APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF GUAM

Supreme Court Case No. CRQ23-001

[Filed October 31, 2023]

IN RE: REQUEST OF	)
LOURDES A. LEON GUERRERO,	)
I MAGA'HÅGAN GUÅHAN,	)
RELATIVE TO THE VALIDITY	)
AND ENFORCEABILITY OF	)
PUBLIC LAW NO. 20-134.	)
	)

OPINION

Cite as: 2023 Guam 11

Request for Declaratory Judgment Pursuant to
Section 4104 of Title 7 of the Guam Code Annotated
Argued and submitted on July 25, 2023
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and JOHN A. MANGLONA, Justice *Pro Tempore*.

TORRES, C.J.:

[1] In 2022, the Supreme Court of the United States issued a watershed decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ----, 142 S. Ct. 2228 (2022). *Dobbs* overturned decades of precedent, most significantly *Roe v. Wade*, 410 U.S. 113 (1973), which held that a woman's right to obtain an abortion was implicit in the Due Process Clause of the 14th Amendment. In the wake of *Dobbs*, states and territories are left to determine the legality of abortion without the constitutional shield provided by *Roe*.

[2] Guam is no exception. Earlier this year, the Attorney General of Guam, Douglas Moylan, filed in the District Court of Guam to revive Public Law 20-134, a 1990 law instituting a broad ban on abortion in

Guam. P.L. 20-134 has been permanently enjoined since its passage because federal courts concluded it was unconstitutional. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1426 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *as amended* (June 8, 1992). According to the Attorney General, since *Roe* is no longer good law, P.L. 20-134 should be enforceable. Besides opposing the Attorney General in federal court, Petitioner Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan* ("the Governor"), filed a Request for Declaratory Judgment under 7 GCA § 4104 requesting that this court declare P.L. 20-134 void *ab initio* or that it had been impliedly repealed by subsequent acts of the Guam Legislature. Req. Declaratory J. (Jan. 23, 2023). Given the salience of this issue, we invited interested parties across Guam to weigh in on the Governor's request.

[3] We hold that P.L. 20-134 has been impliedly repealed by the Guam Legislature and no longer possesses any force or effect in Guam.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Dispute

[4] In 1973, the U.S. Supreme Court declared criminalizing abortion in most instances violated a woman's constitutional right of privacy, implicit in the Due Process Clause of the 14th Amendment. *Roe*, 410 U.S. at 154, *overruled by Dobbs*, 597 U.S. at ----, 142 S. Ct. at 2242. In March 1990, the Guam Legislature passed P.L. 20-134, which was signed by Governor Joseph A. Ada. P.L. 20-134 contained a broad ban on

abortion, establishing criminal penalties for: (1) any person, including medical professionals, providing or administering drugs or employing means to cause an abortion, (2) any woman soliciting and taking drugs or submitting to an attempt to cause an abortion, and (3) any person who solicits any woman to submit to any operation, or uses any means, to cause an abortion. Guam Pub. L. 20-134:3-5 (Mar. 19, 1990).

[5] Less than a week after P.L. 20-134 was passed, a complaint was filed in the District Court of Guam, alleging the law violated the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution, the Organic Act of Guam, and 42 U.S.C.A. § 1983. *Guam Soc'y of Obstetricians*, 776 F. Supp. at 1426. The District Court concluded *Roe v. Wade* applied to Guam, deciding that Congress intended the people of Guam "would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court." *Id.* at 1427-28. The District Court permanently enjoined the enforcement of P.L. 20-134 and declared sections two through five "unconstitutional and void under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983." *Id.* at 1432.

[6] On appeal, the Ninth Circuit affirmed the permanent injunction. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1374 (9th Cir. 1992). The Ninth Circuit determined the Mink Amendment to the Organic Act extended the Due

Process Clause of the 14th Amendment to Guam, and therefore *Roe* applied to Guam. *Id.* at 1370. Despite (and possibly because of) the District Court of Guam's permanent injunction, the Guam Legislature never expressly repealed P.L. 20-134.

[7] The *Dobbs* decision overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and decided the right to abortion is not protected by the U.S. Constitution. *Dobbs*, 597 U.S. at ----, 142 S. Ct. at 2242. Consequently, the Attorney General of Guam issued a Notice of Motion to Dissolve Injunction of Guam Public Law 20-134. In this Notice of Motion, the Attorney General expressed an intention to vacate the injunction by the end of January, noting the Attorney General's Office is "duty-bound" to seek the injunction's dissolution. Req. Declaratory J., Ex. 2 at 1 (Notice Mot. Dissolve Inj., Jan. 11, 2023).

[8] As we have the authority to interpret Guam's laws and are "the final arbiter of questions arising through the jurisdiction of the courts of Guam," *Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶ 35, the Governor requested this court issue a judgment declaring: (1) P.L. 20-134 void forever, such that it cannot be revived following the reversal of *Roe v. Wade*, (2) that the Guam Legislature did not have the authority to pass P.L. 20-134 pursuant to the Organic Act, and P.L. 20-134 is therefore void *ab initio* and invalid, and (3) to the extent P.L. 20-134 is not void or otherwise unenforceable, it has been repealed by implication through subsequent changes in Guam law. Req. Declaratory J. at 25-26. We agreed to hear Questions 2 and 3. Order (Feb. 18, 2023). On March 24,

2023, the District Court of Guam denied the Attorney General's Motion to Dissolve the Permanent Injunction, finding he did not meet his burden that "changed circumstances warrant[ed] relief." Civ. Case No. 90-00013 (Order Den. Mot. Dissolve at 4 (Mar. 24, 2023)). The Attorney General has since appealed, and that matter is awaiting resolution in the Ninth Circuit.

B. The Filings

[9] In our February 18, 2023 Order, we designated the Attorney General of Guam as a Respondent, having inferred he does not view P.L. 20-134 as void *ab initio* or having been impliedly repealed. Order at 6 (Feb. 18, 2023). We also recognized the Governor's Questions concerned the powers and authority of the Guam Legislature and invited the Legislature to participate as a Respondent. *Id.* Further, "[c]ognizant of the importance and salience of this issue to so many stakeholders on Guam," we invited any party to file an *amicus curiae* brief. *Id.* The filings received and the positions taken are briefly summarized below.

1. The Governor

[10] The Governor contends P.L. 20-134 is void *ab initio* because the Guam Legislature was acting *ultra vires*, in violation of the Organic Act, when it passed the law. Alternatively, the Governor maintains P.L. 20-134 has been impliedly repealed by subsequent legislation regulating abortion care in Guam.

2. The Attorney General

[11] The Attorney General asks this court to dismiss the matter for lack of jurisdiction. In responding to the

Governor's contentions, the Attorney General argues the Guam Legislature was not acting *ultra vires* when it passed P.L. 20-134. The Attorney General further asserts P.L. 20-134 was not impliedly repealed because P.L. 20-134 was not "in existence" when the subsequent statutes regulating abortion were passed. Finally, the Attorney General asks this court to order a referendum on the validity of P.L. 20-134.

3. The Legislature

[12] The Legislature argues that despite the law being unconstitutional when it was passed, P.L. 20-134 remains "on the books" until the Guam Legislature repeals or amends it. The Legislature agrees that whether P.L. 20-134 was impliedly repealed is a matter for this court to decide, though it declines to wade into this debate.

4. *Amici* supporting the Governor: William S. Freeman, M.D., Bliss Kaneshiro, M.D., M.P.H., Shandhili Raidoo, M.D., M.P.H., Famalao'an Rights, and the American Civil Liberties Union

[13] *Amici curiae* William S. Freeman et al. are concerned with the First Amendment implications surrounding P.L. 20-134, as medical professionals may be prosecuted for advising patients about abortion as an option and the ability to obtain abortion care in Hawai'i. *Amici* Freeman et al. argue P.L. 20-134 was a legal nullity the moment it was passed, and, because the referendum required by section 7 of the law was a condition precedent that never occurred, the ban cannot be revived.

5. *Amici* supporting the Attorney General

a. Robert Klitzkie[1]

[14] *Amicus* Robert Klitzkie maintains this court should either dismiss the Petition because there is no constitutional standing or abstain from resolving the Governor's Questions. He argues that under this court's precedent, there is no jurisdiction to hear the case or issue an advisory opinion.

b. Timothy J. Rohr

[15] In addition to his challenge to this court's jurisdiction under 7 GCA § 4104 that this is not a "matter of great public interest," *Amicus* Timothy J. Rohr contends that P.L. 20-134 was not repealed by implication, as subsequent abortion legislation was simply a result of the Legislature following other jurisdictions and affirming the constitutional right to abortion "only because it had to." Rohr Br. at 3 (Mar. 13, 2023).

II. JURISDICTION

[16] We have original jurisdiction over declaratory judgment actions regarding "the interpretation of any law, federal *or* local, lying within the jurisdiction of the

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[1] Officially, *Amicus* Klitzkie filed his *amicus* brief in support of neither party. *See* Klitzkie Br. at 11 n.3 (Mar. 31, 2023). We group him with the Attorney General because the latter has adopted *Amicus* Klitzkie's position that there is no injury in fact in this case. Additionally, the Attorney General has filed a separate Motion to Dismiss which would achieve the same result as *Amicus* Klitizkie's ultimate position, which is for this court to decline to exercise jurisdiction in this case. *See id.* at 22.

courts of Guam to decide, and upon any question affecting the powers and duties of [*I Maga'håga*] and the operation of the Executive Branch, or *I Liheslaturan Guåhan*, respectively." 7 GCA § 4104 (added by P.L. 29-103:2 (July 22, 2008)); *In re Request of Leon Guerrero*, 2021 Guam 6 ¶ 8 (per curiam); *In re Request of Calvo*, 2017 Guam 14 ¶ 5.

[17] Yet, before we can address the merits of the Governor's request, several parties now challenge the jurisdiction of this court. *Amicus* Klitzkie argues the Governor fails to show she has suffered an injury in fact, and so this case must be dismissed based on our decision in *In re A.B. Won Pat International Airport Authority*, 2019 Guam 6 ("*Airport Case*"). *Amicus* Rohr alleges that the Governor's request does not concern a "matter of great public interest" as required by 7 GCA § 4104. The Attorney General has also moved to dismiss this proceeding, arguing this court "lack[s] subject matter jurisdiction because the injunction [on P.L. 20-134] remains, and the questions [posed by the Governor] are not ripe and/or moot at this time." Mot. Dismiss at 3 (Apr. 3, 2023). For the reasons below, we determine we have jurisdiction to reach the merits of the case; the requests to dismiss are therefore denied.

A. Standing and the Airport Case

[18] We have previously articulated that parties seeking to invoke this court's jurisdiction must generally show Article III standing. *Benavente v. Taitano*, 2006 Guam 15 ¶¶ 17-18 (noting that "state courts have observed that the traditional rules of standing apply" with limited exceptions). We have referred to these "traditional standing requirements"

as "constitutional standing." *Airport Case*, 2019 Guam 6 ¶ 16. Constitutional standing requires a party to show: "(1) it has suffered an 'injury in fact'; (2) that the injury can be fairly traced to the challenged action taken by the defendant; and (3) that it is likely and beyond mere speculation that a favorable decision will remedy the injury sustained." *Id.* ¶ 17 (quoting *Guam Mem'l Hosp. Auth. v. Superior Court*, 2012 Guam 17 ¶ 10) (internal quotation marks omitted). Though this court is not an Article III court constitutionally bound to require parties to establish standing, we nevertheless have adopted "traditional standing requirements" based on Article III principals and "deriv[ed] guidance" from both state and federal courts. *Guam Mem'l Hosp.*, 2012 Guam 17 ¶ 9.

[19] This case presents the opportunity to further clarify the origin and role of standing in Guam jurisprudence. Though grounded in the U.S. Constitution's case-or-controversy requirement, in the federal system, "[t]he law of Art. III standing is built on a single basic idea— the idea of separation of powers." *TransUnion LLC v. Ramirez*, 594 U.S. ----, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). The role of the judiciary is limited: the doctrine of standing "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, [standing] implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

Thus, "[f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

[20] As the Constitution divides power separately and equally between three branches of federal government, so too does the Organic Act divide the branches of government in Guam. We find that this similarity in separation of power compels our independent judiciary to require standing to assert claims before our courts. Standing ensures the political branches do not abdicate their responsibility in setting the public policy for Guam. Furthermore, our authority is limited to "justiciable controversies and proceedings." 7 GCA § 3107(a) (2005). Thus, our jurisdiction is constrained to disputes that are "appropriate for judicial determination" rather than those that are "hypothetical," "abstract," or "academic." *Maeda Pac. Corp. v. GMP Haw., Inc.*, 2011 Guam 20 ¶ 19. We reaffirm our commitment to a clear separation of powers between the judiciary and the political branches of government by imposing traditional standing requirements on parties before this court. This is the balance struck by the Organic Act in setting up the government for Guam, and standing is how the principle is effectuated in the judicial branch.

[21] We are also aware that the Organic Act grants the Legislature the ability to expand this court's original jurisdiction by law. 48 U.S.C.A. § 1424-1(a)(1) (Westlaw current through Pub. L. 118-19 (2023)). We have reconciled this grant of authority to the

Legislature and the principle of separation of powers by recognizing that "standing is a self-imposed rule of restraint." *Benavente*, 2006 Guam 15 ¶ 16 (quoting *Gutierrez v. Pangelinan*, 276 F.3d 539, 544 (9th Cir. 2002)). As the U.S. Supreme Court has explained:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of . . . Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on . . . jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking . . . jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.'

Flast, 392 U.S. at 100-01 (first quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962); and then quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Because we are committed to a clear separation of powers, we will not use the "injury in fact" prong of constitutional standing to "undermine[] the separation of powers by invading the power of the legislature to

create rights." *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021- NCSC-6, ¶ 56, 853 S.E.2d 698, 721. Where, as here, the case is presented in "an adversary context and in a form historically viewed as capable of judicial resolution," we will reach the merits despite the lack of an injury in fact if the case does not "raise separation of powers problems related to improper judicial interference in areas committed to other branches of . . . Government." *See Flast*, 392 U.S. at 100-01.

[22] To be clear, this is a narrow exception to the "traditional rules of standing," *see Benavente*, 2006 Guam 15 ¶¶ 17-18, that cannot be invoked arbitrarily. *Cf. People v. Tennessen*, 2010 Guam 12 ¶ 24 (per curiam) ("Thus, in an abundance of caution, and in the spirit of judicial transparency, this panel will pass on the standing issue and address the merits of Moylan's requests for disqualification."). Rather, we will look to established doctrines in American jurisprudence where courts have found it justifiable to rule despite a lack of an injury in fact. New Mexico provides a notable example. Though there is no constitutional provision requiring Article III-like standing, New Mexico state courts have "long been guided by the traditional federal standing analysis." *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222. Despite this, the New Mexico Supreme Court has recognized an exception for cases involving "matters of great public importance." *Id.* ¶ 33 (citing *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359, 524 P.2d 975). This exception can be invoked when "the case presents a purely legal issue . . . ." *State ex rel. League of Women Voters of N.M. v.*

Advisory Comm. to N.M. Compilation Comm'n, 2017-NMSC-025, ¶ 10, 401 P.3d 734 (citation omitted).

[23] We find this exception is consistent with Guam jurisprudence as well. In our earliest cases dealing with this statute, we commented that 7 GCA § 4104 could be used even when the test for standing used by federal courts was not met.[2] *See In re Request of*

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[2] Although we have referred to "traditional rules of standing," *Benavente v. Taitano*, 2006 Guam 15 ¶ 18, and "traditional standing requirements," *Guam Mem'l Hosp. Auth. v. Superior Court*, 2012 Guam 17 ¶ 9, that are based upon Article III principles that "we do not reject," *Benavente*, 2006 Guam 15 ¶ 17, we note that "the test for standing that remains the law of standing at the federal level today" is quite modern, *see Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶ 55, 853 S.E.2d 698, 720-21. As the North Carolina Supreme Court has observed in their thorough recounting of the history of standing:

> In 1992, with an opinion written by Justice Scalia, the Supreme Court dramatically altered the law of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), when the Court held for the first time that plaintiffs had no standing to bring suit under a congressional statute authorizing suit because they lacked "injury in fact." . . .
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> . . . .
>
> [T]he very notion of a standing requirement under Article III only arose in the twentieth century. . . . For most of the twentieth century, standing existed where there was invasion of a legal right under the common law, a statute, or the Constitution. The Supreme Court long emphasized a functional and pragmatic approach to the question of standing, focused on "concrete adverseness," generally limiting this concern to constitutional questions, and significantly expanded the categories of claims that could support standing. However, that expansion was reversed, first in the context of taxpayer and citizen suits

Gutierrez, 2002 Guam 1 ¶ 16 ("[H]earing a matter before it has ripened into a true case or controversy 'avoid[s] the necessity of creating harm to some party in order to have a decision.'" (second alteration in original) (quoting 7 GCA § 4104 cmt.)). We have continued to provide judgments under this statute even when an injury in fact was likely nonexistent.[3] *See In re Request of Camacho*, 2006 Guam 5 (providing declaratory judgment on whether a future governor could withdraw from a contract signed by a predecessor). Title 7 GCA § 4104 is a unique statute; only the Governor and the Legislature may seek declaratory relief in this manner. 7 GCA § 4104. And

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> and, later with the adoption of an "injury in fact" requirement, which has been increasingly used to constrain access to federal courts even where a statute creates a right to sue. Ultimately the Court adopted a restrictive interpretation of injury-in-fact that applied its substantially tightened requirements for standing to attack the constitutionality of acts of the other branches based on taxpayer or citizen standing beyond that context to rights actually created by Congress.

Id. ¶¶ 54, 57. In distilling "traditional" standing principles from Article III, we are not bound by *Lujan*; we may also find guidance in the Court's "attempt to expand standing under the injury-in-fact test announced in [*Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970),] and the adoption of a pragmatic and functional approach to the question in [*Baker v. Carr*, 369 U.S. 186 (1962),] and [*Flast v. Cohen*, 392 U.S. 83 (1968)]." *See id.* ¶ 51.

[3] This court has dealt with only one instance of declaratory relief under 7 GCA § 4104 since the *Airport Case*. *See In re Request of Leon Guerrero*, 2021 Guam 6. There, no party raised standing, and so that case made no mention of what effect, if any, the *Airport Case* had on section 4104 review.

they may obtain such relief only if a strict jurisdictional test is met. *See In re Request of Gutierrez*, 2002 Guam 1 ¶¶ 14-15. One criterion of this test is that the request involve a matter of "great public interest." 7 GCA § 4104.

[24] We hold that where the Legislature or the Governor has satisfied the jurisdictional requirements of 7 GCA § 4104, we will reach the merits of the declaratory action in the absence of an injury in fact if the case presents a purely legal issue in an adversary context that is capable of judicial resolution. *See Flast*, 392 U.S. at 100-01. Recognizing this narrow exception does not raise separation of powers problems, but rather respects the principle that the government of Guam is comprised of three separate but co-equal branches of government. This is because relief can be granted to one of the political branches only when the matter is of great public interest. Any issue that satisfies the jurisdictional test of section 4104 will therefore also qualify for the great public interest exception to "injury in fact."

B. Statutory Requirements of 7 GCA § 4104

[25] Having determined the lack of an injury in fact is not fatal to our ability to adjudicate this matter, we next turn to whether the statutory requirements of 7 GCA § 4104 have been met.

> [T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issue raised must be a matter of great public importance; (2) the issue must be such that its resolution through the

> normal process of law is inappropriate as it would cause undue delay; and (3) the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Gutierrez, 2002 Guam 1 ¶ 9. In our February Order, we determined the statutory requirements were met for two of the three questions posed by the Governor. Order at 5 (Feb. 18, 2023). We stand by the analysis in that Order and shall only summarize here.

[26] "[P]ublic interest . . . signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution." *In re Request of Leon Guerrero*, 2021 Guam 6 ¶ 15 (alterations in original) (quoting *In re Request of Gutierrez*, 2002 Guam 1 ¶ 26). "[T]he issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of government that requests the opinion." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 26 (citation omitted). Whether P.L. 20-134 is a valid, viable law will substantially affect the operations of the Legislature, the Governor and subordinate agencies, and the Judiciary. The impact these Questions have on the executive branch is particularly notable, as agencies charged with the enforcement of this legislation may arrest individuals for engaging in certain conduct—resulting in significant consequences.

[27] *Amicus* Rohr argues since so few abortions happen in Guam, the matter of abortion is not of "great public interest," so jurisdiction is wanting. Rohr Br. at

4. There are three problems with his contention. First, although we find it unnecessary to reach on other grounds, the *ultra vires* Question is unaffected by this argument. Though the Question involves the matter of abortion since it was the subject of P.L. 20-134, its real thrust is the authority of the Legislature to pass laws that conflict with the U.S. Constitution and the Organic Act. There is no connection between resolving that Question and the number of abortions performed in Guam. Second, Rohr's count of the people affected by P.L. 20-134 is an understatement. Apart from the act of getting an abortion, P.L. 20-134 also criminalized soliciting abortions, and people could be charged merely for encouraging another to have an abortion. P.L. 20-134:3-5; *see also* Pet'r's Br. at 25 (Mar. 10, 2023) (quoting *Guam Soc'y of Obstetricians*, 776 F. Supp. at 1426) (discussing arrest of director of ACLU's Reproductive Freedom Project for informing audience abortions could be obtained in Hawai‘i). Police, prosecutors, and other government officials are also tasked with enforcing P.L. 20-134. Third and finally, this court has never used an empirical test for determining whether matters are of great public interest, and *Amicus* Rohr cites no authority for us to impose one now. His brief is also non-responsive to how the Governor's Questions fail this court's current test for evaluating matters of great public interest. Thus, we find the Questions posed by the Governor concern a matter of great public interest.

[28] The second statutory requirement for declaratory judgments is that the normal process of law could cause undue delay. The pending appeal in the federal courts creates great uncertainty on when the

federal injunction of P.L. 20-134 will be fully resolved. The Governor's implied repeal Question is purely a matter of local Guam law over which this court is the final authority. We find this requirement is met.

[29] That leaves only the appropriate-subject-matter prong, which is easily satisfied. To determine whether the subject matter is appropriate, we have stated that requests for declaratory relief must ask this court for "(1) an interpretation of an existing law that is within its jurisdiction to decide; *or* (2) an answer to any question affecting [the Governor's] powers and duties as governor and the operation of the executive branch." *In re Request of Calvo*, 2017 Guam 14 ¶ 14 (quoting *In re Request of Gutierrez*, 2002 Guam 1 ¶ 11). The *ultra vires* Question asks this court to interpret the Organic Act regarding the proper authority of the Legislature. When the Legislature acts beyond its authority, the separation of powers doctrine is violated if the "[i]nvalid legislative actions 'impinge upon the Governor's authority.'" *In re Request of Leon Guerrero*, 2021 Guam 6 ¶ 23 (citation omitted). "Separation of powers questions are proper subject matter for declaratory judgment actions." *Id.* ¶ 12. This jurisdictional requirement is also met for the implied-repeal Question. The Governor is asking whether the Women's Reproductive Health Information Act of 2012, the Partial-Birth Abortion Ban Act of 2009, along with the enactment of 19 GCA §§ 4A101-102, 4A107, and 4A109 impliedly repealed P.L. 20-134. Req. Declaratory J. at 21-24. This request is asking this court to interpret local law—the effect these statutes did or did not have on P.L. 20-134. This prong is satisfied.

[30] Thus, the *ultra vires* and implied-repeal Questions meet the test imposed by section 4104, which confers jurisdiction on this court to provide declaratory relief.

C. The Attorney General's Motion to Dismiss

[31] Before turning to the merits of the Governor's Questions, there is one other issue to address: the Attorney General's Motion to Dismiss. In his Motion, the Attorney General argues this court "lack[s] subject matter jurisdiction because the injunction [on P.L. 20-134] remains, and the questions [posed by the Governor] are not ripe and/or moot at this time." Mot. Dismiss at 3. He also claims the Petition no longer presents a "case or controversy" for this court to adjudicate. *Id.* at 5. Nowhere does the Attorney General mention the typical standing requirements of injury in fact, traceability, and redressability. In any event, any issues about standing have been addressed by Part II.A of this Opinion. To the extent the Attorney General argues the Governor's Petition does not satisfy the statutory jurisdiction requirements of 7 GCA § 4104, that is addressed in Part II.B.

[32] This leaves the argument that the Governor's Petition is not "ripe and/or moot." *Id.* at 3. "'[R]ipeness is peculiarly a question of timing.' '[I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.'" *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (alterations in original) (citations omitted). The Governor's Questions are pure questions of law, and there is no need for further facts to develop. It would be inconsistent to say

that not answering the Governor's Questions would lead to an undue delay yet declare the matter not ripe for judicial review. Any ripeness concerns have already been resolved with finding the undue delay requirement has been met.

[33] Finally, this matter is not moot. Cases generally become moot "when the issues are no longer live or the parties lack a legally cognizable interest in the outcome." *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 9 (quoting *United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir. 1994)). "[I]ntervening events or changed circumstances that make it impossible for a reviewing court to grant the complaining party effectual relief will render a case moot." *Linsangan v. Gov't of Guam*, 2020 Guam 27 ¶ 30 (per curiam) (alteration in original) (citation omitted). However, "[t]he mootness doctrine is 'flexible and discretionary; it is not a mechanical rule that we invoke automatically.'" *In re Guardianship of Ulloa*, 2014 Guam 32 ¶ 39 (quoting *In re Guardianship of Tschumy*, 853 N.W.2d 728, 737 (Minn. 2014)). We have "authority to decide cases that are technically moot when those cases are functionally justiciable and present important questions of [islandwide] significance." *Id.* (quoting *Tschumy*, 853 N.W.2d at 737). As discussed above, the Questions presented by the Governor raise matters of great public importance. Our standing discussion also highlights that this case is functionally justiciable. As we are "the final arbiter of questions arising through the jurisdiction of the courts of Guam (short of final *certiorari* review by the United States Supreme Court)," *Underwood*, 2006 Guam 17 ¶ 35, no intervening events or changed circumstances created

by the Ninth Circuit will make it "impossible" for us to grant declaratory relief on a purely legal issue interpreting local Guam law, *see Linsangan*, 2020 Guam 27 ¶ 30; *cf. Webster v. Mesa*, 521 F.2d 442, 443 (9th Cir. 1975) ("While the completion of the election makes injunctive relief moot, declaratory relief is still available."). The issue is not moot. We deny the Attorney General's Motion to Dismiss.

III. STANDARD OF REVIEW

[34] "For cases brought before this court pursuant to our original jurisdiction, all issues are determined in the first instance." *In re Request of Leon Guerrero*, 2021 Guam 6 ¶ 20 (quoting *In re Request of Camacho*, 2006 Guam 5 ¶ 12).

IV. ANALYSIS

[35] With the jurisdictional issues resolved, we now turn to the merits of the Governor's request. As the Governor presents her Questions in the alternative, Pet'r's Br. at 38, we reach only the implied-repeal argument.[4] *See Barrett-Anderson v. Camacho*, 2018 Guam 20 ¶ 30 ("[W]here statutes can be construed to avoid constitutional questions, this court will not answer the question of constitutionality or organicity.").

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[4] While the court is unanimous on implied repeal, the concurrence would also answer the *ultra vires* question. *See infra* (concurring opinion of Carbullido, J.) ("[T]he Governor properly asked this court to answer an important question about the scope of the power and authority of the Guam Legislature. This question merits an answer.").

