for the ADA site. During those negotiations, including a purported "final" lease agreement sent to the Clan, the Republic represented to the Clan that the ADA site would be around 170,000 square meters and that the total lease proceeds would be about $2.6 million. Although Oilouch allegedly encouraged the Clan to sign this "final" draft, it was never signed.

[¶ 4] While the parties were negotiating the lease for the ADA site, Ochedaruchei Clan and the Children of Orrenges Thomas settled their

ownership dispute and agreed to a division of the proceeds from the lease. The settlement stated that Ochedaruchei Clan would receive $1 million of the lease proceeds and the Children of Orrenges Thomas would receive the remainder. The Clan alleges that, in agreeing to this settlement, it relied on the Republic's representation that the proceeds from the lease would be about $2.6 million.

[¶ 5] After the Land Court approved the settlement, the Republic provided the Clan with a new draft of the lease agreement for execution. In this new draft, the size of the ADA site expanded to about 270,000 square meters and the total lease proceeds increased to about $4.3 million. Oilouch told the Clan that the United States had not finalized the size of the ADA site until after the parties' settlement, but the Clan disputes this claim. The Clan alleges that the Republic had not showed the Clan an earlier map with a larger ADA site and that Oilouch told the Clan, after the lease was signed, that the United States had requested a site of at least 250,000 square meters throughout the duration of the negotiations. Ochedaruchei Clan alleges that the Republic and Oilouch deliberately withheld information about the size of the ADA site and that the Clan would not have agreed to the settlement's division of the lease proceeds had it been aware of the actual size of the ADA site.

[¶ 6] Ochedaruchei Clan brought claims for fraudulent misrepresentation, fraudulent concealment, and detrimental reliance against the Republic and Oilouch in both his official and individual capacities and a claim for negligence and negligent misrepresentation against Oilouch in his individual capacity. The Trial Division dismissed the Clan's complaint, holding that the claims against the Republic and Oilouch in his official capacity were barred by sovereign immunity and the negligence claim against Oilouch in his individual capacity failed to state a claim because it was based on the ABA Model Rules of Professional Conduct. Ochedaruchei Clan now appeals.

STANDARD OF REVIEW

[¶ 7] We review a trial court's order granting a motion to dismiss de novo. *Palau Pub. Lands Auth. v. Koror State Pub. Lands Auth.*, 19 ROP 24, 27 (App. Div. 2011). In reviewing a motion to dismiss, we accept all

allegations in the plaintiff's complaint as true and determine whether those allegations state a claim for relief. *Id.*

DISCUSSION

I.

[¶ 8] Ochedaruchei Clan first challenges the Trial Division's dismissal of its claims against the Republic and Oilouch in his official capacity as barred by sovereign immunity. The doctrine of sovereign immunity bars claims against the Republic and its officers acting in their official capacities unless the Republic has consented to be sued. *Superluck Enters., Inc. v. ROP*, 6 ROP Intrm. 267, 271 (App. Div. 1997); *Micronesian Yachts Co. v. Foreign Inv. Bd.*, 5 ROP Intrm. 305, 310 n.6 (Tr. Div. 1995). A waiver of the Republic's sovereign immunity defense must be unequivocally expressed by statute, *Superluck*, 6 ROP Intrm. at 271, and the party bringing a claim against the government bears the burden of demonstrating such a waiver, *Giraked v. Estate of Rechucher*, 12 ROP 133, 145 (App. Div. 2005). Whether sovereign immunity prohibits Ochedaruchei Clan's suit against the Republic and its former vice president turns on whether Ochedaruchei Clan demonstrated that the Republic waived sovereign immunity for fraudulent misrepresentation, fraudulent concealment, and detrimental reliance claims.

[¶ 9] In the Trial Division, Ochedaruchei Clan premised its waiver argument on 14 PNC § 501(a)(2), which waives sovereign immunity for claims based on "any express or implied contract with the government." The Clan argued that section 501(a)(2) applied because the Clan's claims "stem from negotiations related to an express contract negotiated by and entered into between the Republic and [the Clan]." Clan's Opp. to Mot. to Dismiss at 7. But, as the Trial Division noted, section 501's waiver of sovereign immunity is subject to several exceptions in 14 PNC § 502 that "preserve the Republic's sovereign immunity in certain cases." *Tell v. Rengiil*, 4 ROP Intrm. 224, 228 (App. Div. 1994). Under section 502(e), the Republic cannot be sued for any claim arising out of "misrepresentation, deceit or interference with contract rights." The Trial Division found that, even if the Clan's claims against the Republic fall within section 501(a)(2)'s waiver of sovereign immunity, the exception in section 502(e) still bars the claims.

