

No.

IN THE
Supreme Court of the United States

DOUGLAS B. MOYLAN,
ATTORNEY GENERAL OF GUAM,
Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIAN
AND GYNECOLOGISTS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than thirty years, a federal injunction has prohibited enforcement of Guam Public Law 20-134 based solely on *Roe v. Wade*, 410 U.S. 113 (1973).

In *Dobbs v. Jackson Women's Health Org.*, this Court overruled *Roe* and held that the Constitution does not confer a right to abortion. 597 U.S. 215, 292 (2022).

Following *Dobbs*, Guam's Attorney General moved under Federal Rule of Civil Procedure 60(b)(5) to vacate the injunction. The district court denied relief, but the court of appeals dismissed the appeal as moot.

The question presented is:

Whether a federal court may dismiss as moot a Rule 60(b)(5) challenge to an ongoing permanent injunction resting entirely upon constitutional precedent that this Court has expressly overruled.

**PARTIES TO THE PROCEEDING
AND RELATED PROCEEDINGS**

The parties to the proceeding below are as follows:

Petitioner is Douglas B. Moylan, the Attorney General of Guam and the Government of Guam’s Chief Legal Officer, *see* 48 U.S.C. §1421g(d)(1), who sought relief under Rule 60(b)(5) from the permanent injunction entered in *Guam Society of Obstetricians & Gynecologists v. Ada*, No. 1:90-cv-00013 (D. Guam). Respondents are Guam Society of Obstetricians & Gynecologists and the individual plaintiffs who challenged Public Law 20-134 and obtained the permanent injunction entered by the District Court of Guam. Respondent Lourdes A. Leon Guerrero is the Governor of Guam and the congressionally created head of Guam’s executive branch, *see* 48 U.S.C. §1422, intervened in the proceedings below and opposed Petitioner’s request for Rule 60(b)(5) relief.

The related proceedings are:

Guam Society of Obstetricians & Gynecologists v. Moylan, No. 23-15602 (9th Cir.), appeal from the denial of Rule 60(b)(5) relief. The Ninth Circuit dismissed the appeal as moot and denied rehearing and rehearing en banc.

Guam Society of Obstetricians & Gynecologists v. Guerrero, No. 1:90-cv-00013 (D. Guam Mar. 24, 2023), denying Petitioner’s Rule 60(b)(5) motion for relief from judgment.

In re Request of Lourdes A. Leon Guerrero Relative to the Validity and Enforceability of Public Law No. 20-134, CRQ2023-001 (Guam) – Judgment entered on October 31, 2023.

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The Attorney General of Guam, Douglas B. Moylan, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying panel rehearing and rehearing en banc, together with Judge VanDyke's statement respecting the denial of rehearing en banc, is reported at 166 F.4th 798 (9th Cir. 2026) and is available at 2026 Daily Journal D.A.R. 922 (App. F at 58a).

The order of the United States Court of Appeals for the Ninth Circuit dismissing the appeal as moot is reported at 2025 WL 2943087 (App. A at 1a).

The order of the United States District Court for the District of Guam denying Petitioner's motion for relief from judgment pursuant to Rule 60(b)(5) is reported at 2023 WL 2631836 (App. B at 3a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order dismissing the appeal as moot on April 28, 2025. The court of appeals denied petitions for panel rehearing and rehearing en banc on February 3, 2026. On May 13, 2026, Justice Kagan extended the time to file a petition for a writ of certiorari to and including July 3, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 60(b)(5) provides, in relevant part:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding if:

...

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

Fed. R. Civ. P. 60(b)(5).

INTRODUCTION

More than thirty years ago, a federal court permanently enjoined enforcement of Guam Public Law 20-134, Guam's abortion law, because *Roe v. Wade*, 410 U.S. 113 (1973), purportedly required it. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1426 (D. Guam 1990) (App. E at 32a). For more than three decades, that injunction remained in place (App. E at 57a).

Then this Court decided *Dobbs*, overruling *Roe* and holding that the Constitution confers no right to abortion. 597 U.S. at 231. The constitutional foundation of the injunction disappeared.

Petitioner therefore sought relief under Rule 60(b)(5), which authorizes relief from prospective judgments when

continued enforcement is no longer equitable. Petitioner argued that an injunction resting entirely upon *Roe* could not remain in force after *Roe* itself had been overruled.

No federal court ever addressed that argument. As a result, a federal injunction entered solely because of *Roe* remains in force even though this Court has expressly overruled the constitutional decision upon which it rests (App. E at 57a). This case therefore presents not only an important question concerning Rule 60(b)(5), but also the proper administration of justice within the federal judiciary when an inferior federal court continues to enforce prospective equitable relief founded upon constitutional precedent this Court has expressly overruled.

While Petitioner's appeal was pending, the Supreme Court of Guam concluded that Public Law 20-134 had been impliedly repealed by subsequent legislation. *In re Request of Lourdes A. Leon Guerrero Relative to the Validity and Enforceability of Public Law No. 20-134* ("*Leon Guerrero*"), No. CRQ23-001, 2023 WL 7178992, at *1 (Guam Oct. 31, 2023). Relying on that intervening territorial-law determination, the Ninth Circuit dismissed the appeal as moot. *Guam Soc'y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602, 2025 WL 2943087, at *1 (9th Cir. Apr. 28, 2025) (App. A at 1a). As Judge VanDyke later observed, the result is that a federal injunction entered solely because of *Roe* remains in force even though this Court has overruled *Roe* itself. *Guam Soc'y of Obstetricians & Gynecologists v. Moylan*, 166 F.4th 798, 801–05 (9th Cir. 2026) (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a).

This case presents an important question concerning the operation of Rule 60(b)(5) following a fundamental change in constitutional law. It also presents an important institutional question concerning this Court's responsibility to ensure that inferior federal courts administer prospective equitable relief consistently with this Court's constitutional decisions. If a federal court may dismiss a Rule 60(b)(5) challenge as moot without determining whether continued prospective enforcement of an injunction remains equitable after this Court has expressly overruled the constitutional precedent upon which that injunction rests, federal injunctions founded upon overruled constitutional decisions may effectively become immune from meaningful Rule 60(b)(5) review.

This Court should grant the petition.

STATEMENT OF THE CASE

1. In 1990, the Guam Legislature enacted Public Law 20-134, a statute regulating abortion. The law reflected the Legislature's understanding of then-existing abortion jurisprudence and incorporated findings concerning the State's interest in protecting unborn life. *See* Guam Pub. L. No. 20-134 §§ 1, 3.

Within days, a group of plaintiffs challenged Public Law 20-134 in the District Court of Guam. *Ada* (D. Guam), 776 F. Supp. at 1426 (App. E at 32a). The district court ultimately entered a permanent injunction prohibiting enforcement of the statute solely because *Roe* remained controlling precedent. *Id.* ("*Roe v. Wade* [is] the law in the Territory of Guam.") (App. E at 41a-42a).

The Ninth Circuit affirmed. *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992). Like the district court, the Ninth Circuit’s decision rested entirely upon *Roe*. *See id.* at 1373-74. The permanent injunction has remained in place ever since (App. E at 57a).

2. In 2022, this Court overruled both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), holding in *Dobbs* that “*Roe* was egregiously wrong from the start.” 597 U.S. 215, 231 (2022). *Dobbs* instructed lower courts to treat abortion laws “like other health and welfare laws” subject to rational-basis review. *Id.* at 301; *see also Raidoo v. Moylan*, 75 F.4th 1115, 1121 (9th Cir. 2023) (“abortion laws ... are generally subject only to rational basis review by the courts”).

Dobbs thus eliminated the sole constitutional foundation upon which the injunction against Public Law 20-134 had rested since 1990, setting the stage for parallel proceedings in Guam’s federal and territorial courts that ultimately led to this petition.

3. **First, in Guam federal district court:** About five months after *Dobbs* was issued, Petitioner Douglas Moylan became Attorney General of Guam. Shortly after taking office, he moved the District Court of Guam under Rule 60(b)(5) to vacate its permanent injunction against enforcement of Guam Public Law 20-134 in light of *Dobbs* (App. B at 4a). He argued that *Dobbs* eliminated the sole constitutional basis for the injunction and that continued prospective enforcement therefore was no longer equitable under Rule 60(b)(5). Guam’s current Governor, whose

predecessor was a named defendant in the *Ada* litigation, opposed Attorney General Moylan’s Rule 60(b)(5) motion, as did the plaintiffs and other named defendants. *Guam Soc’y of Obstetricians & Gynecologists v. Guerrero*, No. 1:90-cv-00013, 2023 WL 2631836, at *1 (D. Guam Mar. 24, 2023) (App. B at 3a).

4. *Second, in the Supreme Court of Guam:* Before the federal district court could rule on Attorney General Moylan’s Rule 60(b)(5) motion, the Governor initiated a separate proceeding in the Supreme Court of Guam pursuant to 7 Guam Code Ann. § 4104. She sought a declaratory judgment addressing questions that substantially overlapped with those presented in the pending Rule 60(b)(5) proceedings. Specifically, she asked the Supreme Court of Guam to determine, among other things, whether Public Law 20-134 had been impliedly repealed by subsequent legislation. *Leon Guerrero*, 2023 WL 7178992, at *2–4.

5. While the Governor’s original action was pending before the Supreme Court of Guam, the federal district court denied Attorney General Moylan’s Rule 60(b)(5) motion. *Guam Soc’y of Obstetricians & Gynecologists v. Guerrero*, No. 1:90-cv-00013, 2023 WL 2631836 (D. Guam Mar. 24, 2023). The Attorney General immediately appealed that ruling to the Ninth Circuit. *Guam Soc’y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602 (9th Cir. Apr. 25, 2023).

After the parties filed their opening and response briefs—including the Governor’s separate brief defending the injunction—but before appellants filed their reply brief, the Supreme Court of Guam issued its decision in

Leon Guerrero. The court concluded that “P.L. 20-134 has been impliedly repealed by the Guam Legislature and no longer possesses any force or effect in Guam.” *Leon Guerrero*, 2023 WL 7178992, at *1.

6. Following the Supreme Court of Guam’s decision, the Ninth Circuit requested supplemental briefing regarding mootness. *Order Requesting Supplemental Briefing on Mootness, Guam Soc’y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602 (9th Cir. Nov. 7, 2024), ECF No. 61. Petitioner argued that the appeal remained live because a federal injunction continued to exist and because no federal court had addressed whether that injunction could remain in force after *Dobbs*. *Appellant’s Response to Order Requesting Supplemental Briefing on Mootness, Guam Soc’y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602 (9th Cir. Nov. 27, 2024), ECF No. 62.

Without reaching the merits of Petitioner’s Rule 60(b)(5) arguments, the Ninth Circuit dismissed the appeal as moot in light of *Leon Guerrero*. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a). The court concluded that *Leon Guerrero* foreclosed effective relief but did not address whether a federal injunction entered solely because of *Roe* may remain operative after *Dobbs*. *Id.* The Ninth Circuit subsequently denied panel rehearing and rehearing en banc. *Moylan*, 166 F.4th 798 (App. F at 58a).

7. Judge VanDyke’s published statement respecting the denial of rehearing en banc underscores the question presented here. He explained that *Dobbs* eliminated the constitutional foundation upon which the injunction rested, yet the Ninth Circuit’s mootness ruling prevented any

federal court from determining whether the injunction may survive *Dobbs*. *Moylan*, 166 F.4th at 801–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a). As a result, a federal injunction entered solely because of *Roe* remains in force without any judicial determination regarding its continued validity after *Dobbs*. *Id.* at 804–05.

This petition followed.

REASONS FOR GRANTING THE PETITION

This Court’s review is warranted for at least four reasons.

First, review is warranted because this case implicates this Court’s responsibility to ensure the proper administration of justice within the federal judiciary when inferior federal courts continue enforcing prospective equitable relief founded upon constitutional precedent this Court has expressly overruled.

Second, the decision below prevents federal courts from performing the function Rule 60(b)(5) was designed to serve: ensuring that prospective equitable relief does not continue to operate after its legal foundation has disappeared.

Third, the decision permits intervening state or territorial law developments to insulate federal injunctions from review, even when those injunctions rest entirely upon constitutional precedent this Court has expressly overruled.

Fourth, the question presented is exceptionally important because federal injunctions entered under now-overruled constitutional precedent continue to exist throughout the Nation. The lower courts require guidance regarding the proper application of Rule 60(b)(5) when the constitutional foundation of a federal injunction has been eliminated by this Court.

This Court should grant review and make clear that federal injunctions entered solely under constitutional precedent this Court has expressly overruled do not become immune from Rule 60(b)(5) review merely because intervening developments later permit a court to characterize the dispute as moot.

