

**In the
Supreme Court of the United States**

DEPARTMENT OF THE AIR FORCE, ET AL.,
Petitioners,

v.

PRUTEHI GUAHAN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF OF AMICUS CURIAE
VIRGIN ISLANDS BAR ASSOCIATION
IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICUS CURIAE¹

The VIRGIN ISLANDS BAR ASSOCIATION (“VIBA”) is a mandatory bar association whose membership consists of attorneys admitted to practice in the U.S. Virgin Islands. As an integrated bar in a territory served by Article IV federal district courts, it has a direct institutional interest in the sound administration of justice, judicial independence, and public confidence in the courts before which their members practice. Many of their members appear before the District Court of the Virgin Islands, a court that, like the District Court of Guam, exercises the Article III jurisdiction of a district court, but whose judges do not benefit from the tenure and compensation provisions Article III requires.

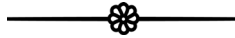
The VIBA submits this brief to highlight an overlooked threshold issue of constitutional jurisdiction: whether a judge without Article III protections may exercise the judicial power of the United States.

The adjudication of federal claims by federal courts in the territories must rest on a proper constitutional foundation. The VIBA has a longstanding

¹ Counsel for amicus certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Neither the brief nor the decision to file it should be construed to reflect the view of any individual member of the VIBA. No judicial members of the VIBA participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any judicial member before filing.

institutional interest in judicial independence, public confidence in the federal courts serving the Virgin Islands and other territories, and the constitutional structure governing those courts.

Amicus supports Respondent's request that the writ be dismissed as improvidently granted. Its institutional interest, however, is broader than the parties' immediate interests in the disposition of this case. If the Court declines to dismiss the writ, amicus submits that the structural protections of Article III must be vindicated through vacatur of the district court decision and remand for proceedings before a constitutionally constituted court.



INTRODUCTION

There is a threshold problem neither party has raised. The court where this case originated, the District Court of Guam, exercises the full judicial power of a United States district court, yet its sole judge lacks the tenure and salary protections that Article III demands for any judge who wields that power. That defect is structural and must be overcome to reach the statutory questions presented by the parties.

The Court may exercise its discretion to dismiss the writ as improvidently granted. But dismissal is not the only permissible course. If the Court declines to dismiss the writ, it cannot proceed to the statutory questions by simply assuming that the tribunal in which this case originated was constitutionally constituted. It must first resolve the antecedent

Article III question. If it does so, the Court should hold that a court exercising exclusively the judicial power of the United States must possess Article III's tenure and compensation protections, hold the inconsistent tenure and removal provisions of 48 U.S.C. § 1424b(a) unconstitutional and severable, and vacate the district court decision and remand for further proceedings consistent with that holding.



STATUTORY BACKGROUND

Congress created the District Court of Guam in 1950 and vested it with “the judicial authority of Guam.” Because it established the District Court as a court of Guam rather than a court of the United States, Congress initially provided for its judges to serve four-year terms—since extended to ten years—“unless sooner removed by the President for cause.” 48 U.S.C. § 1424b(a).

When first created in 1950, Congress provided for the District Court to exercise the following jurisdiction:

The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have

such appellate jurisdiction as the legislature may determine.

Organic Act of Guam § 22(a), Public Law 81-630, 64 Stat. 384, 390 (1950) (current version at 48 U.S.C. § 1424(b)). As this Court found in *Guam v. Olsen*, Congress chose to create the District Court as a court of Guam exercising territorial jurisdiction and some federal jurisdiction rather than establish both a Guam trial court and a U.S. District Court for the District of Guam as a court of the United States “[b]ecause of concern that there would not be sufficient federal question litigation to justify a separate district court in Guam.” 431 U.S. 195 (1977).

But the jurisdiction of the District Court would change significantly over the next 30 years. First, the Guam Legislature enacted the Court Reorganization Act of 1974, Guam Pub. L. 12-85, which entirely divested the District Court of its original jurisdiction over all cases arising under Guam law, transferring such jurisdiction exclusively to the Superior Court of Guam. The Act also purported to divest the District Court of its appellate jurisdiction over the Superior Court, transferring such jurisdiction to a newly created Supreme Court of Guam.