A. Implied Repeal

[36] The Governor posits that in the years since the District Court of Guam enjoined P.L. 20-134, the Guam Legislature has passed several laws forming a comprehensive statutory scheme covering abortion in Guam, which is irreconcilably in conflict with P.L. 20-134. Pet'r's Br. at 30. Because P.L. 20-134 cannot be harmonized with subsequent legislation, the Governor argues P.L. 20-134 has been repealed by implication. *Id.* at 29.

[37] "Implied repeals can be found in two instances: '(1) where provisions in the two acts are in irreconcilable conflict,' or '(2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 16 (quoting *People v. Quinata*, No. CR-81-0004A, 1982 WL 30546, at *2 (D. Guam App. Div. June 29, 1982)); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007) ("We will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act"' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" (alterations in original) (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988))).

[38] Repeals by implication are generally disfavored, and courts "must try to read the [apparently conflicting] statutes in a harmonious manner." *People v. Reselap*, 2022 Guam 2 ¶ 54; *see also Sumitomo Constr.*, 2001 Guam 23 ¶ 16 ("Courts can avoid a finding of implied repeal if the two statutes can be

reconciled."). In considering whether a later statute repealed an earlier statute, the tenets of statutory construction direct the analysis to first look at the plain meaning to resolve apparent conflicts and contradictions. *Reselap*, 2022 Guam 2 ¶ 54. "It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. Absent clear legislative intent to the contrary, the plain meaning prevails." *Sumitomo Constr.*, 2001 Guam 23 ¶ 17 (citations omitted). "Whenever a court is confronted with apparently conflicting legislation, its goal is to ascertain the intent of the legislative body and construe the law accordingly. In determining the legislature's intent . . . , our first resort is to the language of the statute itself." *Karlin v. Foust*, 188 F.3d 446, 470 (7th Cir. 1999) (citations omitted).

[39] The Governor contends the Parental Consent for Abortion Act ("PCAA") codified in 19 GCA § 4A101 *et seq.*, the Women's Reproductive Health Information Act of 2012 ("HIA") codified in 10 GCA § 3218.1, the Partial-Birth Abortion Ban Act of 2008 ("PBABA") codified in 10 GCA § 91A101 *et seq.*, and the Partial-Birth Abortion and Abortion Report law ("Reporting Law") codified in 10 GCA § 3218 irreconcilably conflict, individually and collectively, with P.L. 20-134. Pet'r's Br. at 29-36.

[40] The Attorney General responds by arguing that P.L. 20-134 did not impliedly repeal subsequent legislation because P.L. 20-134 "did not exist" after the injunction in 1990. Resp't Att'y Gen. Br. at 26 (Apr. 21, 2023). He asserts the Guam Legislature passed the four subsequent abortion statutes in an attempt to

"restrain abortions as much as they could because they knew that the Courts stopped their earlier attempt to make abortions illegal altogether." *Id.* at 28. The Attorney General maintains the four statutes do not form a regulatory scheme for abortion in Guam because when the statutes were passed, P.L. 20-134 did not exist. *Id.* at 38-39. His arguments here contradict what he filed in the District Court of Guam, where the Attorney General's Office wrote that "P.L. 20-134 did indeed conflict with the subsequently enacted legislation." Civ. Case No. 90-00013 (Att'y Gen. Reply to Pl. Opp'n Vacate Inj. at 3 (Mar. 7, 2023)).[5] His federal filing continues to say, "If P.L. 20-134 is not void, subsequently enacted legislation would repeal, by implication, P.L. 20-134." *Id.* at 4.

1. Current Guam laws regulating abortion

[41] The Governor argues four statutes—the PCAA, the HIA, the PBABA, and the Reporting

[5] We *sua sponte* take judicial notice of the Attorney General's filing in the pending federal case. We have established that this court may *sua sponte* take judicial notice of certain documents on appeal. *See In re San Nicolas*, 2022 Guam 8 ¶ 3 n.1. In so doing, we do not mean to ignore the general rule providing that courts "may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)). Our judicial notice of the Attorney General's filings is only to establish the arguments he presented to the District Court. In other words, the filings establish the position taken by the Attorney General, not whether his position is correct.

Law—irreconcilably conflict with P.L. 20-134. We summarize the content of each statute in turn.

[42] The PCAA gives guidance on consent, specifically regarding pregnant minors. This statute permits the performance of abortion on a minor if consent is received from the minor and a legal guardian. 19 GCA § 4A102 (added by P.L. 31-155:2 (Jan. 4, 2012)). The statute also permits a minor to bypass the consent requirement with permission from the Superior Court. *Id.* § 4A107. The Department of Public Health and Social Services ("DPHSS") is also mandated under this Act to provide forms for reporting all consent statistics. *Id.* § 4A106.

[43] The HIA elaborates on consent in the abortion context, requiring voluntary and informed consent before any abortion procedure. 10 GCA § 3218.1 (added by P.L. 31-235:2 (Nov. 1, 2012)). Providers are instructed to give information on the gestational age of the fetus and its anatomical features, possible childcare services and benefits, medical risks, and other scientific information. *Id.* DPHSS also must provide a checklist certification for a woman to certify that she has received all obligatory information before the procedure. *Id.*

[44] The PBABA prohibits partial-birth abortion, imposing criminal penalties on any physician who knowingly performs or attempts to perform this procedure. 10 GCA § 91A104 (added by P.L. 29-115:1 (Nov. 18, 2008)). Though, this statute does not apply to a partial-birth abortion to save the life of the mother. *Id.*

[45] Finally, the Reporting Law requires an abortion and post-abortion care report to be completed and shared with the Office of Vital Statistics of DPHSS. 10 GCA § 3218 (as amended by P.L. 33-218:7 (Dec. 15, 2016)). Under this statute, the Office of Vital Statistics must provide, "to physicians performing abortions on Guam," forms for the abortion reports, and must publish a statistical report based on the previous year's abortion data. *Id.*

2. Other jurisdictions addressing implied repeal in the abortion context

[46] Following both *Roe* and *Dobbs*, jurisdictions around the United States have had to confront implied repeal. The position Guam is now in is analogous to both past and ongoing cases in other courts.

a. Jurisdictions finding implied repeal

[47] In *McCorvey v. Hill*, the Fifth Circuit addressed a comparable situation and concluded that Texas statutes criminalizing abortion had been repealed by implication, as Texas regulated abortion "in a number of ways." 385 F.3d 846, 849 (5th Cir. 2004). The state had established a comprehensive set of civil regulations governing the availability of abortion for minors, the practices and procedures of abortion clinics, and the availability of state-funded abortions. *Id.* The Fifth Circuit determined the existing regulatory provisions could not be harmonized with provisions that purport to criminalize abortion:

> There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the

> criminal statutes struck down in *Roe*. . . . "[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another provide that abortions are criminally prohibited."

Id. (quoting *Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990)).

[48] In *Smith v. Bentley*, the United States District Court for the Eastern District of Arkansas considered whether certain abortion statutes had been impliedly repealed. 493 F. Supp. 916, 923-24 (E.D. Ark. 1980) (per curiam). The court noted that the statutes had both similarities and distinctions, though notably, the regulatory scheme for the performance of legal abortions was "the most significant difference." *Id.* at 924. Therefore, the court found the statute criminalizing abortion had been impliedly repealed. *Id.*

[49] The ACLU, arguing a similar position as the Governor does here, convinced a state circuit court to grant a preliminary injunction on a West Virginia "Criminal Abortion Ban." *Women's Health Ctr. of W. Va. v. Miller*, No. 22-C-556, slip op. (W. Va. Cir. Ct. July 20, 2022). The court determined that following *Roe*, the West Virginia Legislature enacted a comprehensive statutory framework, setting forth the circumstances under which an abortion may be lawfully obtained and addressing patient consent, parental notification, state funding, and state reporting. *Id.* at 5-6. The court found this regulatory scheme irreconcilably conflicted with the Criminal Abortion Ban. *Id.* at 5. Following this ruling, state lawmakers met to "clarify and modernize" the old ban.

Campbell Robertson, *West Virginia Passes Strict Abortion Ban*, N.Y. Times (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/west-virginia-abortion.html.

b. Jurisdictions finding no implied repeal

[50] An Arizona Court of Appeals found no implied repeal between a statute permitting physicians to perform elective abortions and a statute prohibiting any abortion after fifteen weeks. *Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262, 264 (Ariz. Ct. App. 2022). The court determined that the statutes could be reconciled and refused to find that a supposed conflict between the laws must result in the repeal of either. *Id.* at 266. Finding the legislature had "created a complex regulatory scheme to achieve its intent to restrict—but not to eliminate—elective abortions," the court held that the statutes regulating abortion could "be readily reconciled in conformity with [the] legislature's express intent." *Id.* at 267-68. Reading the statutes together, the court concluded physicians could perform abortions as regulated, and that these physicians would not be subject to prosecution. *Id.* at 266.

[51] In *People v. Higuera*, the Michigan Court of Appeals found no implied repeal between a statute, which by its express terms prohibited all abortions unless necessary to save the mother's life, and subsequent legislative enactments about parental consent, informed consent, the prohibition of partial-birth abortions, and record keeping. 625 N.W.2d 444, 448 (Mich. Ct. App. 2001). The court held that, in

enacting the later statutes, the legislature had the clear intent to regulate abortions permitted by *Roe* and did not intend to repeal the general prohibition of abortions. *Id.* at 448-49.

3. Subsequent legislation has impliedly repealed P.L. 20-134

[52] Turning back to this case, the Governor argues that provisions in subsequently enacted legislation are in irreconcilable conflict with P.L. 20-134. In deciding whether P.L. 20-134 has been impliedly repealed, this court must consider whether there is any way to construe the statutes at issue so as not to conflict. "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). It is the duty of the court to "interpret statutes in light of their terms and legislative intent." *Port Auth. of Guam v. Civ. Serv. Comm'n (Javelosa)*, 2018 Guam 9 ¶ 15 (quoting *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 46 n.7). And "[s]tatutory interpretation should always begin with the plain language of the statute." *Chargualaf v. Gov't of Guam Ret. Fund*, 2021 Guam 17 ¶ 17. The plain language of the statutes is clear. In establishing guidelines and requirements for the performance of abortion, including conditions surrounding reporting and consent, the statutes enacted after P.L. 20-134 provide a scheme for regulating abortion care in Guam. The Governor correctly observes that P.L. 20-134 cannot be harmonized with these other abortion-care statutes. Because P.L. 20-134 is so restrictive—criminalizing "[e]very person who provides, supplies, or administers to any woman, or procures any woman to

take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion"—the subsequent statutes, providing directive on consent, DPHSS involvement, and the performance of legal abortion procedures, cannot be reconciled.

[53] Similar to *McCorvey* and *Higuera*, the statutes here govern consent, the availability of abortion for minors, and the practices and procedures of abortion clinics. The *McCorvey* and *Higuera* courts came down on opposite sides of implied repeal. The difference of decisions is based upon factual distinctions between the two cases. These distinctions illuminate the analysis of our four Guam statutes. In *Higuera*, the court was not considering the constitutionality of a statute that criminalized all abortions at any time during pregnancy but was narrowly focused to consider whether a particular criminal prosecution under the statute would be constitutionally infirm. 625 N.W.2d at 447. While the validity of P.L. 20-134 will affect medical professionals, here, the court is not only considering criminal penalty provisions. In *McCorvey*, the Fifth Circuit was looking at the constitutionality of a "comprehensive set of civil regulations" governing abortion. 385 F.3d at 849. The Governor relies heavily on this Fifth Circuit decision in arguing implied repeal, and significantly, the Attorney General offers no response to this case.

[54] The Attorney General's soundest argument against implied repeal is his contention that the Guam Legislature did not intend to repeal P.L. 20-134 when passing subsequent abortion-care legislation. But

"[a]bsent clear legislative intent to the contrary, the plain meaning prevails," and he has failed to "point[] out clear legislative intent" to keep the general prohibition of abortions to the extent permitted by the federal constitution. *See Sumitomo Constr.*, 2001 Guam 23 ¶ 17. The plain text of the later-enacted statutes overlaps and conflicts with P.L. 20-134, and, therefore, we do not need to consider the Legislature's intent in passing the law.

[55] We determine that persuasive authority favors finding P.L. 20-134 has been impliedly repealed. *Higuera* dealt with a far more limited statute than we are facing today, making a considerable difference. The near total ban on abortion imposed by P.L. 20-134 cannot be reconciled with subsequent enactments by the Guam Legislature. The logic in *Planned Parenthood Arizona, Inc. v. Brnovich*, 524 P.3d 262 (Ariz. Ct. App. 2022), may counsel for a finding against implied repeal, but we think it notable that the holding there was that the old law did not criminalize abortions made legal by subsequent legislation, *see id.* at 268. Finally, the Attorney General has provided no reason to dissuade us from adopting the Fifth Circuit's reasoning in *McCorvey*. We therefore hold that assuming P.L. 20-134 was a valid law, it has been

impliedly repealed[6] by subsequent acts of the Guam Legislature.[7]

4. The Attorney General's other arguments on implied repeal are unconvincing

[56] The Attorney General also argues that Guam's legislation governing abortion care cannot impliedly repeal P.L. 20-134 because P.L. 20-134 did not exist at the time of the subsequent enactments. Considering the Attorney General maintains P.L. 20-134 is a valid law in his *ultra vires* argument, contending P.L. 20-134 did not exist after 1990 here is conflicting and incongruous. The Attorney General is effectively declaring P.L. 20-134 to be "Schrödinger's Law"—maintaining the law was both invalid and valid while it was enjoined by federal courts. This contradiction is an untenable position, and we cannot ascribe weight to it.

B. We Decline to Address the *Ultra Vires* Question

[57] Having answered the implied-repeal Question, we do not believe it necessary to answer the *ultra vires*

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[6] Notably, this appears to be consistent with the position taken by the Attorney General in his filings in federal court. *See* Civ. Case No. 90-00013 (Att'y Gen. Reply to Pl. Opp'n Vacate Inj. at 4 (Mar. 7, 2023)) ("If P.L. 20-134 is not void, subsequently enacted legislation would repeal, by implication, P.L. 20-134.").

[7] Because we find P.L. 20-134 has been impliedly repealed, we need not and do not address the arguments of *Amici* Freeman et al. and the Attorney General on the referendum contemplated by P.L. 20-134.

Question now. Title 7 GCA § 4104 grants us discretion to provide relief. Section 4104 draws inspiration from an analogous provision in the Massachusetts Constitution. 7 GCA § 4104 cmt. True, the Massachusetts Constitution "*requires* the Justices to respond to such questions when properly put." *Op. of the Justs. to the House of Representatives*, 32 N.E.3d 287, 292 (Mass. 2015) (emphasis added). Crucially, the relevant provision of the Massachusetts Constitution reads: "Each branch of the legislature, as well as the governor or the council, shall have authority to *require* the opinions of the justices of the supreme judicial court." Mass. Const. Pt. 2, C. 3, art. II (emphasis added). Yet the Florida Supreme Court reads its power in a similar context as discretionary. *Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022) (per curiam) ("[A]ssuming the Court has jurisdiction, . . . we exercise our discretion to deny the request for an advisory opinion."). Florida's relevant constitutional provision reads: "The governor may *request* in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties." Fla. Const. art. IV, § 1(c) (emphasis added).

[58] Guam's statute is far more similar to Florida's than Massachusetts's. Our statute reads: "[*I Maga'håga*], in writing . . . may *request* declaratory judgments from the Supreme Court of Guam . . . . The declaratory judgments *may* be issued only where it is a matter of great public interest and the normal process of law would cause undue delay." 7 GCA § 4104

(emphasis added). This section of Guam law also imposes non-discretionary directives which the Legislature has marked with the word "*shall*" with italics in the statute itself. *Id.* The language of section 4104 provides declaratory judgments "may be issued" while making clear that such judgments "*shall* not be available to private parties." *Id.* (emphasis in original). While the section does say this court "*shall* render its written judgment," that language at most means this court must provide written answers rather than orally or some other medium. *Id.* The placement of that language at the end of the section implies it only controls where the court has agreed to issue a declaratory judgment, rather than imposing a requirement to issue such judgments.

[59] The implied-repeal Question is one purely of local Guam law over which this court is the final authority. As the Governor presents her Questions in the alternative, we reach only the implied-repeal argument. Pet'r's Br. at 38. This is because the *ultra vires* Question concerns the Organic Act, and we will not answer the question of organicity unless it has "inescapably come before us for adjudication." *Barrett-Anderson*, 2018 Guam 20 ¶ 30 (quoting *United States v. Rumely*, 345 U.S. 41, 48 (1953)). Having resolved this case using only local law, we decline to address the *ultra vires* Question.

V. CONCLUSION

[60] *Dobbs* was a landmark case, changing the law on the ability of governments to regulate abortion. Yet this case is not really about *Dobbs*; it is far more local in character. In answering the implied-repeal Question,

we dealt only with statutory interpretation of local law. It is up to the political branches of government to set the policy for Guam. This court, however, interprets the law as enacted. In reviewing the Legislature's enactments, there is only one conclusion: P.L. 20-134 has been repealed by implication by subsequent acts of the Guam Legislature.

[61] We enter this declaratory judgment: P.L. 20-134 has been impliedly repealed by the Guam Legislature and no longer possesses any force or effect in Guam.

/s/	/s/
ROBERT J. TORRES	JOHN A. MANGLONA
Chief Justice	Justice *Pro Tempore*

CARBULLIDO, J., concurring:

[62] I agree with the majority on its jurisdictional analysis and its conclusion that Public Law 20-134 was impliedly repealed. I further agree that 7 GCA § 4104 confers upon this court discretion to decline to provide relief even when its jurisdictional test is met. Where I part ways, is the decision to use that discretion in this case. In her *ultra vires* Question, the Governor properly asked this court to answer an important question about the scope of the power and authority of the Guam Legislature. This question merits an answer. I agree with the Governor that because *Roe v. Wade* was the law of the land in 1990, P.L. 20-134 was void *ab initio*, and the Legislature acted *ultra vires* in passing it.

I. P.L. 20-134 Was Void *Ab Initio*, and Passing It Was an *Ultra Vires* Act

[63] The Organic Act was clear in 1990: "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam."[8] 48 U.S.C. § 1423a (1988). A straightforward reading of this provision leads to the following interpretation: the legislative power of Guam does not extend to acts inconsistent with the Organic Act; such acts would be beyond the Legislature's authority. This provision existed in addition to a bill of rights specifically applicable to Guam, along with another provision incorporating several constitutional amendments to Guam. *See* 48 U.S.C. § 1421b (1988). To avoid rendering the language in § 1423a mere surplusage, that language must do more than simply allow for the enjoining of laws passed by the Guam Legislature that are in violation of the rights made applicable by § 1421b. Harmonizing these provisions leads to the conclusion that inorganic laws—laws that are inconsistent with the Organic Act—are "not law" and are void *ab initio*. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

[64] Caselaw provides support for this position. This court has noted as far back as 2002 that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no

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[8] This grant of authority was amended in 1998 by Pub. L. 105-291. My *ultra vires* analysis is limited to the Organic Act as it was written in 1990.

office; it is, in legal contemplation, as inoperative as though it had never been passed." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 17 (quoting *In re Op. of the Justs.*, 168 N.E. 536, 538 (Mass. 1929)).[9] In *Nelson v. Ada*, another relevant case, the then-Governor of Guam sought to remove two school board members. 878 F.2d 277, 278 (9th Cir. 1989). According to the Governor, only he could appoint school board members per the Organic Act. *Id.* Notably, Congress amended the Organic Act prior to the Governor removing the school board members, and this amendment could have potentially allowed for elected school board members, rather than gubernatorial appointments. *See id.* at 278, 280. Still, the court held the change in the Organic Act should not be looked at retroactively. *Id.* at 280-81. Despite the framework of the Organic Act perhaps changing, the court was concerned with the state of the law as it existed when the school board members were first appointed. Thus, even when potential changes occur affecting the framework of the local government of Guam, the analysis is the state of the law when legislative action was first taken, not the date of the latest judicial action.

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[9] I acknowledge that in this portion of *In re Request of Gutierrez*, the court was explaining why declaring acts unconstitutional was not an appropriate use of 7 GCA § 4104 review. 2002 Guam 1 ¶ 17. What the Governor is doing here, though, is different. She is not asking this court to declare P.L. 20-134 unconstitutional; that already happened decades ago. Instead, she is asking this court to interpret the Organic Act to determine the scope of the Legislature's powers—a permissible use of 7 GCA§ 4104 review. *See In re Request of Leon Guerrero*, 2021 Guam 6 ¶¶ 12, 23.

[65] In 1990, the Organic Act placed a clear limitation on the Guam Legislature's authority: it did not have the power to pass laws in violation of the U.S. Constitution. Unconstitutional laws are no laws at all, having been treated as void by this court as well as others. Since P.L. 20-134 was unconstitutional in 1990, passing it was an *ultra vires* act, the law was void *ab initio*, and it cannot be revived by judicial action taking place over thirty years later.

II. Neither the Attorney General nor the Legislature Provide a Convincing Response

[66] Neither the Attorney General nor the Legislature offers a convincing rebuttal to the Governor's and *Amici* Freeman et al.'s argument above. I address each party's position.

A. The Attorney General

[67] First, the Attorney General argues that finding P.L. 20-134 to be an *ultra vires* act would violate the separation of powers. Resp't Att'y Gen. Br. at 9. He believes this court would be deciding "what the public policy shall be" if it finds P.L. 20-134 to be *ultra vires*. *Id.* at 10. How he arrives at this conclusion is unclear. The Governor's position is that the Guam Legislature exceeded its authority by passing a law that clearly violated existing constitutional jurisprudence. Even the Attorney General admits this court can declare laws unconstitutional. *Id.* at 8. There are no policy implications at play here, only a question of interpreting the powers and authority of the Guam Legislature under the Organic Act.

[68] The Attorney General next argues that finding the passage of P.L. 20-134 to be an *ultra vires* act would be the "Judiciary interject[ing] itself into the Legislative process of passing a bill into law." *Id.* at 12. Again, what this means is unclear. The Attorney General argues that such a finding would "deprive[] Senators from passing changes to an otherwise 'unconstitutional' law before the bill becomes a law and is thereafter tested in the Courts." *Id.* But the Governor is asking no such thing. She has initiated court proceedings to have P.L. 20-134 declared void over thirty years after it was permanently enjoined as unconstitutional. This court action is coming only *after* the Legislature passed P.L. 20-134. There would be no interference in the legislative process. To the extent a court would look at the past, that analysis is only to determine what the state of the law was when the bill was passed. This type of analysis is not uncommon. *Cf. People v. Bosi*, 2022 Guam 15 ¶ 18 (analyzing what Guam law required when a criminal defendant was charged, not the present statute).

[69] The Attorney General goes on to ask, "how would the Senators know a bill is void because it's 'unconstitutional,' before that bill is tested" in the courts? *Id.* at 14. Such a question reflects a misunderstanding of the role of courts. Courts are not the only actors who can judge whether a statute is constitutional. The Attorney General himself seems to acknowledge just this in his implied-repeal argument, where he contends the Guam Legislature did not pass more restrictive bans on abortion because such attempts would be "futile." *Id.* at 26. Members of the Guam Legislature swear an oath requiring them to

"well and faithfully support the Constitution of the United States [and] the laws of the United States applicable to Guam." 2 GCA § 1110 (2005). Senators thus have a duty to consider for themselves whether legislation is constitutional and vote against legislation that would violate the Constitution. Likewise, the Governor should veto any legislation that does not conform to the Constitution. The judiciary is not special because it alone determines what is and is not constitutional; rather, it is special because it is the *final* authority on what is and is not constitutional. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final."). When there are disputes about what is and is not constitutional, the judiciary steps in to resolve the dispute. The judiciary is not the only branch responsible for ensuring actions by the government are constitutional.

[70] Declaring a law to be *ultra vires* would not upend the traditional judicial and legislative processes, as claimed by the Attorney General. *See* Resp't Att'y Gen. Br. at 14-17. There would not be pre-judgment of laws if Guam courts declared acts of the Legislature to be *ultra vires*. The Legislature would pass legislation, such legislation would be challenged, and then the courts would say such legislation was void *ab initio* because it exceeded the authority of the Legislature to enact such a change. This is the process used regarding most agency actions at the federal level. *See, e.g.*, *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1291 (D.C. Cir. 2000); *Removal of the Maximum Contaminant Level Goal for Chloroform From the*

National Primary Drinking Water Regulations, 65 Fed. Reg. 34404, 34405 (May 30, 2000). Agencies must ensure any prospective administrative rules are consistent with the law and constitution, lest a court "set aside" the rule and force the agency to start from scratch.

[71] Next, the Attorney General invokes the Speech and Debate Clause of the Organic Act to argue this court lacks the power to declare P.L. 20-134 *ultra vires*. To quote a recent Supreme Court case, "Th[is] is a non-sequitur to end all non-sequiturs." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 54 n.5 (2023). The Speech and Debate Clause is irrelevant to the issue at hand and has no bearing on the relationship between the Legislature and the Judiciary.

[72] Finally, the Attorney General asserts declaring P.L. 20-134 *ultra vires* would have "untenable policy implications." Resp't Att'y Gen. Br. at 22. He argues the adoption of an *ultra vires* doctrine would "presuppose[] that a judicial determination on [a] bill exists before the Senators consider a bill." *Id.* This alleged bad consequence is really no consequence at all because, as mentioned above, Senators have an independent duty to determine what is and is not constitutional, separate from the courts. In his implied-repeal argument, the Attorney General maintains the Guam Legislature never passed stricter abortion laws because such attempts would be "futile." *Id.* at 26. How could attempts be futile unless the Senators were judging beforehand that passing potential laws restricting abortion would be invalidated by the courts? All the *ultra vires* doctrine would impose is that

legislation is to be judged by the prevailing jurisprudence at the time a law was passed, not when it is challenged.

[73] The Attorney General maintains this doctrine would forever deprive the people of Guam of a valid law; it "would destroy [a] public law forever." *Id.* at 23-24. True, a finding that P.L. 20-134 is *ultra vires* would destroy that law forever, but such a finding would not prevent the Guam Legislature from passing an identical bill now. Contrary to the Attorney General's arguments, *id.* at 24-25, an *ultra vires* doctrine allows for the correction of mistakes and changing jurisprudence. It simply places the burden on the legislature to re-enact laws previously held to be unconstitutional. Maybe this is inefficient, but it is a far cry from "untenable."

B. The Legislature

[74] The Legislature's first argument borrows the reasoning from an influential law review article, *The Writ-of-Erasure Fallacy*. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018). In his article, Professor Jonathan Mitchell posits that "[j]udicial review is a non-enforcement prerogative, not a revisionary power over legislation. . . . [E]verything in the statute remains available for future courts to enforce if they reject or overrule the previous court's decision." *Id.* at 983. I can set aside the merits of Professor Mitchell's position for this case, as it does not change the outcome. By his article's terms, the professor was only addressing the power of *federal* courts. *E.g.*, *id.* at 936 ("The federal courts have no authority to erase a duly enacted law from the statute

books, and they have no power to veto or suspend a statute."). Professor Mitchell carves out a separate analysis for state courts. *See id.* at 953 (looking at Georgia where the state supreme court may declare laws void). He confines his analysis to the federal judiciary, and I see no reason to do any differently.