I. This Court’s Supervisory Responsibility Over the Federal Judiciary Warrants Review

Article III vests “[t]he judicial Power of the United States” in “one supreme Court” and such inferior courts as Congress may establish. U.S. Const. art. III, § 1. Reflecting that constitutional structure, this Court has long recognized that it possesses supervisory authority over the federal courts and may prescribe rules governing the administration of justice within the federal judicial system. *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *Yates v. United States*, 356 U.S. 363, 366 (1958) (recognizing this Court’s supervisory power over the administration of justice in the lower federal courts).

This case directly implicates that institutional responsibility because it concerns a federal injunction that remains in force (App. E at 57a) even though the constitutional precedent upon which it rests has been

expressly overruled by this Court. The injunction challenged here rests exclusively upon *Roe v. Wade* (App. E at 41a–42a). After *Dobbs* expressly overruled *Roe*, Petitioner invoked Rule 60(b)(5) to obtain a federal determination whether continued prospective enforcement of that injunction remained equitable. Yet no federal court ever answered that question.

Instead, the Ninth Circuit dismissed the appeal as moot before any federal court determined whether an injunction founded solely upon constitutional precedent this Court has expressly overruled may continue to govern the conduct of public officials. As a result, a federal injunction resting exclusively upon *Roe* remains in force nearly four years after *Dobbs*.

This Court’s supervisory responsibility over the administration of justice within the federal judiciary therefore warrants review. Unless this Court provides guidance, inferior federal courts may continue enforcing prospective equitable relief founded exclusively upon constitutional precedent this Court has expressly overruled without ever determining whether continued enforcement remains equitable under Rule 60(b)(5).

II. The Ninth Circuit’s Mootness Ruling Prevents Federal Courts from Applying Rule 60(b)(5) to Injunctions Resting on Overruled Constitutional Precedent.

Against that backdrop, this case presents precisely the circumstance in which that supervisory responsibility should be exercised. Rule 60(b)(5) authorizes relief from a judgment when “applying it prospectively is no longer

equitable.” This Court has repeatedly recognized that the Rule serves a critical role in ensuring that federal injunctions remain responsive to significant changes in law and fact. *See Horne v. Flores*, 557 U.S. 433, 447 (2009); *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

Petitioner’s Rule 60(b)(5) motion presented precisely the sort of circumstance those decisions contemplate. The injunction at issue was entered solely because *Roe* purported to recognize a constitutional right to abortion. *Dobbs* expressly overruled *Roe* and rejected the constitutional premise upon which the injunction rested. 597 U.S. at 231.

The Ninth Circuit never reached that question. As Judge VanDyke later observed, the court’s mootness ruling prevented any federal court from determining whether the injunction may survive *Dobbs*. *Moylan*, 166 F.4th at 803–04 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a).

That omission is particularly significant because this Court has already held that Rule 60(b)(5) provides an appropriate mechanism for revisiting injunctions entered under constitutional doctrines that later change. *Agostini v. Felton*, 521 U.S. 203, 215–16 (1997). In *Agostini*, the Court permitted relief from an injunction after intervening decisions undermined the legal foundation upon which the injunction rested. *Id.* at 215–16, 237. The same principle should have guided the Ninth Circuit’s analysis here. Yet the Ninth Circuit’s mootness ruling prevented any court from performing the analysis that *Agostini* contemplates.

Instead, the Ninth Circuit dismissed the appeal as moot after the Supreme Court of Guam held that Public Law 20-134 had been impliedly repealed by subsequent legislation. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Leon Guerrero*, 2023 WL 7178992, at *12–13. In doing so, the court effectively prevented any federal court from determining whether continued prospective enforcement of the injunction remains equitable after *Dobbs*.

That result is difficult to reconcile with this Court’s Rule 60(b)(5) jurisprudence. If a federal court may decline to address whether an injunction remains valid after the constitutional precedent supporting it has been expressly overruled by this Court, Rule 60(b)(5) cannot perform the function this Court has repeatedly assigned to it.

The practical consequence of the decision below is that a federal injunction entered solely under *Roe* remains in place more than thirty years after its entry and nearly four years after this Court overruled *Roe* (App. E at 57a). This Court’s review is warranted because the decision below leaves unresolved a question at the heart of Rule 60(b)(5): whether a federal injunction entered solely under constitutional precedent this Court has expressly overruled may remain in force without any federal judicial determination regarding its continued validity. Unless corrected, the decision below threatens to convert Rule 60(b)(5) from a mechanism for revisiting obsolete injunctions into a doctrine that can be displaced entirely by subsequent mootness developments.

III. The Decision Below Allows Federal Injunctions to Evade Review Through Intervening Mootness Developments.

The decision below presents an important question concerning the interaction between mootness doctrine and ongoing federal equitable relief.

Petitioner sought review of a federal injunction entered under federal constitutional law. Yet before any federal court could determine whether that injunction remained valid after *Dobbs*, the Ninth Circuit concluded that intervening developments rendered the case moot. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Moylan*, 166 F.4th at 801–04 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 66a–70a.)

The consequence is that a federal injunction founded entirely upon constitutional precedent this Court has expressly overruled (App. E at 57a) remains in force without any federal appellate determination regarding its continued validity. *Dobbs*, 597 U.S. at 231.

The problem is illustrated by the sequence of events in this case. Public Law 20-134 was enjoined because *Roe* purportedly required it. *Ada* (D. Guam), 776 F. Supp. at 1426; *Ada* (9th Cir. 1992), 962 F.2d at 1373–74 (App. E at 41a–42a). While that injunction remained in place, Guam enacted additional abortion regulations, which the Supreme Court of Guam later relied upon to conclude that Public Law 20-134 had been impliedly repealed. *Leon Guerrero*, 2023 WL 7178992, at *12–13. The Ninth Circuit then relied upon that implied-repeal determination to dismiss petitioner’s Rule 60(b)(5) appeal as moot. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a).

Thus, legal developments that occurred while Guam was operating under a *Roe*-based injunction became the basis for preventing any federal court from deciding whether that injunction may survive *Dobbs*.

The Ninth Circuit’s disposition is particularly difficult to reconcile with this Court’s vacatur jurisprudence. This Court has long recognized that when a case becomes moot through circumstances beyond the control of the party seeking review, vacatur ordinarily serves to prevent an unreviewed judgment from continuing to generate legal consequences. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950). As *Munsingwear* explained, vacatur “clears the path for future relitigation of the issues between the parties” and eliminates a judgment whose review has been prevented through happenstance. *Id.* at 40. The principle underlying *Munsingwear* is that mootness should not ordinarily leave unreviewed federal judgments in place where appellate review has been frustrated by subsequent events. *Id.* at 40–41; see also *id.* at 41 (vacatur prevents an unreviewable judgment from “spawning any legal consequences”).

This Court has likewise recognized that when mootness results from a change in the governing legal framework, the ordinary course is not simply to terminate review, but to vacate and remand for further proceedings under the new framework. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482–84 (1990). There, the Court explained that when mootness results from a change in the governing legal framework, the proper course may be to vacate and remand so that the parties may develop the record and the lower courts may determine what consequences flow from the new legal landscape. *Id.* at 483–84. The same concern is present here.

The question is not unique to Guam or abortion litigation. Federal injunctions and consent decrees often remain in effect for years or decades, during which time the governing legal framework may change substantially. This Court has repeatedly confronted cases requiring lower courts to reconsider prospective relief in light of intervening developments in constitutional doctrine, statutory interpretation, or federal policy. In *Agostini*, for example, the Court revisited a longstanding injunction after intervening Establishment Clause decisions undermined the constitutional premises upon which the injunction rested. 521 U.S. at 215–16, 237. Likewise, this Court recognized in *Rufo* and *Horne* that long-running institutional decrees may require modification or dissolution when significant legal or factual changes render continued enforcement inequitable. 502 U.S. at 380–81; 557 U.S. at 447–50. The issue presented here therefore extends well beyond the specific context of Public Law 20-134.

The decision below produced precisely that result. The Ninth Circuit’s disposition foreclosed any federal court from considering Petitioner’s Rule 60(b)(5) arguments while leaving the underlying injunction in place, thereby permitting the injunction to continue generating legal consequences without any determination of its validity after *Dobbs*. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Moylan*, 166 F.4th at 803–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 66a–70a); cf. *Munsingwear*, 340 U.S. at 41 (vacatur prevents an unreviewable judgment from “spawning any legal consequences”).

Petitioner diligently sought appellate review of the denial of Rule 60(b)(5) relief. Mootness, if it occurred

at all, resulted from an intervening territorial-court decision issued while appellate review was pending. *Leon Guerrero*, 2023 WL 7178992; *Moylan*, 2025 WL 2943087, at *1. Nonetheless, the injunction remains in place and continues to operate (App. E at 57a) despite the absence of any judicial determination regarding its validity after *Dobbs*. *Moylan*, 166 F.4th at 801–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a).

The Ninth Circuit’s disposition resembles the Fifth Circuit’s approach in *McCorvey v. Hill*, 385 F.3d 846, 849–50 (5th Cir. 2004), which held that a Rule 60(b) challenge to Roe-era abortion judgments became moot after the underlying Texas abortion statutes were deemed repealed by implication. But *McCorvey* was decided nearly two decades before *Dobbs* and did not involve a federal injunction resting upon constitutional precedent this Court had expressly overruled. *See Dobbs*, 597 U.S. at 231–32. The question presented here—whether a federal court may dismiss as moot a Rule 60(b)(5) challenge without determining whether continued prospective enforcement of a *Roe*-based injunction may remain in force after *Dobbs*—therefore remains unresolved.

This Court should grant review to clarify whether intervening state or territorial-law developments may prevent federal courts from determining whether continued prospective enforcement of an injunction resting entirely upon overruled constitutional precedent remains equitable under Rule 60(b)(5).

IV. The Question Presented Is Exceptionally Important Because Federal Injunctions Entered Under Now-Overruled Precedent Continue to Exist Throughout the Country.

The importance of the question presented extends far beyond abortion litigation and Guam.

Federal injunctions frequently remain in effect for decades. Federal courts routinely administer injunctions, consent decrees, and other forms of prospective relief long after their entry, often while the governing legal framework continues to evolve.¹ As time passes, constitutional doctrine changes, statutory interpretations shift, and precedent once regarded as settled may later be narrowed, modified, or overruled.

This Court has therefore recognized that prospective relief must remain subject to reconsideration when significant changes in law render continued enforcement inequitable. In *Agostini*, the Court held that Rule 60(b)(5) authorized relief from a longstanding injunction after intervening decisions had undermined the constitutional premises upon which the injunction rested. 521 U.S. at 215–16, 237. Likewise, in *Horne*, the Court emphasized that Rule 60(b)(5) plays a vital role in ensuring that federal injunctions remain responsive to changed legal and factual circumstances. 557 U.S. at 447–50. The need for such review is particularly acute here. *Dobbs* overruled

1. See Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 Vand. L. Rev. 167, 168–73, 204–13 (2017) (discussing the longevity of institutional reform injunctions and the effect of changing legal circumstances).

Roe and held that the Constitution does not confer a right to abortion. 597 U.S. at 231–32. Yet no federal court has determined whether a permanent injunction entered solely because of *Roe* remains legally justified after *Dobbs*. The Ninth Circuit’s mootness ruling foreclosed that inquiry altogether. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Moylan*, 166 F.4th at 801–04 (VanDyke, J., statement respecting denial of rehearing en banc).

Lower courts therefore require clear guidance concerning the circumstances under which ongoing federal injunctions may be reconsidered after significant changes in governing law. The need for guidance is particularly acute where, as here, the underlying constitutional precedent has not merely been narrowed or modified but expressly overruled. *Dobbs*, 597 U.S. at 231. If Rule 60(b)(5) cannot be used to obtain review in those circumstances, lower courts will have little guidance concerning when prospective relief founded upon obsolete constitutional doctrine may be reconsidered.

The decision below creates uncertainty regarding how that principle operates when the underlying constitutional precedent has been expressly overruled by this Court. If appellate courts may dismiss Rule 60(b)(5) proceedings as moot whenever intervening developments alter the practical consequences of the underlying law, lower courts will lack guidance concerning when federal injunctions may be reconsidered and when they may remain in force without any federal court determining whether the underlying injunction remains valid after a dramatic change in governing law.

The importance of the question is not limited to the present status of Public Law 20-134. The injunction remains a federal decree governing the conduct of Guam officials (App. E at 57a). Although the Supreme Court of Guam subsequently concluded that Public Law 20-134 had been impliedly repealed, that determination did not dissolve or modify the federal injunction. The injunction therefore remains in force unless and until a federal court determines that continued prospective enforcement is no longer equitable under Rule 60(b)(5).