[¶ 10] On appeal, Ochedaruchei Clan abandons any reliance on section 501(a)(2), and it instead argues that a different statute—14 PNC § 503—waives the Republic's sovereign immunity for the Clan's claims. According to the Clan, section 503 waives sovereign immunity for tort claims like fraudulent misrepresentation and is not subject to the exceptions in section 502. We need not consider the merits of this argument, however, because the Clan failed to raise this argument—or to even reference section 503—in the Trial Division.

[¶ 11] Although "[n]o axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue," *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (App. Div. 2004), Ochedaruchei Clan suggests that we should consider its section 503 argument because "the issue of subject matter jurisdiction may be raised for the first time on appeal," Clan's Br. at 9 (citing *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103 (App. Div. 2004)). Even if we were to assume for purposes of this appeal that sovereign immunity is within the scope of subject-matter jurisdiction,[1] we disagree.

[¶ 12] We may consider challenges to jurisdiction raised for the first time on appeal because, without jurisdiction, the lower court possessed no authority to adjudicate a dispute. Likewise, without jurisdiction the Appellate Division lacks the authority to entertain an appeal. Ochedaruchei Clan attempts to turn this obligation on its head. The Clan argues that we are required to entertain an argument in favor of a lower court's jurisdiction for the first time on appeal, even if the argument was never presented to the lower court. This argument is a bridge too far. Unlike challenges to jurisdiction, we have no duty to consider improperly raised legal theories in support of jurisdiction. *See, e.g.*, *Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016) ("Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction."). Accordingly, parties forfeit new theories of sovereign immunity waiver—like the Clan's section 503 argument—advanced for the first time on appeal.

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[1] Without taking sides at present, we note that a "divergence of opinion" exists on the precise nature of sovereign immunity and whether it is "synonymous" with subject-matter jurisdiction. *Oneida Indian Nation v. Phillips*, 981 F.3d 157, 170–71 & n.70 (2d Cir. 2020) (collecting cases).

[¶ 13] Because Ochedaruchei Clan forfeited its argument that the Republic waived sovereign immunity through section 503 and does not challenge the Trial Division's dismissal based on section 502(e), we affirm the Trial Division's conclusion that sovereign immunity bars the Clan's claims against the Republic and Oilouch in his official capacity.

II.

[¶ 14] Next, Ochedaruchei Clan challenges the Trial Division's dismissal of its claims against Oilouch in his individual capacity. We first consider the Trial Division's reasoning for dismissing the Clan's claim for negligence and negligent misrepresentation and then consider the remaining claims brought against Oilouch in his individual capacity.

A.

[¶ 15] The Trial Division dismissed Ochedaruchei Clan's claim for negligence and negligent misrepresentation because it was "based on [Oilouch's] duty under the ABA Model Rules of Professional Conduct." Order at 3. The Trial Division correctly noted that the ABA Model Rules of Professional Conduct—incorporated into the ROP Disciplinary Rules by Rule 2(h)—"are not designed to be a basis for civil liability." *Id.* (quoting ABA Model Rules, Scope ¶ 20). Because the Trial Division interpreted the Clan's complaint as stating "a civil liability claim based on violation of the Model Rules," it found that "the law clearly prohibits this as a cause of action" and dismissed. *Id.* at 4.

[¶ 16] The Trial Division's interpretation oversimplifies the Clan's claim. Ochedaruchei Clan does not assert a claim against Oilouch based solely on an alleged violation of the ABA Model Rules. In fact, the Clan's complaint does not even mention the ABA Model Rules. *See* Compl. ¶¶ 97–107. Rather, Ochedaruchei Clan asserts a tort claim for negligence and negligent misrepresentation against its former attorney, alleging that Oilouch breached various duties he owed to the Clan in the context of the lease negotiations. *Id.*

[¶ 17] The Model Rules themselves make clear that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may

be evidence of breach of the applicable standard of conduct." ABA Model Rules, Scope ¶ 20; *see also* Restatement (Third) of the Law Governing Lawyers § 52 (similar). This approach reflects the majority rule that although a violation of the rules of professional conduct, standing alone, does not *create* a private cause of action, the rules of professional conduct may be relevant *evidence* for establishing the standard of care for a claim. *See Mainor v. Nault*, 101 P.3d 308, 320 & n.39 (Nev. 2004) (collecting cases). Courts have explained that because the rules of professional conduct "reflect a professional consensus of the standards of care below which an attorney's conduct should not fall, it would be illogical to exclude evidence of the professional rules in establishing the standard of care." *Id.* at 321.