[75] The Legislature's reliance on *Ramsey v. Chaco*, 549 F.2d 1335 (9th Cir. 1977) (per curiam), is also misplaced. There, the Ninth Circuit held that a law passed by the Guam Legislature was inconsistent with the Organic Act. *Ramsey*, 549 F.2d at 1338. At the time the law was passed, all Guam laws were reported to the U.S. Congress, which had a year to nullify the local laws. *Id.* Because Congress had not acted, the Ninth Circuit held the law was approved, despite any potential conflict with the Organic Act. *Id.* The Legislature argues that this result could not have been reached if the correct analysis is to hold inorganic laws as void *ab initio*. Resp't Legislature Br. at 10-11 (Mar. 31, 2023).

[76] This is a misreading of *Ramsey*. First, the Ninth Circuit never ruled the law at issue inorganic. *Ramsey*, 549 F.2d at 1338. Second, the whole basis for the decision was that it was *Congress* that approved the law. There is no question that Congress may amend the Organic Act and, by so doing, change what is and is not organic. Because it had this congressional review method at the time, the Organic Act effectively allowed for passive amendments. Put another way, at the time of *Ramsey*, local laws were inorganic only if Congress declared them to be. Otherwise, Congress would deem local action to be a proper use of power delegated to the

local government. This was no longer the case by the time of P.L. 20-134; congressional review of local laws had ended. P.L. 20-134 could not be made organic like the law in *Ramsey*, and so any comparison between the two situations is inapposite.

[77] Finally, the Legislature's argument that the lack of a "hammer clause" renders the language "[t]he legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam" to be merely aspirational is also unconvincing. For one, the Legislature failed to provide a specific source of authority for this proposition. Second, applying such a requirement to the Organic Act is nonsensical. Take, for example, the provision of the Organic Act which states that this court shall hear and decide appeals "by a panel of three justices." 48 U.S.C.A. § 1421-4(a)(5). This provision, too, has no "hammer clause"; nowhere does the Organic Act provide any enforcement mechanism to ensure our decisions come from a panel of three justices. Yet, this provision in the Organic Act is not a mere aspiration—it is a command. If ever the Legislature tried to mandate a panel of seven decide an appeal, such a mandate would fail. The action would violate the Organic Act and be void *ab initio*.

III. *Webster* Did Not Open the Door to P.L. 20-134

[78] During oral argument, *Amicus* Rohr suggested that P.L. 20-134 should not be considered void *ab initio* because the 20th Guam Legislature could have reasonably believed the law "had a shot" at passing

constitutional muster. Oral Arg. at 12:04:50 (July 25, 2023). This was due to the then-recent U.S. Supreme Court decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). His argument fails for three reasons.

[79] First, it was unreasonable to conclude that *Webster* opened the door to broader abortion restrictions. *Webster* concerned challenges to the constitutionality of four provisions of a Missouri abortion law: (1) the preamble of the law, declaring the public policy of the state to be that life begins at conception; (2) a prohibition on the use of public facilities or employees to perform abortions; (3) a prohibition on public funding of abortion counseling; and (4) a requirement that physicians conduct viability tests prior to performing abortions. 492 U.S. at 504.

[80] In considering the preamble, the majority held the language there was not binding, and so there was no need to pass on its constitutionality. *Id.* at 507. If the preamble was used to restrict abortion, then federal courts could address its legality; however, that was not the case before the Court. *Id.* at 506-07.

[81] Moving to the use of public facilities, the Court reaffirmed its principle that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 507 (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)). Thus, the 14th Amendment and *Roe v. Wade* were not implicated by this portion of the state law at issue. *Id.* at 509-10.

[82] The plaintiffs argued the ban on public funding of abortion counseling did not apply to them, eliminating the case or controversy before the Court. *Id.* at 512. The Court was unanimous in directing "the Court of Appeals to vacate the judgment of the District Court with instructions to dismiss the relevant part of the complaint." *Id.* at 512-13.

[83] The final provision—that physicians conduct viability tests for fetuses at least 20 weeks old—proved the most controversial. Under *Roe*, a state could broadly regulate abortion only after the fetus was viable. *Id.* at 516 (citing *Roe*, 410 U.S. at 165). In *Webster*, the Court allowed a regulation requiring viability tests, knowing "the tests will undoubtedly show in many cases that the fetus is not viable." *Id.* at 519. This meant the regulation increased the expense and effort of obtaining an abortion before viability, prior to the point at which the state could broadly regulate abortion. *Id.* A plurality of the Court reasoned this result was acceptable since the regulation's intent was to determine whether the fetus was viable—the point where the state may protect the fetus's interests. *Id.* at 519-20. It was only this part of *Roe*, its "rigid[ity]" in the form of the trimester framework, that was changed by the plurality. *Id.* at 518-19, 521. Otherwise, the holding of *Roe* was left "undisturbed." *Id.* at 521.

[84] In Part III of *Webster*, a plurality of the Court noted the case before it did not require overturning *Roe* since *Roe* dealt with a complete abortion ban compared to the narrow regulations at issue in that case. *Id.* In a concurrence, Justice Scalia asserted the Court

effectively overruled *Roe* in its viability-testing section and should have explicitly done so. *Id.* at 532 (Scalia, J., concurring). Combining Justice Scalia's concurrence with Part III of the Opinion is the best place to argue the Court was announcing the end of *Roe*. Yet, that is not the whole story. The crucial fifth vote for holding the viability testing unconstitutional was Justice O'Connor. In her concurrence, she argued *Webster* did not implicate *Roe*, and any analysis of *Roe* was unnecessary. *Id.* at 525-26 (O'Connor, J., concurring). Thus, only one justice of the Court (Scalia) stated explicitly that *Roe* should be overturned, three justices (Chief Justice Rehnquist and Justices White and Kennedy) felt only a small narrowing was needed, one justice (O'Connor) felt *Roe* was inapplicable, and four justices, though believing *Roe* was implicated, argued for *Roe*'s continuing application. There are thus no grounds to argue that *Webster* substantially changed the law on abortion generally.

[85] Second, it is beyond apparent that the 20th Guam Legislature was put on notice of the legality of P.L. 20-134. Per the District Court of Guam, Senator Elizabeth Arriola's own legal counsel "had advised her that the Bill as introduced would probably be struck down because '[j]udges are bound by Supreme Court decisions because [the decisions are] binding precedent, and that more than likely a judge would probably find that this bill was not in keeping with *Roe v. Wade*.'"[10] *Guam Soc'y of Obstetricians*, 776 F. Supp. at 1425 (alterations in original) (quoting Dep. of Att'y June Mair at 23 (May 10, 1990)). The Attorney General of

[10] Senator Arriola was P.L. 20-134's primary sponsor.

Guam at the time likewise agreed the law would violate *Roe*:

> The Attorney General gave as the legal opinion of her office that both bills were "violative of a woman's constitutional right of privacy as enunciated by the United States Supreme Court in *Roe v. Wade*." The Attorney General noted that a "state cannot interfere with a woman's right of personal privacy to decide to have an abortion whatever the cause of her pregnancy. The state may *regulate* such a decision, but it cannot deprive a woman of such a choice." Because both bills effectively proscribed abortion, the Attorney General gave as her legal opinion that "both bills would be held unconstitutional."

Id. (quoting Att'y Gen.'s Op. at 1-4). Unquestionably, there existed a right to an abortion under the U.S. Constitution in the 1990s, and P.L. 20-134 infringed upon that right.

[86] Third and finally, there is no need to speculate on what the constitutional status of P.L. 20-134 was because the answer was unequivocally provided by the Ninth Circuit. *See Guam Soc'y of Obstetricians*, 962 F.2d 1366. There may be a future instance where this court is faced with the question of whether to declare a statute void *ab initio* because it violated prevailing constitutional law at the time of its passage, though it went unchallenged. That is not this case. Here, P.L. 20-134 was challenged, and that challenge was upheld. The U.S. Supreme Court declined to review the decision of the Ninth Circuit. *Ada v. Guam Soc'y of*

Obstetricians & Gynecologists, 506 U.S. 1011 (1992) (denying certiorari). Thus, it does not matter if one assumes the Guam Legislature was reasonable in believing it "had a shot" when it passed P.L. 20-134; the federal judiciary definitively determined the law violated the U.S. Constitution. It is an inarguable fact, then, that P.L. 20-134 violated the Constitution when it was passed.

IV. Conclusion

[87] The Organic Act, as it existed in 1990, clearly limited the power of the Guam Legislature to only pass legislation consistent with the U.S. Constitution. When it was passed, P.L. 20-134 violated the established law on the 14th Amendment; the case of *Webster v. Reproductive Health Services* did not change that fact. Thus, the Legislature acted *ultra vires* in passing P.L. 20-134, which makes the law void *ab initio*; it cannot be revived by subsequent changes in the law.

[88] Holding P.L. 20-134 void is still consistent with the idea of judicial fallibility. Judges are humans, and mistakes are inevitable. Cases and doctrines can still be overturned. But a crucial principle in our system of law is finality. *See In re Registration of Title to Est. No. 2959*, 2023 Guam 6 ¶ 29. The validity of a law should not bounce back and forth simply due to changes in judicial precedent. Rather, once a decision has been made and any appeals settled, that case is decided. It is not the function of the judiciary to revive policies from thirty years ago. Should the people wish to change abortion policy in Guam, they ought to go to the Legislature, not to the courts.

[89] Because I would find P.L. 20-134 was void *ab initio*, I concur in the judgment.

/s/
F. PHILIP CARBULLIDO
Associate Justice

APPENDIX B

IN THE SUPREME COURT OF GUAM

NO. CRQ23-001

[Filed May 8, 2023]

IN RE:	)
REQUEST OF	)
LOURDES A. LEON GUERRERO,	)
I MAGA'HÅGAN GUÅHAN,	)
RELATIVE TO THE VALIDITY	)
AND ENFORCEABILITY OF	)
PUBLIC LAW NO. 20-134.	)
	)

CONSOLIDATED REPLY BRIEF OF PETITIONER LOURDES A. LEON GUERRERO, I MAGA'HÅGAN GUÅHAN

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[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

Several parties submitted briefs in this matter, including Respondents, the 37th Guam Legislature and Attorney General Douglas B. Moylan,[1] and several amici curiae. Petitioner, by and through counsel, hereby submits her Consolidated Reply Brief, which addresses arguments Respondents and amici curiae raised in opposition to Petitioner's Opening Brief.

I. ARGUMENT

A. THE COURT HAS JURISDICTION OVER THIS MATTER

In his brief, Amicus Robert Klitzkie argues that the court lacks jurisdiction in this matter. Brief for Amicus Curiae Robert Klitzkie ("Klitzkie Br.") at 8-11.[2] Specifically, Amicus Klitzkie argues that: (1) constitutional standing is required in all actions before the courts of Guam, including actions for declaratory judgment as authorized in 7 GCA § 4104; (2) declaratory judgments actions under 7 GCA § 4104, including this matter, do not satisfy constitutional standing requirements; and (3) Petitioner lacks constitutional standing to bring this action because she

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[1] Petitioner continues to object to Respondent Moylan's representations that he is appearing in this matter as attorney for the Government of Guam or the People of Guam, neither of which is a party in this action.

[2] In his brief, Respondent Moylan joins Amicus Klitzkie's position that the court "has no jurisdiction over this matter due to the Petitioner's lack of standing." Moylan Br. at 2.

has not suffered an "injury in fact" as required to meet the standards for constitutional standing. Klitzkie Br. at 8-11 (citing *In Re A.B. Won Pat Int'l Airport Auth.* ("the Airport Case"), *Guam*, 2019 Guam 6; *Hemlani v. Melwani*, 2021 Guam 26; and *Leon-Guerrero v. Gov't of Guam*, 2022 Guam 5 (collectively the "Constitutional Standing Cases")). Further, Amicus Klitzkie argues that because the court announced a constitutional standing requirement, it cannot recognize an exception thereto to retain jurisdiction in this matter. Klitzkie Br. at 11-15.

In *In re A.B. Won Pat*, the court observed that "[c]onstitutional standing is a necessary prerequisite to pursuing relief in *all* cases filed in the courts of Guam, and the legislature cannot remove the requirement of constitutional standing by statute." 2019 Guam 6 ¶ 19 (emphasis in original). Amicus Klitzkie has characterized any potential departure from the general rule this court adopted in the Constitutional Standing Cases as conflicting with the Organic Act and "transform[ing] standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement." Kliztkie Br. at 13. In demonizing any refinements the court may make to its self-imposed utilization of constitutional standing in adversarial matters, Amicus Klitzkie seeks to bind the court to a single jurisdictional strategy across all cases before it.

However, by design, the doctrine the court adopted in the Constitutional Standing Cases was intended to apply in adversarial proceedings. *See Massachusetts v. E.P.A.,* 549 U.S. 497, 516, 127 S. Ct. 1438, 1452, 167 L. Ed. 2d 248 (2007) ("Article III of the Constitution limits

federal-court jurisdiction to 'Cases' and 'Controversies.' Those two words confine the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.") (cleaned up). The doctrine was not intended to apply in declaratory judgment or binding advisory opinion cases.

While "[a]n overwhelming majority of states apply some type of constitutional standing doctrine" as a self-imposed judicial rule of restraint, "[a]n overwhelming majority of states provide some exception to their constitutional standing requirements…"[3] A number of jurisdictions that have adopted some version of constitutional standing, including some that have outright adopted the test in full, also allow for advisory opinion actions filed by the governor or legislature.[4]

This court has, in fact, *already* recognized that it has jurisdiction over declaratory judgment cases under Section 4104 notwithstanding the absence of a "case or controversy" within the meaning of Article III. In *In re Request of Mina'bente Sing'ko na Liheslaturan Guahan*, 2001 Guam 3, the court considered a Section 4104 request for declaratory judgment from the Legislature,

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[3] Wyatt Sassman, A Survey of Constitutional Standing in State Courts, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 349, 353 (2016)

[4] These jurisdictions include South Dakota, Alabama, Delaware, Massachusetts, New Hampshire, Missouri, Oklahoma, Vermont. Other states that have adopted constitutional standing have likewise carved out other exceptions to the doctrine, such as taxpayer standing in the case of Pennsylvania. *Id.*

seeking an opinion as to whether eligible Guam taxpayers were entitled to the Earned Income Tax Credit. In considering whether the District Court of Guam held exclusive jurisdiction over matters involving the Guam Territorial Income Tax ("GTIT"), the court determined that the district court was restrained from assuming jurisdiction over the matter. The court observed:

> The "case or controversy" limitation of the United States Constitution prohibits federal courts from rendering advisory opinions. *Aetna* announced the meaning of "controversy" in the constitutional sense as follows:
>
> > A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts....
>
> In contrast here, we are asked by the Legislature to render an advisory opinion on the applicability of the EIC to Guam taxpayers and whether the Director is required to pay the refundable EIC.…*Neither is there a controversy in the constitutional sense. No specific legal relationship is*

> *at stake, no specific relief is sought, nor do the parties have direct adverse legal interests in this controversy*….[I]t is the position of this court that the Legislature's request for declaratory judgment falls outside the District Court's jurisdiction as defined by the Organic Act.

Id. at ¶ 12-13 (cleaned up) (emphasis added).

The court concluded that it had jurisdiction over the matter, observing that the Legislature, conferred with the authority to define actions that qualify for the court's original jurisdiction, had authorized the court to issue declaratory judgments interpreting federal or local law and determining questions affecting the powers and duties of the Governor and the operation of the Executive Branch. *Id*. at ¶14-15.

Notably, the Constitutional Standing Cases all involved adversarial proceedings on appeal from the Superior Court of Guam, on which the constitutional standing doctrine could be applied and for which constitutional standing was developed as a tool of judicial restraint. In contrast, *In re Request of Mina'bente Sing'ko na Liheslaturan Guahan*, which the Constitutional Standing Cases did not reverse and which remains good law, recognized that declaratory judgment actions as authorized in Section 4104 fell outside the adversarial actions contemplated by Article III, but qualified nonetheless for this court's consideration.

Amicus Klitzkie would undoubtedly prefer the court either applied the constitutional standing doctrine without exception, including in non-adversarial cases

not contemplated by the doctrine, or did not apply the doctrine at all. However, such rigidity would be inconsistent with the court's authority to fashion a comprehensive framework to control its docket and orderly administration of justice while recognizing that this interest must yield to other considerations in limited circumstances.[5] Section 4104 provides its own internal justiciability standards, including the requirement that the issue raised is a "matter of great public importance," a common exception to the standing requirements in numerous states.

In light of the established precedent in *In re Request of Mina'bente Sing'ko na Liheslaturan Guahan*, the fact that the constitutional standing doctrine was not developed to apply to non-adversarial matters otherwise authorized by law, and the safeguards in Section 4104 that substantially protect the court's exercise of jurisdiction in declaratory judgment matters, the court may exercise jurisdiction in this matter.[6]

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[5] The United States Supreme Court itself recognizes an exception to traditional constitutional standing requirements where Congress has accorded a litigant with a procedural right to protect his interest. *See Massachusetts*, *supra*, 549 U.S. at 517-518 ("…[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests, can assert that right without meeting all the normal standards for redressability and immediacy…") (cleaned up).

[6] Amici Klitzkie and Timothy Rohr have also advanced arguments requesting that the court abstain from resolving this matter. In response, Petitioner incorporates by reference her arguments against abstention in her Opposition to Attorney General of Guam's Motion to Dismiss, filed on April 10, 2023.

B. THE LEGISLATURE EXCEEDED ITS ORGANIC ACT AUTHORITY IN ITS ENACTMENT OF GUAM PUBLIC LAW 20-134

Respondents, the Guam Legislature and Attorney General Moylan, argue against a finding that P.L. 20-134 was *void ab initio*, even after it is found to have violated the Organic Act. *See* Moylan Br. at 11-15, 19; Leg. Br. at 1-8, 12-13. Instead, Respondents urge the court to find that courts should merely enjoin enforcement of Guam legislation held to violate the Organic Act. *See* Moylan Br. at 20; Leg. Br. at 15.

As discussed further herein, the Organic Act expressly prohibits the Legislature from passing laws that conflict with the Organic Act or federal law applicable to Guam. The limiting provisions must be given effect so that they are not rendered superfluous. Accordingly, the court should issue declaratory judgment finding that P.L. 20-134 is *void ab initio* as exceeding the legislature's grant of authority in the Organic Act.

1. The Organic Act Prohibits Legislative Enactments that Conflict with the Organic Act or Applicable U.S. Law, and Legislative Enactments in Derogation of the Organic Act are *Ultra Vires*

In its brief, the Legislature correctly observes that prior to the 1998 amendment to the Organic Act, which was enacted "to provide Guam with a greater measure of self-government," *In re Request of Camacho*, 2004

Guam 10, ¶ 32, Section 1423a provided the following, more restrictive language:

> The Legislative power of Guam shall extend to all subjects of legislation of local application *not inconsistent with the provisions of this Act and the laws of United States applicable to Guam*.

48 U.S.C.A. § 1423a (1950) (emphasis added). Both the original and current versions of Section 1423a restricted the legislative power of the Guam Legislature to legislation not inconsistent with the Organic Act or applicable U.S. law. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 36 (emphasis added) ("The 'chapter' referred to [in Section 1423a] is the Organic Act; therefore, the Legislature is *prohibited* from enacting laws that are inconsistent with the Organic Act."); *see also* S. Rep. 81-2109 Sec. 1 ("[t]his Act may be cited as the 'Organic Act of Guam.'").

The Legislature submits that "it is neither illegal nor contrary to the Organic Act for *I Liheslaturan Guåhan* to develop and pass bills on topics falling within the Organic Act scope of authority." Leg. Br. at 8. While the Legislature does not expressly concede the obvious corollary to the preceding statement, that it *is* illegal and contrary to the Organic Act for the Legislature to develop and pass bills on subjects *outside* its scope of authority, the Legislature appears to acknowledge that its legislative power under the Organic Act is limited. Specifically, the Legislature concedes the following:

> *Arguably*, Guam *may* not enact legislation exceeding authority such as approving treaties with

> China or declaring war with Russia. Article I, Section 10 of the United States Constitution prohibits states from engaging in a set of activities that implicate international affairs, while the Supremacy Clause, Foreign Commerce Clause, and other constitutional provisions place key elements of this power with the federal government.

Leg. Br. at 7 (emphasis added).

The Legislature appears to be conflating the limitation on its legislative power related to *federal preemption* with its limitations related to *organicity*, an issue the court addressed in *In re Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan Guahan*, 2017 Guam 14:

> Use of the term preemption by the parties, in this case, is intended to implicate a fundamentally different concept—*i.e.*, that powers of the Government of Guam are necessarily limited by the Organic Act and Congress did not vest the Government of Guam with authority to pass legislation or rules inconsistent therewith. This principle is expressly set forth in the first phrase of 48 U.S.C.A. § 1423a, which prohibits any law "inconsistent with the provisions of this chapter" (*i.e.*, inconsistent with the Organic Act). If any local laws or rules violate this provision, the statute or rules are said to be inorganic.… the parties are debating in this case whether the territorial law conflicts with the very law empowering the Territory to act.

Id. at ¶ 20. Similarly, the issue in this matter is not whether a federal statute *preempts* local law, but rather whether the Legislature has power to pass a law at all pursuant to the Organic Act enabling language.

The Legislature's equivocation notwithstanding, the clear limitation on its exercise of legislative power applies to subjects well short of the grandiose national security related subjects the Legislature is willing to concede it may not have authority to legislate. The more immediate application of the limitation on the Legislature's power to legislate is that it has no authority to pass legislation that conflicts with the Organic Act itself. The Legislature has no more authority to pass laws that violate the Organic Act than it has to declare war against Russia.

Though the Legislature may not be willing to acknowledge that it is not authorized to pass legislation that conflicts with the Organic Act, the principle is well-established.[7] This court has repeatedly observed that the Legislature is prohibited from

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[7] In his brief, Respondent Moylan argues that *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 5, 75 S. Ct. 553, 556, 99 L. Ed. 773 (1955) is inapplicable in this matter because the Virgin Islands Organic Act provision conferring legislative power was limited to subjects with relevant ties within the territories, and P.L. 20-134 complies with this requirement. Respondent Moylan is confused. Guam legislation is of course not required to comply with the Virgin Islands Organic Act. However, both the Virgin Islands and Guam Organic Acts limited legislative power to legislation not inconsistent with the respective acts. In *Granville-Smith*, the U.S. Supreme Court held that the legislation at issue exceeded such legislative power granted by Virgin Islands Organic Act and was therefore void.

enacting laws that are inconsistent with the Organic Act. *See In re: Request of Calvo*, 2017 Guam 14 ¶ 18. "The provisions of the Organic Act…set the outer limits of the Guam Legislature's authority." *People of the Territory of Guam v. Okada*, 694 F.2d 565, 568 (9th Cir. 1982). The Guam Legislature "*cannot enact laws* which are in derogation of the provisions of the Organic Act." *A.B. Won Pat Guam Int'l Airport Auth. ex rel. Bd. of Directors v. Moylan*, 2005 Guam 5 ¶ 21 (emphasis added).

To hold that inorganic legislation is nonetheless "a duly passed law" would disregard Organic Act limitations on the power conferred on the Legislature, and render the limiting language of 48 U.S.C. § 1423a superfluous. "[B]ecause a statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant…the judicial branch must ensure other branches of government do not act beyond the law." *In re Leon Guerrero*, 2021 Guam 6 ¶ 70. *Macris v. Richardson*, 2010 Guam 6 ¶ 15; *see also Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115–16, 25 L. Ed. 782 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word…[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. This rule has been repeated innumerable times.") (internal quotations omitted).

In interpreting constitutions or organic documents, courts have held that it was not only preferable but mandatory that such documents be interpreted so that no part is rendered meaningless. *See Burnsed v. Seaboard Coastline R. Co.*, 290 So. 2d 13, 16 (Fla. 1974) ("It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts."); *Sw. Travis Cty. Water Dist. v. City of Austin*, 64 S.W.3d 25, 30 (Tex. App. 2000) ("Recourse to the whole of the constitution is required to ascertain the true meaning of a particular provision, and no part of the constitution should be treated as superfluous, meaningless, or inoperative.").

The limiting language of Section 1423a must be given meaning. Because the Legislature's authority only extends to subjects of legislation not inconsistent with the Organic Act and federal law applicable to Guam, legislation passed in derogation of either constitutes an *ultra vires* act, an act outside its scope of authority. *See In Re Calvo*, 2017 Guam 14 ¶ 50 (finding that an inorganic act is invalid and void); *United States v. Al-Maliki*, 787 F.3d 784, 791 (6th Cir. 2015) ("When Congress lacks constitutional authority to pass a law, it acts *ultra vires*."); *see also Bordallo v. Baldwin*, 624 F.2d 932, 934-5 (9th Cir. 1980) (finding that "Legislature has exceeded its power" where Guam statute required the appointment of hospital board members designated by organizations, despite Organic Act provision granting the governor ultimate authority over operation of the hospital).

Though both the Legislature and Respondent Moylan urge a rule simply enjoining the enforcement of inorganic legislation, *see* Leg. Br. at 15 and Moylan Br. at 15, this proposed remedy does not adequately address the fact that the act of passing the legislation itself was defective.

2. <u>The District Court's Finding that P.L. 20-134 Violated the First and Fourteenth Amendments to the U.S. Constitution and the Organic Act Rendered P.L. 20-134 *Void Ab Initio*</u>

The Legislature claims that it is not concerned regarding "the consequence or lack thereof resulting from Public Law 20-134 remaining on the books," but rather, its concern is centered around the possibility that the court may treat a "duly-enacted law as never having existed." Leg. Br. at 9. The Legislature argues that characterizing laws like P.L. 20-134 *void ab initio* would amount to a judicial "erasure" or "veto" of such laws. Leg. Br. at 1-2 and 12-13. Citing to *Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209–10 (9th Cir. 2018), the Legislature posits that a law, though enjoined, continues in existence until the legislature that enacted the law repeals it. Leg. Br. at 8-9.

The Legislature's proposition that a law declared "unconstitutional and void" does not cease to exist but rather lies dormant pending possible revival at a later time reflects a recent line of conservative thinking. *Close v. Sotheby's, Inc.*'s holding, which the Legislature references in support of this position, itself relies on

The Writ-of-Erasure Fallacy, a 2018 Virginia Law Review article penned by Jonathan F. Mitchell.[8]

Though *The Writ-of-Erasure Fallacy* has been referenced in several U.S. Supreme Court concurrences by Justices Clarence Thomas and Neil M. Gorsuch, it does not reflect the majority rule. *See United States v. Sineneng-Smith*, 206 L. Ed. 2d 866, 140 S. Ct. 1575, 1586 (2020) (Thomas, J., concurring); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 207 L. Ed. 2d 494, 140 S. Ct. 2183, 2219 (2020)(Thomas, J., concurring in part and dissenting in part); *United States v. Arthrex, Inc.,* 210 L. Ed. 2d 268, 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., concurring in part and dissenting in part); *Borden v. United States*, 210 L. Ed. 2d 63, 141 S. Ct. 1817, 1835 (2021)(Thomas, J., concurring in part). Though the Legislature only directly references *The Writ-of-Erasure Fallacy* in its block quote of the *Close v. Sotheby's* decision, the Legislature's statement further in its brief that "[J]udicial review is a non-enforcement prerogative, not a revisionary power over legislation," Leg Br. at 12, was lifted verbatim, with no credit, from Mitchell's article. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy,* 104 VA. L. REV. 933, 983 (2018).