This case presents that question in its clearest form. Judge VanDyke also recognized that the case presents an unresolved question concerning the continued validity of a *Roe*-based injunction after *Dobbs*. *Moylan*, 166 F.4th at 803–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a). The injunction at issue rests solely upon *Roe*. *Ada* (D. Guam), 776 F. Supp. at 1426; *Ada* (9th Cir. 1992), 962 F.2d at 1373–74 (App. E at 41a–42a). *Dobbs* did not merely distinguish *Roe* or narrow its application. It expressly overruled *Roe* and declared it “egregiously wrong from the start.” *Dobbs*, 597 U.S. at 268. Yet no federal court has determined whether a permanent injunction entered solely because of *Roe* may remain operative after *Dobbs*. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Moylan*, 166 F.4th at 803–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 62a–66a).

The issue is exceptionally important to the administration of federal equitable relief and warrants this Court’s review. The continuing existence of this injunction therefore implicates not only the proper application of Rule 60(b)(5), but also this Court’s

institutional responsibility to ensure that inferior federal courts administer prospective equitable relief consistently with this Court's constitutional decisions. When a federal injunction continues to rest upon constitutional precedent this Court has expressly overruled, yet no federal court determines whether continued prospective enforcement remains equitable, this Court's supervisory role over the administration of justice in the federal judiciary is directly implicated.

That continuing legal significance is underscored by the nature of judicial precedent itself. Judicial precedent is not immutable. This Court reconsidered and overruled *Roe* in *Dobbs*, fundamentally altering the constitutional framework upon which the injunction rests. Likewise, if the Supreme Court of Guam were ever to revisit *Leon Guerrero* or otherwise conclude that Public Law 20-134 remains operative, the federal injunction would immediately resume its role as the principal legal obstacle to enforcement of the statute. The continuing existence of that injunction therefore creates present legal consequences independent of *Leon Guerrero* and underscores the need for a federal determination whether continued prospective enforcement remains equitable under Rule 60(b)(5). Because the injunction remains a continuing decree of an inferior federal court (App. E at 57a), only a federal court can determine whether its prospective enforcement remains equitable under Rule 60(b)(5) following *Dobbs*.

Respondents may contend that this case is an unsuitable vehicle because the Supreme Court of Guam subsequently held that Public Law 20-134 was impliedly repealed. *Leon Guerrero*, 2023 WL 7178992,

at *12–13. But that determination does not dissolve the federal injunction, nor does it resolve whether continued prospective enforcement of that injunction remains equitable after *Dobbs*. The Ninth Circuit relied upon that intervening territorial-law development without deciding whether continued prospective enforcement of the injunction remains equitable after *Dobbs*. *Moylan*, 2025 WL 2943087, at *1 (App. A at 1a); *Moylan*, 166 F.4th at 803–05 (VanDyke, J., statement respecting denial of rehearing en banc) (App. F at 66a–70a). Whether that disposition was proper is the very issue this petition asks the Court to resolve. The case therefore presents a clean and direct vehicle for resolving the question presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition to clarify the proper application of Rule 60(b)(5) following a fundamental change in constitutional law and to ensure the consistent administration of justice within the federal judiciary when inferior federal courts continue enforcing prospective equitable relief founded upon constitutional precedent this Court has expressly overruled.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED APRIL 28, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15602
D.C. No. 1:90-cv-00013
District of Guam, Agana

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS; *et al.*,

Plaintiffs-Appellees,

v.

DOUGLAS B. MOYLAN, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF GUAM,

Defendant-Appellant,

v.

LOURDES LEON GUERRERO, IN HER OFFICIAL
CAPACITY AS GOVERNOR OF GUAM; *et al.*,

Defendants-Appellees.

Filed April 28, 2025

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Appendix A

ORDER

Before: TASHIMA, OWENS, and DESAI, Circuit Judges.

The court has received the responses to the November 7, 2024 order. We dismiss this appeal as moot in light of *In Re Leon Guerrero*, 2023 Guam 11 (Guam Oct. 31, 2023).

DISMISSED.

**APPENDIX B — ORDER DENYING MOTION TO
VACATE PERMANENT INJUNCTION OF THE
DISTRICT COURT OF GUAM, DATED MARCH 24, 2023**

THE DISTRICT COURT OF GUAM

CIVIL CASE NO. 90-00013

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS; GUAM NURSES
ASSOCIATION; THE REVEREND MILTON H.
COLE, JR.; LAURIE KONWITH; EDMUND A.
GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; JOHN
DUNLOP, M.D.; ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED, AND
ALL THEIR WOMEN PATIENTS,

Plaintiffs,

vs.

LOURDES A. LEON GUERRERO, IN HER
OFFICIAL CAPACITY AS THE GOVERNOR
OF GUAM; ARTHUR U. SAN AGUSTIN, IN HIS
OFFICIAL CAPACITY AS THE DIRECTOR OF
THE DEPARTMENT OF PUBLIC HEALTH AND
SOCIAL SERVICES; LILLIAN PEREZ-POSADAS,
M.N., R.N., IN HER OFFICIAL CAPACITY AS THE
ADMINISTRATOR OF THE GUAM MEMORIAL
HOSPITAL AUTHORITY; DOUGLAS B. MOYLAN,
IN HIS OFFICIAL CAPACITY AS THE ATTORNEY
GENERAL OF GUAM; ALICE M. TAIJERON,
GERARD “JERRY” C. CRISOSTOMO, JOSEPH P.

Appendix B

MAFNAS, ANTONIA “TONI” R. GUMATAOTAO,
BENNY A. PINAULA, G. PATRICK CIVILLE,
AND CARISSA E. PANGELINAN, IN THEIR
OFFICIAL CAPACITIES AS THE BOARD
OF DIRECTORS OF THE GUAM ELECTION
COMMISSION, TOGETHER WITH ALL
OTHERS SIMILARLY SITUATED,

Defendants.

**ORDER DENYING DEFENDANT ATTORNEY
GENERAL OF GUAM’S MOTION TO
VACATE PERMANENT INJUNCTION**

Before the court is Defendant Attorney General of Guam Douglas B. Moylan’s Motion to Vacate Permanent Injunction Pursuant to Fed. R. Civ. P. 60(b)(5) and to Dismiss the Case with Prejudice (hereinafter “Motion”). *See* ECF No. 357. For the reasons stated herein, the Motion is hereby **DENIED**.¹

Defendant Attorney General of Guam (“Defendant AG”) moves the court for an order vacating the permanent injunction issued on August 23, 1990, in the above-captioned matter. *See* Mot., ECF No. 357. The basis for the Motion is that “[t]he doctrinal underpinnings of the permanent injunction in this case were predicated on the Supreme Court’s decision in *Roe v. Wade*. . . . But *Roe* and

1. The court finds oral argument to be unnecessary.

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its progeny are no longer the law.” Mem. Supp. at 2-3,² ECF No. 358.

Plaintiffs, Defendant Governor of Guam (“Defendant Governor”), and Defendant Guam Memorial Hospital Administrator (“Defendant GMH Administrator”) filed oppositions to the Motion. *See* Opp’ns, ECF Nos. 382, 391, and 392. Defendants Governor and GMH Administrator both argue that Sections 4 and 5 of Guam Public Law 20-134 violate the First Amendment’s freedom of speech clause. *See* Def. Governor’s Opp’n at 28-32, ECF No. 382; Def. GMH Adm’r’s Opp’n at 11-15, ECF No. 392. They argue that the United States Supreme Court’s opinion in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022),³ neither impacted nor affected the unconstitutionality of these sections. *Id.* Defendant Governor also argues that Guam Public Law 20-134 was impliedly repealed by subsequent measures passed by the Guam Legislature and therefore, the Motion is moot. *See* Def. Governor’s Opp’n at 18-27, ECF No. 382. Defendant GMH Administrator separately argues that the Government of Guam did not appeal the District Court of Guam’s decision on Sections 4 and 5 of Guam Public Law 20-134, and therefore, any challenges to said sections are foreclosed. Def. GMH Adm’r’s Opp’n at 13-14, ECF No. 392.

2. The page numbering throughout this order is based on the CM/ECF page numbering system.

3. In a nutshell, *Dobbs* reversed *Roe v. Wade*.

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Plaintiffs, on the other hand, argue, *inter alia*, that Defendant AG has not met his burden for obtaining relief under FED. R. CIV. P. 60(b)(5). Pls.' Opp'n., ECF No. 391. Defendant AG "does not (and cannot) dispute that both the ban on pre-viability abortion and solicitation of abortion violated the laws of the United States applicable to Guam, when [Guam Public Law 20-134] was passed." *Id.* at 18. Because the abortion ban violated the laws of the United States applicable to Guam, the Guam Legislature lacked the authority to enact such a ban.⁴ *Id.* at 19. Plaintiffs contend that because the Guam Legislature lacked the authority, Guam Public Law 20-134 was void *ab initio*. *Id.* at 16-20.

While Defendant AG filed a response to the oppositions filed by Defendants Governor and GMH Administrator (*see* Reply, ECF No. 409), Defendant AG's Reply did not respond to the issues raised in the Plaintiffs' Opposition.⁵ Based on Defendant AG's lack of response to Plaintiffs' arguments, especially those that did not overlap with the arguments raised by Defendants Governor and GMH Administrator, it is reasonable to presume that Defendant AG takes no position on their arguments or is not contesting them. *Maciel v. Cate*, 731 F.3d 928, 932 n.4 (9th Cir. 2013) (holding a party forfeited an argument

4. "The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of [the Organic Act] and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a.

5. A reply to all oppositions was due March 22, 2023. *See* Order at 2, ECF No. 393; CVLR 7(f).

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raised in the opponent's answering brief by failing to address it in reply brief); *Sabra v. Maricopa Cty. Cmty. Coll. Dist.*, 44 F.4th 867, 881-882 (9th Cir. 2022) (same).

Rule 60(b)(5) permits a party to obtain relief from a judgment or order if “the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]” FED. R. CIV. P. 60(b)(5). In reviewing a Rule 60(b)(5) motion, the Supreme Court requires that there must be “a significant change in facts or law [that] warrants revision of the decree,” and “the proposed modification [must be] suitably tailored to the changed circumstance.” *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 393 (1992). The party seeking relief bears the burden of establishing that changed circumstances warrant relief. *Id.* In this case, the burden falls on Defendant AG.

While Defendant AG argues that the legal basis for the permanent injunction no longer exists, Defendant AG failed to address whether the change in law in *Dobbs* warrants vacatur of the permanent injunction in its entirety. As Plaintiffs have argued, “irrespective of *Dobbs* or any other Supreme Court decision concerning abortion issued after [Guam Public Law 20-134] was enacted, the [public law] was a legal nullity the moment it was passed and can have no force or effect today.” Pls.’ Opp’n at 20, ECF No. 391. Defendant AG has not refuted this argument, and after having reviewed the relevant statutes and the legal authority provided by Plaintiffs in their opposition, to which Defendant AG did not respond,

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the court finds that Defendant AG has not met his burden under Rule 60(b)(5).

Based on the foregoing, the court hereby **DENIES** Defendant AG's Motion. Any other pending motions⁶ in this case are hereby **MOOT**.

SO ORDERED.

/s/ **Frances M. Tydingco-Gatewood**
Chief Judge
Dated: Mar 24, 2023

6. Motion to Intervene, ECF No. 389; and Motion for Abstention, ECF No. 368.

9a

**APPENDIX C — OPINION OF THE SUPREME
COURT OF THE UNITED STATES, FILED
NOVEMBER 30, 1992**

SUPREME COURT OF THE UNITED STATES

No. 92-104

JOSEPH F. ADA, GOVERNOR OF GUAM,

Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS, *et al.*

Filed November 30, 1992

OPINION

On Petition for writ of certiorari to the
United States Court of Appeals for the Ninth Circuit

The petition for a writ of certiorari is denied.

Justice SCALIA, with whom THE CHIEF JUSTICE and
Justice WHITE join, dissenting.

I dissent from the denial of the petition for writ of
certiorari. The Ninth Circuit held in this case that Guam
Pub.L. 20-134, outlawing all abortions except in cases of
medical emergency, is unconstitutional on its face. That

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seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional.

Statutes are ordinarily challenged, and their constitutionality evaluated, “as applied”—that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional “as applied” is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute “on its face.” Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (Bail Reform Act of 1984 not facially unconstitutional). “[C]ourts are not,” we have said, “roving commissions assigned to pass judgment on the validity of the Nation’s laws.” *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). The only exception to this rule recognized in our jurisprudence is the facial challenge based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called “overbreadth” doctrine, rendering such a statute invalid in all its applications (*i.e.*, facially invalid) if it is invalid in any of them. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 520-523, 92 S.Ct. 1103, 1105-1107, 31 L.Ed.2d 408 (1972).