The United States Court of Appeals for the Ninth Circuit affirmed the legality of the transfer of original jurisdiction and found such jurisdiction not concurrent with the District Court, *see Agana Bay Dev. Co. (Hong Kong) v. Supreme Court of Guam*, 529 F.2d 952, 955, n.4 (1976); that holding has never been overruled or otherwise disturbed by this Court, *see Olsen*, 431 U.S. at 197 n.3. However, in its 1977 decision in *Olsen*, this Court invalidated the transfer of the District Court’s local appellate jurisdiction because

Congress expressly authorized a “transfer” of the District Court’s original jurisdiction but withhold a like power respecting the court’s appellate jurisdiction, empowering Guam to “determine” the District Court’s appellate jurisdiction only in the sense of the selection of what should constitute appealable causes.

Id. at 201.

In 1978, this Court interpreted the meaning of the language delineating the jurisdiction of the District Court as a “court of the United States.” The District Court and the Ninth Circuit had taken the position that the language Congress utilized in the 1950 Organic Act had vested the District Court with the full and complete jurisdiction of a federal district court, including diversity jurisdiction. This Court held that the grant to the District Court of “all causes arising under the Constitution, treaties, and laws of the United States” did not vest the District Court with diversity jurisdiction because Article III established federal-question and diversity jurisdiction “as distinct classes of cases” for which “the grant of jurisdiction over one of them does not confer jurisdiction over . . . the other.” *Chase Manhattan Bank (Nat’l Ass’n) v. South Acres Development Co.*, 434 U.S. 236, 238 (1978) (quoting *Canter*, 1 Pet. at 545). As in *Olsen*, this Court in *Chase* grounded its decision not in the Constitution, but the language Congress used in the Organic Act.

After *Chase*, the District Court remained a hybrid court: one that heard federal-question cases but did not exercise any other jurisdiction of a court of the United States; and which heard appeals from the Superior Court of Guam like an appellate court of Guam but

did not exercise any other jurisdiction of a court of Guam. But in 1984, Congress enacted Title VIII of Public Law 98-454 to amend the Guam Organic Act to legislatively overrule the results of *Olsen* and *Chase*. It amended the grant of jurisdiction of the District Court to eliminate the limiting language and instead provide that “[t]he District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code, and that of a bankruptcy court of the United States.” 48 U.S.C. § 1424(b). That change in jurisdiction went into effect immediately, and by its own terms vested the District Court with the entirety of the jurisdiction of a district court of the United States rather than only federal-question jurisdiction.

The 1984 amendments also expressly authorized the Guam Legislature to create a local appellate court which, once established, would divest the District Court of appellate jurisdiction over all appeals not yet taken. 48 U.S.C. § 1424-3(d). This provision was not self-executing but went into effect twelve years later when the Guam Legislature passed the Frank G. Lujan Memorial Court Reorganization Act, Guam Pub. L. 21-147, to create a new Supreme Court of Guam.

Today, the District Court is no longer a hybrid court. It exercises no original jurisdiction—exclusive or even concurrent—over Guam law. It has no appellate jurisdiction whatsoever to hear appeals from the Superior Court of Guam or any other court established by the Guam Legislature; the few appeals still pending when the Supreme Court of Guam assumed such jurisdiction in 1996 have long since been resolved. However, it possesses the entire jurisdiction of a “district court

of the United States,” without any qualification or limit whatsoever.

While in 1978 this Court described the District Court as “unique” because of its hybrid jurisdiction over some federal and many territorial matters, *Chase*, 434 U.S. at 239, today it remains unique for an entirely different reason. In terms of substance, the District Court is no longer virtually indistinguishable from the Article III federal district courts—it is indistinguishable. The District Court now exercises solely the judicial power of the United States; whatever might have been the case in 1950 or 1978, the District Court today cannot be fairly said to in any way still wield the judicial power of Guam. Nevertheless, it remains unique because despite exercising the entire jurisdiction of a “district court of the United States,” its judges lack the protections afforded by Article III. Rather, the judges of the District Court serve only ten-year terms despite being subject to nomination by the President of the United States and confirmation by the Senate, and even then, may be removed by the President “for cause.” 48 U.S.C. § 1424b(a). In that respect Guam’s district court stands alone: it wields the entire jurisdiction of a district court of the United States, yet its judge serves without the tenure and compensation guarantees enjoyed by the district judges who sit in the fifty states, Puerto Rico, and the District of Columbia.