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[8] Jonathan F. Mitchell was the Solicitor General of Texas from 2010 to 2015, and is credited with designing the private enforcement mechanism in the Texas Heartbeat Act, Senate Bill 8, which authorized private citizens to sue persons who perform or assist an abortion post- "fetal heartbeat." *See*, Michael S. Schmidt, Behind the Texas Abortion Law, a Persevering Conservative Lawyer, N.Y. TIMES, September 12, 2021.

In *The Writ-of-Erasure Fallacy*, Mitchell proposes that a court finding that an unconstitutional law is "void," "invalid," or "stricken," or otherwise purporting to excise or treat as a legal nullity the problematic provisions of a statute, mischaracterizes the power of judicial review. *Id.* at 935. Mitchell contends that, notwithstanding the language courts use to describe the status of a statute following a finding of unconstitutionality, such finding does not result in alteration or annulment of a statute, but rather allows a court to decline or enjoin enforcement of the statute. *Id.* at 936. Such statutes, Mitchell argues, continue to exist after a court declares it unconstitutional. *Id.* at 937.

Attacking landmark U.S. Supreme Court decisions including *Marbury v. Madison*, 5 U.S. 137, 180, 2 L. Ed. 60 (1803), and *Norton v. Shelby Cnty.*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886), Mitchell contends that the judicial pronouncements that legislative provisions are unconstitutional do not render such provisions non-existent, but are rather "temporary" and "*always* subject to reversal on appeal or repudiation by a future Supreme Court, and the temporarily disapproved statute continues to exist as a law until it is repealed by the legislature that enacted it." 104 VA. L. REV. at 942.

In his *Seila Law* concurrence in part, Justice Thomas, citing to *The Writ-of-Erasure Fallacy*, criticized the Court's decision to sever an unconstitutional provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part

and dissenting in part). The Court rejected Justice Thomas's criticism, upholding its established severability practice, and severing the constitutional flaws in the statute and upholding the remainder. *Seila Law*, 140 S. Ct. at 2209 ("Justice Thomas would have us junk our settled severability doctrine and start afresh…We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today.").

This court has also similarly held on numerous occasions that unconstitutional or inorganic enactments are void. *See*, *e.g.*, *In re Leon Guerrero*, 2021 Guam 6 ¶ 2 ("The Organic Act of Guam bestows specific quarantine powers to the Governor, and we hold that the legislative enactment of section 19605 impermissibly encroaches upon that power. Section 19605 is inorganic and void."); *In re Camacho*, 2004 Guam 10 ¶ 55, 81 ("[W]e find that if the invalid terms 'exclusive' and 'final' are excised from sections 2 and 3 of Public Law 26-169, the remaining provisions are fully operative as law…We [] hold that the inorganic provisions of Public Law 26-169 may be severed and thus, the remaining provisions of Public Law 26-169 are upheld."); *In re Calvo*, 2017 Guam 4 ¶ 50 ("Title 2 GCA § 2104 and section 1.02(d)(4) are invalid and void."). Notably, the Legislature itself has asked the court to invalidate a prior Legislature's enactment. *See In re Request of Gutierrez*, 2002 Guam 1 (declaratory judgment action in which 26th Guam Legislature moved to dismiss case on basis that 4 GCA § 4104, enacted by a prior legislature, was "ultra vires and therefore invalid.").

Even if the court were persuaded by *The Writ-of-Erasure Fallacy*'s logic, Mitchell himself noted exceptions to his theory that a law deemed unconstitutional and void is merely dormant until a future court revives it. Specifically, Mitchell observed that certain state constitutions authorized judicial pronouncements voiding statutes that violate such constitutions. 104 Va. L. Rev. at 953. In particular, Mitchell noted that the Georgia Constitution provides that "Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the Judiciary shall so declare them." *Id.* (citing Ga. Const. art. I, § 2, ¶ V).

Similarly, because Section 1423a specifically limits the legislative power conferred on the Legislature to subjects not inconsistent with the Organic Act, and this court is conferred with the judicial authority of Guam and the power to interpret the law, an adjudication that legislation is inconsistent with the Organic Act or "inorganic" also inherently encompasses a finding that the Legislature was not authorized to pass such legislation. Though such a finding effectively nullifies such legislation, a holding that the Legislature did not have authority to pass a law cannot properly be characterized as a "veto."

3. Inorganic Legislation Cannot Be Revived by a Change in Statutory or Decisional Law

Respondent Moylan argues that a determination by this court that legislation held to be inorganic is *void ab initio* "does not allow for Judicial mistakes or Judicial fallibility," Moylan Br. at 13, as in the case of *Dobbs* overturning *Roe*. Moylan further argues that

courts deciding a law's constitutionality should have "flexibility to further decide the law's constitutionality as the circumstances warrant and then later possibly reconsider its actions again, *ad infinitum*." Moylan Br. 16-17.

The *Dobbs* decision has launched efforts nationally to vacate injunctions imposed on the enforcement of anti-abortion legislative enactments based on the change in decisional law pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Other jurisdictions, whose constitutions do not condition the exercise of proper legislative power on the constitutionality of legislation, must consider the impact *Dobbs* has on enjoined laws, and specifically whether the court should lift injunctions based on the change in decisional law. However, because Guam's Organic Act provides that the legislative power only extends to subjects not inconsistent with the Organic Act, the impact of *Dobbs* on the legal status of P.L. 20-134 is greatly simplified.

Because the legislative power is conditioned on consistency with the Organic Act, a change in law that would have rendered a prior enactment consistent with the Organic Act, had it been in effect at the time of such enactment, does not cure the enactment's original Organic Act defect. This concept is illustrated in *Nelson v. Ada* line of cases.

The Organic Act, as passed in 1950, vested the governor of Guam with ultimate authority over public education. *See* 48 U.S.C. 1421g(b)(1950). In 1952, the Legislature established a school board whose membership was appointed by the governor. *See*

Findings of Fact and Conclusions of Law, *Nelson v. Ada*, Superior Court of Guam Special Proceedings Case No. 192-87 (November 6, 1987) ("11/6/1987 FFCL") at 2-3. In 1977, the Legislature enacted Public Law 14-1, which provided for an elected school board. *Id.* at 3. In 1986, the U.S. Congress amended the Organic Act, transferring ultimate authority over public education away from the governor to the Legislature. *Id.* at 3-4. In 1987, Governor Joseph Ada, terminated the Director and Deputy Directors of the Department of Education, who had been appointed to their positions by the elected school board.

In its 11/6/1987 FFCL, the Superior Court of Guam held that the 1986 Amendment to the Organic Act "does not confirm, ratify,[9] or in any way validate any organically infirm legislation enacted by the Guam Legislature" prior to the amendment. *Id.* at 4. "The 1986 Amendment did not trigger the revival of formerly inorganic local laws," whose validity "must be tested as of the date of their enactment because they were enacted prior to 1986." *Id.* at 5. The court concluded:

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[9] In its brief, the Legislature claims that applying the doctrine of *void ab initio* to laws passed in excess of the Legislature's authority under § 1423a would have made the pre-1968 implied ratification process of the Organic Act impossible. This hypothetical situation does not have present-day application. However, Petitioner submits that the court was not required to review organicity prior to the 1968 Amendment, because Congress, as the body with plenary power over the territories and authority to amend the Organic Act, authorized the possible extension of the legislative power through the ratification process. Congress would have similar power to authorize the otherwise inorganic law authorizing an elected school board discussed in *Nelson*, or to authorize P.L. 20-134, if it elects to do so.

> The statutory scheme enacted by [the public law] providing for an elected school board, violates the original version of…the Organic Act[.] It is therefore inorganic under the doctrine of *Bordallo v. Baldwin* as exceeding the Legislature's powers under 48 U.S.C. 1432a (sic).

Id. at 6.

The matter was thereafter appealed to the District Court of Guam. In *Nelson v. Ada*, CIV. 87-00071A, 1988 WL 242618 (D. Guam App. Div. June 8, 1988), *aff'd*, 878 F.2d 277 (9th Cir. 1989), the court affirmed the Superior Court of Guam's denial of a writ of mandate, finding as follows:

> Although the amendment to § 1421g(b) authorizes future legislation similar to that relied on by Petitioners, it does not ratify or confirm the existence of the elected Board.
>
> *Petitioners seek to revive a law which is inorganic. Sections 1 and 2 of Public Law 14-1, an act which is* void ab initio*, is not validated by the amendment to § 1421g(b).*

Id. at 3 (emphasis added). The Ninth Circuit Court of Appeals thereafter affirmed the District Court's decision. *See Nelson v. Ada*, 878 F.2d 277, 281 (9th Cir. 1989).

Similarly, though *Dobbs* represents a change in decisional law which may have partially resolved P.L.

20-134's constitutional infirmity,[10] it does not cure the enactment's Organic Act infirmity. Because the question of whether the Legislature has authority to pass a law (*i.e.*, whether the legislation is consistent with the Organic Act) "must be tested as of the date of [its] enactment," 11/6/1987 FFCL at 5, and because P.L. 20-134 was finally adjudicated to be unconstitutional at the time of its enactment, it is *void ab initio*.[11] Persuasive authority suggesting that an *unconstitutional* law may be revived by a change in jurisprudence, *"ad infinitum*," is inapposite. An *inorganic* law is not capable of revival, because the legislature that purported to "pass" the law had no authority to do so.

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[10] As Petitioner discussed in her Opening Brief, Sections 4 and 5 of P.L. 20-134, which restrict the "solicitation" of abortion services in Guam, *still* violate the First Amendment to the U.S. Constitution, as applicable to Guam in the Organic Act, notwithstanding the issuance of *Dobbs*. Opening Br. at 23-27.

[11] As discussed above, the Georgia Constitution similarly prohibits legislation inconsistent with the state Constitution. Georgia cases have also determined that such consistency with the state constitution is tested at the date of its passage. *See*, *City of Atlanta v. Gower*, 216 Ga. 368, 372, 116 S.E.2d 738, 742 (1960) ("The time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and, if it is unconstitutional then, it is forever void.").

4. Determining that an Inorganic Legislation is *Void Ab Initio* Does Not Violate the Separation of Powers

Respondent Moylan contends that the court would violate the separation of powers doctrine if it held that inorganic legislation is *void ab initio*:

> [T]he Court should not substitute its own policy…for that of the Legislature. The right of the Legislature to pass bills into laws must continue unfettered by the two other branches.

Moylan Br. at 12. Respondent Moylan's argument that application of the *void ab initio* doctrine would violate the separation of powers doctrine appears to be based at least in part on his theory that the *void ab initio* doctrine entails judicial action against a potentially inorganic bill before it is even passed by the Legislature. *See* Moylan Br. at 12-13. Respondent Moylan further laments that such a process, by which Respondent Moylan imagines the court would order the Legislature not to enact laws, would potentially interfere with the Speech and Debate rights of the legislature. Moylan Br. at 5.

The process Respondent Moylan describes is not consistent with the processes by which our courts review the organicity of legislation on Guam, which invariably entail either an adversarial proceeding or a request for declaratory judgment under 7 GCA § 4104 *after* the legislation has ostensibly passed. The established *processes* would not be altered if the court determines in this matter that law found inorganic is *void ab initio*; rather, the *impact* of such a holding

would be clarified – that once legislation is finally adjudicated as inorganic through established legal processes, such legislation would be not merely unenforceable or enjoined, but a nullity and, as discussed, not capable of revival by a change in law or jurisprudence.

In its brief, the Legislature likewise asks the court not to "disturb" its authority:

> I Liheslaturan Guåhan declines to involve itself with the subsequent judicial interpretation of the current validity or invalidity of Public Law 20-134 as resolution of this dispute is properly left to the Judicial Branch within the Government of Guam. *Reciprocally*, I Liheslaturan Guåhan requests the Guam Supreme Court not disturb the previous or current authority of I Liheslaturan Guåhan to pass bills or perform functions authorized by the Organic Act of Guam.

Leg. Br. at 3 (emphasis added).

First, the court specifically invited the Legislature to participate in this matter as a Respondent. *See* 2/18/2023 Order at 6. The Legislature's decision "not to involve" itself in Question 2 does not in any way confer a benefit on the court. Second, the Legislature's request that the court should abstain from deciding against it on Question 1 in exchange for the Legislature's decision not to submit arguments on Question 2, is wholly inappropriate. The power to interpret the Organic Act is not shared between the Judicial and Legislative branches, such that the Legislature may attempt to

negotiate a positive ruling on one issue in exchange for its deference to the court on another.

Determinations regarding the organicity of legislative enactments are entrusted, exclusively, to the courts. *See Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶ 21 ("…[T]he Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law."); *In re Request of Gutierrez*, 2002 Guam 1 ¶ 41 ("…[I]t is the court's duty to interpret the laws. Therefore, the court must declare a legislative enactment unconstitutional if an analysis of the constitutional claim compels such a result.").

Interpreting the scope of legislative power in the Organic Act to determine whether P.L. 20-134's violation of the Organic Act renders it *void ab initio* entails a legal determination, not a policy determination as Respondent Moylan suggests. This determination is therefore within the court's exclusive purview.

C. P.L. 20-134 HAS BEEN REPEALED BY IMPLICATION BY LATER-IN-TIME LAWS

The court has held that later-in-time statutes repeal by implication earlier statutes where provisions in the two acts are in irreconcilable conflict, or where the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *See Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 16. Respondent Moylan concedes that P.L. 20-134 cannot be reconciled with (1) the Parental Consent for Abortion Act ("PCAA"), 19 GCA § 4A101 *et seq*; and

(2) the Women's Reproductive Health Information Act of 2012 ("HIA"), 10 GCA §3218.1:

> Courts can read the Reporting Statute and the Partial-Birth Abortion law together with P.L. 20-134 because physicians still could report performing abortions that jeopardize a woman's health, and partial-birth abortions represent a specific instance of a more general ban. But reinstating P.L. 20-134 removes the Parental Consent Law and the Informed Consent Law from Guam's statutory code. The bottom line is that the four subsequently passed laws must be read in the light that the Senators knew that they could not pass a full-anti-abortion statute.
>
> These laws had no constitutional infirmity, but demanding consent for a minor to obtain an optional abortion, and requiring physicians to inform all women about the stakes of an optional abortion, violate the ban on all optional abortions. These laws presume the constitutionality of *Roe*….In Guam, *Dobbs* rendered the Parental Consent and the Informed Consent laws moot.

Moylan Br. at 34-35. As discussed, the Guam Legislature has declined to present arguments regarding this issue. *See* Leg. Br. at 3.

Respondent Moylan seeks a sharp departure from the "traditional" treatment of implied repeals, whereby later laws are held to repeal earlier laws to the extent of inconsistency. Moylan Br. at 29. He submits that this deviation is appropriate because the Legislature purportedly only passed these laws intending to

restrict abortion to the greatest extent it could because P.L. 20-134 had been repealed. Moylan Br. at 26-31.[12] Respondent Moylan offers no authority for these inventive propositions, and makes no attempt to synthesize these theories with accepted canons of statutory construction. *See Sumitomo*, 2001 Guam 23 ¶ 17.

In evaluating a potential implied repeal, courts look first to the language of the statute itself and "[a]bsent clear legislative intent to the contrary, the plain meaning prevails." *Id.* Neither Respondent Moylan nor Amicus Rohr served in the 31st Guam Legislature, which enacted the PCAA and the HIA, and there is no statutory construction tenet that elevates their conjecture to the status of reliable evidence of legislative intent.

The PCAA and the HIA do not expressly declare an intent to prioritize the abortion ban of P.L. 20-134 over the access to lawful abortion authorized in these enactments upon fulfillment of their respective consent conditions. Neither statute directly references P.L. 20-134. While both public laws contain legislative intent provisions, neither supports the claims of Respondent Moylan and Amicus Rohr that the laws were intended to restrict abortion to the greatest extent possible consistent with existing constitutional strictures.

The Legislative Findings and Intent section for Public Law 31-155, which enacted the PCAA, describes that the intent of the law was to further the important

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[12] Amicus Rohr offers similar arguments in his brief. Amicus Curiae Brief of Timothy J. Rohr ("Rohr Br.") at 2.

and compelling interests of (1) protecting minors against their own immaturity; (2) fostering family unity and preserving the family as a viable social unit; (3) protecting the constitutional rights of parents to rear children who are members of their household; (4) reducing teenage pregnancy and unnecessary abortion; and (5) allowing for "judicial bypasses" of the parental consent requirement in exceptional circumstances. Guam Pub. L. 31-155:2 (December 29, 2011).

The Legislative Findings and Intent section for Public Law 31-235 in turn states that the Legislature finds that receipt of complete and accurate information material to the choice of whether to undergo an abortion is essential to a woman's psychological and physical well-being. Guam Pub. L. 31-235:1 (November 1, 2012).

The fact that abortion bans were deemed unconstitutional pursuant to *Roe* at the time the PCAA and the HIA were passed does not mean the Legislature could not have enacted so-called "trigger laws," legislation intended to implement abortion bans in the event *Roe* was overturned, which many other states had implemented prior to *Dobbs*. There is simply no language in the PCAA and the HIA that evidence an intent to yield to the broader restrictions in P.L. 20-134 if *Roe* were overturned.

Accordingly, the court should reject Respondent Moylan's invitation to depart from the universal implied repeal doctrine providing that in the event of irreconcilable conflict between statutes, the later-in-time statute operates to repeal the first.

D. THE COURT SHOULD NOT ORDER A REFERENDUM ON P.L. 20-134

Respondent Moylan further asks that the court order a referendum on P.L. 20-134 in lieu of issuing a determination regarding its validity. Moylan Br. at 40-45. The court should reject this request out of hand. This request is outside the scope of the issues before the court in this matter, and the scope of declaratory judgment review provided in 7 GCA § 4104, and Respondent Moylan does not have standing to request affirmative relief pursuant to Section 4104.

Further, P.L. 20-134's referendum provision requires a referendum on a date certain, November 6, 1990. *See* P.L. 20-134:6. Ordering a referendum on any other date would require the court to rewrite the legislation. *See People v. 9660 Cherokee Lane, Newcastle*, 48 Cal. Rptr. 2d 406, 411 (Cal. Ct. App. 1995)("…[O]ur job is to interpret what the Legislature has given us, not to weave a more desirable legislative scheme from tattered cloth.").

Finally, P.L. 20-134 provides that, until such time the referendum is accomplished, P.L. 20-134 shall remain in effect. In fact, the mandated referendum question asks whether P.L. 20-134 should be repealed. *See* P.L. 20-134:6. Though Respondent Moylan has offered to "exercise prosecutorial discretion," and not prosecute women who seek abortions until the proposed referendum occurs, Moylan Br. at 44, ordering the referendum to proceed would also allow this legislation to continue without adjudication of its organicity, which is properly before the court in this matter. A referendum would not resolve whether the

Legislature had authority to pass P.L. 20-134 in the first place. Only the court has the power to do so.

The Legislature has authority to pass new legislation or mandate a referendum without the court's intervention. Petitioner submits that the court should not entertain offers to compromise its authority over the issues before it, or indulge attempts to negotiate a non-legal resolution to this matter.

II. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court issue declaratory judgment finding that P.L. 20-134 is *void ab initio* as *ultra vires* of the legislature's grant of authority in the Organic Act. Alternatively, Petitioner requests declaratory judgment finding that P.L. 20-134 has been repealed by implication by later-in-time laws regulating abortion services in Guam.

OFFICE OF THE GOVERNOR OF GUAM

By: /s/ Leslie A. Travis
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Governor of Guam

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX C

IN THE SUPREME COURT OF GUAM

CRQ2023-001

[Filed April 21, 2023]

IN RE:	)
	)
REQUEST OF	)
LOURDES A. LEON GUERRERO,	)
I MAGA'HÅGAN GUÅHAN,	)
RELATIVE TO THE VALIDITY	)
AND ENFORCEABILITY OF	)
PUBLIC LAW NO. 20-134	)
	)

BRIEF OF RESPONDENT

GOVERNMENT OF GUAM / PEOPLE OF GUAM
Douglas B. Moylan
Attorney General of Guam

[SEAL]

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CRQ2023-001

SUPREME COURT OF GUAM

IN RE:

REQUEST OF LOURDES A. LEON GUERRERO, *I MAGA'HÅGAN GUÅHAN*, RELATIVE TO THE VALIDITY AND ENFORCEABILITY OF PUBLIC LAW NO. 20-134

Certificate of Interested Parties

On January 24, 2023, Justice Katherine A. Maraman disqualified herself from this proceeding based on her prior representation of one of the parties in a related case, *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992). The Chief Justice appointed the Honorable John A. Manglona as Justice *Pro Tempore* on January 24, 2023.

The Attorney General certifies that no Justice on the panel has ever presided over any portion of this case or any related proceeding in the Superior Court or served as counsel of record or provided legal advice to any party to this appeal, and there are no known interested parties other than those participating in this case.

Respectfully submitted this 21st day of April, 2023.

OFFICE OF THE ATTORNEY GENERAL
/s/ Douglas B. Moylan
Douglas B. Moylan
Attorney General of Guam

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

Introduction

This is a declaratory judgment petition brought by Petitioner under 7 GCA § 4104, which allows the Governor to seek the High Court's interpretation of important questions of law, in exercise of its original jurisdiction. The Attorney General on behalf of his client, which is the Government of Guam ("People of Guam" or "People"), asks this High Court to dismiss this matter for lack of jurisdiction. 48 USC § 1421g(d)(1) ("The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam."). In the alternative, if the Supreme Court of Guam reaches Petitioner's questions, the People of Guam respectfully asks that the Court answer them as contended by the Attorney General.

Statement of Jurisdiction

In its order of February 18, 2023, this High Court ruled that it has jurisdiction to issue a declaratory judgment in this matter pursuant to its authority under 7 GCA § 4104. On April 3, 2023, the People of Guam moved to dismiss this matter, arguing that the Court should decline to exercise jurisdiction at this time in order to allow a parallel proceeding on the same issue to proceed in an earlier Federal District Court case.[1] We also contend that because the District Court

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[1] The Attorney General asks this Court to take judicial notice of the proceedings in that case, *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, Case No. 1:90-CV-00013 (D. Guam). *See* GRE

of Guam recently, on March 24, 2023, denied the motion to lift the 1990 injunction placed upon P.L. 20-134,[2] the High Court indicated in its earlier February 18, 2023 order that this § 4104 action would be "*unnecessary*."

The Government of Guam joins with the legal position of *amicus curiae* and former Senator Robert Klitzkie, who contends in his brief that this High Court has no jurisdiction over this matter due to the Petitioner's lack of standing.

Questions Presented for Declaratory Judgment

1. Whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing Public Law 20-134 (aka "void *ab initio*"); and

2. To the extent Public Law 20-134 is not void or otherwise unenforceable, has it been repealed by

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201(b)(2) & (d) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court shall take judicial notice if requested by a party and supplied with the necessary information."). The Governor has made certain filings in the District Court case available through exhibits attached to her motion for judicial notice filed on March 10, 2023.

[2] The District Court's order denying the motion to vacate is attached as Exhibit 2 to the Attorney General's Declaration in Support of the Motion to Dismiss filed with this Court on April 3, 2023.

implication through subsequent legislation passed by the Guam Legislature?

Statement of the Case

This case begins with the enactment in 1990 of Public Law 20-134, which prohibits abortions on Guam, *except* to protect the mother's health, and mandates a referendum on the law's existence. Interested parties sued the Governor, the Attorney General, and other parties in the U.S. District Court of Guam, challenging the constitutionality of the law and seeking to enjoin it. The District Court held the law unconstitutional under the U.S. Supreme Court precedent set in *Roe v. Wade*, 410 U.S. 113 (1973), and issued an injunction that prevented enforcement of the law. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1431-32 (D. Guam 199). The Ninth Circuit Court of Appeals affirmed. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1374 (9th Cir. 1992).

The Guam Legislature subsequently passed several other laws regulating abortion, namely:

(1) The Partial-Birth Abortion and Abortion Report Law, P.L. 22-130:2 (May 31, 1994), codified at 10 GCA §§ 3207 & 3218;
(2) The Partial Birth Abortion Ban Act of 2008, P.L. 29-115:1 (Nov. 18, 2008), codified at 10 GCA Ch. 91A;
(3) The Parental Consent for Abortion Act, P.L. 31-155:2 (Jan. 4, 2012), codified at 19 GCA §§ 4A101-4A111; and

(4) The Women's Reproductive Health Information Act of 2012, P.L. 31-235:2 (Nov. 1, 2012), codified at 10 GCA § 3218.1.

In 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), holding that "*Roe* was **egregiously wrong from the start**", *id.* at 2243 (emphasis added), and "the Constitution does not confer a right to abortion." *Id.* at 2279 (overruling *Roe* and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)). On February 1, 2023, shortly after taking office, the Attorney General moved to vacate the District Court's injunction. In an order dated March 24, 2023, the District Court denied the motion and left the injunction against P.L. 20-134 in place.

In the meantime, the Petitioner filed this action on January 23, 2023, seeking declaratory judgment on a number of issues relating to the validity of P.L. 20-134. This High Court narrowed Petitioner's issues to two questions in its order of February 18, 2023, and directed the parties to brief the issues. The Attorney General hereby respectfully presents the Government of Guam's opposition to the position taken by Petitioner and Petitioner's supporting *amici curiae* (*Freeman et al.*).

Summary of Argument

I. When enacting P.L. 20-134, the Guam Legislature acted under Organic Act authority. Despite the District Court finding the law unconstitutional at the time, this finding did *not* render the law void *ab*

initio. Applying the principle of void *ab initio* to constitutionality would disturb the process of determining constitutionality. That process requires enacting a law, challenging it, and having a constitutional court decide whether it adheres to the constitution. This process institutes the separation of powers.

The Legislature may identify public harms and seek to remedy them. We analogize the legislative function to the Speech or Debate Clause of the Organic Act. Senators have an Organic right to debate current problems. The Judiciary should not attempt to interfere with this discourse. The Separation of Powers Doctrine prevents the Judiciary from ordering the Legislature not to enact laws on certain subjects, thereby substituting its policy choices for those of elected representatives.

The Judiciary has a crucial responsibility to ensure those laws do not offend the original agreement between the State and its people. But the Organic Act authorizes that responsibility only after the Legislature enacts a law. Unleashing the principle of void *ab initio* in the constitutional context undermines the legislative process and the legal process of developing and correcting constitutional principles. If the U.S. Supreme Court had followed the doctrine of void *ab initio* in *Roe v. Wade*, it never would have decided *Dobbs*. Because of *Dobbs*, P.L. 20-134 was a constitutional enactment.

II. The Senators who enacted the four abortion statutes after P.L. 20-134 knew a federal injunction prevented them from prohibiting abortion. The

question presented presumes non-existent facts. The doctrine of implied repealer does *not* apply to this case because a legislature cannot impliedly repeal an invalid law (and one that has been enjoined). In fact, the Guam Legislature did not try to repeal P.L. 20-134. Instead, they sought to restrict abortion to the full extent that federal constitutional law permitted. The four later abortion laws were *not* irreconcilable with P.L. 20-134 but stood in lieu of P.L. 20-134.