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The Court's first opinion in the abortion area, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), seemingly employed an "overbreadth" approach—though without mentioning the term and without analysis. See *id.*, at 164, 93 S.Ct., at 732. Later abortion decisions, however, have explicitly rejected application of an "overbreadth" doctrine. See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, 110 S.Ct. 2972, 2980-2981, 111 L.Ed.2d 405 (1990) (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524, 109 S.Ct. 3040, 3060, 106 L.Ed.2d 410 (1989) (O'CONNOR, J., concurring in part and concurring in judgment)). As Justice O'CONNOR explained in *Webster*, this Court's previous decisions concerning state and federal funding of abortions "stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional." *Id.*, at 524, 109 S.Ct., at 3060. See also *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) (facial challenge to federal regulations limiting the ability of recipients of federal funds to engage in abortion-related activities "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted; citation omitted)). The Court did not purport to change this well-established rule last Term, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

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Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting—through judicial decision or enforcement discretion—statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional. Under this Court’s current abortion case law, including *Casey*, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge. It is important for this Court to call attention to the point, since the course taken by the Ninth Circuit here was also followed by the Fifth Circuit in affirming the facial invalidation of Louisiana’s abortion statute, see *Sojourner T. v. Edwards*, 974 F.2d 27 (1992)—though it is possible that there, unlike here, the facial challenge point was not asserted by the State.

I would grant certiorari, vacate the decision of the Court of Appeals, and remand the case for the Ninth Circuit to consider, as the prevailing legal standard for facial challenges requires, whether Guam Pub.L. 20-134 has any constitutional applications.

**APPENDIX D — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED JUNE 8, 1992**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16706

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS; GUAM NURSES
ASSOCIATION; THE REVEREND MILTON COLE,
JR.; LAURIE KONWITH; EDMUND A. GRILEY,
M.D.; WILLIAM S. FREEMAN, M.D.; JOHN
DUNLOP, M.D.; ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED, AND
ALL THEIR WOMEN PATIENTS,

Plaintiffs-Appellees,

v.

JOSEPH F. ADA, GOVERNOR OF GUAM, IN HIS
OFFICIAL CAPACITY,

Defendant-Appellant.

Argued and Submitted Nov. 4, 1991

Decided April 16, 1992

As Amended June 8, 1992

OPINION

Appeal from the United States
District Court for the District of Guam

Before: CHOY, D.W. NELSON and CANBY, Circuit
Judges.

Appendix D

CANBY, Circuit Judge:

On March 19, 1990, the Territory of Guam enacted a statute (“the Act”) outlawing almost all abortions.¹

1. The final version of Guam Public Law 20–134 states:

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

Appendix D

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 drugs 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.

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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–[134]), 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

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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.² 776 F.Supp. 1422. We affirm.

I

The plaintiffs in this case are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; physicians Edmund A. Griley, William S. Freeman, and John Dunlop; the Reverend Milton H. Cole, Jr.; and Laurie Konwith. The health care providers in this group clearly have standing to bring this action.

2. The district court also held that Sections 4 and 5 of the statute, which make criminal the “soliciting” of abortions, violated the First Amendment. That ruling has not been appealed.

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See Planned Parenthood v. Danforth, 428 U.S. 52, 62, 96 S.Ct. 2831, 2837, 49 L.Ed.2d 788 (1976); *Abele v. Markle*, 452 F.2d 1121, 1125 (2d Cir.1971). Because some of the plaintiffs have standing, it is not necessary to determine whether the others do. *See Doe v. Bolton*, 410 U.S. 179, 188–89, 93 S.Ct. 739, 746, 35 L.Ed.2d 201 (1973); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir.), *cert. denied*, 474 U.S. 826, 106 S.Ct. 85, 88 L.Ed.2d 70 (1985).

The district court held that the plaintiffs could maintain their action under 42 U.S.C. § 1983, and awarded them relief under the due process guarantees recognized in *Roe v. Wade*. The court determined that those guarantees applied in Guam, under the provisions of the Mink Amendment to the Guam Organic Act, 48 U.S.C. § 1421b(u). The Territory of Guam in the person of Governor Ada (“Guam”) challenges all of these rulings on appeal, and urges as well that the authority of *Roe v. Wade* has been undermined by later decisions of the Supreme Court. Before we address these points, however, we must deal with a threshold issue raised by the plaintiffs.

A. Severability of the Unappealed Sections

The district court held that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal from that ruling. The plaintiffs now argue that these sections are not severable from the remainder of the Act. The result, they contend, is that the entire Act has been invalidated, in effect, by the district court’s unappealed

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ruling, leaving nothing to be decided on this appeal. We reject this contention because we conclude that Sections 4 and 5 are severable from the other parts of the Act.

The standard for determining the severability of an unconstitutional provision is well established: “Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987) (citations omitted). The sections of the Act that remain if Sections 4 and 5 are severed clearly are fully operative as a law. Unless there is evidence of contrary legislative intent, the remainder of the Act should therefore survive the invalidation of Sections 4 and 5.

The plaintiffs put forward two related arguments suggesting a legislative intent against severability. First, they contend that Section 7, which provides for a referendum to determine whether the entire Act should be repealed,³ demonstrates that the Guam Legislature intended the Act to stand or fall as a whole. Second, they argue that the Legislature’s intention was to pass a comprehensive antiabortion statute, and that removal of Sections 4 and 5 creates a weaker and less comprehensive statute.

3. The provision for a referendum did not delay the effective date of the Act. There is accordingly no issue of ripeness.

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With respect to the first argument, the fact that there was to be a referendum on the entire Act reveals very little about legislative intent regarding severability. The plaintiffs place undeserved emphasis on the words “in its entirety.” That part of the section provides that, if a majority of the voters vote to repeal the law, “such public law shall be repealed in its entirety.” An entire repeal is the obvious and logical result of a vote to repeal in a referendum; the words in question signify no more than that.

While the plaintiffs’ second argument is not wholly implausible, they present no evidence to support it. The mere suggestion that legislators wanted a comprehensive Act is not sufficient to overcome the presumption of severability that is implicit in the *Alaska Airlines* standard. We therefore reject the plaintiffs’ severability arguments, and proceed to the arguments that Guam raises on appeal.

B. Applicability of *Roe v. Wade* to Guam

Guam contends that the substantive due process guarantee enforced in *Roe v. Wade* and subsequent abortion cases does not apply to Guam because nothing in Guam’s Organic Act, codified at 48 U.S.C. §§ 1421–1424b (1988), so provides. The plain language of the 1968 Mink Amendment to the Organic Act, codified at 48 U.S.C. § 1421b(u) (1988), belies their claim. The Mink Amendment states that:

The following provisions of and amendments to the Constitution of the United States are hereby

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extended to Guam . . . and shall have the *same force and effect there as in the United States or in any State* of the United States: . . . the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u) (emphasis added). The Mink Amendment thus expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded.⁴ *See Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 726.

It may be true, as Guam argues, that the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam. *See Guam v. Olsen*, 431 U.S. 195, 97 S.Ct. 1774, 52 L.Ed.2d 250 (1977). We can scarcely imagine, however, any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments “have the same force and effect” in Guam as in a state of the United States. There is no need, therefore, to go further. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 186–87, 110 S.Ct. 1737, 1740, 109 L.Ed.2d 163 (1990) (resorting to legislative history

4. The Mink Amendment also extends to Guam every other conceivable constitutional source of the right of privacy. *See Roe*, 410 U.S. at 152, 93 S.Ct. at 726 (sources relied on by the Court or individual Justices have included the First Amendment, the Fourth and Fifth Amendments, the penumbra of the Bill of Rights, the Ninth Amendment, and the Fourteenth Amendment).

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only after determining that the statutory language was unclear). Accordingly, we hold that *Roe v. Wade* applies to Guam as it applies to the states.⁵

C. Prospective Relief Under 42 U.S.C. § 1983

Guam next argues that the plaintiffs cannot maintain this action against Governor Ada under 42 U.S.C. § 1983 because he is not a “person” within the meaning of that statute. We hold that he is a “person” when sued in his official capacity for prospective relief.

Section 1983 creates liability for “persons” who, while acting “under color” of state or territorial law, deprive citizens or other persons of rights, privileges, or immunities secured by the Constitution or federal law. 42 U.S.C. § 1983. In *Ngiraingas v. Sanchez*, 495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990), an action for damages, the Supreme Court held that territories are not “persons” within the meaning of § 1983. The Court also stated: “[p]etitioners concede, . . . and we agree, that if Guam is not a person, neither are its officers acting in their official capacity.” *Id.* at 192, 110 S.Ct. at 1743. Guam seizes upon this language. It contends that, because Governor Ada

5. Our disposition of this question on the basis of the Mink Amendment makes it unnecessary for us to address the further contention of the plaintiffs that the right of privacy-autonomy protected by *Roe v. Wade* qualifies as a “fundamental” constitutional right applicable to an unincorporated territory by its own force. See, e.g., *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n. 30, 96 S.Ct. 2264, 2280 n. 30, 49 L.Ed.2d 65 (1976) (only “fundamental” constitutional rights apply in unincorporated territory).

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is being sued to prevent him from enforcing a statute of Guam, he is necessarily being sued in his official capacity. Therefore, Guam asserts, he cannot be considered a “person” subject to suit under section 1983.

Guam’s argument overlooks the distinction between suits against governmental officials for damages, such as *Ngiraingas*, and those for injunctive relief. The distinction has been spelled out in cases involving state officials. Like territories, states are not “persons” for purposes of section 1983. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 63–65, 109 S.Ct. 2304, 2307–08, 105 L.Ed.2d 45 (1989). In addition, state officers, when sued for damages in their official capacities, are likewise not “persons” within the meaning of 1983. *Id.* at 71, 109 S.Ct. at 2311. Any other conclusion would render meaningless the ruling that states are not “persons”; a judgment against a state official in his or her official capacity runs against the state and its treasury. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985).

The rule is entirely different, however, when the suit is for injunctive relief. “Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Will*, 491 U.S. at 71 n. 10, 109 S.Ct. at 71 n. 10 (quoting *Kentucky v. Graham*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14); see *Ex parte Young*, 209 U.S. 123, 159–60, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908). We can see no reason why the same distinction between injunctive and damages actions against officials should not apply to a territory.

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Guam attempts to distinguish *Will* by arguing that Guam is a “federal instrumentality” rather than a sovereign entity like a state. Because Congress maintains control over the Territory, Guam contends that there is no need to apply § 1983 to Guam or its officials.

Guam’s argument proves too much. Under its approach, section 1983 would not apply at all in any territory—not even to municipalities or officials acting in their individual capacities. Such a result would totally nullify the provision of section 1983 imposing liability upon persons acting under color of law of “any State *or Territory*.” Accordingly, we conclude that Governor Ada, when sued as he is here in his official capacity for injunctive relief, is a person within the meaning of 42 U.S.C. § 1983.

II

Having determined that the plaintiffs may maintain this action under section 1983, we turn to the substantive due process claim. Two issues arise: (1) whether Guam’s Act violates the right of privacy protected by *Roe v. Wade*, and (2) whether subsequent Supreme Court decisions, particularly *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), have so eroded *Roe v. Wade* that *Roe* cannot now be applied to invalidate Guam’s Act.

A. Validity of the Act under *Roe v. Wade*

The first issue is not hard to resolve. Guam’s Act makes no attempt to comply with *Roe*. In *Roe*, the Supreme Court

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recognized that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” and that for the state to deny this choice “may force upon the woman a distressful life and future,” along with other harms. *Roe*, 410 U.S. at 153, 93 S.Ct. at 727. The Court further recognized that limitation of the woman’s fundamental right of choice could be justified only by a “compelling state interest.” *Id.* at 155, 93 S.Ct. at 728.

The Court in *Roe* rejected the state’s argument, renewed by Guam here, that the state has a compelling interest in protecting fetal life from the moment of conception. *Id.* at 159, 93 S.Ct. at 729. Thus *Roe* recognized the superior right of choice by the woman during the first trimester of pregnancy, and her right during the second trimester limited only by the state’s compelling interest in protecting her health. *Id.* at 163, 93 S.Ct. at 731. Only after the point of viability did the state’s interest in fetal life become compelling and permit the state to proscribe abortion entirely. *Id.* at 163–64, 93 S.Ct. at 732.

The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*. Even the exceptions for abortion to save the mother’s life or to prevent grave impairment to her health are hedged with crippling restrictions. The pivotal determination must be made by two physicians “who practice independently of each other”; they must make their determination “using all available means,” and subject to subsequent review

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by a peer review committee. Act, 9 Guam Code Ann. § 31.20. Less cumbersome two-physician and peer review requirements were struck down by the Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 199–200, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973), decided with *Roe*, and in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768–71, 106 S.Ct. 2169, 2182–84, 90 L.Ed.2d 779 (1986).

If the core of *Roe* remains good law, then, the Act is clearly unconstitutional. Guam contends, however, that subsequent decisions have so eroded the analysis of *Roe* that Guam’s Act should be held to be constitutional under the current state of the law. We now address that contention.