SUMMARY OF THE ARGUMENT

This brief raises an overlooked threshold question: whether a judge who lacks the tenure and salary protections of Article III may exercise the judicial power of the United States. The constitutional status of the District Court of Guam is antecedent to the merits questions presented in the certiorari petition. In *Nguyen v. United States*, this Court held that, absent statutory authorization, permitting an Article IV judge to exercise the judicial power of the United States is structural error. 539 U.S. 69 (2003). What the Court has not decided—and expressly declined to decide in *Nguyen*—is whether a statute that vests an Article IV judge with the judicial power of the United States while withholding Article III’s protections works a structural error of constitutional magnitude.

Nevertheless, text, history, and precedent all suggest that it does. This Court recently reaffirmed that “structural constraints, designed in part to ensure political accountability, apply to all exercises of federal power, including those related to Article IV entities.” *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 457 (2020). It has also described a constitutional challenge to the authority of a judge to preside over a matter as amongst the class of “nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below.” *Freytag v. Comm’r of Int. Rev.*, 501 U.S. 868, 878-79 (1991). This Court recognized this type of error as among “those rare cases” not susceptible to waiver due to “the strong

interest of the federal judiciary in maintaining the constitutional plan of separation of powers.” *Id.* at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)). And like the issues in those cases, Article III “has no Article IV exception.” *Aurelius*, 590 U.S. at 457.

The narrow exceptions this Court has recognized do not shore up this structural deficiency. The only one that could arguably apply—the territorial-courts exception of *American Insurance Co. v. Canter*, 26 U.S. 511 (1828)—reaches only courts that exercise the judicial power of a territory. The District Court of Guam no longer does; Congress has narrowed its jurisdiction to that of a district court of the United States, and nothing more. The territorial-courts exception cannot extend to a court that no longer exercises the judicial power of Guam.

This Court should dismiss the writ as improvidently granted, as Respondent urges in its brief for other reasons. Resp. Br. 19 n.3. This Court did not grant certiorari to resolve the constitutional infirmity of the structure of the District Court of Guam, but to address different questions pertaining to the Resource Conservation and Recovery Act of 1976, the Administrative Procedure Act, and the National Environmental Policy Act of 1969. But under its precedents, this Court cannot simply proceed to answer those merits questions and entirely ignore the structural error that the District Court of Guam lacked the constitutional authority to render its October 6, 2022 judgment in the first place. To the extent this Court does not wish to resolve this structural error as part of this case, dismissing the writ as improvidently granted is the only option available to it.

But this Court need not dismiss the writ as improvidently granted. Under its other precedents, it may notice the structural constitutional error despite the issue not having been presented by the parties or considered by the lower courts. If it elects not to dismiss the writ, the Court should sever the unconstitutional language in this manner and correspondingly vacate the district court’s judgment, vacate the court of appeals’ opinion as moot, and remand the case for resolution before a judge who enjoys the full protection of Article III.



ARGUMENT

I. In Creating “Inferior Courts” Vested with the “Judicial Power of the United States,” Congress Must Accept the Structural Limitations That Insulate the “Judicial Power” from Political Interference.

The tenure and compensation protections of Article III insulate federal judges from any pressure to favor the incumbent President, or to bow to other political pressures. This Court has thoroughly examined the origin of these protections, and their vitality in maintaining the Republic:

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because

the King of Great Britain “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the clear heads and honest hearts deemed essential to good judges.

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government’s “judicial Power” on entities outside Article III. That is why we have long recognized that, in general, Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. When a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of

the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law—to the Judiciary.

Stern v. Marshall, 564 U.S. 462, 483-84 (2011) (citation modified).

The “inseparable element of . . . checks and balances” created by Article III has long compelled this Court to conclude that “the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article.” *Id.* at 503.

Alexander Hamilton, too, emphasized the critical importance of service during good behavior and fixed undiminished compensation on a functional and independent federal court system. *See* THE FEDERALIST No. 79. While “individual judges are direct beneficiaries of the tenure and salary protections of Article III,” these protections promote the “institutional value[]” of shielding the judicial branch from “improper influences” from other branches. *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 65 (D.C. Cir. 2001) (citing *Northern Pipeline*, 458 U.S. at 59 n.10). This is because, as Hamilton wrote, “a power over a man’s subsistence amounts to a power over his will,” and an independent judiciary simply could not function in a system where judges remain at the mercy of the President for their continued employment. THE FEDERALIST No. 79. Like Madison, Hamilton did not assume that only the virtuous would serve in the federal government, and viewed Article III and other checks and balances as necessary protections to ensure that federal judges did not feel the temptation to rubber-

stamp the will of the President in the same manner that colonial judges felt they had to implement the desires of King George III.