The U.S. Supreme Court's reversal of *Roe v. Wade* reinstated P.L. 20-134. When a court finds a law unconstitutional that found an earlier statute unconstitutional, by reinterpreting the Constitution and extending the umbrella of constitutionality to the statute's purpose, the Court must reinstate the prior statute. Correcting the constitutional error eliminates the only impediment to the statute's legality, and the judiciary has no other reason or power to hold the prior statute invalid. Without *Roe v. Wade*, the Guam Supreme Court would be striking P.L. 20-134 by fiat, an *ultra vires* act.

III. The Attorney General urges the Guam Supreme Court to order a referendum. P.L. 20-134 sought a referendum on its substance. The Court has authority to effectuate equity depending on the facts of a given case, and it may order an affirmative injunction. A referendum will subject the 1990 law to current views on abortion while fulfilling *Dobbs*'s promise to return the question of abortion to the People. It also enables the Court to exercise judicial restraint.

Argument

I. The Guam Legislature acted under its Organic Act authority and its acts cannot be deemed void *ab initio* because a law is "unconstitutional."

This is a case of first impression, and unprecedented in Guam's legislative and judicial history.

It is the Courts who decide whether a law is "constitutional" or "unconstitutional," and this is only after a law is duly passed. "When a statute is held facially unconstitutional, i.e., unconstitutional in all its applications, the statute is said to be void *ab initio*." *People v. Blair*, 986 N.E.2d 75, 81 (Ill. 2013). "The void *ab initio* doctrine is based on the theory that an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* (cleaned up).

However, when a court holds a statute "void *ab initio*," this does not mean that the statute "*never existed*," otherwise the court would be repealing the statute, thereby violating the Separation of Powers principle by taking onto itself a power that belongs only to the legislature. *Id.* When a court declares a statute unconstitutional and void *ab initio*, it means only that the statute was constitutionally infirm from the moment of its enactment and is, therefore, "unenforceable" as of the time the Judiciary analyzes and decides the question. However, this determination is made after the bill has been passed into law; and is

adjudicated in the Judiciary. Consequently, the court will give no effect to the unconstitutional statute and will instead apply the prior law to the parties before the court. *Id.* at 82. Moreover, the Judicial determination of "unconstitutionality" occurs after a legal process and can be subject to subsequent judicial "reversal," as was the situation here. *Dobbs*, 142 S. Ct. at 2262-65.

A. In entertaining the Petitioner's questions, the court risks violating the Separation of Powers doctrine.

1. The doctrine of the Separation of Powers is fundamental to our form of government.

The Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*, "serves the function of a constitution for Guam." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996). As such, it supplies the organizing principles for the form of government in Guam, including "the constitutional doctrine of separation of powers. The doctrine is not expressly enunciated in the Constitution. It is, rather, a doctrine inferred from the organizing principles underlying the Constitution itself." *Bean v. State of Nevada*, 410 F. Supp. 963, 966 (D. Nev. 1974) (citing *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1927)).

"Under the Organic Act, the government consists of three separate but co-equal branches of government." *In re Leon Guerrero*, 2021 Guam 6 ¶ 22 (citing 48 U.S.C. § 1421a ("The government of Guam shall consist of three branches, executive, legislative and judicial

. . . .")). The Governor of Guam, as head of the executive branch, "shall be responsible for the faithful execution of the laws of Guam". 48 U.S.C. § 1422. "The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. The Organic Act also establishes the judiciary for Guam. 48 U.S.C. § 1424 *et seq*.

Thus, under our form of government, the legislative branch makes public policy by enacting laws. The executive branch implements the laws passed by the legislature. The Courts may be called upon to interpret the laws or the manner in which they are being implemented. However, the Courts do not themselves decide what the public policy shall be.

"Public policy has nothing to do with the construction of a statute when the statute is clear on its face." *Lewis Operating Corp. v. Super. Ct.*, 200 Cal. App. 4th 940, 950 (Cal. Ct. App. 2011) (J. King, dissenting) (citing *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th at 733, 737 (Cal. 2004)). When litigants bring matters of public policy before the courts, the courts must remember that, "aside from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state." *Lewis*, 200 Cal. App. 4th at 950 (quoting *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 71 72 (Cal. 1998)).

"When the Legislature has spoken, the court is not free to substitute its judgment as to the better policy." *Lewis*, 200 Cal. App. 4th at 950 (quoting *City & County*

of San Francisco v. Sweet, 12 Cal. 4th 105, 121 (Cal. 1995)). "When the legislative intent is clear from the plain meaning of the words we [the courts] are to follow it, whatever we may think of the wisdom, expediency, or policy of the act." *Lewis*, 200 Cal. App. 4th at 950-51 (quoting *California Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 632 (Cal. 1997)) (internal quotation marks and brackets omitted).

2. The doctrine of the separation of powers bars the Court from substituting its policy for the Guam Legislature's.

Petitioner's legal interpretation applying a "void *ab initio*" logic is unmanageable to our three "separate but equal" branches of government, and Separation of Powers doctrine and associated legal processes.

Here, the Court should not substitute its own policy, at Petitioner's urging, for that of the Legislature. The right of the Legislature to pass bills into laws must continue unfettered by the two other branches. Only after passage should the Court's exercise their power. Petitioner would have the Judiciary interject itself into the Legislative process of passing a bill into law by finding that the act of the Guam Legislature in having passed P.L. 20-134 was void at the moment they passed it, and find that it is a "nullity" or "never existed." Such a construction is an impermissible intrusion of the Judicial Branch into the Legislative Branch.

Petitioner would also have this Judiciary rule upon the "constitutionality" of P.L. 20-134 at the moment the

Legislature passes the bill to stop them from doing so, or have the Senators' actions immediately ruled void because a law like *Roe v. Wade* existed at the time. The construction not only interjects the Judiciary into the Legislative realm to discuss, debate and to pass a law, but to prevent Senators from even acting as their actions are "futile." It also deprives Senators from passing changes to an otherwise "unconstitutional" law before the bill becomes a law and is thereafter tested in the Courts.

The Organic Act processes require that the Judiciary not act until the piece of proposed legislation has been duly passed into law. Only then can and should the Judiciary entertain a party's challenge to the law under the Court's legal processes, such as having proper subject matter and personal jurisdiction, and only then make a decision ruling upon the law's enforceability. Before such time, the Judiciary should respect the roles of the stewards of each branch of Government and wait until the legal question of "constitutionality" or enforceability is properly presented before it.

To reason otherwise, as Petitioner argues, threatens not only the fundamental separations of power between the Legislative Branch and the Judicial Branch, but is practically untenable. For instance, Petitioner's interpretation does not allow for Judicial mistakes or Judicial fallibility, such as occurred here. If this High Court were to adopt Petitioner's rule, then not only would the Senators when passing a law have to decide if an act they were taking was "unconstitutionally void" at the time they passed that bill, but their actions

would be a "nullity" so the People would be deprived of that legislation before the Courts could rule upon its "constitutionality."

In other words, the Senators would become Judges of the legislation before it is passed out of the Legislature. More practically, the Senators could not decide if their act was a nullity because the legislation was "unconstitutional", because the determination of "unconstitutionality" is only decided after they act to make the bill into law, and later when the Judiciary takes that statute and considers the legal issues then passes a ruling that is subject to appeal and ultimate determination years later. The legal paradox is akin to the "*chicken before the egg*" conundrum.

It is a practical impossibility to rule a statute void *ab initio* because the determination of whether a statute is "*constitutional*," or "*unconstitutional*" can only occur after the bill's passage into law, and the law is no longer inside the realm of the Legislative body. Practically speaking, how would the Senators know a bill is void because it's "unconstitutional," before that bill is tested, and the test for "constitutionality" can only be done after the bill is passed into law and subsequently the law is challenged across the street in the Courts?

Furthermore, the legal problem is exacerbated when the Judiciary makes a mistake and reverses an earlier determination of a law being "unconstitutional," and finds in fact that the law was "constitutional." The process of <u>*not*</u> pre-judging a law as constitutional or unconstitutional not only observes the Separation of Powers between the Judicial and Legislative Branches,

but is a process that best protects against what occurred in the District Court case here, where the 1990 abortion law was struck down as "unconstitutional" under *Roe v. Wade* and *Planned Parenthood v. Casey*, then thirty years later the judicial process found its earlier decisions totally in error, and the Judicial Branch reversed itself, finding that its earlier decision was (egregiously) wrong and that the abortion law P.L. 20-134 in fact did <u>*not*</u> violate the U.S. Constitution and is again presumed "constitutional."

A legal theory of void *ab initio* creates a flawed legal process which undermines the Legislative process in passing a bill into law and prevents the Judiciary from correcting incorrect decisions, especially when it requires decades to pass. It also deprives the People of Guam from benefiting from laws that were in fact "constitutional" and should have been passed to confer benefits upon our People. Petitioner's interpretation is legally flawed and practically detrimental to the processes of government and the People's right to receive the benefits of the laws passed by the Guam Legislature.

The Governor's interpretation of void *ab initio* constitutes an inorganic intrusion of the Judiciary into the Legislative co-equal branch of government that seeks to "negate" an act by the Legislature in passing a bill into law before it is duly enacted. Void *ab initio* is an impracticable concept to implement. The current legal process of having an injunction applied to an unconstitutional law best protects the separation of powers and accommodates judicial errors in interpretation. The imposition of an injunction to stop

a law because of a legal principle allows the Senators to fulfill their desires and duties in passing that law (for the benefit of the community), and also allows the Judiciary to correct itself later if the injunction they imposed was in error. It prevents the Judiciary from intruding upon the Legislative processes and respects the separation of powers and duties for each branch of government. The rule that the Judiciary acts only *after* the Legislature finishes passing its bill into law is the most practical way and allows the Judiciary to correct its mistakes as it did in this abortion law problem that has taken about 50 years for the Judiciary to develop, from finding unconstitutionality over many laws passed by the States and Territories in 1973, to now finding the Judiciary should never have been involved, as of June 24, 2022, in *Dobbs*, 142 S. Ct. at 2279 (overturning *Roe*).[3]

Finally, the void *ab initio* legal theory also inherently reflects an incorrect interpretation that the Judiciary has more authority over the Legislature because it says to the Senators that they should not even act because their action in passing a bill into law is a waste of time because the Courts say their bill is unconstitutional. However, the Courts might later find in fact the act they might have done in passing the law, was in fact "constitutional." Again, the better legal interpretation is simply to allow bills to pass into law, and only then, after the legislative act is fully completed, to have the Courts decide its

[3] One must realistically ask, and who knows if the Judiciary might years or decades later again reverse itself finding the abortion issue again "unconstitutional."

constitutionality and have the flexibility for the Courts to further decide the law's constitutionality as the circumstances warrant and then later possibly reconsider its actions again, *ad infinitum*. Such likewise is the process with the Legislature in passing a law, then a subsequent Legislature changing its "collective mind" and reconsidering its actions as a Legislature to repeal or amend a duly passed law.

B. Organic Act protects actions taken by the Legislative Branch to pass laws like Public Law 20-134, preventing judicial findings voiding their actions.

Like the United States Constitution, the Organic Act contains a Speech or Debate clause. *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 7. Our local Courts have previously respected the Separation of Powers doctrine recognizing the existence of Guam's Speech of Debate protection for our Legislative Branch for acts taken within the legislative realm. *Id*. The Organic Act provides that "[n]o member of the legislature shall be held to answer before any tribunal other than the legislature itself for any speech or debate in the Legislature." 48 U.S.C. § 1423c(b); *cf*. U.S. Const. art. 1 § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.") (*cited in Hamlet*, 1999 Guam 18 ¶ 7 n.5).

The Supreme Court of Guam has recognized that "[t]he Speech or Debate Clause is deeply rooted in the principle of separation of powers between the three co-equal branches of government." *Hamlet*, 1999 Guam 18 ¶ 8. The Clause ensures that the legislative branch has

"wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch[,] . . . serves to protect the legislative branch from a possible hostile judiciary[,] . . . [and] recognize[s] the danger posed to the legislature by the other branches of government." *Id.* (cleaned up).

In *Hamlet*, the court held that the Speech or Debate Clause protected a Guam senator who played a recording of a private telephone conversation during an ongoing legislative session because the Senator's act fell "within the sphere of legitimate legislative activity." *Id.* ¶ 21. This High Court found that the Senator used the recording "as part of a general discussion surrounding the override of a bill vetoed by the Governor[, . . .] centered upon the alleged abuse in spending of federal emergency funds". *Id.* As a result, the Senator's action amounted to "speech and debate occurring on the session floor . . . [and was] an integral part of the legislative process." The Court therefore refused to violate the Separation of Powers Doctrine by preventing a party "from interfering with this type of discourse." *Id.* ¶ 22.

Here, consistent with the Speech or Debate Clause, the Supreme Court of Guam is once again asked in this case to respect and protect the Legislative Branch's right to discuss, consider and pass bills into law, uninhibited by the Executive and Judicial Branches. The Court should let the Legislative Branch complete its action in duly considering the benefits or harms of a bill, and to duly act to pass a bill into law. The Courts should not be interfering with bills by predetermining them as being "void *ab initio*." In contrast, P.L. 20-134

in fact was never "void *ab initio*" because *Dobbs* has now found that the underlying cases that stopped its enforcement were bad law. *Dobbs*, 142 S. Ct. at 2243.

The Court should let the process of our three branches of government complete themselves before intrusion occurs. Allow the Legislative Branch to pass a law unmolested. Then, the law becomes subject to the Judicial Branch and the Court's deciding that law's fate upon the leaving the Legislature's jurisdiction, upon proper presentation of that law being challenge. Such was the case in P.L. 20-134. The governmental process concludes with the Judicial Branch either finding constitutionality or unconstitutionality, then imposing an injunction upon the law, or not—and allowing for further reconsideration later in time as to whether the injunction should remain or not. As *Dobbs* has shown us, no law is "clearly" unconstitutional. *Dobbs*, 142 S. Ct. at 2243.

The governmental "process" is just as important, and we contend more important, than just P.L. 20-134. Whether the law under scrutiny be an anti-abortions statute, or a jay walking law, the procedure in which the law must first be certified as a law by the Guam Legislature and the Governor's role in creating that law, must mature and complete, before the Courts can determine that law's constitutionality. And even that Judicial determination of constitutionality is subject to future challenge and reconsideration under *Dobbs*, 142 S. Ct. at 2243.

The existence of the Legislature's Speech or Debate Clause and protection from intrusion by the Executive Branch or the Courts into the Legislative realm was

upheld on Guam previously in *Hamlet*. *Hamlet*, 1999 Guam 18. That Supreme Court of Guam opinion should once again guide us in establishing a legal framework respectful of a co-equal branch of government to handle not just P.L. 20-134, but all other similar laws that will in the future come before the Courts. The Courts should let the Legislature finish its act, and then, and only then, should the Courts involve themselves. That legal process creates the most flexibility to handle future cases to *Dobbs* – like fact patterns, as well as following the *stare decisis* holdings like *Hamlet* and this High Court's respect for a co-equal branch of government whose acts in passing laws are intended to benefit our People and community.

C. Case law cited by Petitioner is inapplicable to this novel situation.

Petitioner argues that the fact that the state of the law after *Dobbs* permits the Guam Legislature to pass a restrictive abortion law today does not mean that the Guam Legislature could have passed such a law earlier, because "*Dobbs* does not purport to reach thirty years into the past to grant the 20th Guam Legislature authority where it had none." Pet'r's Br. at 21-22. In support of her argument, the Petitioner cites to *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955). There, the Legislature of the Virgin Islands enacted a divorce law that allowed a plaintiff to make a *prima facie* showing of domicile if the plaintiff maintained a continuous presence in the Virgin Islands prior to filing for divorce. *Id.* at 2-3.

The *Granville-Smith* Court held that Congress conferred upon the Virgin Islands Legislature the

power to enact laws that have a "local application" limited "to subjects having relevant ties within the territory". *Id.* at 9-10. Because the divorce law was "designed for people outside the Virgin Islands" *id.* at 11, the Court held that the Virgin Islands Legislature exceeded its Organic Act authority in enacting the law. *Id.* at 16.

Here, on the other hand, P.L. 20-134 applies to everyone in the territory. It was not "designed for export" to reach persons outside the territory like the Virgin Islands law. Therefore, the *Granville-Smith* case does not support the Petitioner's contention that P.L. 20-134 is inorganic.

D. Petitioner's arguments have untenable policy implications.

The process is more important than the arguments about P.L. 20-134, and the legal issue presented in this § 4104 action will have lasting effects upon the administration of justice. As mentioned earlier in Part I.A.2, *supra*, Petitioner's void *ab initio* argument suffers from a practical application problem. It poses the "*chicken before the egg*" problem and is not conducive to future correction of Judicial mistakes. First, saying that a Senator's action in passing a bill is "void *ab initio*" presupposes that a judicial determination on that same bill exists before the Senators consider a bill. This is not how the facts normally play out.

Ordinarily a law is passed and no further Legislative action takes place. Then, if a party brings it before the court, the Judiciary can consider that law

and pass judgment. In the case of P.L. 20-134, an injunction properly issued based upon *existing* United States Supreme Court precedent. *See Guam Soc'y of Obstetricians*, 776 F. Supp. at 1426 (imposing injunction) (citing *Roe v. Wade*, 410 U.S. 113). The legal process also allowed for *Dobbs* to be decided, and mandated that injunctions issued earlier should be dissolved because the case authority and legal reasoning were simply wrong. The reality of this situation applied to P.L. 20-134 is that the 1990 decision imposing the injunction was wrong in 1990 and, according to the U.S. Supreme Court's reasoning in *Dobbs*, P.L. 20-134 was a constitutionally valid law passed by the Guam Legislature. Petitioner's interpretation does not work in these real life situations of Judicial reconsideration and reversal.

Under Petitioner's void *ab initio* argument, the Legislature's act in passing P.L. 20-134 was invalid at the time the Legislature passed it in 1990, "*end of story*." Such, however, was not the case, as the *Dobbs* decision in 2022 corrected the erroneous *Roe* decision that the District Court relied upon in 1990. The administration of justice demands that we not make the same mistake by "*setting into stone*" pronouncements like "void *ab initio*," otherwise the Legislature's act in 1990 (or at any other time) is simply a nullity when the Legislature passes a bill into law. The People of Guam would forever be deprived of the otherwise valid law under Petitioner's methodology.

The logic is fundamentally flawed and incapable of later Judicial correction for its errors (in determining the unconstitutionality in the case of P.L. 20-134). The

"cleaner" and more workable legal process and procedure would be to allow a bill to pass into law, clear the Legislative realm, then either impose a Judicial injunction to "strike it" and allow for later court proceedings in the Judicial Branch to potentially correct an earlier error or injustice. We must not forget that the reasons a law is passed is to confer a benefit upon our People. To callously and impetuously presume that a law is wrong and unconstitutional prevents future correction that acknowledges the fallibility of us all, whether we be senators, governors or judges, and the flexibility in our legal analysis to "fix" a mistake. The opposition provides no workable solution to this fallibility problem.

Also, to apply a void *ab initio* framework, we ignore an important precept: that each two-year Legislature is different. The Judiciary's application of a void *ab initio* approach would effectively negate the beneficial actions by a particular set of senators who only exist for that two-year period, and the benefits that could arise from that particular mix and the laws they pass. In other words, application of the void *ab initio* theory to a P.L. 20-134 fact pattern would destroy that public law forever and prevent allowing for the public law to be enforced based upon a Judicial error that needed to be corrected later in time. It is also unfair since the Courts would be given the ability to change its decisions, but the Legislature would not be able to have their otherwise good law to be enforced because a "void *ab initio*" rule would forever kill a law that should have been benefiting our People and community.

Under Petitioner's void *ab initio* argument, the People would never be able to benefit from P.L. 20-134 because it was unconstitutional, when in fact it was "constitutional" in 1990 because the Supreme Court of the United States made an "*egregious error from the start*" in having decided *Roe*. *Dobbs*, 142 S. Ct. at 2243 (emphasis added). "An interpretation must be reasonable." 20 GCA § 15134 (maxim of jurisprudence). Applying an injunction for so long as the Courts deem it appropriate is the most sound "administration of justice." It allows for the flexibility needed for the Judiciary of Guam to potentially correct errors versus forever striking a law, finding out later the law should not have been stricken, then *not* allowing that law to be enforced since it was always good law. Our interpretation not only addresses the P.L. 20-134 situation, but any future similar situations. "An interpretation which gives effect is preferred to one which makes void." 20 GCA § 15133 (maxim of jurisprudence). It also respects the Separation of Powers doctrine, and restrains judicial overreach.

II. Public Law 20-134 remains enforceable because subsequent legislation did *not* impliedly repeal it.

This is a case and question of first impression. Whether a subsequent law impliedly repealed P.L. 20-134 is a "*loaded question*." In analyzing this legal issue, one must first recognize that implied repealer cases normally do not analyze a Senator's later actions in light of a prior law being enjoined, and those subsequent Senators being *fully aware* that an

injunction prevented them from passing the same law in a futile attempt.

How can one (impliedly) repeal a law that does not exist? Petitioner's declaratory judgment question presupposes a substantial fact that does not exist. P.L. 20-134 did not exist after the 1990 injunction occurred. Therefore, you cannot even compare that law against the 4 subsequently passed laws to evaluate any form of "repealer."

In this case we are dealing with the 1990 20th Guam Legislature that had its P.L. 20-134 prohibiting abortions enjoined by the Courts. Every law after that law not only attempted to restrict abortions, like P.L. 20-134 had done, yet also had Senators acting with the clear understanding that P.L. 20-134 was enjoined so they could not pass another anti-abortion law. In other words, each Senator acted with full knowledge that he or she could not again prohibit abortions on Guam as P.L. 20-134 had tried to do. This is an important, distinguishing fact and critical framework in which the Supreme Court of Guam should scrutinize Petitioner's argument for "implied repealer."

Petitioner's implied repealer argument fails when one simply considers that the later legislatures passed the 4 partial anti-abortion laws understanding that they could not pass a full anti-abortion law like P.L. 20-134 because an injunction existed. The Senators fully understood they could not pass another law fully outlawing abortions.

In her Request for Declaratory Judgment (7 GCA § 4104), Petitioner states:

> Finally, if the court finds that P.L. 20-134 is not void, invalid, or otherwise unenforceable, it has been repealed by implication by subsequent laws enacted by the Guam Legislature. "It is a well settled rule that later statutes repeal by implication earlier irreconcilable statutes." *People at Territory of Guam v. Quinata*, 1982 WL 30546, at *2 (D. Guam App. Div. 1982), *aff'd*, 704 F.2d 1085 (9th Cir. 1983); *see also Sumitomo Constr. Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 16 ("Implied repeals can be found in two instances: (1) where the provisions in the two acts are in irreconcilable conflict, or (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.") (internal quotations omitted).

Request for Declaratory Judgment ¶ 27 (Jan. 23, 2023).

Petitioner goes on to state:

> P.L. 20-134 cannot be reconciled with subsequent laws passed by the Guam Legislature that govern abortion on Guam.

Request for Declaratory Judgment ¶ 28 (Jan. 23, 2023). However, this fact pattern is substantially different than the cases Petitioner cites. The Senators post 1990 20th Guam Legislature were not passing laws that were "irreconcilable with P.L. 20-134." They were passing laws that were in lieu of P.L. 20-134 because P.L. 20-134 did not exist. The picture of what happened is crystal clear. They acted to restrain abortions as much as they could because they knew that the Courts

stopped their earlier attempt to make abortions illegal altogether. The Governor's cases are not on point.

In *First Nat'l Bank of Millville v. Horwatt*, 162 A.2d 60 (Pa. Super. Ct. 1960), the court there stated: "In determining whether a prior act is repealed by implication, the question is exclusively one of legislative intent." *Id.* at 63 (holding that adoption of the Uniform Commercial Code did not impliedly repeal the Pennsylvania Motor Vehicle Sales Act). In this case the legislative intent in the four laws were consistent with P.L. 20-134 in that they were attempting to restrict an abortion in light of the Senators inability to outright outlaw it as they tried to do but had the original law enjoined. The four laws passed after P.L. 20-134 never repealed P.L. 20-134 because the Senators knew full well that there was no law to repeal because that law was already enjoined.

Normally, "the implied repeal doctrine provides that if two statutes are so inconsistent that the provisions of both cannot reasonably be construed to be in effect at the same time, the later repeals the earlier to the extent of such inconsistency, even in the absence of a repealing clause." *Brown v. Porter*, 149 F. Supp. 963, 972 (N.D. Ill. 2016) (citing *Campbell v. City of Chicago*, 119 F.2d 1014, 1017 (7th Cir. 1941) (quotation marks omitted)). Again, the problem with this "traditional" treatment of an implied repealer fact pattern is that you have a valid law that was originally passed. Here, that original law did not exist because it was earlier enjoined in 1990. There was nothing to repeal. Had they known that P.L. 20-134 was still good law, then the Senators would not have passed the 4 laws, or

would have taken an affirmative step to repeal P.L. 20-134. Those are not the facts of our reality.

The law disfavors implied repeals but will allow them under the following limited circumstances:

> (1) Where provisions in the two acts are in *irreconcilable* conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and
>
> (2) If the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503 (1936); *accord Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In any case, there must be a "clear and manifest" intent by the legislature to repeal, otherwise "the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment." *Posadas*, 296 U.S. at 503 (emphasis added). Here, not only did P.L. 20-134 not exist when they passed the 4 subsequent anti-abortion laws, but the 4 law that the Senators passed clearly are trying to restrict the act of an abortion. They were not laws mandating that abortions are legal on Guam, nor did they simply state that P.L. 20-134 was repealed. The reason they did not state that in the laws was: (1) the Senators already knew P.L. 20-134 was impossible to pass due to the injunction, and (2) they did not intend to allow

abortions because the laws they passed were trying to restrict the ability to freely have an abortion.

A. The question incorrectly presumes non-existent facts.

When one considers an "implied repealer" situation, one presumes that a valid law existed. In this case P.L. 20-134 did not exist for the Senators to consider to repeal. In fact, the exact opposite occurred. Specifically, in the Legislatures subsequent to the 20th Guam Legislature that passed P.L. 20-134, the legislators all knew and recognized that they could not prohibit abortions because the U.S. District Court of Guam in 1990 struck down P.L. 20-134 as unconstitutional.

Not only did each subsequent Guam Legislature after 1990 that touched the issue of reproductive rights pass laws trying to restrict abortions consistent with P.L. 20-134, but they did so with the full knowledge that they could not logically re-pass their anti-abortion law, P.L. 20-134, because it was under an ongoing injunction.

Moreover, Petitioner's reasoning ignores the obvious question: "How can you repeal a law that is non-existent?" This is the reality that each post-1990 Legislature (post-1990 P.L. 20-134 injunction) operated under. Petitioner's flawed reasoning would have the Courts start with the presumption that the Senators were unaware that a 1990 injunction prevented them from passing another anti-abortion law. Such is factually *not* the case. Instead, the Senators proceeded by introducing, considering and then passing four bills into law that did everything possible to slow and

restrict abortions as much as possible in light of the 1990 injunction upon their former law that completely banned an abortion.