B. The Status and Applicability of *Roe* Today

Guam contends that *Roe* has no force after *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). Putting *Webster* together with non-majority opinions in other cases, Guam contends that the classification of competing interests has changed. Guam relies particularly upon Justice O’Connor’s dissents in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814, 106 S.Ct. at 2206, and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452, 103 S.Ct. 2481, 2504, 76 L.Ed.2d 687 (1983). According to Guam, five Justices of the Supreme Court now recognize the state’s compelling interest in potential human life throughout pregnancy, and no longer adhere to the *Roe* analysis. In *Webster*, a three-Justice plurality

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stated that it did “not see why the State’s interest in protecting potential human life should come into existence only at the point of viability.” *Webster*, 492 U.S. at 519, 109 S.Ct. at 3057. It also characterized the woman’s interest as a “liberty interest,” as distinguished from a “fundamental right.” *Id.* at 520, 109 S.Ct. at 3058. Guam would put these statements together with Justice Scalia’s view that *Roe* should be overruled. *Id.* at 532, 109 S.Ct. at 3064. It would then add Justice O’Connor’s view that regulations that do not impose an “undue burden” on a woman’s right to seek an abortion are sustainable if rationally related to a legitimate state purpose. *Id.* at 529–30, 109 S.Ct. at 3062–63; *Thornburgh*, 476 U.S. at 828, 106 S.Ct. at 2214.⁶ Finally, it would include Justice O’Connor’s position elsewhere expressed that the state’s compelling interest exists throughout pregnancy. *See Akron*, 462 U.S. at 459, 103 S.Ct. at 2507; *Thornburgh*, 476 U.S. at 828, 106 S.Ct. at 2214. From this mix, Guam derives the conclusion that its interest in fetal life can overcome the woman’s right to choose whether to have an abortion, and that Guam’s Act is therefore not unconstitutional on its face.

6. Guam also contends that *Roe*’s requirement of a “compelling interest” on the part of the state was reduced to that of a “rational basis” in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (*Akron II*), and *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990). *Akron II* and *Hodgson* dealt with minor women, however, and the Court has recognized that “the State has somewhat broader authority to regulate the activities of children than of adults.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976).

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We reject Guam’s construct. The bits and pieces assembled by Guam fall short of compelling us to do that which the Supreme Court itself has declined to do—overrule *Roe v. Wade*. In *Webster*, the Court modified *Roe* only to the extent necessary to uphold Missouri’s requirement of testing for viability. *Webster*, 492 U.S. at 521, 109 S.Ct. at 3058. The plurality opinion stated that the case afforded no occasion to revisit *Roe*, “and we leave it undisturbed.” *Id.* Justice O’Connor found no conflict between Missouri’s statute and *Roe*, and similarly concluded that there was no need to reexamine *Roe*. *Id.* 492 U.S. at 525–26, 109 S.Ct. at 3060–61. Three dissenters opined that *Roe* survived *Webster*, although it was not secure. *Id.* at 537, 109 S.Ct. at 3067 (dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall). Justice Scalia in his concurrence chastised the Court for failing to overrule *Roe*. *Id.* at 532, 109 S.Ct. at 3064. In the face of these pronouncements, it would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead.⁷

We also have severe difficulty accepting the conclusions that Guam draws from the existing mosaic of decisions. In the first place, it is hard to see how Justice O’Connor’s

7. In its most recent abortion-related case, *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), the Supreme Court upheld certain federal regulations against a challenge that they violated a woman’s due process right to choose whether to terminate her pregnancy. The Court held that the regulations dealing with activities of federally-funded programs did not violate *Roe v. Wade*. *Id.* 111 S.Ct. at 1777. It did not suggest that *Roe v. Wade* was no longer the law.

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view helps Guam: surely an outright criminalization of abortion places an “undue burden” on the exercise of the woman’s right.⁸ Second, a view of the state’s interest in potential life as “compelling” throughout pregnancy does not necessarily mean that it sweeps all other interests out of the way.⁹ There is a countervailing right in issue here, although we find little reflection of it in Guam’s briefs. No matter how it is characterized, the right of a woman not to be forced to endure a pregnancy and birth is an extremely important one. Pregnancy entails “profound physical, emotional, and psychological consequences.” *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471, 101 S.Ct. 1200, 1205, 67 L.Ed.2d 437 (1981). “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision—with the guidance of her physician

8. Because Justice O’Connor’s “undue burden” test is of no assistance to Guam, we need not decide what authoritative effect, if any, it must be given. *See Planned Parenthood v. Casey*, 947 F.2d 682, 687–98 (3d Cir.1991) (Justice O’Connor’s standard is now the law of the land, *cert. granted*, 502 U.S. 1056, 112 S.Ct. 931, 117 L.Ed.2d 104 (1992)).

9. There clearly must be limits to the ability of a state’s interest in potential life, whether or not characterized as compelling, to override all conflicting interests. Potential human life exists in the ovum and sperm. *See Webster*, 492 U.S. at 565–66, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). A state could maximize that potential by forbidding contraception, or even by requiring regular sexual intercourse by all fertile persons. The prospect is absurd, of course, because there are highly important constitutional rights that would be interfered with by such a measure.

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and within the limits specified in *Roe*—whether to end her pregnancy.” *Thornburgh*, 476 U.S. at 772, 106 S.Ct. at 2184. The individual’s interest in exercising control over intimate personal decisions has been recognized in decades of Court precedent. *See id.*; *Akron*, 462 U.S. at 419, 103 S.Ct. at 2487; *Roe*, 410 U.S. at 167–70, 93 S.Ct. at 733–36 (Stewart, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). We would not lightly conclude that it could be overcome wholesale at any stage of pregnancy by Guam’s interest in potential life.

The balancing of these vital individual interests against the state’s interest in potential life is not an exercise in mathematics. These forces present a constitutional clash of the first order. Its outcome cannot be predetermined by adopting in the abstract various assembled characterizations of the interests at stake or formulae for weighing them. A more fundamental process is at work. *Roe* worked through that process and came to a result that has affected the lives and rights of millions of people. It is not for this court to discard that precedent.¹⁰

10. We find it unnecessary to address the plaintiffs’ arguments that Guam’s Act is void for vagueness and overbreadth. We also decline to address the plaintiffs’ arguments based on the Establishment Clause, the Equal Protection and Due Process Clauses, the Eighth and Thirteenth Amendments, and comparable provisions of the Guam Bill of Rights, 48 U.S.C. § 1421b.

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III

The judgment of the district court permanently enjoining the enforcement of Guam's Public Law 20–134 is

AFFIRMED.¹¹

11. The plaintiffs have requested attorneys' fees in connection with this appeal. They will be entitled to them if they ultimately prevail in this proceeding. 42 U.S.C. § 1988; *see Hutto v. Finney*, 437 U.S. 678, 692, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978). If the plaintiffs apply for fees in this court, we will transfer their application to the district court for a determination of the recoverable amount. In those proceedings, Guam will have the opportunity to contest the standing of the plaintiffs who are not health care providers, to the extent that that issue has any effect on recoverable fees.

Fees at the trial level were granted in a separate proceeding, separately appealable.

**APPENDIX E — DECISION AND ORDER
OF THE DISTRICT COURT OF GUAM
FILED OCTOBER 13, 1990**

UNITED STATES DISTRICT COURT
DISTRICT COURT OF GUAM

Civ. No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS, GUAM NURSES
ASSOCIATION, THE REVEREND MILTON
H. COLE, JR., LAURIE KONWITH, EDMUND
A. GRILEY, M.D., JOHN DUNLOP, M.D., ON
BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED, AND ALL THEIR
WOMEN PATIENTS,*

Plaintiffs,

v.

JOSEPH F. ADA, IN HIS INDIVIDUAL AND
OFFICIAL CAPACITIES, DR. LETICIA
ESPALDON, GEORGE B. PALICAN, ELIZABETH
BARRETT-ANDERSON, GLORIA B. NELSON,
THOMAS J.B. CALVO, FLORENCIO T. RAMIREZ,
LEONILA L.G. HERRERO AND MICHAEL
PHILLIPS, AS THE BOARD OF DIRECTORS OF
THE GUAM ELECTION COMMISSION, IN THEIR
OFFICIAL CAPACITIES, TOGETHER WITH ALL
OTHERS SIMILARLY SITUATED,

Defendants.

* Original lead plaintiff Maria Doe was dismissed as a party after motion and an order of the Court entered June 26, 1990.

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**DECISION AND ORDER RE PERMANENT
INJUNCTION AND OTHER MOTIONS**

Filed August 23, 1990
Amended Judgement October 13, 1990

MUNSON, District Judge.

THIS MATTER came before the Court on August 7, 1990, for hearing of the following motions: Plaintiffs' motion for summary judgment and permanent injunction; plaintiffs' motion for summary judgment based on 42 U.S.C. § 1983; defendant Governor Ada's motion to dismiss; defendant Governor Ada's motion for partial summary judgment; and, defendant Attorney General Barrett-Anderson's motion to dismiss.

THE COURT, having reviewed the voluminous filings and having fully considered the arguments made by the parties in their respective memoranda of law and at oral argument, finds that there are no genuine issues of material fact which would preclude summary judgment and that such disposition is, therefore, appropriate.

Statement of Undisputed Facts

On July 10, 1989, Senator Elizabeth P. Arriola introduced Bill 848 before the Guam Legislature. Bill 848 provided as follows:

AN ACT TO REPEAL AND REENACT § 31.20
OF TITLE 9, GUAM CODE ANNOTATED,
TO REPEAL §§ 31.21 AND 31.22 THEREOF,

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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) ectopic

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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

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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.”

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

Section 7. Abortion referendum. (a) There shall be submitted to an 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. 20–134), 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.

During later discussion of the Bill, the Senator justified the near-complete ban on abortions on Guam on the ground that

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Guam is a Christian community. That no matter which way you're going to say "this is not religion, this is not so and so," I beg to differ, Mr. Speaker. It's a Christian community. We decide what we're going to have here on Guam.¹

Transcript of Legislative Session, March 8, 1990.

Senator Arriola's legal counsel had advised her that the Bill as introduced would probably be struck down

1. This passage calls to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice Brennan in *School District of Abington Township (Pa.) v. Schempp*, 374 U.S. 203, 304, 83 S.Ct. 1560, 1614–1615, 10 L.Ed.2d 844 (1963):

The manifest object of the men who framed the institutions of this country was to have a *State without religion*, and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. "Essay of Religious Liberty," in Black, ed., *Essays and Speeches of Jeremiah S. Black* (1886), 53. (Emphasis in the original)

Schempp is a noteworthy primer on First Amendment religious freedom.

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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*.” Deposition of Attorney June Mair, May 10, 1990, at p. 23.

On September 16, 1989, the Guam Legislature’s Committees on Health, Welfare and Ecology and the Judiciary and Criminal Justice held a joint hearing on two abortion bills, Senator Arriola’s and another introduced by two other senators. The latter bill would have allowed abortions under somewhat broader circumstances. Of the people who testified at the hearing, the “overwhelming majority . . . supported the bill on grounds of expressed religious belief or orientation.” Committee Report on Bill 848, at pp. 3–4.

On February 26, 1990, Guam’s Attorney General, Elizabeth Barrett–Anderson, filed twelve pages of written testimony with the Committee on Judiciary and Criminal Justice. 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.” (Emphasis in original) Because both bills effectively proscribed abortion, the Attorney General gave as her legal opinion that “both bills would be held unconstitutional.” Attorney General’s Opinion, pp. 1–4.

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After minor amendments, including the addition of a legislative “finding” that “life begins at conception,” the Legislature unanimously passed the Bill 848 on March 8, 1990.

On March 19, 1990, defendant Governor Joseph F. Ada signed the bill into law as Public Law 20–134. In his March 23, 1990, transmittal letter to the Speaker, Governor Ada noted that his “pro-life” stance was well-known, but that Bill 848 was “even more severe than my views on the subject are.” Despite his expressed misgivings about almost every substantive part of the bill, and after, in his own words, prayer and much soul-searching, the Governor

came to the realization that in terms of my personal beliefs and my personal actions, the question for me really boils down to one simple point. Do I consider a fetus a human being? In my heart, I believe a fetus is a human being. And having such belief, how could I accord a fetus any less respect or dignity than I would any other human being? Having come to this conclusion, my choice is fairly simple. Do I act in accordance with my firmly held personal beliefs, or do I not?

* * * * *

Believing as I do, I personally can see no honorable course for me to take, no action that I could take and still be true to my conscience other than signing this bill. This is a personal decision, and one that I must make if I am to be true to my own beliefs.

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The law took effect immediately and abortions were effectively banned in the Territory of Guam.

On March 20, 1990, Janet Benshoof, in a luncheon speech before the Guam Press Club, after acknowledging that Guam's new law prohibited the "soliciting" of abortions, "informed" the audience that abortions could be obtained in Hawaii and gave a telephone number in that state for further information. She was promptly arrested under the solicitation provisions of the new law. (These charges subsequently were dismissed, but without prejudice.)