The Framers deliberately designed a system that insulates federal judges from the Executive Branch. The Framers did not share the view that courageous and virtuous judges would assure judicial independence; rather, a robust and co-equal federal judiciary develops naturally from “permanency in office and the right to undiminished compensation.” *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984). These protections “are present constitutional necessities, not relics of antique ideas.” *Id.* They form the very foundation for the American judicial system, where ruling against the powerful is just another day at the office; not an act of political courage.

II. The District Court of Guam Suffers a Structural Infirmary: It Exercises the Judicial Power of the United States Without Article III’s Protections.

In *Nguyen v. United States*, the Court told us that, absent statutory authorization, allowing an Article IV judge to exercise the judicial power of the United States is structural error. 539 U.S. 69 (2003). What the Court has not said—and expressly declined to say in *Nguyen*—is whether a statute imbuing an Article IV judge with the judicial power of the United States, while expressly refusing Article III’s protections, creates a structural error of constitutional magnitude. However, it described challenges to the authority of judges to preside over a matter as amongst the class of “nonjurisdictional structural constitutional objections

that could be considered on appeal whether or not they were ruled upon below.” *Freytag v. Comm’r of Int. Rev.*, 501 U.S. 868, 878-79 (1991). This Court recognized this type of error as among “those rare cases” not susceptible to waiver due to “the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.” *Id.* at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)).

Text, history, and precedent all strongly suggest that it does. Indeed, the Court reaffirmed just a few years ago that “structural constraints, designed in part to ensure political accountability, apply to all exercises of federal power, including those related to Article IV entities.” *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 457 (2020).

While *Aurelius* arose under the Appointments Clause, there is little sense in cabining it there. Nor does *Aurelius* purport to stop at Article II’s edge. In search of a principle to guide the Court’s analysis, *Aurelius* looked to the same interplay between Article III and Article IV that arises here. Specifically, case law addressing “whether Article III’s tenure and salary protections applied to judges of the courts in the District of Columbia.” *Id.* at 457 (quoting *O’Donoghue v. United States*, 289 U.S. 516 (1933)).

This “rough analogy” guided the Court to conclude that structural constraints on the use of federal power do not disappear in the wilderness of Article IV. As such, the Court reaffirmed and synthesized the precedent that highlights the structural infirmity here. In sum, *Aurelius* confirms that *O’Donoghue* was right, the protections of Article III must apply to a court with

authority “over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application,” while its “consideration of purely local affairs was obviously subordinate and incidental.” *Palmore v. United States*, 411 U.S. 389, 406 (1973) (citing *O’Donoghue v. United States*, 289 U.S. 516 (1933)) (citation modified). At the same time, the Court was right to later distinguish *O’Donoghue* by holding “that Article III protections do not apply to an Article I court focused, unlike the courts at issue in *O’Donoghue*, primarily on local matters.” *Aurelius*, 590 U.S. at 457.

Aurelius’s synthesis of this *O’Donoghue/Palmore* dichotomy gives rise to the structural infirmity lurking below the surface of this case. The District Court of Guam falls on the *O’Donoghue* side; Congress gave it the same authority as any United States district court—and only that authority—without observing the structural limitations imposed on it by Article III. Like the Appointments Clause, Article III “has no Article IV exception.” *Aurelius*, 590 U.S. at 457.

As the Framers knew, the restriction must follow the power. Without the power, the restriction has no meaning; without the restriction, the power has no legitimacy.

III. The Narrow Exceptions to Article III Are Not Applicable to the Modern-Day District Court of Guam.

This Court has recognized certain narrow exceptions that permit the adjudication of certain matters by judges and courts that lack the tenure and compensation protections of Article III. This Court “has declined

to adopt formalistic and unbending rules,” but “ha[s] weighed a number of factors . . . with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986). As summarized in *Schor*:

Among the factors upon which we have focused are the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (quoting *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 587 (1985)) (collecting cases). Of the exceptions already recognized, only one—the territorial courts exception—could even arguably apply to the District Court of Guam.²

² The other three exceptions are courts-martial, judicial adjuncts, and the public rights doctrine. The District Court of Guam is plainly not a military tribunal engaging in the “trial of soldiers to maintain discipline.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Nor are its judges supervised by Article III judges, as is the case with magistrate judges. Rather, the judges of the District Court of Guam exercise “total control and jurisdiction” in the same manner as an Article III judge serving in a federal district court elsewhere. *Peretz v. United States*, 501 U.S. 923, 937 (1991) (quoting *United States v. Raddatz*, 447 U.S. 667, 681 (1980)). In fact, the judges of the District Court of Guam supervise magistrate judges of their own. See 28 U.S.C. § 631(a).