In contrast, had the post 1990 Guam Legislatures intended to do so over the past 30 years, they could have simply *repealed* P.L. 20-134 and statutorily allowed abortions on Guam. They did just the opposite. Each of the four laws in fact restricted abortions as much as they could do to preserve the life of the unborn fetus, understanding that a 1990 injunction prevented them from passing another law again stopping abortions on Guam. Also, for each of the four laws passed after the 1990 injunction, the Senators could have simply identified the code sections added by P.L. 20-134 and repealed them.[4] They did not.

Petitioner's argument is *not* applicable to this fact pattern. It ignores important facts inapplicable to the interpretative laws regarding implied repealer statutory analysis. Petitioner's interpretation should not be adopted.

B. The June 24, 2022 reversal of *Roe v. Wade* reinstated Public Law 20-134.

When a Supreme Court finds a law or principle unconstitutional, and that law found a prior statute unconstitutional, the change in constitutional law reinstates the prior statute into the legal firmament. The prior statute that an earlier court struck based on

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[4] Senators could have included in the four post-1990 laws a reference to repeal 9 GCA §§ 31.20 and 31.23 (enacted by P.L. 20-134).

misinterpreting the Constitution becomes valid law again. *See Pickens County v. Pickens County Water & Sewer Auth.*, 312 S. Ct. 218, 220 (1994) (*cited in* Norman J. Singer & J.D. Shambie, *Sutherland's Statutes & Statutory Construction*, § 23:6 (7th ed. 2007)). The only reason the initial statute had no legal effect is because a constitutional court misinterpreted the Constitution. A re-interpretation that corrects the error eliminates the only impediment to the statute's legality.

The striking of P.L. 20-134 was passed to confer a benefit upon Guam's People. The fact that the Judicial Branch made an "egregious error" or mistake should not deprive our People of the benefits of that legislation. In fact, an Organic Act imperative exists to apply equity to ensure that the 1990 law is immediately applied to right the "wrong."

What other effect should the later Constitutional Court's interpretation have? For what reason could the later court rely on to hold the original statute invalid? None exists. If a legislature satisfies all constitutional requirements to enacting a law, the Constitution automatically bestows legality on the act. Reversing a decision finding that a statute violates the Constitution places that statute in the same legal position prior to the faulty judgment: the Legislature enacted a valid law following constitutional standards. To hold otherwise strikes a statute by fiat and violates the Separation of Powers. The striking is *ultra vires* because it does not abide by the constitutional rules. A court must have a reason originating in the

Constitution to invalidate a Legislature's act. Without that reason, it has no power to hold a law invalid.

In this case, *Dobbs* reversed *Roe*, holding that the United States Constitution recognizes no fundamental right to abortion. *Dobbs*, 142 S. Ct. at 2242. The District Court of Guam held P.L. 20-134 unconstitutional because it violated *Roe*'s holding that the Constitution grants women a fundamental right to an abortion. *Guam Society of Obstetricians*, 776 F. Supp. at 1428-29. Without *Roe*, the District Court of Guam has no authority to enjoin P.L. 20-134. After *Dobbs*, the Organic Act guarantees P.L. 20-134's validity.

After *Dobbs*, Guam Courts must try to read all five abortion statutes together, recognizing that only four have been enforceable since P.L. 20-134 has been enjoined since 1990. Courts can read the Reporting Statute and the Partial-Birth Abortion law together with P.L. 20-134 because physicians still could report performing abortions that jeopardize a woman's health, and partial-birth abortions represent a specific instance of a more general ban. But reinstating P.L. 20-134 removes the Parental Consent Law and the Informed Consent Law from Guam's statutory code. The bottom line is that the four subsequently passed laws must be read in the light that the Senators knew that they could not pass a full anti-abortion law.

These laws had no constitutional infirmity, but demanding consent for a minor to obtain an optional abortion, and requiring physicians to inform all women about the stakes of an optional abortion, violate the ban on all optional abortions. The laws presume the

constitutionality of *Roe*. No implied repeal occurred at the time these statutes were enacted because P.L. 20-134 remained invalid. But neither Legislature that enacted the Parental Consent Law nor the Legislature that enacted the Informed Consent Law would have done so had not the U.S. Supreme Court erred by misinterpreting the Constitution, which enabled the District Court to find P.L. 20-134 invalid. In Guam, *Dobbs* rendered the Parental Consent and the Informed Consent laws moot. The Legislature itself always can amend P.L. 20-134 based on the will of the people.

C. The four other statutes that address the subject of abortion can be read in light of an injunction upon Public Law 20-134.

The statute in question, P.L. 20-134, was a sweeping ban on abortion, setting criminal penalties for persons (1) providing drugs or employing other means to cause an abortion, (2) submitting to an operation or to the use of other means with intent to cause an abortion; and (3) "soliciting" a woman to submit to an abortion. P.L. 20-134 also purported to repeal the statute which governed abortions at that time, which were enacted in 1978 as part of the original Criminal and Correctional Code.

Subsequent to the U.S. District Court of Guam enjoining the enforcement of P.L. 20-134, the Guam Legislature passed four statutes relating to abortion. In 2012, the 31st Guam Legislature passed P.L. 31-155, the Parental Consent for Abortion Act ("PCAA"), which is codified at 19 GCA § 4A101.

The PCAA prohibits a person from performing an abortion upon a pregnant unemancipated female under the age of eighteen, unless the person first obtains the written consent of both the pregnant person and one of her parents or a guardian. *See* 19 GCA § 4A102. Section 4A107 of the PCAA further authorizes the Superior Court of Guam to waive the consent requirement for a minor if the court finds, by clear and convincing evidence, that the minor is sufficiently mature or well-informed to decide whether to have an abortion, and to issue an order authorizing the minor to consent to the performance of an abortion without the consent of a parent or guardian. *See* 19 GCA § 4A107. Section 4A109(a) of the PCAA provides that any person who performs an abortion with knowledge that the person upon whom the abortion is to be performed is an unemancipated minor is guilty of a third degree felony. Any person not authorized to provide consent for a minor to have an abortion who provides consent is guilty of a third degree felony. 19 GCA § 4A109(c). Any person who coerces a minor to have an abortion is guilty of a misdemeanor. 19 GCA § 4A109(d).

Later, in 2012, the 31st Guam Legislature also passed P.L. 31-235, the Women's Reproductive Health Information Act of 2012 (the "HIA"). The HIA, codified at 10 GCA § 3218.1, regulates general consent to abortion. Under § 3218.1(b), a person provides "voluntary and informed consent" to abortion when at least 24 hours prior to obtaining an abortion, the physician gives the patient specific information regarding the procedure in person, including a description of the method, the associated medical risks

of the proposed abortion, the probable gestational age of the unborn child at the time the abortion is to be performed, the medical risks associated with carrying the pregnancy to term and any need for anti Rh immune globulin therapy, risks for declining such therapy, and costs associated therewith.

In 2009, the 29th Guam Legislature passed P.L. 29-115, the Partial Birth Abortion Ban Act of 2008, codified at 10 GCA § 91A101 *et seq*. It prohibits a person from knowingly performing or attempting to perform a partial-birth abortion, defined as vaginally delivering a living fetus until either the entire fetal head is outside the body of the mother in the case of breach presentation, for the purpose of performing an act the person knows will kill the partially-delivered living fetus, and performing an overt act that kills the partially delivered living fetus. 10 GCA §§ 91A103 & 91A104. A person who performs a partial-birth abortion shall be guilty of a third degree felony. 10 GCA § 91A106.

In 1994, the 22nd Guam Legislature passed P.L. 22-130, which, in relevant part, repealed Chapter 3 of Title 10, Guam Code Annotated and added a new Chapter 3 to Title 10. Title 10 GCA § 3218 requires that individual reports for each abortion are completed by the attending physicians and transmitted to the Office of the Vital Statistics of the Department of Public Health and Social Services, and that such reports shall be confidential and not contain the name of the mother. 10 GCA § 3218. The Office of the Vital Statistics shall receive and retain the reports, and

publish a statistical report based on the date on an annual basis.

Petitioner incorrectly argues that these four statutes form a complex regulatory scheme that recognizes and regulates abortion as a lawful medical procedure on Guam. Petitioner reaches this conclusion by concluding that these four statutes repealed, by implication, P.L. 20-134, the abortion ban statute enacted in 1990. The logic is fundamentally flawed because P.L. 20-134 did not exist and the Senators clearly knew it when they passed the four laws. Petitioner's logic would only have a "leg" to stand on had the injunction upon P.L. 20-134 not existed.

The more tenable explanation is that the Senators passed four laws trying to re-establish as many restrictions as they could, if they could not outlaw abortions altogether like they tried to do in 1990. *Dobbs* mandates lifting the injunction, so that the benefits of P.L. 20-134 intended by the Guam Legislature finally are enforced as the Legislative Branch intended.

III. The People of Guam propose, as a resolution to the issues in this case, that the referendum envisioned in Public Law 20-134 take place.

An "*equitable resolution*" best serves the People of Guam. "An egregious wrong occurred from the start." *Dobbs*, 142 S. Ct. at 2243. Those words are normally not seen in local decisions, and practically never seen coming from the Supreme Court of the United States. Moreover, the Supreme Court of the United States stated:

> We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.
>
> We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

Dobbs, 142 S. Ct. at 2279 (emphasis added).

In light of the "*egregious wrong*" authored by the Judicial Branch, the question of whether abortions should or should not be permitted on Guam must be placed before the People of Guam to decide pursuant to the mandate created by the Legislative Branch. "An interpretation which gives effect is preferred to one which makes void." 20 GCA § 15133 (maxim of jurisprudence).

Public Law 20-134 expressly provides for an abortion law **referendum** *for the People of Guam to decide this important question*:

> (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

> "Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-___), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?"
>
> In the event a majority of those voting "Yes", such public law shall be repealed in its entirety as of December 1, 1990.
>
> (b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

P.L. 20-134, § 7 (Mar. 19, 1990).

Guam's High Court, instead of looking for ways to invalidate the law, should instead be open to ways to make the referendum happen. This is the Democratic way, and equitably fixes a bad situation that has taken over three decades to reach this point. The People have been deprived of a law duly passed by the Guam Legislature for 33 years, which was intended to provide a public benefit. "The law respects form less than substance." 20 GCA § 15120 (maxim of jurisprudence).

A. The referendum proposes an equitable solution to a thorny problem.

A referendum not only applies equity to an unprecedented situation exacerbated by the Federal Judiciary, but furthers the ends of both the Supreme Court of the United States and the mandate of the Guam Legislature. Ordering the referendum "bridges" the warring camps on opposite ends of the abortion issue to bring closure, and effectuates the legislative mandate along with *Dobbs's* fundamental returning the question to local Democratic principles and decision making.

When exercising equity jurisdiction, a judge may seek a just result and "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The decree may display "flexibility" in pursuit of a practical resolution. *Id*.

In *Hecht Co.*, the Administrator of the 1942 Emergency Price Control Act sought to enjoin a D.C. department store from violating the act by selling goods above the prescribed level. The Supreme Court would not reverse the District Court's decision not to enjoin the overcharges because the District Court found that the department store acted in good faith, that it sought to correct the mistake by devoting more resources to interpreting the byzantine regulations, and that it offered to donate the overcharges to a local charity. *Id*. at 325-26.

Although courts hesitate to grant affirmative injunctions, injunctions compelling acts are available whenever the circumstances warrant. In *Ferry-Morse*

Seed Co. v. Food Corn, Inc., 729 F.2d 589 (8th Cir. 1984), the defendant argued that the court should impose a more stringent injunction standard when a party seeks affirmative relief instead of prohibitory relief. *Id.* at 593. The Eighth Circuit Court of Appeals refused, saying that when the status quo is shifting, creating a threat of irreparable harm, courts will not hesitate to issue an affirmative injunction. *Id.* The Eighth Circuit acted to do equity when equity was required. "For every wrong there is a remedy." 20 GCA § 15115 (maxim of jurisprudence).

The situation between Guam's branches of government has been shifting on the abortion issue. The U.S. Supreme Court issued an almost unprecedented repeal of a constitutional right that threw Guam's abortion statutes post P.L. 20-134 into disarray. Two of the three political branches now do not wish to agree to nor be held accountable for any new abortion legislation. The 1990 law, which *Dobbs* reinstituted, called for a referendum. Everyone could agree that the Legislature enacted the 1990 law and that it mandated that even that Legislature's bold statement needed to be agreed to by the People of Guam through a referendum. The legislation was prophetic of what the *Dobbs* Court would ultimately decide over three decades later. Many views, including those on abortion, could shift over time. And 33 years is a long time. A referendum would subject the 1990 law to current views on abortion and serve as a just resolution to this heated question. Democracy has a way of harmonizing unsettled issues, including those before the Judiciary.

Guam's High Court has the opportunity to timely call for an election on the question of P.L. 20-134 to finally bring to fruition the mandate of the Guam Legislature. The Attorney General is prepared to likewise exercise his prosecutorial discretion to defer prosecution against women who may be seeking an abortion until such time as the referendum occurs.

B. Allowing the referendum to go forward lets the Democratic process unfold.

A referendum is defined as "[t]he process of referring a state legislative act . . . to the people for final approval by popular vote" or "[a] vote taken by this method." Black's Law Dictionary 1307 (8th ed. 2004). In contrast to laws enacted after being voted on by legislative representatives, a referendum allows the members of the electorate to cast a direct vote on a proposed law.

Other courts have held that "[t]hough the implementation of change through popular referendum does not immunize it from constitutional limitations, the results of the democratic process deserve initial respect in the courts." *Center for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 639, 673-74 (S.D. Ohio 2016) (citing *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 505 (6th Cir. 2012) (Sutton, J., dissenting), *rev'd sub nom Schuette v. BAMN*, 572 U.S. 291 (2014)).

The *Dobbs* Court stated that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at

2279. Holding a referendum now will fulfill the Democratic promise of P.L. 20-134.

C. The referendum permits Guam's High Court to exercise judicial restraint.

Conceptually, the judiciary violates the doctrine of the separation of powers when it interferes with the proper functioning of the other two branches of government. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). When the judicial branch exercises judicial restraint, it limits its own powers so that all three branches function without encroaching upon one another's domain.

In *Pinson v. U.S. Dep't of Justice*, 514 F. Supp. 232 (D.D.C. 2021), a plaintiff successfully sued prison officials for violating her first amendment rights under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which "permits a plaintiff to recover [money] damages against individual federal officers for violations of certain constitutional rights even when there is no statute authorizing her claim." *Pinson*, 514 F. Supp. at 239. Defendants sought reconsideration in light of the U.S. Supreme Court's decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017).

The *Abbasi* Court held that, under the *ancien regime* of earlier precedents, it would recognize only three types of *Bivens* claims: for violations of rights found in the fourth, fifth and eighth amendments, *id.*

at 131-32, because when the judicial branch creates a cause of action against government officials, this implicates separation of powers concerns. "[E]xpanding the *Bivens* remedy is now a disfavored judicial activity", *Abbasi*, 582 U.S. at 167, that is best left to the legislative branch, which is "better positioned than the courts to weigh the host of considerations involved in imposing a new substantive legal liability." *Pinson*, 514 F. Supp. at 240 (citing *Abbasi*, 582 U.S. at 135-36). As a result, the court in *Pinson* exercised judicial restraint and declined to "insert into th[e political-legislative] sphere a new form of liability." 514 F. Supp. at 242.

Similarly, the Court in this case should exercise judicial restraint and let the people decide the fate of P.L. 20-134, as the Guam Legislature intended, and out of respect for that co-equal Branch of Government, instead of keeping that decision to the Judicial Branch.

Conclusion

The Organic Act of Guam authorized the Guam Legislature in 1990 to pass P.L. 20-134. As a co-equal branch of government, the Guam Legislature did not commit an *ultra vires* by passing the public law. The Judiciary made an egregious mistake, which highlights the importance of the governmental process to continue unmolested by voiding laws passed by the Guam Legislature *ad infinitum*.

Neither did the Senators impliedly repeal P.L. 20-134 because there was no law in existence with the injunction in effect upon P.L. 20-134 in 1990 before the four subsequent laws. In fact, just the opposite, the subsequently passed laws recognized the 1990

injunction upon P.L. 20-134 and took our laws as close to prohibiting abortions as they could under *Roe v. Wade*.

The proper equitable resolution of this matter is to find that, based upon the legal issues presented in this case, P.L. 20-134 is valid and that the referendum required by the Guam Legislature should be conducted. Our Supreme Court of Guam should uphold the Rule of Law and prevent a few from taking away the People of Guam's fundamental and Democratic right to vote upon this important and divisive question.

Respectfully submitted this 21st day of April, 2023.

OFFICE OF THE ATTORNEY GENERAL

/s/ Douglas B. Moylan
Douglas B. Moylan
Attorney General of Guam

[*Certificate of Compliance Omitted in Printing of this Appendix.*]

Statement of Related Cases

The following case is related to this matter:

(1) *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, Case No. 1:90-CV-00013 (D. Guam).

Respectfully submitted this 21st day of April, 2023.

OFFICE OF THE ATTORNEY GENERAL

/s/ Douglas B. Moylan
Douglas B. Moylan
Attorney General of Guam

[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX D

IN THE SUPREME COURT OF GUAM

Supreme Court Case No. CRQ23-001

[Filed March 31, 2023]

IN RE: REQUEST OF LOURDES A. LEON GUERRERO, I MAGÅ'HÅGAN GUÅHAN,	)
Petitioner,	)
vs.	)
DOUGLAS B.K. MOYLAN, I ABUGÁO HINIRAT and I LIHESLATURAN GUÅHAN *Respondents.*	)

On Petition for Declaratory Judgment Relative to the Validity and Enforceability of Public Law 20-134

BRIEF OF RESPONDENT I LIHESLATURAN GUÅHAN

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CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record for Respondent, I Liheslaturan Guåhan, certifies that in addition to the named parties, there are no individuals or entities with an interest in the outcome of this case.

The undersigned also certifies, based on information and belief, no assigned Justice presided over any portion of the instant case or any related proceeding in the court below and no Justice has served as counsel of record or provided legal advice to any party to these proceedings.

Respectfully submitted this 31st day of March, 2023.

PHILLIPS & BORDALLO, P.C.

By: /s/ Michael F. Phillips
MICHAEL F. PHILLIPS

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I. STATEMENT OF THE CASE

On January 23, 2023, Petitioner, Lourdes A. Leon Guerrero, I Måga'hagån Guåhan, ("Petitioner") filed a verified Petition for Declaratory Judgment Relative to the Validity and Enforceability of Public Law 20-134. Petitioner asks this Court to rule, *inter alia*, I Liheslaturan Guåhan did not have the authority to pass Public Law 20-134 pursuant to the Organic Act of

Guam, and further alleges Public Law 20-134 is *void ab initio* and invalid.

The Supreme Court of Guam, on February 17, 2023, designated Douglas B.K. Moylan, I Abugáo Hinirat, as a Respondent, and invited Liheslaturan Guåhan to participate in this matter as a Respondent. Liheslaturan Guåhan accepts this Court's invitation recognizing "the Governor's Questions touch on the powers and authority of I Liheslaturan Guåhan."

II. SUMMARY OF ARGUMENT

Courts do not have authority to erase a duly enacted law from the Guam Code or Public Laws and have no power to veto or literally "void" a statute retroactively. The power of judicial review permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute while the court's injunction remains in effect. A Guam public law continues to exist even after a court later opines it violates the Organic Act, and remains law until I Liheslaturan Guåhan repeals the law.

"Despite its possible conflict with the Organic Act, the original [Public Law 20-134]" remains a statute (*Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir. 1977) subject to this Court's equitable power of injunction or legal interpretation. The question asked by the courts should be, "Is Public Law 20-134 valid today?" I Liheslaturan Guåhan defers to the Guam Supreme Court the necessary interpretation and, if needed, possible remedies. The Organic Act of Guam

exclusively authorizes I Liheslaturan Guåhan to repeal or amend Public Law 20-134.

III. ARGUMENT

The Organic Act of Guam, as it existed in 1990, authorized I Liheslaturan Guåhan to pass Public Law 20-134

A. I Liheslaturan Guåhan respectfully declines to involve itself with the subsequent judicial interpretation of the current validity or invalidity of Public Law 20-134.

"I may disagree with what you say, but I will defend to the death your right to say it." This adage, often used while defending freedom of speech, similarly explains I Liheslaturan Guåhan's position before the Court today. The Organic Act of Guam in 1990 authorized I Liheslaturan Guåhan to pass Bill No. 848, as a "subject of local application," and today authorizes I Liheslaturan Guåhan to pass any bill applying to "rightful subjects of legislation."

I Liheslaturan Guåhan declines to involve itself with the subsequent judicial interpretation of the current validity or invalidity of Public Law 20-134 as resolution of this dispute is properly left to the Judicial Branch within the Government of Guam. Reciprocally, I Liheslaturan Guåhan requests the Guam Supreme Court not disturb the previous or current authority of I Liheslaturan Guåhan to pass bills or perform functions authorized by the Organic Act of Guam. I Liheslaturan Guåhan does not side with either I Måga'hågan Guåhan or I Abugáo Hinirat.

B. The history of the Organic Act is primarily shaped by the unending desire of the people of Guam for autonomy and self-governance.

The Treaty of Peace between the United States and Spain ceded Guam to the United States in 1898. In 1950, the United States created the Government of Guam granting limited powers of self-government and restricted Guam's authority to the specific grants contained in the Organic Act of Guam.

The Guam Supreme Court should take judicial notice of the pre-Organic Act half-century struggle of the people of Guam to govern themselves under United States rule. The focus of the desire for autonomy remained, for the most part, on the quest to pass laws for ourselves and have our laws honored and upheld, basic elements of self-governance.

> When Guam received its Organic Act in 1950, after half a century of US naval occupation, it was not a benevolent gift from a generous colonizer nor a prize awarded to the Chamorro people for their loyalty throughout a brutal wartime experience. Rather, its long-overdue passage in an era of decolonization is attributable to various factors, including a half-century of Chamorro resistance climaxing with a walkout by the Guam Congress in 1949. The walkout generated intense national publicity, and friends of Guam residing in the United States stepped up their lobbying efforts, using the walkout to illustrate graphically Chamorro dissatisfaction with US naval rule.

Hattori, Anne Perez. "Righting Civil Wrongs: The Guam Congress Walkout of 1949." *ISLA: A Journal of Micronesian Studies* 3, no. 1 (Rainy Season 1995): 1-27.

"The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters... shall be under the general administrative supervision of the Secretary of the Interior." The Congress promulgated, "the legislative power of Guam" "shall extend to all subjects of legislation of local application not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam." Organic Act of Guam 48 U.S.C.A. § 1421 et seq. (1950).

The Guam Supreme Court has outlined the relevant change to the Organic Act affecting the authority of I Liheslaturan Guåhan:

> The Organic Act of Guam remained substantially unchanged for twenty years following the 1968 Elective Governor Act amendments. In 1998, an amendment was passed which extended Guam legislative power, changing language from "all subjects of legislation of local application not inconsistent with the provisions of this [Organic] Act and the laws of the United States applicable to Guam" to "all rightful subjects of legislation not inconsistent with the provisions of this [Organic] Act and the laws of the United States applicable to Guam." Pub. L. 105-291, 105th Cong., § 4 (1998) (enacted and codified at 48 U.S.C. §§ 1421g, 1423a). Such amendment to the Legislature's powers were enacted to "provide

> Guam with a greater measure of self-government." H.R. Rep. No. 105-742 (1998), 1998 WL 658802 at *3.

In re Request of Camacho, 2004 Guam 10, 32 (Guam 2004).

While the people of Guam have not yet received the authority to consent to be governed, we can hardly afford to have our limited powers to legislate for ourselves further restricted.

> Guam continues to be a nonself-governing territory. It remains a nonself-governing territory because it does not have any voting participation in the laws that are applicable to them in any respect. So an individual living in a territory and a law is passed here on the Endangered Species Act or a law regarding the regulation of land or the law regarding taxation, and that law has some applicability to that person, it violates the very first tenet of the American creed, which is government by the consent of the governed. And there is no consent to governance.

Robert Underwood, Extension of Remarks relative to the 50th Anniversary of the Organic Act of Guam, Congressional Record, Volume 146 (2000), Part 12. pp. 16627-16630.

The Supreme Court of Guam may opine on the current validity of Public Law 20-134 without ruling this Guam law is no longer recorded or existing.

C. Public Law 20-134 addressed an authorized subject of local application.

In 1990, the Organic Act stated in relevant part, "The Legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam." Bill No. 848 and Public Law 20-134 were a "subject of legislation of local application" in 1990 and today remain a "rightful subject of legislation." It is for the courts to determine if Public Law 20-134 may be enforced or enjoined.

In the District Court of Guam, I Magå'hågan Guåhan pointed out the issues Public Law 20-134 raises "implicate ... a sensitive area of social policy." *Guam Society of Obstetricians and Gynecologists, et al. v. Lourdes A. Leon Guerrero, et al.*, Civil Case 90-00013, Memorandum In Support of Motion for Abstention, pp. 14-15. The Supreme Court of the United States has also found issues involving abortion are within the authority of local legislatures. "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." "We now ... return that authority to the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ , 79 (2022).

Arguably, Guam may not enact legislation exceeding authority such as approving treaties with China or declaring war with Russia. Article I, Section 10 of the United States Constitution prohibits states from engaging in a set of activities that implicate

international affairs, while the Supremacy Clause, Foreign Commerce Clause, and other constitutional provisions place key elements of this power with the federal government. This issue is beyond the necessary scope of this brief.

The Organic Act of Guam, as it existed in 1990, authorized I Liheslaturan Guåhan to pass Bill No. 848, signed into law as Public Law 20-134.

D. Public Law 20-134 remains a law until repealed by I Liheslaturan Guåhan.

The Organic Act of Guam, as of 1990, authorized I Liheslaturan Guåhan to pass Bill No. 848, later signed into law by Governor Joseph F. Ada as Public Law 20-134, and this law can be found as is recorded as a Public Law with I Liheslaturan Guåhan. I Liheslaturan Guåhan did not act *ultra vires* in passing Bill No. 848. *Ultra vires* ('beyond the powers') is a Latin phrase used in law to describe an act which requires legal authority but is done without it. As distinguished from the executive carrying out a function contrary to law, it is neither illegal nor contrary to the Organic Act for I Liheslaturan Guåhan to develop and pass bills on topics falling within the Organic Act scope of authority. See, *In re Request of Camacho,* 2004 Guam 10 ("With respect to the Governor's issuance of Executive Order 2004-07, we hold that such executive order is void as an invalid exercise of the Governor's authority to issue executive orders pursuant to section 1422.").

While some may conclude "a law is not a law unless it is enforceable," there is a legal distinction. The

legislative enactment remains notwithstanding a court issuing an injunction.

> Holding that a state law is preempted by federal law does not, however, render the entire state law "nonexistent" in the way that plaintiffs argue. The state law continues to exist until the legislature that enacted it repeals it. At the same time, any portion of the law that is preempted is unenforceable in court until Congress removes the preemptive federal law or the courts reverse course on the effect of the federal law. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy,* 104 VA. L. REV. 933, 953 (2018) ("[S]tate statutes that contradict 'supreme' federal law continue to exist as 'laws,' even as they go unenforced, and they would become enforceable if federal law were amended or reinterpreted to remove the conflict."). Preemption is therefore claim-driven: when a party successfully invokes preemption as a defense to a state-law *claim*, the court will apply the federal law and the state law will be disregarded to the extent the laws conflict.