On March 23, 1990, plaintiffs filed this lawsuit, challenging the constitutionality of the Act. Plaintiffs alleged that the law violates 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. The Court issued a temporary restraining order the same day. After a hearing on March 26, 1990, the temporary restraining order was continued in force until further order of the Court.

Decision**Summary Judgment and Permanent Injunction**

After the emotionalism and stridency of the opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade*² the law in the Territory of Guam? Because the Court

2. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973).

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finds that it is, plaintiffs' motion for summary judgment is GRANTED and, for the reasons stated hereinbelow, defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon³ are permanently enjoined from enforcing any of the provisions of Public Law 20-134.

In 1968, the United States Congress amended the Organic Act of Guam.⁴ Among the 1968 changes was one amending Guam's Bill of Rights to add an entire section:

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; *the second sentence of section 1 of the fourteenth*

3. Dr. Leticia Espaldon is the Director of the Department of Public Health and Social Services for the Territory of Guam.

Defendant George B. Palican is the Administrator of Guam Memorial Hospital. By stipulation filed June 25, 1990, he agreed "to abide by all injunctions and court orders and . . . be bound by the final judgment or decree in this action." The Election Commission entered into a like stipulation.

4. Title 48 U.S.C. § 1421, *et seq.* The amendments were contained in the Guam Elective Governor Act, Pub.L. 90-497, § 10, 82 Stat. 842 (1968).

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*amendment*⁵; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency. (Emphasis added)

48 U.S.C. § 1421b(u).

Governor Ada insists that § 1421b(u) does not mean what it says. His position of record, in his memoranda and at oral argument, is that post-1968 United States Supreme Court decisions in the area of substantive due process rights and equal protection have no force and effect in the Territory of Guam. This unusual proposition is based upon his belief that since the United States Congress, when it amended the Organic Act in 1968, could not have foreseen the 1973 Supreme Court decision in *Roe v. Wade*, Congress could not have intended it to apply to the Territory of Guam. To quote from defendant Governor's memorandum of July 13, 1990:

5. The second sentence of section 1 of the Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Under *Ngiraingas v. Sanchez*, [495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990)], in determining whether Congress extended the privacy/abortion right under the First, Third, Fourth, Fifth, Ninth or Fourteenth Amendments, this court must seek indicia of congressional intent at the time 48 U.S.C. Section 1421b(u) was enacted in 1968. There is, however, no clear signal given from the legislative history of Section 1421b(u) that Congress intended to extend the privacy/abortion right to Guam. As a matter of law, therefore, the First, Third, Fourth, Fifth and Ninth and Fourteenth Amendments, to the extent that they encompass a privacy/abortion right, do not have the same effect and application that they have in the states. *Roe v. Wade* . . . does not apply to Guam and Guam may regulate abortion as in Public Law 20–134.

According to Governor Ada, Guam was “frozen in time” in 1968 unless it can be shown that Congress gave a “clear signal” that post–1968 Supreme Court decisions involving any of the rights § 1421b(u) were to have force and effect in the Territory. He sees no such “signal.”⁶

Governor Ada’s precise argument finds no known precedent in American jurisprudential history. His reliance on *Ngiraingas* to support the “frozen in time”

6. This appears to be the first time since 1968 that Guam’s government has forwarded this interpretation of subsection (u). None of the defendants supplied the Court with any case citations in support of this singular reading of the Organic Act.

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theory of the applicability of certain constitutional rights to the Territory of Guam is erroneous. It is sufficient here to note just one flaw in defendant's reasoning. Section 1983 was enacted by Congress more than a century ago in response to the activities of the Ku Klux Klan. It was not unreasonable in *Ngiraingas*, then, for the Supreme Court to look at § 1983's legislative history to determine if a territory such as Guam was intended to fall within its ambit. However, the Organic Act of Guam is a federal statute concerning *only* Guam. When it was amended in 1968, the amendments applied *only* to Guam. It is inconceivable to the Court that Congress would add subsection (u) to § 1421b and yet simultaneously fix it immutably in time in 1968 so that it would not truly "have the same force and effect" as in the United States, as provided.

This Court cannot imagine a clearer "signal" from Congress than that, by enacting subsection (u) in 1968, it felt an obligation to insure 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

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20–134 is unconstitutional. For the reasons given below, the entire law must fall.

This Court need not address the legislative finding of Section 1 that “life begins at conception.” It is sufficient to note that Guam cannot “justify” an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodies Guam’s view of when life begins.

Next, as the *Roe* Court noted, the United States Supreme Court has recognized since at least 1891 that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The roots of this right of privacy are found in the First Amendment, the Fourth and Fifth Amendments, the penumbræ of the Bill of Rights, the Ninth Amendment, and the concept of liberty guaranteed by the first section of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. at 152–153, 93 S.Ct. at 726–727. The right of privacy has some extension to marriage, procreation, contraception, family relationships, child rearing and education, and the qualified right to obtain an abortion. *Id.*

However, as *Roe* noted, the right of personal privacy, in the context of a woman’s decision regarding abortion, is not unqualified and must be weighed against important state interests in regulation. *Id.*, at 155, 93 S.Ct. at 728. Under *Roe*, Guam may regulate abortions only to serve two compelling interests: The government’s paramount interest throughout the pregnancy in the woman’s health, *Id.* at 154, 93 S.Ct. at 727, and the government’s interest after viability in protecting the potentiality of human life, *Id.*, at 162, 93 S.Ct. at 731. During approximately the first trimester of pregnancy, neither of these interests

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is deemed “compelling” for purposes of constitutional analysis and the government may not restrict a woman’s right to choose an abortion. *Id.*, at 164, 93 S.Ct. at 732. During approximately the second trimester, the government may only regulate the abortion procedure in ways that are “reasonably related to maternal health.” *Id.* After viability [of the fetus], the government 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.*, at 165, 93 S.Ct. at 733. Therefore, any law purporting to regulate abortion must take into account these different interests, and protect both the rights of the individual woman and the interests of the state.

Because Sections 2⁷, 3⁸, 4⁹, and 5 (Title 9 G.C.A. §§ 31.20, 31.21, 31.22, and 31.23, respectively) of the Guam law fail to

7. The “two-physician” and “peer review” provisions fail. *See, Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1410, 35 L.Ed.2d 694 (1973).

The “two-physician” requirement fails because the “required acquiescence by co-practitioners has no rational connection with a *patient’s* needs and unduly infringes on a physician’s right to practice.” (Emphasis added) *Id.*, 410 U.S. at 199, 93 S.Ct. at 751. Also, the section contains no emergency exception to the two-physician requirement, as required by the Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 770–771, 106 S.Ct. 2169, 2183–2184, 90 L.Ed.2d 779 (1986).

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make distinctions based on the stage of the pregnancy, and because the law does not recognize, as it must, any

The “peer review committee” fails because it is “unduly restrictive of the patient’s rights that . . . have already been medically delineated and substantiated by her personal physician.” *Id.*, 410 U.S. at 197–198, 93 S.Ct. at 750–751. As well, the additional time necessitated by this procedure may implicate the Supreme Court’s decision in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), which invalidated a 24-hour waiting requirement.

Finally, some of the phrases contained in this section—such as “practice independently of each other,” “reasonably determine using all available means,” “substantial risk,” “gravely impair,” and “adequately equipped medical clinic”—lacking as they do any precise definition,

8., 9. See notes 8 and 9 on page 1429.would undoubtedly raise due process questions since “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

8. Section 3 directly contravenes the law as established by *Roe v. Wade*.

9. Sections 4 and 5 also violate the First Amendment since they attempt to prohibit freedom of speech. “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [Citations omitted].” *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989).

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of the other constitutionally-protected interests involved, it violates the Due Process Clause of the Fourteenth Amendment¹⁰, as it applies to Guam via § 1421b(u).¹¹

42 U.S.C. § 1983 Claims

Because of the importance of the issue and the seemingly unsettled state of the law as it applies to Guam, the Court believes it is necessary and proper to address plaintiffs' § 1983 claims.

These two sections are constitutionally infirm insofar as they would make criminal any discussion between a woman and her doctor concerning the need for, and access to, an abortion. The state has no compelling interest in intruding in this most private area of consultation between a woman and her physician. *See, e.g., Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir.1990).

These sections are also invalid on their face insofar as they purport to prohibit more general speech concerning abortion and its availability. *See, Thornburgh, supra*, 476 U.S. at 760–764, 106 S.Ct. at 2178–2181; *Akron Center for Reproductive Health, supra*, 462 U.S. at 429–430, 443–445, 103 S.Ct. at 2492–2493, 2499–2501.

10. To paraphrase *Roe*, “Indeed, it is difficult to imagine a more complete abridgement of a constitutional freedom than that worked by the inflexible criminal statute now in force in [Guam].” *Roe v. Wade*, 410 U.S. at 171, 93 S.Ct. at 736.

11. In light of the Court’s decision, Section 7 of the Act, providing for a referendum, is rendered moot. The Election Commission was named as a defendant since it would have been charged with responsibility for conducting the referendum. The Commission has remained neutral throughout these proceedings.

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The Supreme Court has held that “neither the Territory of Guam nor its officers acting in their official capacities are ‘persons’ under § 1983.” *Ngiraingas v. Sanchez*, 495 U.S. 182, 110 S.Ct. 1737, 1743, 109 L.Ed.2d 163 (1990). The Supreme Court has also said, however, that “a state official acting in his or her official capacity, when sued for injunctive relief, *would* be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the state.’” (Emphasis added) *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2311, n. 10, 105 L.Ed.2d 45 (1989), quoting, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985). The theory supporting this view was expressed in *Ex parte Young*, 209 U.S. 123, 159–160, 28 S.Ct. 441, 453–454, 52 L.Ed. 714 (1908):

The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

* * * * *

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The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Plaintiffs thus make two arguments for the continuing vitality and utility of § 1983 in the Territory of Guam. First, they argue that *Ngiraingas* left open the question of the availability under § 1983 of injunctive relief against the Territory of Guam and its officers acting in their official capacities. Second, they maintain that § 1983 injunctive relief is available against Governor Ada in his *individual* capacity. The Court will consider each claim in turn.¹²

The Supreme Court's decision in *Ngiraingas* did not address, and thus cannot be said to have changed, the rule that prospective injunctive relief is available against an official acting in his or her official capacity. *See, Will* and *Kentucky v. Graham, supra*. However, because both the Supreme Court and the Ninth Circuit, in their respective *Ngiraingas* decisions, found on the facts of that

12. The Court is aware, as surely are the parties, that a finding of any relief predicated upon § 1983 will entitle plaintiffs to apply for an award of attorney fees under 42 U.S.C. § 1988. Section 1988 provides in part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

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case that Guam was not a “person” for purposes of § 1983, neither court confronted the issue of whether Guam, like a state, enjoys sovereign immunity under the Eleventh Amendment or the extent of the immunity afforded by 48 U.S.C. § 1421a¹³. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 2, and 1743, n. 12.

The Court believes that Guam does not on the facts before it enjoy immunity from injunctive relief, whether based on the Eleventh Amendment or § 1421a. “In an injunction grounded on federal law, the State’s [Eleventh Amendment] immunity *can* be overcome by naming state officials as defendants.” (Emphasis in original) *Kentucky v. Graham*, 473 U.S. at 170, n. 18, 105 S.Ct. at 3107, n. 18, *citing Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), and *Ex parte Young*, *supra*. Similarly, and relying again on the reasoning of *Ex parte Young* and its progeny, the Court finds that § 1983 provides an independent ground to permanently enjoin defendants Governor Ada, Attorney General Barrett–Anderson, and Dr. Espaldon from enforcing any of the provisions of Public Law 20–134.¹⁴

13. Section 1421a provides in part that “The government of Guam . . . shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.”

14. The Court does not today, of course, address the issue of attorney fees. The § 1988 provision for an award of attorney fees and costs was enacted to encourage enforcement of civil rights provisions by compensating those who bring meritorious actions. The possibility of an award of fees and costs provides an

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The remaining issue involves § 1983 injunctive relief against Governor Ada in his individual capacity. Plaintiffs argue that such relief is available because the Supreme Court noted without objection that portion of the Ninth Circuit’s *Ngiraingas* opinion which held that the police officers there still could be sued under § 1983 in their individual capacities, to the extent they were not entitled to immunity. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 3.

important inducement for attorneys to undertake the vindication of constitutional rights in unpopular causes. Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray.