In *American Insurance Co. v. Canter*, 26 U.S. 511 (1828), this Court considered the constitutional structure of the territorial courts of Florida, whose judges served four-year terms. This Court determined that Congress only enacts “laws of the United States” when exercising its national legislative powers under Article I and adopts a different sort of power under the Territorial Clause. *Id.* at 544-46. The Court analogized Congress’s powers under the Territorial Clause to the power of a state to structure its state government: because Article III extends only to courts exercising the judicial power of the United States, state judges exercising the judicial power of a state are not required to have life tenure, and thus territorial judges exercising the judicial power of a territory also need not possess life tenure—even if such state and territorial judges possess jurisdiction to hear some cases arising under federal law. *Id.*

The public rights exception also does not justify the departure from Article III. Congress established the District Court of Guam as equal and indistinguishable, in every single respect, to a federal district court, giving it the entire “jurisdiction of a district court of the United States” without limit. The public rights exception used to justify non-Article III courts such as the Tax Court “has no textual basis in the Constitution and must therefore derive instead from background legal principles.” *Securities & Exchange Comm’n v. Jarkesy*, 603 U.S. 109, 131 (2024). One such background principle is that the jurisdiction of such courts must necessarily be limited to only cases that come within this public rights exception—after all, “a holding that non-article III bodies could exercise unlimited article III authority would effectively gut the article III salary and tenure protections by facilitating congressional circumvention of those protections.” Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 200 (1983).

The territorial-courts exception recognized in *Canter* is correct in its reasoning. Given the then-prevailing view that territorial governments were transitory and “presumably ephemeral,” it made perfect sense for the Framers to not intend to “give permanent tenure of office or irreducible compensation” to a judge essentially serving as a placeholder in “a purely provisional government.” *O’Donoghue v. United States*, 289 U.S. 516, 536-38 (1933). After all, Article III did not extend to state courts, and even during the Founding Era only eight of the original thirteen states gave their judges life tenure.³ Arthur Vanderbilt, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 21 (1956). The Framers intended for the Constitution to allow newly-admitted states to join the original thirteen states on equal footing, and most newly-admitted states would necessarily be drawn from the territories. It thus made no sense to confer lifetime tenure on the judges of territorial courts. The practice of the Founding Era, and which continued thereafter, was to transfer the jurisdiction of territorial courts to state courts and to create a new Article III federal court which would assume jurisdiction over federal actions not cognizable in state courts. See *Benner v. Porter*, 50 U.S. 235, 245 (1850).

Saddling future states with a cadre of territory-era holdover judges holding life tenure on their state courts would not only interfere with the state’s ability to determine the length of its judges’ service but effectively allow the President of the United States to shape the judicial branches of these areas not just

³ Today, that number has fallen to just one out of fifty. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 899 (2021).

during the transition from territory to statehood but for potentially decades afterwards.⁴

The *Canter* rule, however, extends only to courts of a territory, *i.e.* those courts that possess jurisdiction over territorial law. While the District Court originated as a court of Guam vested with primarily territorial jurisdiction and ancillary federal jurisdiction, Congress since narrowed its jurisdiction to eliminate its territorial character entirely and vest it exclusively with the “jurisdiction of a district court of the United States.” 48 U.S.C. § 1424(b). In doing so, the District Court necessarily ceased being a territorial court and became a court of the United States.

To put it another way, the constitutional status of a governmental entity cannot rest on the source of authority Congress invoked when the institution was first created. Constitutional analysis does not freeze at the moment of an entity’s creation. As Justice Kavanaugh recently explained, constitutional principles and their exceptions must be applied faithfully to modern conditions and institutional developments even though “the meaning of rules is constant.” *Trump v. Barbara*, 609 U.S. __, __ S. Ct. __, 2026 WL 1870543, at *27 (June 30, 2026) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). A majority of this Court recently embraced this principle in *Trump v. Slaughter*, 609 U.S. __, __ S. Ct. __, 2026 WL 1855612, at *17 (June 29, 2026), where it arrived at its constitutional decision based on analyzing the powers of the Federal Trade Commission “in its present