[¶ 18] Indeed, the decision that the Trial Division relied on to dismiss the Clan's negligence claim, *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008), confirms the majority rule. The *CenTra* court noted that a violation of the rules of professional conduct "does not by itself give rise to an actionable claim." *Id.* at 410. But the plaintiff there did not assert a claim against its former law firm for a violation of the rules of professional conduct. *Id.* Rather, it brought claims for breach of contract, breach of fiduciary duties, and legal malpractice. *Id.* Thus, the Sixth Circuit held that the plaintiff had appropriately invoked the rules of professional conduct as evidence to support its tort and contract claims. *Id.* at 411.

[¶ 19] So too here. Ochedaruchei Clan did not attempt to state a cause of action for violation of the ABA Model Rules. It stated a claim for negligence and negligent misrepresentation, and whether Oilouch breached various duties to the Clan may be relevant to that claim. Thus, we reverse the Trial Division's dismissal of Ochedaruchei Clan's claim for negligence and negligent misrepresentation.

B.

[¶ 20] Finally, Ochedaruchei Clan appeals the Trial Division's dismissal of its claims for fraudulent misrepresentation, fraudulent concealment, and detrimental reliance against Oilouch in his individual capacity. In his motion to dismiss in his individual capacity, Oilouch only sought dismissal of the Clan's claim for negligence and negligent misrepresentation. However, the Trial Division dismissed Ochedaruchei Clan's complaint against Oilouch in its entirety. This dismissal was apparently based on the Trial Division's

understanding that the Clan's "first three counts are against the Republic of Palau and Raynold Oilouch in his capacity as a government official," while the "last count is against Oilouch in his capacity as an individual." Order at 2–3. The Trial Division seems to have believed that only one of the four claims in the complaint was against Oilouch in his individual capacity. However, nothing in the Clan's complaint distinguishes between the four claims. All four claims are brought against Oilouch, and the Clan sued Oilouch "in both his individual and official capacity." Compl. ¶ 4. Thus, the Trial Division erred by dismissing the complaint in its entirety without addressing the Clan's fraudulent misrepresentation, fraudulent concealment, and detrimental reliance claims against Oilouch in his individual capacity.

CONCLUSION

[¶ 21] For the reasons set forth above, we **AFFIRM** the Trial Division's dismissal of Ochedaruchei Clan's claims against the Republic and Oilouch in his official capacity, we **REVERSE** the Trial Division's dismissal of the Clan's claims against Oilouch in his individual capacity, and we **REMAND** the case for further proceedings on the Clan's claims against Oilouch in his individual capacity.

DOLIN, Associate Justice, concurring:

[¶ 22] I join the opinion of the Court and agree that Ochedaruchei Clan forfeited its argument that 14 PNC § 503 waives the Republic's sovereign immunity for the Clan's tort claims. I write separately, however, to add a few observations in hopes that they will provide guidance to current and future litigants on what is, admittedly, an inartfully drafted statute.

I.

[¶ 23] Section 503 permits civil actions to "be brought against the government of the Trust Territory or Republic, which shall be liable to the same extent as a private person under like circumstances, for tort claims . . . ." Ochedaruchei Clan reads this language as the Republic's unqualified abrogation of sovereign immunity in all tort cases. But that section does not stand alone. Rather, it forms only a part of Chapter 5, which waives the

Republic's sovereign immunity in certain circumstances. *See* 14 PNC §§ 501-503.

[¶ 24] "The well-trod first step in statutory interpretation is to ascertain the plain meaning of the statute's language." *In the Matter of the Adoption of S.N.F.*, 19 ROP 105, 107 (2012). Relying on this well-known formulation, Ochedaruchei Clan is "asking us to construe [section 503] *verbatim ac litteratim*, ignoring the [provision's] place in the overall statutory framework." *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). "But when construing the plain text of a statutory enactment, we do not construe each phrase literally or in isolation." *Id.* Rather, an equally well-known rule of statutory construction is that courts should read statutory language in the context of the "design of the statute as a whole." *Koror State Legislature v. KSPLA III*, 2020 Palau 15 ¶ 13. "Statutory construction is a holistic endeavor," *County of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008), and in "ascertaining the plain meaning of [a statute], the Court should read its sections together, not as parts standing on their own," *Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010). In construing statutes, courts must take care so that the construction does not render any part of the statute "inoperative or superfluous, void or insignificant." *Diaz v. ROP*, 21 ROP 62, 65 (2014) (quoting 73 Am. Jur. 2d *Statutes* § 164). Thus, in determining the meaning of section 503, we must ensure that we do not read sections 501 and 502 out of the statute. Yet, this is precisely what Ochedaruchei Clan is asking this Court to do.