Close v. Sotheby's, Inc., 909 F.3d 1204, 1209-10 (9th Cir. 2018).

The consequence or lack thereof resulting from Public Law 20-134 remaining on the books is not I Liheslaturan Guåhan's concern or reason for its appearance herein. I Liheslaturan Guåhan is united in its concern this Court may treat a duly enacted law as never having existed.

The original Organic Act provided the United States Congress with power to "deem" Guam laws otherwise in violation of the Organic Act valid.

> All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. *If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved*.

Organic Act of Guam § 19, 64 Stat. at 389 (codified as amended at 48 U.S.C. § 1423i) (emphasis added).

While appearing to be completely out of place given subsequent amendments, this Congressional mandate could be frustrated by a local court ruling a legislative enactment unconstitutional and *void ab initio*. If I Liheslaturan Guåhan passed Public Law 20-134 in 1967 and a court found it to be *void ab initio* and therefore treated it as it never existed, how would the Congress' failure to annul the law within one year have any legal possibility of effect?

> We agree with the defendants that Congress' failure to annul the original rebate bill within one year constituted an implied approval under former Section 19 of the Organic Act. Despite its possible conflict with the Organic Act, the original rebate law was implicitly ratified by Congress' inaction, and the Guam legislature's

> later alteration of the specific rebate percentages did not give rise to a possible independent violation of the Organic Act and therefore did not require congressional approval. Having concluded that Congress has impliedly approved of the Guam legislature's use of rebates, we need not address the issue of whether the passage of such rebates constituted unauthorized substantive changes in the Guam tax law, in violation of the Organic Act. *See HMW Industries, Inc. v. Wheatley*, 504 F.2d 146 (3d Cir. 1974). The judgment of the district court accordingly is affirmed.

Ramsey v. Chaco, 549 F.2d 1335, 1338 (9th Cir. 1977). (Emphasis added)

The courts have distinguished between I Liheslaturan Guåhan passing a bill and the enactment of a bill into law.

> Moreover, the language of the Act itself suggests that there is a distinction between the legislature's failure to pass appropriations and its inability to *enact* such measures. 48 U.S.C. § 1423i provides that "[e]very bill *passed* by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor." (emphasis added.) *Passage* is thus considered to be the first step toward enactment. If this section is to be read in harmony with Section 1423j(b), the Court must conclude that it is the legislature, rather than the governor, which controls the automatic reenactment provision.

Thirteenth Guam Legislature v. Bordallo, 430 F. Supp. 405 (D. Guam 1977) U.S. District Court for the District of Guam - 430 F. Supp. 405 (D. Guam 1977) February 14, 1977. See also *Nelson, et al. v. Ada*, 878 F.2d 277 (9th Cir. 1989) ("A statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." "Congressman Udall's comments also do not supply any clear indication of intent to ratify prior Guam legislation.")

Ratification by the Congress would appear to be impossible herein where the courts made clear the passage of the first Elected School Board law violated the Organic Act's earlier mandate that the Governor establish, mantain and operate public schools. *See also*, *Haeuser v. Department of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996) ("The Organic Act serves the function of a constitution for Guam. Guam's self-government is constrained by the Organic Act, and the courts must invalidate Guam statutes in derogation of the Organic Act.") The Judiciary properly remains authorized to "invalidate" a statute but not legislative actions. Courts are not able to literally render a duly passed law "*void ab initio*" and treat the law as never having existed. Judicial review is a non-enforcement prerogative, not a revisionary power over legislation.

Respondent, I Abugáo Hinirat, arguably faces a similar dilemma. Appellate courts should not "annul" previously existing lower courts' injunctions. There are remedies available and in this case I Liheslaturan Guåhan leaves argument in this debate to the other named parties and amici wanting to participate. As

with previous, otherwise valid court rulings, remedies sought should not include annulment or a finding of *void ab initio*. "History cannot be rewritten. There is no common law writ of erasure." *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 810 F. Supp. 263, 266 (N.D. Cal. 1992).

On July 6, 2022, the former Attorney General issued an "Opinion Memorandum" "Regarding Public Law 20-134 and *Dobbs v. Jackson Women's Health Organization*." General Camacho wrote in relevant part, "Because the 20th Guam Legislature did not have the power to pass P.L. 20-134 in the first place, it is *void ab initio* and has had no legal effect on Guam since its passage." The former Attorney General concluded, "The 1978 abortion law, currently codified at 9 GCA §§ 31.20 thru 31.22, remains on the books and has ostensibly been the operative law governing abortions in Guam since its passage." Attorney General of Guam, Opinion Memorandum, Ref. LEG-22-0324 (July 61 2022).

The title given in the actual public law, Public Law 20-134, states, "AN ACT TO REPEAL AND REENACT § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF." I Liheslaturan Guåhan did, in fact and in law, repeal the 1978 abortion law to which the former Attorney General refers. I Liheslaturan Guåhan leaves to the Guam Supreme Court the effect of I Liheslaturan Guåhan's repeal of the previous abortion statutes.

In *Guam Society of Obstetricians & Gynecologists v. Ada*, the Ninth Circuit correctly recognized "Guam enacted a statute." Plaintiffs challenged "the validity of

the [statute]." All the courts did was "enjoin enforcement of the Act." The Guam Supreme Court may attribute significance to the existence of Public Law 20-134 or it may find no significance. I Liheslaturan Guåhan duly passed Public Law 20-134 and it remains a Public Law today. It is for the Judiciary to determine whether previous courts' rulings enjoining enforcement of Public Law 20-134 continue and, if not, what consequences result from this Court's interpretation of the validity of Public Law 20-134 today.

> On March 19, 1990, the Territory of Guam enacted a statute ("the Act") outlawing almost all abortions. The only exceptions were abortions in cases of ectopic pregnancy, and abortions in cases where two physicians practicing independently reasonably determined that the pregnancy would endanger the life of the mother or "gravely impair" her health. All other abortions were declared to be crimes, both on the part of the women submitting to the abortions and on the part of the persons procuring or causing them.
>
> The validity of the Act was immediately challenged in this class action brought by the Guam Society of Obstetricians Gynecologists and others against Joseph F. Ada, the Governor of Guam. The district court accurately viewed the Act as a direct challenge to the regime of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in the Territory of Guam. The district court held that *Roe v. Wade* applied, and granted summary judgment for the plaintiffs,

permanently enjoining enforcement of the Act. 776 F. Supp. 1422. We affirm.

Guam Society of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368-69 (9th Cir. 1992) (Emphasis added).

Notwithstanding the federal or local Courts' subsequent interpretation of Public Law 20-134, the Organic Act of Guam authorized I Liheslaturan Guåhan to pass Bill No. 848. I Liheslaturan Guåhan retains the authority to pass bills and should these bills result in enacted laws, the Judiciary is authorized to enjoin laws the Judiciary finds to be in violation of the Organic Act. A contrary reading of the authority of courts would arguably allow the equivalent of an injunction against I Liheslaturan Guåhan passing bills found by the courts to violate either the Organic Act or Constitution.

IV. CONCLUSION

I Liheslaturan Guåhan could have but chose not to authorize the Judiciary in Public Law 20-134 to remove or repeal sections found at any time to violate the Organic Act of Guam or United States Constitution. The Organic Act authorized I Liheslaturan Guåhan to pass Bill No. 848, signed into law (Public Law 20-134). No legal magic or Judicial gymnastics can change history.

Respectfully submitted this 31st day of March, 31, 2023.

PHILLIPS & BORDALLO, P.C.

By:/s/ Michael F. Phillips
MICHAEL F. PHILLIPS

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX E

IN THE SUPREME COURT OF GUAM

Supreme Court Case No. CRQ23-001

[Filed February 18, 2023]

IN RE:	)
	)
REQUEST OF	)
LOURDES A. LEON GUERRERO,	)
I MAGA'HÅGAN GUÅHAN,	)
RELATIVE TO THE VALIDITY	)
AND ENFORCEABILITY OF	)
PUBLIC LAW NO. 20-134.	)
	)

ORDER

This matter comes before the court upon the filing of a Request for Declaratory Judgment by *I Maga'hågan Guåhan* Lourdes A. Leon Guerrero ("the Governor") on January 23, 2023. Her request comes as the Attorney General of Guam has moved to dissolve the permanent injunction placed upon Public Law 20-134 by the District Court of Guam. P.L. 20-134 had a broad ban on abortion, establishing criminal penalties for: (1) any person, including medical professionals, providing or administering drugs or using means to cause an abortion; (2) any woman soliciting and taking drugs or submitting to an attempt to cause an abortion; and (3) any person who solicits

any woman to submit to any operation, or to using any means, to cause an abortion. Federal courts declared P.L. 20-134 unconstitutional swiftly after its passage in 1990 as it violated the holding in *Roe v. Wade*, 410 U.S. 113 (1973). *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1426 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *as amended* (June 8, 1992).

In June 2022, the United States Supreme Court issued its Opinion in *Dobbs v. Jackson Women's Health Organization*, overruling *Roe v. Wade* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and deciding the right to abortion is not expressly or implicitly protected by the U.S. Constitution. *Dobbs*, 142 S. Ct. 2228, 2242 (2022). In January of this year, the Attorney General of Guam, Douglas Moylan, issued a Notice of Motion to Dissolve Injunction of Guam Public Law 20-134. In this Notice of Motion, Moylan expressed an intention to vacate the injunction by the end of January, noting the AG's Office is "duty-bound" to seek the injunction's dissolution. Req. Declaratory J. (Ex. 2). Moylan has since filed a Motion to Vacate the injunction in the District Court of Guam.

In response to the Attorney General's actions, the Governor seeks a declaratory judgment answering three questions: (1) Is P.L. 20-134 void forever, such that it cannot be revived following the reversal of *Roe v. Wade*?; (2) Whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing P.L. 20-134?; and (3) To the extent P.L. 20-134 is not void or otherwise

unenforceable, has it been repealed by implication through subsequent changes in Guam law? Req. Declaratory J. at 25-26.

Title 7 GCA § 4104 permits the Governor of Guam or the Guam Legislature to request declaratory judgments from this court in certain circumstances. 7 GCA § 4104 (added by P.L. 29-103:2 (July 22, 2008)). However, there is a strict jurisdictional test that must be met before this court can give such a judgment.

> [T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issue raised must be a matter of great public importance; (2) the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay; and (3) the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Gutierrez, 2002 Guam 1 ¶ 9. The court must now determine whether the Governor's three Questions meet these jurisdictional requirements.

"[P]ublic interest . . . signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution." *In re Request of Leon Guerrero*, 2021 Guam 6 ¶ 15 (per curiam) (alterations in original) (quoting *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 26). "[T]he issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of

government that requests the opinion." *In re Gutierrez*, 2002 Guam 1 ¶ 26 (citation omitted).

Moving to the Questions posed by the Governor, we conclude that they satisfy this requirement. This is not an instance where the issue concerns only one branch of government. *See In re Leon Guerrero*, 2021 Guam 6 ¶ 13. Rather, the Questions as to whether P.L. 20-134 is a viable law have implications for Guam's Legislature, the Executive Branch and subordinate agencies, and the Judiciary. Req. Declaratory J. at 14-15. The impact these Questions have on the Executive Branch is notable, as agencies charged with the enforcement of P.L. 20-134 may be permitted to arrest individuals for engaging in certain conduct—resulting in significant consequences.

Also, all the Questions concern the power of the Legislature and when it may legislate. Whether the Guam Legislature violated the Organic Act in passing an unconstitutional law is a matter of considerable importance, as is whether the Legislature impliedly repealed P.L. 20-134 through several subsequent enactments. Therefore, all three of the Governor's Questions satisfy the first prong of the jurisdictional test.

With the first jurisdictional requirement addressed, we move to the second requirement: whether waiting for the normal process of law to play out would cause an undue delay. Because there is no "bright line demarcation," undue delay is analyzed using a two-element test, requiring the court to "(1) measure the delay relative to the time that would be consumed by litigating the issue through the 'normal process of

law' and (2) determine whether this delay is 'excessive or inappropriate.'" *In re Leon Guerrero*, 2021 Guam 6 ¶ 17 (quoting *In re Request of Calvo*, 2017 Guam 14 ¶ 11).

Turning to the first Question posed by the Governor, we conclude this requirement is not met. The Attorney General has moved to seek the dissolution of the permanent injunction issued by the District Court of Guam. This motion was made under Federal Rule of Civil Procedure 60(b). To dissolve the injunction, the District Court would have to conclude the underlying law supporting the injunction changed and/or injunction itself is "no longer equitable." Fed. R. Civ. P. 60(b)(5).

For Question 1, the Governor's theory is that no law has changed. She asserts that when the District Court found P.L. 20-134 unconstitutional, it became void and is void forever. Req. Declaratory J. at 19. In ruling on the Attorney General's Motion, the District Court of Guam will provide an answer to this Question. If the District Court of Guam dissolves the injunction, then it cannot be the case that P.L. 20-134 was void forever by virtue of being unconstitutional when passed, and the Governor's Question would be answered. If the court declines to dissolve the injunction, the status quo would be unchanged, and declaratory relief from this court would be unnecessary. Thus, we must decline to answer this Question.

Conversely, Questions 2 and 3 may not be addressed by the District Court. While the District Court may consider the points raised by Questions 2 and 3 in its analysis of whether to dissolve the

injunction, those questions have not been explicitly raised by the Motion to Vacate. Unlike with Question 1, there is a clear path for the District Court of Guam either to dissolve its injunction or decline to do so without answering Questions 2 or 3. Accordingly, there is a potential delay in adjudicating these Questions.

If the District Court declines to address these arguments, the delay in answering Questions 2 and 3 would be notable. First, the litigation surrounding P.L. 20-134 is unlikely to end at the District Court. Rather, an appeal by the losing side will almost assuredly follow. During that time, there will be great uncertainty in Guam about the status of P.L. 20-134 and about the legality of abortion. Assuming the federal courts eventually dissolve the injunction on federal constitutional grounds, this matter would then be litigated in Guam courts on matters of local law. Guam residents, healthcare providers, and law enforcement agencies would suffer from a lack of clarity regarding their rights and obligations. At worst, a resident of Guam could be held liable for conduct ultimately declared legal.

One purpose of section 4104 is to "avoid the necessity of creating harm to some party in order to have a decision." 7 GCA § 4104 cmt. The present situation comports with the statutory purpose. Assuming the Governor is right, by not adjudicating the present Questions, this court could let some harm come to Guam residents only to then hold the statute had no force. This risk of potential harm thus bolsters our decision to hear Questions 2 and 3.

The final jurisdictional hurdle is whether the Questions posed by the Governor are appropriate for section 4104 review.[1] To determine if the topic is appropriate, we have stated that requests for declaratory relief must ask this court for "(1) an interpretation of an existing law that is within its jurisdiction to decide; *or* (2) an answer to any question affecting [the Governor's] powers and duties as governor and the operation of the executive branch." *In re Calvo*, 2017 Guam 14 ¶ 14 (quoting *In re Gutierrez*, 2002 Guam 1 ¶ 11). In *In re Calvo*, this court reaffirmed this test is disjunctive, meaning the Governor need only show her Questions meet one of the two options. *Id.* ¶ 15.

Question 2 asks this court to interpret the Organic Act; specifically, it asks this court to determine the powers given to the Guam Legislature by the Congress of the United States. Moreover, "the question of whether or not legislation has validly passed necessarily impinges on the operation of the executive branch, and the Governor's powers and duties." *Id.* When the Legislature acts beyond its authority, the separation of powers doctrine is violated. *In re Leon Guerrero*, 2021 Guam 6 ¶ 23. "Separation of powers questions are proper subject matter for declaratory judgment actions." *Id.* ¶ 12. This requirement is met for Question 2.

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[1] Because Question 1 does not meet the undue delay requirement of the jurisdictional test, we omit analysis of whether it would meet the third jurisdictional requirement under 7 GCA § 4104.

This jurisdictional requirement is also met for Question 3. The Governor is asking whether the Women's Reproductive Health Information Act of 2012, the Partial-Birth Abortion Ban Act of 2009, and the enactment of 19 GCA §§ 4A101-102, 4A107, and 4A109 served as implied repeals of P.L. 20-134. Req. Declaratory J. at 21-24. This request is asking this court to interpret local law—the effect the statutes had or did not have on P.L. 20-134. Thus, this prong is satisfied.

Question 1 fails to meet the undue delay requirement of 7 GCA § 4104, and so we cannot provide an answer to it. Questions 2 and 3 satisfy our jurisdictional test, and so we shall consider them further. For clarity, the specific questions on which we invite briefing are:

1. Whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing Public Law 20-134; and

2. To the extent P.L. 20-134 is not void or otherwise unenforceable, has it been repealed by implication through subsequent changes in Guam law?

On briefing, 7 GCA § 4104 provides this court "*shall*, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented." Cognizant of the importance and salience of this issue to so many stakeholders on Guam, the

court is inviting any party to file amicus briefing in this matter consistent with the schedule set forth below.[2]

As for the parties to the case, the court first designates the Attorney General of Guam as a Respondent. It can be inferred from his Motion that the Attorney General does not view P.L. 20-134 as void *ab initio* and/or as having been impliedly repealed; moreover, it is in response to his actions that the Governor is seeking declaratory relief. In addition, we recognize that the Governor's Questions touch on the powers and authority of *I Liheslaturan Guåhan* ("the Legislature"). We invite the Legislature to participate in this matter as a Respondent. If the Legislature participates, it shall file its briefing under the Amicus schedule below and be entitled to participate in oral argument.

Briefing will proceed as follows:

The Governor's brief must be served and filed by **March 10, 2023**.

Any party supporting the Governor or supporting neither the Governor nor the Respondents shall serve and file their brief by **March 17, 2023**.

The Attorney General shall serve and file his brief by **March 24, 2023**.

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[2] Pursuant to Guam Rule of Appellate Procedure 2, the court is suspending the requirement that amicus parties must first seek the consent of the parties or leave of the court before filing briefing; any party may file a brief consistent with the schedule contained in this Order. All other rules pertaining to amicus briefs shall apply to amicus briefs filed in this matter.

Any party supporting the Attorney General shall serve and file their brief by **March 31, 2023**.

The Governor may serve and file a reply brief by **April 5, 2023**.

The court schedules this matter for oral argument on **April 25, 2023, at 10:00 a.m.** in the Monessa G. Lujan Appellate Courtroom before the panel of Chief Justice Robert J. Torres, Associate Justice F. Phillip Carbullido, and Justice *Pro Tempore* John C. Manglona. A status conference shall be held on **April 10, 2023, at 10:00 a.m.** in the Monessa G. Lujan Appellate Courtroom. Any party objecting to the competency of any justice shall make such an objection by the status hearing date.

SO ORDERED this 17th day of February, 2023.

/s/
F. PHILIP CARBULLIDO
Associate Chief Justice

/s/
JOHN A. MANGLONA
Justice *Pro Tempore*

/s/
ROBERT J. TORRES
Chief Justice

APPENDIX F

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Attorneys for the
Honorable Lourdes A. Leon Guerrero
Governor of Guam

IN THE SUPREME COURT OF GUAM

SUPREME COURT CASE NO. CRQ23-001

[Filed January 23, 2023]

IN RE:	)
	)
REQUEST OF	)
LOURDES A. LEON GUERRERO,	)
I MAGA'HÅGAN GUÅHAN,	)
RELATIVE TO THE VALIDITY	)
AND ENFORCEABILITY OF	)
PUBLIC LAW NO. 20-134.	)
	)

REQUEST FOR DECLARATORY JUDGMENT (7 GCA § 4104); VERIFICATION; EXHIBITS 1-2

Petitioner Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam, by and through counsel and pursuant to 7 GCA § 4104, Rules 26 and 27 of the Guam Rules of Appellate Procedure, and the Organic Act of Guam, as amended, requests that the court issue declaratory judgment relative to the validity or enforceability of Guam Public Law 20-134 (March 19, 1990), following the U.S. Supreme Court's issuance of its Opinion in *Dobbs v. Jackson Women's Health Org.*, 241 S.Ct. 2228 (2022) on June 24, 2022.

I. INTRODUCTION

In 1990, six years prior to the Supreme Court of Guam's establishment in 1996, the Guam Legislature ostensibly passed Guam Pub. L. 20-134, broadly criminalizing abortion. Today, the Supreme Court of Guam stands as the highest court of Guam, vested with the authority to interpret the meaning of the Organic Act of Guam, the validity of laws enacted by the Guam Legislature, and to develop our island's common law. The legislation at issue in this case, embraces an important subject not previously addressed by this court – abortion – but resolution of the questions this Petition raises does not require the court to evaluate the substantive moral, ethical, and Constitutional issues associated with abortion.

Rather, the questions involve broader concerns of statutory validity; specifically, (1) whether legislation that was inorganic and unconstitutional at the time of its passage is a legal nullity and therefore invalid, or

merely unenforceable at the time, such that a change in the governing caselaw can revive it; (2) whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing P.L. 20-134; and (3) whether such legislation is valid and enforceable notwithstanding the evolution of the broader statutory scheme in the intervening decades since it was deemed unconstitutional. Resolution of these issues is critical to develop our government's understanding of its duties and limitations, and to provide our people with appropriate notice of their rights, and the conduct Guam law proscribes.

These are significant questions of *local* jurisprudence, regardless of subject matter, and it is important that these questions are addressed in the first instance not by the federal courts, but by the highest court of Guam. *See Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 1985, 170 L. Ed. 2d 837 (2008) (holding that "[a] State's highest court is unquestionably the ultimate expositor of state law," and "the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums.") (internal quotations omitted).

In the seminal 1973 case, *Roe v. Wade*, the United States Supreme Court recognized a Constitutional right of personal privacy that encompassed a woman's decision whether to terminate a pregnancy, and that regulations limiting such rights may be justified only by a compelling state interest and must be narrowly drawn to express only legitimate state interests. 410

U.S. 113, 122, 93 S. Ct. 705, 711, 35 L. Ed. 2d 147 (1973). In so finding, the Court held:

> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id., 410 U.S. at 164. The Court concluded that the Texas abortion statutes "as a unit, must fall." *Id.* at 166.

On March 19, 1990, Governor Joseph A. Ada purported to sign into law P.L. 20-134, "An Act to Repeal and Reenact §31.20 of Title 9, Guam Code Annotated, to Repeal §§31.21 and 31.22 thereof, to

Repeal Subsection 14 of Section 3107 of Title 10, Guam Code Annotated, Relative to Abortions, and to Conduct a Referendum Thereon." *See* P.L. 20-134, attached hereto as Exhibit 1. P.L. 20-134 contained a sweeping ban on abortion,[1] setting criminal penalties for (1) persons providing drugs or employing other means to cause an abortion, including doctors; (2) women soliciting and taking a drug with intent to cause an abortion, or submitting to an operation or to the use of other means with intent to cause an abortion; and (3) persons "soliciting" a woman to submit to an abortion. *Id.* P.L. 20-134 purported to repeal the existing statutes governing abortions at the time, which were enacted in 1978 as part of the original Criminal & Correctional Code.

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[1] Significantly, while Article 1196 of the Texas statutes at issue in *Roe v. Wade* provided that "[n]othing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother," P.L. 20-134 *excludes* termination of a pregnancy that endangers the life of the mother from the definition of "abortion":

> "Abortion" does not mean the medical intervention in ... a pregnancy at any time after the commencement of a pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother...

See, P.L. 20-134:2, Ex. 1 at 1-2.

On March 23, 1990, plaintiffs[2] in *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), aff'd, 962 F.2d 1366 (9th Cir. 1992), as amended (June 8, 1992), filed a complaint in the District Court of Guam (the "District Court case") alleging that P.L. 20-134 violated the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983, and seeking a judgment declaring P.L. 20-134 to be in violation of the United States Constitution and the Organic Act, and permanently enjoining its enforcement. Compl., *Guam Soc. of Obstetricians & Gynecologists v. Ada*, District Court of Guam Civil Case No. 90-00013 (March 23, 1990).

On August 23, 1990, the District Court of Guam issued a Decision and Order re Permanent Injunction and Other Motions, granting summary judgment to the plaintiffs and permanently enjoining the enforcement of P.L. 20-134, finding that *Roe v. Wade* applied in Guam. Specifically, the District Court held:

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[2] Plaintiffs in the District Court case included Maria Doe, a pregnant Guam resident suffering from a chronic health condition; the Guam Society of Obstetricians and Gynecologists; the Guam Nurses Association; Reverend Milton H. Cole, Jr., an Episcopal priest at a church in Agat, Guam; Laura Konwith, a Guam resident and a member of the Jewish faith, which does not believe a fertilized egg is a person; and Edmund Griley, M.D., William Freeman, M.D., and John Dunlop, M.D., physicians licensed in Guam who specialized in the practice of obstetrics and gynecology. Plaintiff Maria Doe was dismissed as a party on order of the court entered June 26, 1990. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427 (D. Guam 1990).

> This Court cannot imagine a clearer "signal" from Congress than that, by enacting subsection (u) [of Section 1421b of the Organic Act of Guam] in 1968, it felt an obligation to insure (*sic*) that the people of Guam would enjoy more of the constitutional protections afforded other citizens of the United States. Inarguably, it seems to this Court, the express words of the statute demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court. It follows, then, when interpreting subsection (u), that since the decisions of the United States Supreme Court, including *Roe v. Wade*, are the law of the land, they apply with equal force and effect to the Territory of Guam. Having determined that *Roe v. Wade* applies in Guam, the Court finds that Public Law 20-134 is unconstitutional. For the reasons given below, the entire law must fall.

Guam Soc. of Obstetricians & Gynecologists v. Ada, *supra* at 1427. On October 16, 1990, the District Court amended its judgment to order in relevant part that "[S]ections two through five of Public Law 20-134 are hereby declared *unconstitutional and void* under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983." *Id.* at 1431 (emphasis added).

In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (the "Ninth Circuit case"), the United States Court of Appeals for the

Ninth Circuit affirmed the District Court's judgment permanently enjoining the enforcement of P.L. 20-134, finding that the 1968 Mink Amendment to the Organic Act of Guam, "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded," and that P.L. 20-134 was unconstitutional, where it "ma[de] no attempt to comply with *Roe*." *Id.* at 1370.

Approximately thirty years later, on June 24, 2022, the United States Supreme Court issued its Opinion in *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade* and finding, among other things, that the right to abortion is not expressly or implicitly protected by the U.S. Constitution, including by the Due Process Clause of the Fourteenth Amendment, upon which *Roe v. Wade* was decided. *Id.* at 2242. Expressly reversing *Roe v. Wade*, the *Dobbs* Court further found that, as the U.S. Constitution does not confer a right to abortion, "the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at 2279.

On January 11, 2023, Douglas Moylan, the Attorney General of Guam ("AG") issued to Gov. Leon Guerrero and other successors to the government officials originally named as defendants in the District Court case, a Notice of Motion to Dissolve Injunction of Guam P.L. 20-134, *Guam Society of Obstetricians and Gynecologists v. Ada*, 776 F. Supp 1422 (D.Guam 1990), *aff'd, 962 F. 2d 1366; cert denied sub nom. Ada v. Guam Society of Obstetricians and Gynecologists, 506*

US. 1011 (1992) ("Notice of Motion to Dissolve Injunction"), attached hereto as Exhibit 2.