⁴ This would, of course, apply even more so to territories like Guam that may one day seek free-association or independence in lieu of statehood.

form” rather than at the time of its initial creation by Congress in 1914 or at the time the Court issued its ruling in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

Amicus does not contend that the territorial-courts exception first recognized in *Canter* expired with the passage of time. *Canter’s* territorial-courts exception remains constant, but its application to the District Court of Guam must account for the multitude of changes Congress made to its jurisdiction since its establishment. The District Court of Guam as it existed in 1950 certainly exercised the judicial power of Guam and qualified for the territorial-courts exception. But after Congress completely eliminated all vestiges of its territorial jurisdiction and left it exercising only the jurisdiction of a United States district court, the District Court of Guam is no longer the same institution today as in 1950. It no longer administers the judicial power of Guam, but exercises authority that derives exclusively from the United States and is coextensive with that of an ordinary federal district court. When territorial judicial power has been entirely transferred elsewhere—in this case to the Superior and Supreme Courts of Guam—the territorial-courts exception can no longer supply the constitutional justification for withholding Article III’s protections to the District Court of Guam.⁵

⁵ Amicus recognizes that the Ninth Circuit previously rejected an Article III challenge to the authority of the District Court for the Northern Mariana Islands to adjudicate a federal criminal prosecution. *United States v. Xiaoying Tang Dowai*, 839 F.3d 877 (9th Cir. 2016). But the *Dowai* court did not have the benefit of this Court’s subsequent decisions in *Aurelius*, *Slaughter*, or *Barbara*. Nor did it confront the institutional transformation

presented here; it concluded that the CNMI District Court still possessed residual local jurisdiction that had not been altered since 1976 and acted, when exercising that jurisdiction, as a “court of the Northern Mariana Islands.” 48 U.S.C. § 1822(b).

Amicus disagrees with the *Dowai* court’s characterization of the CNMI District Court. But the question before this Court is not the jurisdiction of the CNMI District Court, but that of the District Court of Guam. As laid out earlier, the District Court of Guam plainly no longer exercises original or appellate jurisdiction over any aspect of Guam law. Its operative authority is the jurisdiction of a district court of the United States—and nothing else.

That distinction matters. *Palmore* described territorial courts as tribunals that characteristically administered both generally applicable federal law and purely territorial law. 411 U.S. at 402-03. *Canter* authorized term-limited judges in territories who exercised the judicial power of the territorial government. But neither decision held that Congress may vest the complete jurisdiction of a United States district court in a tribunal whose judge lacks Article III’s protections. *Dowai*’s reasoning also cannot be reconciled with this Court’s subsequent instruction that structural constitutional constraints apply to exercises of federal power involving Article IV entities. *Aurelius*, 590 U.S. at 457.

Nor does the *Dowai* court’s recognition that appeals from the CNMI District Court (and the District Court of Guam) are heard by an Article III court—the Ninth Circuit—cure the defect. The Ninth Circuit exercises no greater authority over the District Court of Guam than it exercises over an Article III district court. And if appellate review by an Article III court—without more—is enough to deny the protections of Article III to federal district court judges, there is nothing to stop Congress from divesting every Article III federal district court of its jurisdiction and those courts to term-limited judges removable by the President—so long as it allows for an appeal to an Article III court of appeals. Article III does not permit its protections to be so easily circumvented.

IV. This Case Highlights the Real Dangers of Ignoring the Framers' Warnings.

The recent history of the District Court of Guam illustrates precisely why the Framers mandated that judges who wield the judicial power of the United States hold their offices during good behavior. The judge of the District Court of Guam that presided over this case is the sole judge of that court. She was nominated by President George W. Bush and confirmed by the Senate in 2006. Had she been confirmed to serve in an identical judicial role in any federal court sitting in one of the 50 states, the District of Columbia, or Puerto Rico, confirmation would have been accompanied by complete political insulation in the form of life tenure and compensation protections. But, in the Guam Organic Act, Congress both granted the District Court of Guam with the jurisdiction of a federal district court, while withholding the benefits of Article III. Its judges serve a fixed, 10-year term. They are subject to unilateral removal by the President. *See* 48 U.S.C. § 1424b(a). Or they may be denied other benefits given to life-tenured judges—like eligibility for a pension or senior status based on years of service, *see* 28 U.S.C. § 371—simply because a later President nominates someone else to the position at the end of the term.