[¶ 25] The Republic has chosen to waive sovereign immunity for certain, but not all, claims. *See* 14 PNC §§ 501-503. In order to do so, it retained (as modified) statutes adopted during the Trust Territory days and formerly codified at 6 TTC §§ 251-253. The Republic agreed to waive sovereign immunity for, *inter alia*, actions seeking to recover "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment." 14 PNC § 501(a)(3). At the same time, the Republic excepted from the waiver "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." *Id.* § 502(e). Section 503—formerly 6 TTC § 253—was added several years later, *see Antonio v. Trust Territory*, 7 TTR 123, 127 (Tr. Div. 1974)

(recounting the legislative history of the section), specifying the scope of the Republic's liability for "tort claims." From this, Ochedaruchei Clan draws the conclusion that the exceptions in section 502 have been abrogated for tort claims. In other words, Ochedaruchei Clan is asking us to construe one subsection of the sovereign immunity statute—the so-called intentional tort exemption in section 502(e)— as wholly inoperable. It is a big ask, and Ochedaruchei Clan's task is made much more difficult by the fact that the precedent is squarely against them.

[¶ 26] In *Antonio*, the court considered the same argument and held that "that Section 253 [now section 503] must be read in conjunction with Sections 251 and 252 [now sections 501 and 502, respectively] and if certain exceptions apply to Section 253 [now section 503], they will provide governmental immunity in those cases." 7 TTR at 128. To be fair, we, as an appellate court, are not bound by the decision of a trial court. But Ochedaruchei Clan has given no reason to deviate from this well-considered judgment that has stood the test of time for nearly four decades.

[¶ 27] Moreover, even if this Court were writing on a blank slate, I would still be inclined to conclude that the exceptions to the waiver of sovereign immunity contained in section 502 have not been abrogated with the adoption of section 503. As the *Antonio* court explained, when the Congress of Micronesia adopted the sovereign immunity waiver statutes, it simply imported the relevant provisions of the United States Federal Tort Claims Act into the local legislation. *See* 7 TTR at 125-27; *Ikosia v. Trust Territory*, 7 TTR 274, 276-77 (Tr. Div. 1975); *see also Micronesian Yachts Co. v. Foreign Investment Board*, 5 ROP Intrm. 305 (Tr. Div. 1995) (noting that Palauan sovereign immunity statutes are "based on the U.S. Federal Tort Claims Act"). "There is no indication that when this same language was adopted in Palau it was with the intention of rejecting the construction given to it by the United States courts." *Becheserrak v. ROP*, 7 ROP Intrm. 111, 115 (1998). It is a "well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute." *Id.* (quoting *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988)). It therefore makes eminent sense to interpret our statute in parallel with how the U.S. courts interpret the progenitor statute. *See id*.

[¶ 28] In the provision parallel to section 503, the United States Federal Tort Claims Act states that the "United States shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This "broad waiver of sovereign immunity is, however, subject to 13 enumerated exceptions." *Kosak v. United States*, 465 U.S. 848, 851-52 (1984) (citing 28 U.S.C. § 2680(a)-(n)). For example, section 2680(h)—the analogue of 14 PNC § 502(e)—preserves the United States government's immunity from suit for tort claims arising out of "misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The thrust of this and the other exceptions is that the waiver of sovereign immunity in section 2674 renders the United States liable to suit for some, *but not all*, tort claims.

[¶ 29] As the *Antonio* court explained, the Trust Territory Code—and now the Palau National Code—"must be read in the same light" as the Federal Tort Claims Act from which it was "largely drawn." 7 TTR at 127-28. Accordingly, despite the fact that section 503 "specifically does not refer to the other two sections . . . that [s]ection [] must be read in conjunction with [sections 501 and 502] and if certain exceptions apply to [section 503], they will provide governmental immunity in those cases." *Id.* at 128. When it waived sovereign immunity, the Republic "opened the litigation door about as wide as the United States Congress did," *Antonio*, 7 TTR at 128, but no wider. Ochedaruchei Clan's interpretation of section 503 cannot stand because it would expose the Republic to tort liability far beyond the scope of the waiver in the FTCA, on which the Palauan waiver of sovereign immunity is based.

[¶ 30] I agree with Justice Heffner's observation that it would have "clarified everything if Section 253 [now section 503] had wording making it subject to the exceptions outlined in Section 252 [now section 502]." *Antonio*, 7 TTR at 128. "That we may rue inartful legislative drafting, however, does not excuse us from the responsibility of construing a statute as faithfully as possible to its actual text." *DePierre v. United States*, 564 U.S. 70, 82 (2011). Like Justice Heffner, I too "cannot accept the argument that [section 503] in effect repealed [section 502]." *Antonio*, 7 TTR at 128.