In his Notice of Motion to Dissolve Injunction, AG Moylan states that pursuant to the *Dobbs* decision, the "[Office of the Attorney General of Guam] is now duty-bound to seek to have the U.S. District Court of Guam vacate (dissolve) the injunction entered against [the Governor's] predecessors in office in *Guam Society of Obstetricians and Gynecologists v. Ada...*" *Id.* at 1. AG Moylan further states that his office "intend[s] to move to dissolve the injunction upon Guam P.L. No. 20-134 on or by the end of this month." *Id.* at 2.

Gov. Leon Guerrero petitions the court for declaratory judgment on the validity and enforceability of P.L. 20-134.

The first question presented is whether P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed by the Ninth Circuit Court of Appeals, is void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade.*

The second question presented for the court's consideration is whether the passage of P.L. 20-134 constitutes an *ultra vires* act, where the Organic Act limits the Legislature's authority to pass laws to subjects of legislation that are not inconsistent with U.S. law applicable to Guam, and, at the time of its passage, P.L. 20-134 was inconsistent with the U.S. Constitution as applicable to Guam.

The final question presented for the court's consideration is, if the court finds that the Organic Act authorized the 20th Guam Legislature to pass P.L. 20-134, and the legislation is not *void ab initio*, whether P.L. 20-134 was impliedly repealed by subsequent legislation the Guam Legislature passed regulating abortion on Guam.

Gov. Leon Guerrero requests that this Court issue declaratory judgment on these questions pursuant to its authority under 7 GCA § 4104.

II. STANDING

1. Gov. Leon Guerrero is the Governor of Guam and has standing to request declaratory judgment pursuant to 7 GCA § 4104.

III. JURISDICTION

2. This court has original jurisdiction over requests from the Governor of Guam seeking declaratory judgment interpreting any federal or local law "and upon any question affecting the powers and duties of [*I Maga'hågan*] and the operation of the Executive Branch[.]" 7 GCA § 4104. *See also* 48 U.S.C.A. § 1424-1(a).

3. Guam law authorizes the Governor of Guam to request that the Supreme Court of Guam directly interpret federal or local law affecting the powers and duties of the Governor of Guam and the operation of the Executive Branch:

> *I [Maga'hågan] Guåhan*, in writing ... may request declaratory judgments from the

> Supreme Court of Guam as to the interpretation of any law, federal or local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of *I [Maga'håga]* and the operation of the Executive Branch... The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments *shall* not be available to private parties. The Supreme Court of Guam *shall*, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented and *shall* render its written judgment thereon.

7 GCA § 4104 (emphasis in original).

4. This court has held:

> [T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issues raised must be a matter of great importance; (2) the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay; (3) and the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Governor Carl T. C. Gutierrez, Relative to the Organicity & Constitutionality of Pub. L. 26-35, 2002 Guam 1 ¶ 9.

IV. MATTER OF GREAT IMPORTANCE

5. This court has held that a matter of great importance or public interest "signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution... the issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of government that requests the opinion." *In re Request of Governor Gutierrez for a Declaratory Judgment as to Organicity of Guam Pub. Law 22-42*, 1996 Guam 4 ¶ 4.

6. This Petition seeks declaratory judgment regarding specific issues related to validity of P.L. 20-134 in the wake of *Dobbs*.

7. Current Guam law governing abortion was enacted in 1978 as part of the original Criminal & Correctional Code. Title 9 GCA § 31.20 authorizes performance of an abortion (1) within thirteen (13) weeks after commencement of a pregnancy; (2) within twenty-six (26) weeks after the commencement of the pregnancy if the physician has reasonably determined that the child would be born with grave physical or mental defect or that the pregnancy resulted from rape or incest; or (3) at any time after the commencement or pregnancy if the physician reasonable determines that there is a substantial risk that the pregnancy would endanger the life of the mother or gravely impair the physical or mental health of the mother. *See* 9 GCA § 31.20. Any person performing an abortion in circumstances other than permitted by Section 31.20 shall be guilty of a third degree felony. 9 GCA § 31.21.

8. In contrast, P.L. 20-134 provides that the following acts are subject to criminal penalty:

> a. For a person to provide or administer a drug or employ means to cause an abortion. If the person performing the act is a physician, the person shall be subject to disciplinary action by the Guam Medical Licensure Board in addition to being guilty of a third degree felony;
>
> b. For a woman to solicit a drug from any person and take the same, or submit to an operation or to the use of any other means, with intent to cause an abortion; and
>
> c. For a person to solicit a woman to submit to an operation or to the use of any means to cause an abortion.

See Ex. 1 at 2.

9. On August 23, 1990, the District Court of Guam issued a Decision and Order re Permanent Injunction and Other Motions ("8/23/90 D&O"), granting summary judgment to the plaintiffs and permanently enjoining the enforcement of P.L. 20-134, finding that Sections 2, 3, 4, and 5 violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution,[3] and ultimately issuing a

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[3] Sections 4 and 5 of P.L. 20-134 criminalized (1) a woman's solicitation and taking of a drug or submitting to an operation to cause an abortion, and (2) a person's solicitation of a woman to submit to an abortion, respectively. In the District Court case, the court found that, in addition to P.L. 20-134's violation of the Due Process clause of the Fourteenth Amendment, Sections 4 and 5

judgment declaring that Sections two through five of P.L. 20-134 unconstitutional and void. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427 (D. Guam 1990).

10. In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992), the Ninth Circuit affirmed the District Court's judgment permanently enjoining the enforcement of P.L. 20-134, finding that the 1968 Mink Amendment to the Organic Act of Guam, "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded," and that P.L. 20-134 made no attempt to comply with *Roe* and was unconstitutional. *Id.* at 1370.

11. In *Dobbs v. Jackson Women's Health Org.*, issued on June 24, 2022, the Supreme Court of the United States overturned *Roe v. Wade*, holding that the right to abortion is not expressly or implicitly protected by the U.S. Constitution and that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279.

12. On January 11, 2023, Douglas Moylan, the Attorney General of Guam issued a Notice of Motion to Dissolve Injunction, notifying Gov. Leon Guerrero and

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violated the First Amendment to the United States Constitution since they attempt to prohibit free speech. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, *supra* at 1429 n.9. The defendants in the District Court case did not appeal this ruling. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992).

other successor defendants in *Guam Society of Obstetricians and Gynecologists v. Ada* of his intent to move the District Court of Guam for an order dissolving the injunction entered against enforcement of P.L. 20-134 by the end of January, 2023. *See* Ex. 2 at 2.

13. While dissolution of the permanent injunction imposed by the District Court of Guam and affirmed by the Ninth Circuit against the enforcement of P.L. 20-134 would represent a substantial shift in the law governing abortion on Guam, the issue holds broader implications regarding the continued validity (or lack thereof) of legislation that was unconstitutional at the time of its passage; the limitations on the Guam Legislature's authority to pass legislation that is contrary to federal law, and the status of such legislation upon passage; and, if valid, the repeal by implication of such legislation based on the subsequent passage of related, conflicting legislation.

14. These questions are critical to the administration of justice on Guam. Their resolution will inform inferior courts, the Guam Legislature, the executive branch agencies charged with enforcement of such legislation regarding their respective authority relative to such legislation. Further, it will inform the members of the general public regarding abortion laws that are currently in effect.

V. UNDUE DELAY IN NORMAL PROCESS OF LAW

15. The second jurisdictional requirement for Section 4104 review is that the issue must be such that

its resolution through the normal process of law is inappropriate as it would cause undue delay. This prong is likewise satisfied.

16. While "[t]he issue of undue delay ... lacks bright line demarcation," *In re Request of Governor Carl T.C. Gutierrez for a Declaratory Judgment as to the Organicity of Guam Pub. L. 22-42*, 1996 Guam 4 ¶ 7, the court has held that the undue delay standard requires the court to "(1) measure the delay relative to the time that would be consumed by litigating the issue through the normal process of law and (2) determine whether this delay is excessive or inappropriate." *In re Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan Guahan*, 2017 Guam 14 ¶ 11.

17. While Section 4101 "was intended to provide a fast track for the initiation of cases before the Supreme Court of Guam so that rulings could be obtained on important issues of law without time consuming litigation in the inferior court," *In re Gutierrez*, 1996 Guam 4 ¶ 8, "the foundational question of whether certain legislation has passed presents a uniquely exigent question that, if not decided quickly, has potential to impede functions of legislative and executive governance." *In re Calvo*, 2017 Guam 14 ¶ 13.

18. The Attorney General has stated his intent to move to vacate the injunction imposed on the enforcement of P.L. 20-134 by the District Court of Guam and affirmed by the Ninth Circuit. *See* Notice of Motion to Dissolve Injunction, Ex. 2. The questions of whether P.L. 20-134 is valid though it was

unconstitutional at the time of its passage, whether the Guam Legislature had authority to pass it is in the first instance under the Organic Act of Guam, and whether, if valid, P.L. 20-134 was repealed by implication by subsequent legislation therefore present "uniquely exigent question[s] that, if not decided quickly, has potential to impede the functions of legislative and executive governance." *In re Calvo*, 2017 Guam 14 ¶ 13. If not resolved expediently, the pending questions would cause confusion for the affected agencies and the general public regarding their respective rights and responsibilities.

VI. REQUESTED INTERPRETATION AFFECTING THE GOVERNOR'S POWERS AND DUTIES AND OPERATIONS OF THE EXECUTIVE BRANCH

19. This court has identified two subjects appropriate for section 4104 review: (1) questions that require an interpretation of federal or local law lying within the jurisdiction of Guam or (2) questions that affect the powers and duties of the Governor and the operation of the executive branch.

20. "[T]he question of whether or not legislation has validly passed necessarily impinges on the operation of the executive branch, and the Governor's powers and duties, because 'issues involving separation of powers are undoubtedly the type of matter that can be addressed in a request ... under section 4104.'" *In re Calvo*, 2017 Guam 14 ¶ 5 (citing *In re Tax Trust Fund,* 2014 Guam 15 ¶ 15 (internal quotations omitted). "Section 4104 permits expedited review of the non-requesting party's operations where those operations

"impinge" on the operations of another branch of government." *In re Calvo*, 2017 Guam 14 ¶ 5 (finding that Section 4101 review was appropriate where the ability of the executive branch to issue tax and revenue anticipated notes was "directly depending on first determining whether the legislation [permitting the issue of the notes] has duly passed.").

21. Where "the Governor is asking the core, fundamental question of whether a bill was validly passed *at all* pursuant to certain statutory language ... this interpretive question plainly has ramifications for the Governor's powers and duties, as well as the operations of the executive branch, including the Governor's authority to sign any such passed legislation into law, *see* 48 U.S.C.A. § 1423i, and his obligation to faithfully execute the law, *see* 48 U.S.C.A. § 1422." *In re Calvo*, 2017 Guam 14 ¶ 16 (emphasis in original).

22. Resolution of questions regarding the validity of P.L. 20-134 affects the legislation's enforcement, particularly when considered with the broader statutory scheme regulating abortion on Guam.

23. The Governor seeks declarations on the following questions:

a. As a matter of Guam law, is P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed by the Ninth Circuit Court of Appeals, void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade*.

b. Was the passage of P.L. 20-134 an *ultra vires* act, where the Organic Act limited the Legislature's authority to pass laws to subjects of legislation that were not inconsistent with U.S. law applicable to Guam, and, at the time of its passage, P.L. 20-134 was inconsistent with the U.S. Constitution as applicable to Guam; and

c. As a matter of Guam law, if the court finds that the Organic Act authorized the 20th Guam Legislature to pass P.L. 20-134, and the legislation was not *void ab initio,* was P.L. 20-134 impliedly repealed by subsequent legislation the Guam Legislature passed regulating abortion on Guam.

VII. GOVERNOR LEON GUERRERO'S LEGAL POSITION

24. Gov. Leon Guerrero submits that P.L. 20-134 is void and unenforceable, notwithstanding the change in United States Supreme Court case law interpreting whether abortion is protected by the U.S. Constitution.

25. First, because P.L. 20-134 was held unconstitutional in its entirety at the time of its passage, it is *void ab initio*, and is void forever. "It is an elementary principle of American law that statutes inconsistent with the Constitution are void." *People v. Aldan*, 2018 Guam 19 ¶ 24 (citing *Marbury v. Madison*, 5 U.S. 137, 180 (1803)); *see also In re Request of Gutierrez*, 2022 Guam 1 ¶ 17 ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal

contemplation, as inoperative as though it had never been passed.") (quoting *In re Opinion of the Justices*, 269 Mass. 611, 168 N.E. 536, 538 (1929)); *City of Atlanta v. Gower*, 216 Ga. 368, 372, 116 S.E.2d 738, 742 (1960)("The time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and, if it is unconstitutional then, it is forever void."); *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 570 (9th Cir. 1989) ("A law passed in violation of the Constitution is null and void *ab initio*.").

26. Second, at the time P.L. 20-134 was enacted, the Organic Act of Guam, provided in relevant part that "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 GCA §1423a (August 1, 1950). As this court in *In re Request of Governor Felix P. Camacho*, explained:

> [I]t is a "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." H.R.REP. NO. 105-742 (1998), 1998 WL 658802 at *3 ... The Ninth Circuit Court of Appeals similarly recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, held that courts must "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir.1996).

2004 Guam 10 ¶ 33 (holding provisions of Public Law 26-169 inorganic and "invalid," and "striking down" as inorganic Executive Order 2004-07 because "its

unconstitutionality is clearly apparent."). Accordingly, because the Guam Legislature lacked authority to pass a law which violated the United States Constitution as made applicable to Guam through the Organic Act of Guam, as amended, the passage of P.L. 20-134 constitutes an *ultra vires* act and the legislation is invalid on this basis.

27. Finally, if the court finds that P.L. 20-134 is not void, invalid, or otherwise unenforceable, it has been repealed by implication by subsequent laws enacted by the Guam Legislature. "It is a well-settled rule that later statutes repeal by implication earlier irreconcilable statutes." *People of Territory of Guam v. Quinata*, 1982 WL 30546, at *2 (D. Guam App. Div. 1982), aff'd, 704 F.2d 1085 (9th Cir. 1983); *see also Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶16 ("Implied repeals can be found in two instances: (1) where provisions in the two acts are in irreconcilable conflict, or (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.")(internal quotations omitted).

28. P.L. 20-134 cannot be reconciled with subsequent laws passed by the Guam Legislature that govern abortion on Guam.

29. Title 19 GCA § 4A101 *et seq* prohibits a person from performing an abortion upon a pregnant female under the age of eighteen (18) and not emancipated, unless the person first obtains the written consent of both the pregnant person and one of her parents or a guardian. *See* 19 GCA § 4A102. Section 4A107 of the same chapter further authorizes the Superior Court of Guam to waive the consent

requirement for a minor if the court finds, by clear and convincing evidence, that the minor is sufficiently mature or well-informed to decide whether to have an abortion, and to issue an order authorizing the minor to consent to the performance of an abortion without the consent of a parent or guardian. *See* 19 GCA § 4A107. Any person who performs an abortion with knowledge the person upon whom the abortion is to be performed is an unemancipated minor is guilty of a third degree felony. 19 GCA § 4A109(a). Any person not authorized to provide consent for a minor to have an abortion who provides consent is guilty of a third degree felony. 19 GCA § 4A109(c). Any person who coerces a minor to have an abortion is guilty of a misdemeanor. 19 GCA §4A109(d).

30. The Women's Reproductive Health Information Act of 2012, codified at 10 GCA §3218.1 *et seq*, regulates general consent to abortion. Under Section 3218.1(b), a person provides "voluntary and informed consent" to abortion when (1) at least 24 hours prior to obtaining an abortion, the physician gives the patient specific information regarding the procedure in person, including a description of the method, the associated medical risks of the proposed abortion, the probable gestational age of the unborn child, the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed, the medical risks associated with carrying the pregnancy to term, and any need for anti-Rh immune globulin therapy, risks for declining such therapy, and costs associated therewith; (2) at least 24 hours prior to the abortion, the physician informs the patient in person that

medical assistance benefits may be available for prenatal care, childbirth and neonatal care, public assistance may be available to provide medical insurance for the child, public services exist to help facilitate adoption, printed materials to be provided describe this information as well as the unborn child, the father of the unborn child is liable to assist in the support of the child, and the woman is free to withhold or withdraw her consent to the abortion without affecting her future care or treatment and without the loss of local or federal benefits she may be entitled to, (3) at least 24 hours before the abortion, the physician provides a copy of the printed materials to the woman, and the same is read to her if she is unable to read them on her own, (4) the foregoing information is provided to her individually in a private room, (5) prior to the abortion, the woman certifies on a checklist certification that the information has been provided, (6) the physician receives and signs a copy of the certification prior to the abortion, (7) in the event of a medical emergency, the physician shall certify the nature of the emergency and circumstances that necessitated the waiving of the informed consent requirements, and (8) the physician shall not require payment for providing the foregoing information. 10 GCA § 3218.1. Violation of this section is a misdemeanor. *Id.*

31. The Partial-Birth Abortion Ban Act of 2009, codified at 10 GCA § 91A101 *et seq*, prohibits a person from knowingly performing or attempting to perform a partial-birth abortion, defined as vaginally delivering a living fetus until either the entire fetal head is outside the body of the mother in the case of head-first

presentation, or any part of the fetal trunk past the navel is outside of the body of the mother in the case of breach presentation, for the purpose of performing an act the person knows will kill the partially-delivered living fetus, and performing an overt act that kills the partially-delivered living fetus. 10 GCA §§ 91A103 and 91A104. A person who performs a partial-birth abortion shall be guilty of a third degree felony. 10 GCA § 91A106.

32. Title 10 GCA § 3218 requires that individual reports for each abortion are completed by attending physicians and transmitted to the Office of Vital Statistics of the Department of Public Health and Social Services, and that such reports shall be confidential and not contain the name of the mother. 10 GCA §3218. The report is required to include information regarding the mother, including but not limited to, the age, ethnic origin, marital status, number of previous pregnancies, the number of years of education, the number of living children, the number of previous induced abortions, method of contraception at the time of conception, the date of the beginning of her last menstrual period, her medical condition at the time of the abortion, the procedure used, the type of family planning recommended, the type of counseling given, the complications, and the gestational age of the unborn child terminated by the abortion. *Id.* The Office of Vital Statistics shall receive and retain the reports, and publish a statistical report based on the data on an annual basis. *Id.*

33. P.L. 20-134 cannot be harmonized with the body of statutory law governing abortion on Guam,

which, along with existing abortion law enacted in 1978, form a comprehensive statutory scheme that cover the subject. Accordingly, P.L. 20-134, to the extent it is not *void ab initio*, invalid, or otherwise unenforceable on other bases, has been impliedly repealed by the enactment of subsequent statutes in this area. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (finding that pre-*Roe* abortion statute was repealed by implication where "comprehensive regulations governing the availability of abortion for minors, the practices of abortion clinics and state funding for abortions could not be harmonized with provisions purporting to criminalize abortion); *see also Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990) ("[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited. ... A blanket criminal prohibition of abortions and the use of abortifacients is inconsistent with these regulations."); *State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921) (finding that if subsequent statutes are "repugnant" to an earlier statute, the later statutes will repeal the earlier one because they are "the last legislative declaration upon the subject.").

VIII. PRAYER FOR RELIEF

WHEREFORE Petitioner Governor Leon Guerrero respectfully requests the Court issue a Judgment declaring the following:

1. P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed by the Ninth Circuit Court

of Appeals, is void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade*.

2. The Guam Legislature did not have the authority to pass P.L. 20-134 pursuant to the Organic Act of Guam, and P.L. 20-134 is therefore *void ab initio* and invalid; and

3. To the extent P.L. 20-134 is not void, invalid or otherwise unenforceable, it has been repealed by implication by Guam law passed subsequent to the enactment of P.L. 20-134.

Respectfully submitted this 23rd day of January, 2023.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By: /s/ Leslie A. Travis
LESLIE A. TRAVIS
JEFFREY A. MOOTS
Attorneys for Petitioner
Lourdes A. Leon Guerrero,
Governor of Guam

VERIFICATION

GUAM U.S.A.)
) ss:
Territory of Guam)

The undersigned, deposes and says: That she is the petitioner in the foregoing Request for Declaratory Judgment, that the facts contained therein are true

and correct to the best of her knowledge and belief, except as to the matters stated upon information and belief, and as to those matters, she believes them to be true.

Dated this 23rd day of January, 2023.

/s/ Lourdes A. Leon Guerrero
LOURDES A. LEON GUERRERO

SUBSCRIBED and SWORN to before me on the day and year first above-written.

/s/ Ryta S. Barcinas
NOTARY PUBLIC
[Notary Stamp]

EXHIBIT 1

TWENTIETH GUAM LEGISLATURE
1990 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Substitute Bill No. 848 (COR), "AN ACT TO REPEAL AND REENACT §31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§31.21 AND 31.22 THEREOF, TO ADD §31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON," was on the 8th day of March, 1990, duly and regularly passed.

/s/ Joe T. San Agustin
JOE T. SAN AGUSTIN
Speaker

Attested:

/s/ Pilar C. Lujan
PILAR C. LUJAN
Senator and Legislative Secretary

This Act was received by the Governor this 8 day of MAR, 1990, at 6:22 o'clock p.m.

/s/ _____
Assistant Staff Officer
Governor's Office

APPROVED:

/s/ Joseph F. Ada
JOSEPH F. ADA
Governor of Guam

Date: March 19, 1990

Public Law No. 20-134

TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session

Bill No. 848 (COR)
Substituted by the author

Introduced by: E. P. Arriola
T. D. Nelson

AN ACT TO REPEAL AND REENACT §31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§31.21 AND 31.22 THEREOF, TO ADD §31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON.

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. §31.20 of Title 9, Guam Code Annotated. is repealed and reenacted to read:

"§31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with

intent thereby to cause an abortion of such woman as defined in §31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

Section 4. §31.22 of Title 9 , Guam Code Annotated, is repealed and reenacted to read :

"§31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in §31.20 of this Title is guilty of a misdemeanor."

Section 5. A new §31.23 is added to Title 9, Guam Code Annotated, to read:

"§31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in §31.20 of this Title is guilty of a misdemeanor."

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the

question to appear on the ballot in English and Chamorro:

> "Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-__) which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?

In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission') sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

EXHIBIT 2

[SEAL]

January 11, 2023

To: Hon. Lourdes Leon Guerrero, Governor of Guam; Governor's Attorney Jeffrey A. Moots, Mr. Arthur U. San Agustin, MHR, Director, Department of Public Health and Social Services; Ms. Lillian Posadas, MN, RN, Administrator and CEO of Guam Memorial Hospital Authority; and Guam Election Commission Members Ms. Alice M. Taijeron, Mr. Gerard "Jerry" C. Crisostomo, Mr. G. Patrick Civille, Mr. Joseph P. Mafnas, Ms. Antonia "Toni" R. Gumataotao, Ms. Carissa E. Pangelinan, and Mr. Benny A. Pinaula

From: Douglas B. Moylan, Attorney General of Guam

Subject: Notice of Motion to Dissolve Injunction on Guam P.L. No. 20-134,
Guam Society of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422 (D.Guam 1990), aff'd, 962 F.2d 1366 (9th Cir. 1992); cert denied sub nom. Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011 (1992)

Hafa Adai,

In light of the Supreme Court of the United States' recent June 24, 2022 decision in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), which

held that there is no right to an abortion in the U.S. Constitution, overruling *Roe v. Wade*, 410 U.S. 113 (1973); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Office is now duty-bound to seek to have the U.S. District Court of Guam vacate (dissolve) the injunction entered against your predecessors in office in *Guam Society of Obstetricians and Gynecologists v. Ada*, Civil Case No. 90-00013 (D. Guam) on August 23, 1990, as amended October 13, 1990.

Under Rule 25(d) of the Federal Rules of Civil Procedure, when a public official leaves office for whatever reason, the current office holder is *automatically* substituted in a lawsuit seeking injunctive or other equitable relief. There are many other jurisdictions throughout the country where similar injunctions against the implementation and enforcement of laws similar to Guam's laws have been successfully vacated, some without opposition from the plaintiffs.

The lawsuit is principally against the Attorney General because the relief it sought was to enjoin enforcement of parts of what were to become changes to Guam's criminal laws in Title 9 of Guam Code Annotated. When the case was first filed the Attorney General was appointed by and served at the pleasure of the Governor, so it may have been at the time appropriate that the Governor and AG be named defendants. Today, unlike back in 1990, the Attorney General of Guam is an independent and elected office created by Congress. *See* 48 U.S.C. § 1421g(d)(1) ("[T]*he Attorney General of Guam shall be the Chief Legal*

Officer of the Government of Guam."); 5 G.C.A. § 30109 ("[T]*he Attorney General is the public prosecutor and, by himself, a deputy or assistant, shall: (a) conduct on behalf of the government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in any of the courts of Guam, the District Court of Guam, and any appeals therefrom*..."); 5 G.C.A. § 30104 ("[T]*he Attorney General shall have cognizance of all matters pertaining to public prosecution, including the prosecution of any public officials*."); 5 G.C.A. § 30102 ("[N]*otwithstanding any other provision of law, the Attorney General shall have cognizance of all legal matters, excluding the Legislative and Judicial Branches of the government of Guam, involving the Executive Branch of the government of Guam, its agencies, instrumentalities, public corporations, autonomous agencies and the Mayors Council, all hereinafter referred to as 'agency'*."); and 5 G.C.A. § 30103 ("[T]*he Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes* to *be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary*."). Further, it is the responsibility of the Attorney General of Guam to enforce laws passed by the Guam Legislature.

Please find attached a copy of Guam P.L. No. 20-134, and the 1990 injunction.

In addition, regardless of the foregoing, the Attorney General of Guam was a separate party and separately sued in the before mentioned District Court case. We also maintain an ethical duty of candor to the U.S. District Court of Guam to inform the Court of the recent change in the controlling authority by the Supreme Court of the United States, upon which the District Court earlier relied upon. *Supra.*

For the above reasons and possibly others, the injunction is no longer appropriate. We therefore intend to move to dissolve the injunction upon Guam P.L. No. 20-134 on or by the end of this month. Please do not hesitate to contact me, or my Acting Civil Division Deputy Joseph Guthrie, if you have any questions regarding the above matters.

Cordially,
/s/ Douglas B. Moylan
Douglas B. Moylan
Attorney General of Guam

Attachments (13)

Office of the Attorney General
Douglas B. Moylan • Attorney General of Guam

590 S. Marine Corps. Drive • ITC Bldg., Ste. 901 • Tamuning, Guam 96913 • USA 671-475-3324 • 671-475-4703 (fax) • dbmoylan@oagguam.org • www.oagguam.org
"Guam's Toughest Law Enforcers"

TWENTIETH GUAM LEGISLATURE
1990 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

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/s/ Joe T. San Agustin
JOE T. SAN AGUSTIN
Speaker

Attested:

/s/ Pilar C. Lujan
PILAR C. LUJAN
Senator and Legislative Secretary

This Act was received by the Governor this 8 day of MAR, 1990, at 6:22 o'clock p.m.

/s/_____
Assistant Staff Officer
Governor's Office

APPROVED:

/s/ Joseph F. Ada
JOSEPH F. ADA
Governor of Guam

Date: March 19, 1990

Public Law No. 20-134

TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session

Bill No. 848 (COR)
Substituted by the author

Introduced by: E. P. Arriola
T. D. Nelson

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In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission') sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.