As demonstrated by the district judge here—and similarly situated judges in the Virgin Islands and Northern Mariana Islands—this is not a hypothetical concern. The district judge's initial 10-year term expired in 2016. Her tenure has continued only by virtue of the fact that Guam's Organic Act permits her to serve past her term if no replacement is confirmed. *See* 48 U.S.C. § 1424b(a). As a result, her continued

tenure has remained an open question across three administrations.

It is not mere hyperbole to say that the uncertainty of throwing a federal judge's job security up in the air for years on end creates unique pressures. This is confirmed by a former judge of a similar court, the District Court of the Virgin Islands. As he recounted in a 2003 amicus curiae brief to this Court, he—like Guam's incumbent district judge—was “willing to continue to serve after his ten-year term expired,” but was not reappointed. Brief of Thomas K. Moore as Amicus Curiae Supporting Respondents, 2003 WL 554458, at *12-13, *Nguyen v. United States*, 539 U.S. 69 (2003). President Bush did not explain why (nor was he required to), but “[t]he media have widely attributed” it “to his rulings against the United States and various influential entities and persons in the Virgin Islands.” Brief of Thomas K. Moore as Amicus Curiae Supporting Respondents, 2003 WL 554458, at *12-13, *Nguyen v. United States*, 539 U.S. 69 (2003). The brief noted that even if this is “not the reason he has not been reappointed, the mere appearance that these may be the cause . . . undermines the public's confidence in the court's impartiality.” Brief of Thomas K. Moore as Amicus Curiae Supporting Respondents, 2003 WL 554458, at *12-13, *Nguyen v. United States*, 539 U.S. 69 (2003).

“Ironically,” the brief concluded, “knowledge that one will not be reappointed would be almost as sure a guarantee of independence as life tenure.” Brief of Thomas K. Moore as Amicus Curiae Supporting Respondents, 2003 WL 554458, at *12 n.12, *Nguyen v. United States*, 539 U.S. 69 (2003). Unfortunately, Guam's district judge has no such knowledge, one way

or the other. These are the very pressures the Framers aimed to foreclose in Article III. Yet they have slipped through regardless and now bear down on yet another federal judge.⁶

V. The Writ Should Be Dismissed as Improvidently Granted or, in the Alternative, this Court Should Sever the Unconstitutional Language.

As *Nguyen* confirms, the *O'Donoghue/Palmore* dichotomy cuts to the very heart of a court's authority. An *O'Donoghue* court suffers a structural defect of such constitutional significance that it cannot continue to operate as constituted. Such a structural issue cannot be waived by the parties or be pushed aside on the way to more interesting questions.

Article III “safeguards the role of the Judicial Branch . . . by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850-

⁶ In addition to the uncertainty of reappointment, 48 U.S.C. 1424b(a) permits the President to remove a judge of the District Court of Guam at any time “for cause.” This Court recently clarified in *Trump v. Cook*, 609 U.S. ___, ___, S.Ct. ___, 2026 WL 1855613, at *11-12 (June 29, 2026), that statutory “for cause” language is not “at-will employment” but imposes a genuine limitation that contemplates judicial review and procedural protections. But this still falls far short of the protections of Article III, which does not merely protect against arbitrary removal but guarantees that judges “hold their Offices during good Behaviour” and without diminished compensation. U.S. Const., art. III, § 1.

51 (1986) (citation modified). “To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2.” *Id.*

If it does not want to address the structural constitutional error, this Court should dismiss the writ as improvidently granted. Although “a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits,” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 546 U.S. 422, 431 (2007), under its prior precedents this Court cannot choose to ignore the structural error that the District Court of Guam lacked the constitutional authority to render its judgment in the first place. This is because the questions presented in the certiorari petition—pertaining to the Resource Conservation and Recovery Act of 1976, the Administrative Procedure Act, and the National Environmental Policy Act of 1969—do not relate to subject-matter jurisdiction or implicate any similar antecedent and nonwaivable structural or constitutional errors. Under the “bright line” this Court drew in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006), whether something constitutes “final agency action” under the Administrative Procedure Act, 5 U.S.C. 704, is not a question of subject-matter jurisdiction but rather goes to the merits of the complaint. *See Trudeau v. FTC*, 456 F.3d 178, 183-84 & nn. 6-7 (D.C. Cir. 2006). As such, its prior precedents would preclude this Court from ignoring the structural error in this case and reversing the court of appeals on one of the questions presented in the certiorari

petition.⁷ Dismissing the writ as improvidently granted is the only option available to avoid the issue.