[¶ 31] First of all, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and

manifest." *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (quoting *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009)). Generally, in order to "clearly and manifestly" express its intention to repeal express statutory text, the legislature must, at the very least, "specifically address language on the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Nothing of this sort occurred when what is now known as section 503 was added to the Code. That the different sections were not adopted as part of a single Act, or at exactly the same time, is not enough to show that in adopting the later provision the Trust Territory Legislature clearly and manifestly showed its intent to repeal the section adopted a few years earlier.

[¶ 32] Whereas courts "disfavor construing a statute in such a way that a repeal by implication results, they disfavor implicit waivers of sovereign immunity to an even greater degree." *St. Vincent's Med. Ctr. v. United States*, 29 Fed. Cl. 165, 170 (1993), *aff'd*, 32 F.3d 548 (Fed. Cir. 1994). The reason "that a waiver of sovereign immunity cannot be implied," *Becheserrak*, 7 ROP Intrm. at 114, is that "the right to determine how, when and under what circumstances the Government may be sued" is "[i]mplicit in the sovereignty of nations," *Ikosia*, 7 TTR at 278. Accordingly, we have held that a waiver of sovereign immunity "must be *explicit and unequivocal* as to the particular type of claim." *Giraked v. Estate of Rechucher*, 12 ROP 133, 146 (2005) (emphasis added); *see also Superluck Enterprises, Inc. v. ROP*, 6 ROP Intrm. 267, 271 (1997). At the very least, the conflicting language in section 502(e) and section 503 indicates that the Republic did not *explicitly* and *unequivocally* waive its immunity for *all* tort claims (including, as relevant here, tort claims based on "misrepresentation, deceit or interference with contract rights," 14 PNC § 502(e)). *See St. Vincent's Med. Ctr.*, 29 Fed. Cl. at 170 (noting that "the very existence" of a particular alternative administrative remedy "creates uncertainty as to the vitality of the" general sovereign immunity waiver).

[¶ 33] Thus, whether for procedural reasons identified by the Court or for the reasons that I have laid out in this opinion, Ochedaruchei Clan's arguments as to the Republic's liability for alleged "fraudulent misrepresentation," "fraudulent concealment," and "detrimental reliance" have all been properly rejected.

II.

[¶ 34] I also write to add a few observations about the qualified immunity argument raised in this appeal. There appears to be some confusion among the litigants as to when the doctrine of qualified immunity applies and what actions it applies to. We have not yet recognized the qualified immunity doctrine in Palau, *see Toribiong v. Whipps*, 2016 Palau 4 ¶ 22 n.5, and because Oilouch failed to raise it in his Answer, it appears that this will not be the case where we will have to squarely face the issue either. Accordingly, I will not dwell on the subject, and will, for the sake of clarity, only attempt to dispel some of the errors that have crept into the parties' analysis of the issue and to draw clear boundaries between the sovereign immunity doctrine and its qualified immunity cousin.

[¶ 35] In their briefs to this Court, Ochedaruchei Clan mistakenly characterizes section 502(b)—an exception to the Republic's waiver of sovereign immunity—as the codification of qualified immunity and argues that this "qualified immunity" applies (to the extent it applies at all) to the actions of Appellee Oilouch in his *official* capacity. But that is incorrect.

[¶ 36] Governmental employees may be sued in two capacities: an official capacity or an individual capacity. "A suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent." *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (cleaned up). "[L]awsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which an officer is an agent,' and they may also be barred by sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985)). Thus, if the Republic enjoys sovereign immunity from Ochedaruchei Clan's claims (and in my view it does, *see ante* ¶¶ 23-32), then so does the former Vice President on any "official capacity" claims.

[¶ 37] In contrast, at least under U.S. law, in a suit brought against a government employee in his *individual* capacity, qualified immunity may protect the defendant if at the time the alleged improper conduct took place, he was performing discretionary functions within the scope of his employment. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are

shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). But this judicially created doctrine is different from the statutory prohibition on suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function" by a governmental employee. 14 PNC § 502(b).

[¶ 38] Though the resolution of the questions on the scope and vitality of the qualified immunity doctrine is best left for another day, it is important not to conflate this doctrine with the "discretionary function" exception to the waiver of the Republic's sovereign immunity. *See id.*

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[¶ 39] With these observations, I join the opinion of the Court.