Left for future consideration is the effect of the Ninth Circuit’s reasoning in its *Ngiraingas* decision that a § 1983–based money judgment against defendants in their official capacities was prohibited because it would have affected the public treasury and, thus, would essentially have been a suit against the Government of Guam itself. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1372 (9th Cir.1988). Likewise here, even though the granting of injunctive relief does not itself affect the public treasury, a request for, and an award of, attorney fees following the injunction *would* most assuredly affect the public treasury. The Court is cognizant of those cases that treat attorney fees as “ancillary” to the merits of the case and which are deemed, therefore, not to affect the public treasury. *See, e.g., Kentucky v. Graham*, 473 U.S. at 170, n. 18, 105 S.Ct. at 3107, n. 18; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Edelman v. Jordan*, 415 U.S. 651, 667–668, 94 S.Ct. 1347, 1357–1358, 39 L.Ed.2d 662 (1974); *Maher v. Gagne*, 448 U.S. 122, 131–132, 100 S.Ct. 2570, 2575–2576, 65 L.Ed.2d 653 (1980) and *Gagne v. Maher*, 594 F.2d 336, 341–342 (2nd Cir.1979); *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir.1986); and, *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir.1983).

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The distinction between personal-capacity liability and official-capacity liability was explained in *Kentucky v. Graham*, 473 U.S. at 166–168, 105 S.Ct. at 3105–3106 (1985):

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. (Citations omitted)

* * * * *

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. (Citation omitted)

* * * * *

When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objective reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. (Citations omitted) The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

* * * * *

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With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. (Emphases in the original)

Graham involved a suit for money damages. Here, in contrast, plaintiffs seek to enjoin Governor Ada, as an *individual*, from enforcing the provisions of Public Law 20–134. The Court does not believe it would be possible for the Governor, acting as a *private individual*, to enforce Public Law 20–134. The Court declines to enjoin Governor Ada, as an individual, under § 1983.

ACCORDINGLY, for the reasons given above, summary judgment shall enter that Public Law 20–134 violates the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. Defendants, their employees, agents, and successors, are permanently enjoined from enforcing and/or executing any portion of Public Law 20–134.

IT IS SO ORDERED.

*Appendix E***AMENDED JUDGMENT**

Pursuant to the Order granting plaintiffs' Motion to Alter or Amend Judgment issued today, the judgment previously entered in this matter is hereby amended as follows:

This matter came on for hearing, on August 7, 1990 on plaintiffs' Motion for Summary Judgment re 42 U.S.C. § 1983 and Motion for Summary Judgment and Permanent Injunction pursuant to Rule 56 of the Federal Rules of Civil Procedure; defendant Ada's Motion for Partial Summary Judgment; and defendants Ada's and Barrett-Anderson's Motions to Dismiss. The Court having considered the pleadings in the action, the motions, oppositions and replies, all of the declarations and exhibits on file herein, and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that plaintiffs are entitled to judgment as a matter of law, the Court having further concluded that a permanent injunction should issue because plaintiffs will suffer permanent and irreparable injury, loss and damage,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS in their official capacities in accordance with the Decision and Order filed in this matter on August 23, 1990. Defendant Joseph F. Ada cannot be held liable in his individual capacity under 42 U.S.C. § 1983.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that sections 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. Consequently, section seven of Public Law 20–134 is hereby rendered moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Joseph F. Ada, Leticia Espaldon, George B. Palican, Elizabeth Barrett–Anderson, Gloria B. Nelson, Thomas J.M. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael F. Phillips, in their official capacities, their officers, agents, assistants, servants, employees, successors and all persons acting in concert or cooperation with them at their direction or under their control be restrained and enjoined permanently from operating, administering, enforcing or executing all provisions of Public law 20–134.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Order Granting Ex Parte Motion for Extension of Time to File Application for Attorneys’ Fees and Costs, dated September 17, 1990, plaintiffs may file their application for attorneys fees, costs, and disbursements within thirty (30) days from entry of this Amended Judgment. Defendants shall have thirty (30) days to file a response to plaintiffs’ application, and plaintiffs shall have fifteen (15) days to reply to defendants’ response.

**APPENDIX F — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED FEBRUARY 3, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15602
D.C. No. 1:90-cv-00013

GUAM SOCIETY OF OBSTETRICIANS AND
GYNECOLOGISTS; GUAM NURSES ASSOCIATION;
MILTON H. COLE, JR., REVEREND; LAURIE
KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S.
FREEMAN, M.D.; JOHN DUNLOP, M.D., ON BEHALF
OF THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs-Appellees,

v.

DOUGLAS B. MOYLAN, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF GUAM,

Defendant-Appellant,

v.

LOURDES LEON GUERRERO, IN HER OFFICIAL
CAPACITY AS GOVERNOR OF GUAM; ARTHUR U.
SAN AGUSTIN, MHR, IN HIS OFFICIAL CAPACITY
AS DIRECTOR OF THE DEPARTMENT OF PUBLIC
HEALTH AND SOCIAL SERVICES; LILLIAN
PEREZ-POSADAS, M.N., R.N., IN HER OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE GUAM
MEMORIAL HOSPITAL; ALICE M. TAIJERON,
IN HER OFFICIAL CAPACITY AS MEMBER OF
THE GUAM ELECTION COMMISSION; GERARD

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C. CRISOSTOMO, “JERRY”, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION; G. PATRICK CIVILLE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION; JOSEPH P. MAFNAS, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION; ANTONIA R. GUMATAOTAO, “TONI”, IN HER OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION; CARISSA E. PANGELINAN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION; BENNY A. PINAULA, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE GUAM ELECTION COMMISSION,

Defendants-Appellees.

**ORDER;
STATEMENT BY JUDGE VANDYKE**

Filed February 3, 2026

Before: A. Wallace Tashima, John B. Owens, and Roopali H. Desai, Circuit Judges.

Judges Owens and Desai have voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Tashima did not participate in this petition.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority

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of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Judge VanDyke's statement regarding the denial of rehearing en banc is filed concurrently herewith.

VANDYKE, Circuit Judge, statement regarding the denial of rehearing en banc:

As prominent jurists have memorably emphasized—perhaps more aspirationally than descriptively—our role as judges should be as umpires, not players, merely “calling balls and strikes.” But what happens when, for fifty years, the strike zone for one team spans the 17-inch width of home plate, but the umpires call the strike zone for its division rival as spanning the entire diameter of the stadium? If—at the end of those fifty years—the umpires correct course and define the strike zone consistently (and fairly) for both teams, is that enough to rectify five decades of unfairness? Does simply judicially fixing the long-broken rule fully address a half-century of a judicially skewed playing field?

Often not, and this case vividly illustrates at least one example of why. The Territory of Guam enacted an abortion ban decades ago in 1990. But *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), wrongly compelled that every pitch against a pro-life legislature

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was a strike, so Guam’s ban (which would be over thirty-five years old today) survived just a few short days before the federal district court in Guam permanently enjoined its enforcement. Eventually, fifty years post-*Roe*, the Supreme Court corrected course and narrowed the strike zone against state and territorial governments. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022). But by the time Guam’s current attorney general, Douglas Moylan, asked our court to instruct the district court to dissolve the permanent injunction so that he could enforce the ban, it was too late—the ban had been, according to the Supreme Court of the Territory of Guam, impliedly repealed by subsequent pro-life legislation passed in the shadow of *Roe* and its progeny. A panel of our court dismissed the appeal on mootness grounds. That was the right call. But that conclusion has consequences, and I write this statement to flesh them out.

The wages of *Roe*’s judicial misconduct on unborn life and the rule of law are not merely incalculable, they are ongoing. While *Roe* may no longer have a *doctrinally binding* effect in the federal courts, there are many ways it continues to have a momentous *practical* effect on the law and culture as it exists today. If *Roe* had never happened, abortion would have been illegal in Guam in 1990, and it would almost certainly still be illegal in Guam today. Even though *Roe* itself is mercifully gone, it remains the fact that it is because of *Roe* that abortion is legal today in Guam.

*Appendix F***I.**

Until the 1960s, abortion was, with few exceptions, criminally prohibited throughout the United States. Linda Greenhouse & Reva Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate before the Supreme Court's Ruling* 3 (2d ed. 2012); *see also Dobbs*, 597 U.S. at 241, 142 S.Ct. 2228. In the 1962 Model Penal Code, even the American Law Institute (not exactly a right-wing advocacy group) prescribed abortion-performance as a felony, with limited exceptions. *See* Model Penal Code § 230.3 (A.L.I., Proposed Official Draft 1962). As late as 1973, thirty states “prohibited abortion at all stages except to save the life of the mother.” *Dobbs*, 597 U.S. at 249, 142 S.Ct. 2228 (citing *Roe*, 410 U.S. at 118, 93 S.Ct. 705).

That all changed on January 22, 1973—the day that the Supreme Court of the United States issued its opinion in *Roe*. There, a majority of the Justices found a constitutional right to abortion because they, in their words, “fe[lt]” that the “Fourteenth Amendment’s concept of personal liberty” contained a “right of privacy.” 410 U.S. at 153, 93 S.Ct. 705. And that “right of privacy,” according to the *Roe* Court, was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* To be sure, the *Roe* Court declared that the right to abortion it had discovered was not absolute—a state could regulate post-first-trimester abortions to “preserv[e] and protect[] . . . maternal health.” *Id.* at 163, 93 S.Ct. 705. And a state could go as far as to proscribe abortion to protect unborn life after the point of so-called fetal “viability,” the point at which, the Court decreed, an unborn child first

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“has the capability of meaningful life outside the mother’s womb.” *Id.* at 163, 93 S.Ct. 705. But even post-viability, states were required to legalize abortions “necessary to preserve the life or health of the mother.” *Id.* at 164, 93 S.Ct. 705. In an opinion issued the same day, the Court defined “health” so broadly that pretty much *any* elective abortion at any time during pregnancy could fall under the mandatory “health” exception. *See Doe v. Bolton*, 410 U.S. 179, 192, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (“We agree with the District Court that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” (citation omitted)).

Fast forward nearly two decades, to March 1990. The Territory of Guam enacted Public Law 20-134 to “protect the unborn children of Guam . . . from the moment of conception until birth at every stage of biological development.” Guam Pub. L. 20-134, § 1 (1990). The law made abortion-performance (not including the termination of a pregnancy that “would endanger the life of the mother or would gravely impair the health of the mother”) a third-degree felony and also outlawed the solicitation of abortions. *Id.* §§ 2–5. Section 7 of the law provided for a referendum—if a majority of Guam’s voters voted to repeal the law, the law would be repealed “in its entirety.”

Though it came nearly 20 years after *Roe*, the passage of Public Law 20-134 did not amount to an act of legislative defiance. In 1990, it was unclear whether *Roe* applied to Guam and the other United States territories. *See Guam*

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Soc’y of Obstetricians & Gynecologists v. Ada (Ada II), 962 F.2d 1366, 1370 (9th Cir. 1992), *as amended* (June 8, 1992) (“Accordingly, we hold that *Roe v. Wade* applies to Guam as it applies to the states.”). And, of course, if *Roe* didn’t apply to Guam, Public Law 20-134 would have had no constitutional problem.

But four days after Guam enacted Public Law 20-134, a group of abortionists sued to enjoin its enforcement. *Guam Soc’y of Obstetricians & Gynecologists v. Ada (Ada I)*, 776 F. Supp. 1422, 1426 (D. Guam 1990). To the district court, the question presented was straightforward: “Is *Roe v. Wade* the law in the Territory of Guam?” *Id.* (footnote omitted). The district court answered in the affirmative and “permanently enjoined” territory officials “from enforcing and/or executing any portion of Public Law 20-134.” *Id.* at 1426, 1431. A panel of our court affirmed. *See Ada II*, 962 F.2d at 1368.

With its abortion ban permanently enjoined, Guam proceeded to codify numerous abortion restrictions that could satisfy the demands of *Roe* and its spawn. For example, Guam law required minor females to obtain the written consent of a parent or legal guardian before obtaining an abortion. *See* 19 Guam Code Ann. § 4A102. Guam also banned partial-birth abortions under pain of criminal penalty, *see* 10 Guam Code Ann. § 91A106, and required abortionists to provide information about relevant abortion procedures and the medical risks of abortion to pregnant women seeking abortions, *see id.* § 3218.1.

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And then—still decades later—the Supreme Court issued its 2022 decision in *Dobbs*. The Court finally overruled *Roe* and established that the rational-basis test governs review of all state abortion regulations. *See Dobbs*, 597 U.S. at 231, 300–01, 142 S.Ct. 2228. Under that standard, an abortion regulation deserves “a ‘strong presumption of validity.’” *Id.* at 301, 142 S.Ct. 2228 (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). It survives judicial scrutiny as long as “there is a rational basis on which the legislature could have thought that it would serve legitimate state interests,” such as “respect for and preservation of prenatal life at all stages of development.” *Id.* (citations omitted).

At last, the supreme legal incoherence that had prevented Guam from enforcing its democratically enacted abortion ban had been eliminated. In response to *Dobbs*, Moylan moved, under Federal Rule of Civil Procedure 60(b), to vacate the federal permanent injunction against the enforcement of Public Law 20-134. Moylan argued that because “*Roe* and its progeny are no longer the law . . . there is no longer a legal basis to support the injunction.”