But this Court need not dismiss the writ as improvidently granted. Under *Nguyen*, *Freytag*, *Glidden*, and its other precedents, it may notice the structural constitutional error despite the issue not having been presented by the parties or considered by the lower courts.

Although the issue may appear complicated, its resolution is not.⁸ This Court could cure the constitutional infirmity by severing a mere 26 words found in 48 U.S.C. § 1424b(a):

⁷ Four Justices recently recognized an exception to the rule that a court may not proceed to the merits without resolving questions of jurisdictional or structural error in the narrow context of assessing a party’s request for a preliminary injunction or other interim relief if doing so would result in denial of interim relief. *Mullin v. Doe*, 609 U.S. __, __ S. Ct. __, 2026 WL 1825840, at *11 (June 25, 2026) (plurality opinion). But that determination that this Court “may reverse the District Court’s grant of interim relief on either jurisdictional or merits grounds” rested on the fact a decision on interim relief requires “only a predictive—not a final—decision about the outcome of the case.” *Id.* This case arrives after final judgment, and the Court cannot adjudicate the questions presented by the Petitioner without leaving unresolved the structural objection to the constitutional authority of the district court.

⁸ Resolution of this matter will not require this Court to consider the continued vitality of the *Insular Cases*. Whatever the scope of Congress’s authority under the Territorial Clause, this Court has held that Article IV does not displace otherwise applicable structural constitutional constraints. *Aurelius*, 590 U.S. at 457.

The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court of Guam

who shall hold office for the term of ten years and until his successor is chosen and qualified unless sooner removed by the President for cause.

The judge shall receive a salary payable by the United States which shall be at the rate prescribed for judges of the United States district courts.

48 U.S.C. § 1424b(a) *with text recommended for severance in bold.*

What remains would be “fully operative as a law” going forward.⁹ *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 934 (1983) (severing 130 words that violated the Presentment Clauses), and cause the least amount of disruption to the administration of justice in Guam and other territories.¹⁰

This remedy is not unprecedented. In fact, it is precisely the remedy this Court ordered in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), where it judicially

⁹ Such a ruling would not unsettle final judgments previously rendered by the District Court of Guam or similarly constituted courts. New rules of federal law ordinarily govern cases still open on direct review, but do not reopen cases that have become final. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993).

¹⁰ The same severance could be done with the virtually identical language applicable to the District Court of the Virgin Islands and the District Court for the Northern Mariana Islands. *See* 48 U.S.C. § 1614(a); 48 U.S.C. § 1821(b)(1).

declared two courts to be Article III courts rather than Article I courts and invalidated statutes that conferred jurisdiction deemed inconsistent with Article III status. There is even less doubt in this case than in *Glidden*. While Congress conferred the courts at issue in *Glidden* with some non-Article III jurisdiction, the District Court of Guam possesses the full jurisdiction of a district court of the United States—and only the jurisdiction of a district court of the United States, with no remnants of Article IV jurisdiction. If this Court declines to dismiss the writ as improvidently granted, it should cure the structural defect by severing the unconstitutional language, vacating the underlying lower court decisions, and remanding the case for further proceedings before a constitutionally constituted district court.¹¹

¹¹ A question remains as to the status of the District Court’s sole incumbent judge, who was initially nominated and confirmed to a ten-year term in 2006 but has continued in office under a holdover provision due to the failure to confirm a successor. 48 U.S.C. § 1424b(a). Because the incumbent judge was confirmed after the District Court lost the last vestige of its territorial jurisdiction, her 2006 confirmation could be deemed confirmation to an Article III judgeship—particularly given that the President and Senate were aware in 2006 that she could potentially serve indefinitely under the holdover provision. However, because her ten-year term did expire, a vacancy on the District Court of Guam technically exists to which three consecutive Presidents have made a nomination.

But this Court need not resolve the status of the incumbent judge as part of this case; it may simply order the assignment of an Article III judge, including potentially one from another district, and allow the political branches or future litigation to resolve whether the incumbent judge continues in office as an Article III judge.



CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to dismiss the writ as improvidently granted or in the alternative should sever the unconstitutional language, vacate the district court's October 6, 2022 judgment, vacate the court of appeals' February 13, 2025 opinion and order as moot, and remand the case to the newly-constitutionally constituted District Court of Guam for resolution before a judge who enjoys the full protections of Article III.

Respectfully submitted,

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