The abortionists opposed Moylan’s motion, as did Guam’s governor and the administrator of Guam Memorial Hospital (collectively “Appellees”). The district court denied the motion, concluding that Moylan failed to meet his burden for vacating the injunction. Moylan appealed the adverse order.

But simultaneously, the opponents of Moylan’s attempt to remove the now-obsolete injunction fought against his

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efforts on another front. In addition to opposing him in federal court, Guam’s governor went to Guam’s territorial courts seeking a declaratory judgment that, among other things, Public Law 20-134 “had been impliedly repealed by subsequent acts of the Guam Legislature.” *In re Leon Guerrero*, No. CRQ23-001, 2023 WL 7178992, at *1 (Guam Terr. Oct. 31, 2023), *cert denied sub nom. Moylan v. Guerrero*, — U.S. —, 145 S. Ct. 136, 220 L.Ed.2d 10 (2024). That effort was successful. While the federal appeal was pending, the Supreme Court of the Territory of Guam issued a decision answering that question in the affirmative. It held that the enactment of the partial-birth abortion ban, the parental-consent requirement, and the information rules—precisely the regulations that Guam had adopted *because* it was restrained from enforcing Public Law 20-134—amounted to an implied repeal of Public Law 20-134. *Id.* at *12.

The Guam Supreme Court’s declaratory judgment made the decision for the panel of our court straightforward. In a two-sentence disposition, the panel dismissed the appeal “as moot” in light of that judgment.

II.**A.**

“It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed.” *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 609, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013) (citation omitted).

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“A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Id.* (citation omitted). Both the Supreme Court and our court “have repeatedly held that a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language.” *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019). “Where there is nothing left of a challenged law to enjoin or declare illegal, further judicial action would necessarily be advisory and in violation of the limitations of Article III.” *Id.* “To test whether subsequent developments have mooted a suit,” our court “ask[s] whether the claim could have been brought ‘in light of the . . . statute as it now stands.’” *Id.* (quoting *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) (second alteration in original)).

Here, the Guam Supreme Court declared—as a matter of local law—that Public Law 20-134 “no longer possesses any force or effect in Guam.” *In re Leon Guerrero*, 2023 WL 7178992, at *13. The panel in this case correctly concluded that moots Moylan’s appeal because even if Moylan prevailed on the merits (and our court instructed the district court to dissolve the permanent injunction), the declaratory judgment of *In re Leon Guerrero* would still completely eliminate Moylan’s ability to enforce the now-repealed abortion ban. Thus, “it is impossible for [our] court to grant any effectual relief whatever to [Moylan].” *Decker*, 568 U.S. at 609, 133 S.Ct. 1326 (citation omitted).

The Fifth Circuit encountered similar facts—and reached the same legal conclusion—in *McCorvey v. Hill*,

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385 F.3d 846 (5th Cir. 2004). There, Norma McCorvey (the original plaintiff in *Roe*), filed a Rule 60(b) motion in the original *Roe* case in an effort to have the district court revisit its injunction against the abortion laws at issue in *Roe*. *Id.* at 847. The district court denied the motion, reasoning that “McCorvey’s motion . . . was not filed within a reasonable time after final judgment was entered.” *Id.* But the Fifth Circuit dismissed the appeal as moot. Relying on Texas law, the court reasoned that “[t]he Texas statutes that criminalized abortion . . . and were at issue in *Roe* ha[d], at least, been repealed by implication.” *Id.* at 849. That mooted McCorvey’s Rule 60(b) motion. *Id.*

The case for mootness is, if anything, even stronger here than it was in *McCorvey*. The *McCorvey* court acknowledged that the implied-repeal issue was a matter of Texas state law. *See id.* But the *McCorvey* court didn’t cite to any state-court decision holding that the statutes at issue had been impliedly repealed. *See id.* In contrast, here, the Guam Supreme Court unambiguously declared, under Guam law, that Public Law 20-134 “has been impliedly repealed by the Guam Legislature and no longer possesses any force or effect in Guam.” *In re Leon Guerrero*, 2023 WL 7178992, at *13.

To be sure, an important exception exists to the general rule that the repeal of a statute moots a lawsuit challenging the constitutionality of that statute. If “there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it,” then the case is not moot. *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir.

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2019) (en banc). But not even Moylan argues this exception applies. Plaintiffs argue that the “exception does not apply to the instant case,” and it’s clear enough why they’re right about that: even assuming Guam is ready to reenact an abortion ban, the legal basis for the original injunction against the abortion ban (the binding nature of *Roe*) no longer exists, so the exception serves no purpose on these facts.

Implicit in the reasonable-expectation-of-reenactment exception to mootness is the anticipation that the reenacted statute will present the same constitutional problem that the original statute presented. That’s the only reason the exception exists: to prevent a state government from evading judicial review of a questionable statute by “repealing the challenged statute and replacing it with one that differs only in some insignificant respect.” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993); *see also City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 & n.11, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (applying the exception where the defendant city repealed “the objectionable language” of an ordinance but announced an intention to reenact “precisely the same provision” if the judgment of unconstitutionality were vacated). In other words, the exception applies when the challenged statute is technically repealed, but the “challenged conduct” continues under a different name. *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 662 n.3, 113 S.Ct. 2297.

That’s not what we have here. Even if tomorrow Guam were to enact an abortion ban substantively similar to

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Public Law 20-134, such a law would have no nexus to the injunction in this case, which applies to a different statute and which was based entirely on a case (*Roe*) that the Supreme Court has expressly overruled. Such a ban would of course not be immune to a *different* challenge, but such a challenge would be just that: a wholly new one. Not a continuation of the challenge that began this case, which arose under a legal framework incompatible with current Supreme Court precedent.

Like night follows day, it follows from the panel’s mootness conclusion that the current permanent injunction would *not* restrain Moylan—or a future enforcing official in Guam—from enforcing any future abortion ban should Guam lawmakers choose to enact one. Indeed, if the injunction against Public Law 20-134 applied to future Guam abortion regulations, then this case *wouldn’t* be moot: it would be possible to grant Moylan “effectual relief” by vacating the injunction. *Decker*, 568 U.S. at 609, 133 S.Ct. 1326. The only reason that this case is moot is because Moylan is not effectively bound by the injunction, which applies *only* to a statute that, under Guam law, does not exist. Moylan would obviously not be bound by the now defunct injunction with respect to any future law enacted by Guam.

B.

At a broader level, this case highlights something far more serious than a routine application of mootness doctrine: the pernicious—and often irreversible—ramifications of judicial overreaching. If *Roe* had come

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out correctly, abortion would be illegal in Guam today. Solely because the *Roe* Court abused its authority and got it wrong—and notwithstanding the Court’s decades-later correction in *Dobbs*—the legal status of abortion in Guam has undergone a complete reversal that remains today.

Imagine that *Dobbs*—not *Roe*—was the law in 1990, when Guam codified Public Law 20-134. Perhaps abortionists would have sued to enjoin it. But such a challenge to the abortion-ban provisions on due-process grounds would have fallen flat on its face. Guam enacted the ban “to protect the unborn children of Guam . . . from the moment of conception until birth at every stage of biological development.” Guam Pub. L. 20-134, § 1 (1990). Under *Dobbs*, this easily passes as a legitimate state interest. 597 U.S. at 301, 142 S.Ct. 2228. And “there is a rational basis on which the [Guam] legislature could have thought” that Public Law 20-134 would serve that interest. *Id.* The legislature specifically found that “unborn children have protectible interests in life, health, and well-being,” and there is a reasonable relationship between outlawing abortion (which terminates an unborn life) and Guam’s interest in preserving unborn life. Guam Pub. L. 20-134, § 1 (1990). The statute easily satisfies rational-basis review.

Roe, and the seven unelected people who fabricated it, are not only 100% culpable for the fact that abortion was legal in Guam from 1990–2022; they remain 100% responsible for the fact that abortion is still legal in Guam today. Absent *Roe*, the district court never would have enjoined the enforcement of the abortion ban, and Guam never would have needed to enact the *Roe*-compliant

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abortion restrictions that provided the basis for the Guam Supreme Court's later determination that the abortion ban was impliedly repealed. Bad judicial decisions, it turns out, don't happen in a vacuum and are not so easily remedied. They continue to affect policy, culture, and millions of lives long after they are ostensibly "fixed."

In a separate concurrence in *McCorvey*, Judge Edith Jones pointed out, in 2004, that the Supreme Court has failed us "not only [in] the abortion decisions, but [in] a number of other areas in which the Court [has] unhesitatingly step[ped] into the realm of social policy under the guise of constitutional adjudication." *McCorvey*, 385 F.3d at 853 (Jones, J., concurring). Over twenty years later, our current Supreme Court seems to be doing a better job. In *Dobbs*, the Court admitted the error of its ways in the abortion decisions and corrected course, finally allowing pro-life governments their fair chance at bat fifty years late and tens of millions of unborn lives short. But let's be honest. Our judiciary's approach—through these decisions and others—of undemocratically cramming social policy down the throats of the American people has succeeded even when the improper decisions are later reversed. Illegitimate legal rulings affect and transform social mores. And merely "correcting" the law later often doesn't reverse the ramifications of decades-old and despicable constitutional jurisprudence that our country has long since accepted as dogma. Judicial activism has run up the score on democracy. Leveling the playing field for the rest of the game may be the only practical solution, but make no mistake: that "solution" is a poor one, and it doesn't remove any ill-gotten points from the scoreboard.

*Appendix F***III.**

This is a sad case, but perhaps it can serve as a reminder that while the parties in our social-engineering rulings may come and go, the broader effects of those decisions (whether good or bad) persist. *See Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958) (describing “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”). For worse, not for better, our country is in many ways now run by judges. And while there may be little hope that our judiciary will ever willingly surrender the reins of power that we have aggregated for ourselves by our own judicial fiat, I cannot help but bring attention to it with the hope that someday more in our nation will recognize the huge and enduring social costs of judicial overreach and view it with the deep distrust it deserves. Judges are not good at running a country.

**APPENDIX G — STATUTORY
PROVISIONS AND RULES INVOLVED**

**48 U.S.C.A. § 1421b
Bill of rights**

(a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.

(b) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

(c) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

(d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

(e) No person shall be deprived of life, liberty, or property without due process of law.

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(f) Private property shall not be taken for public use without just compensation.

(g) In all criminal prosecutions the accused shall have the right to a speedy and public trial; to be informed of the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(h) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(i) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in Guam.

(j) No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

(k) No person shall be imprisoned for debt.

(l) The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion or imminent danger thereof, the public safety shall require it.

(m) No qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter.

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(n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.

(o) No person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(p) No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

(q) The employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

(r) There shall be compulsory education for all children, between the ages of six and sixteen years.

(s) No religious test shall ever be required as a qualification to any office or public trust under the government of Guam.

(t) No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of Guam or of the United States shall be qualified to hold any public office of trust or profit under the government of Guam.

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(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

*Appendix G***Federal Rules of Appellate Procedure Rule 40.
Panel Rehearing; En Banc Determination**

(a) A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

(b) Content of a Petition.

(1) Petition for Panel Rehearing. A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc must begin with a statement that:

(A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;

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(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

(1) Time. Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered--or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time,

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the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

- (A) the United States;
- (B) a United States agency;
- (C) a United States officer or employee sued in an official capacity; or
- (D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) **Form of the Petition.** The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) **Length.** Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:

- (A) 3,900 words if produced using a computer; or
- (B) 15 pages if handwritten or typewritten.

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(4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.

(e) **If a Petition Is Granted.** If a petition for panel rehearing or rehearing en banc is granted, the court may:

- (1) dispose of the case without further briefing or argument;
- (2) order additional briefing or argument; or
- (3) issue any other appropriate order.

(f) **Panel's Authority After a Petition for Rehearing En Banc.** The filing of a petition for rehearing en banc does not limit the panel's authority to take action described in Rule 40(e).

(g) **Initial Hearing En Banc.** On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

*Appendix G***Federal Rules of Civil Procedure Rule 60.
Relief From a Judgment or Order**

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has

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been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) **Effect on Finality.** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

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PUBLIC LAW NO. 20-134

Bill No. 848 (COR) Introduced by: E.P. Arriola
Date Became Law: Mar. 19, 1990 T.S. Nelson
Governor's Action: Approved

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.

Section 1 ... Legislative findings relative to the protection
of unborn children of Guam.

Section 2 ... R/R 9GCA §31.20, abortion.

Section 3 ... R/R 9GCA §31.21, administering drug or
employng as cause of abortion.

Section 4 ... R/R 9GCA §31.22, soliciting and taking
drug or submitting drug or submitting to
an attempt to cause an abortion.

Section 5 ... Added 9GCA §31.23, soliciting to submit to
operation, etc., to cause an abortion.

Section 6 ... Repeals 10GCA §3107(14).

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Section 7(a). There shall be an Abortion Referendum on November 6, 1990.

(b). Appropriations to the Election Commission is authorized.

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

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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,

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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.), 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.

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(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.