I MINA'TRENTAI SIETTE NA LIHESLATURAN GUÅHAN
RESOLUTIONS

Resolution No.	Sponsor	Title	Date Intro	Date of Presentation	Date Adopted	Date Referred	Referred to	PUBLIC HEARING DATE	DATE AUTHORS REPORT FILED	NOTES
408-37 (COR)	Committee on Rules	RELATIVE TO AUTHORIZING THE LEGISLATIVE COUNSEL OR OTHER RETAINED COUNSEL TO REPRESENT I MINA'TRENTAI SIETTE NA LIHESLATURAN GUAHAN IN THE UNITED STATES SUPREME COURT AND TO FILE A RESPONSE TO THE ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI AS REQUESTED BY THE SUPREME COURT OF THE UNITED STATES.	5/17/24 3:28 p.m.							Addendum 5/20/24

COMMITTEE ON RULES

Senator Chris Barnett, Chairperson
I Mina'trentai Siette Na Liheslaturan Guåhan
37th Guam Legislature

May 20, 2024

To: **Joaquin P. Taitague**
Clerk of the Legislature

Attorney Darleen Hiton
Legislative Legal Counsel

From: **Senator Chris Barnett**
Chairperson, Committee on Rules

Subject: **Addendum for Resolution No. 408-37 (COR) by the Committee on Rules for processing.**

Håfa Adai yan Biba Guåhan!

Attached is an **Addendum for Resolution No. 408-37 (COR),** to be processed and posted on the legislature website for public accessibility.

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-828.html

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 7, 2024

Mr. Michael F. Phillips
Phillips & Bordallo, P.C.
410 West O'Brien Drive, Ste 102
Hagatna, GU 96910-5044

Re: Douglas B. Moylan, Attorney General of Guam
v. Lourdes Leon Guerrero, Governor of Guam, et al.
No. 23-828

Dear Mr. Phillips:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should be filed on or before June 6, 2024.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be orange.

Sincerely,

Scott S. Harris

Scott S. Harris
Clerk

cc: Tyler Green
Leslie A. Travis

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East Dean Keeton Street | Austin, Texas 78705-3299 | (512) 475-9198 | svladeck@law.utexas.edu

STEPHEN I. VLADECK
Charles Alan Wright Chair in Federal Courts

May 13, 2024

Mr. Scott Harris
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: ***Moylan* v. *Leon Guerrero*, No. 23-828**

Dear Mr. Harris,

On May 7, 2024, this Court requested a response to the petition for a writ of certiorari in the above-referenced matter, which is currently due on **Thursday, June 6, 2024**.

I have recently been retained by Governor Lourdes Aflague Leon Guerrero, one of the respondents here, to represent her in this matter. I am writing under Rule 30.4 of the Rules of this Court to respectfully request a 30-day extension for the filing of Governor Leon Guerrero's response—which would therefore be due on **Monday, July 8, 2024**.

Such an extension is made necessary by my recent engagement as counsel in this matter, by the press of other business, and by previously arranged personal travel that I am not able to reschedule. Counsel for petitioner has informed me that he does not object to such an extension.

If I can provide any additional information to assist the Court in its consideration of this request, please do not hesitate to ask.

Sincerely yours,

Stephen I. Vladeck

cc: Counsel for Petitioner

No. _____

In the Supreme Court of the United States

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

v.

LOURDES LEON GUERRERO,
GOVERNOR OF GUAM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

PETITION FOR A WRIT OF CERTIORARI

Douglas B. Moylan
Attorney General
OFFICE OF THE ATTORNEY GENERAL OF GUAM
590 S. Marine Corps Drive
Suite 901
Tamuning, GU 96913
(671) 475-3324
dbmoylan@oagguam.org

Tyler R. Green
Counsel of Record
CONSOVOY MCCARTHY PLLC
222 S. Main St., 5th Fl.
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Gilbert C. Dickey
Kathleen L. Smithgall
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Counsel for Petitioners

January 29, 2024

QUESTION PRESENTED

"It is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (cleaned up). Yet the Supreme Court of Guam—an Article IV court that Congress created and vested with just one power: the "judicial authority," 48 U.S.C. §1424(a)(1)—still granted the Governor of Guam's request for an advisory opinion on the status of a Guam law. That opinion expressly "determined the lack of an injury in fact is not fatal to our ability to adjudicate this matter." App.17.

The question presented is whether the Supreme Court of Guam's advisory opinion constitutes a permissible exercise of the "judicial authority" that Congress has vested in that court under 48 U.S.C. §1424(a)(1).

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. 48 U.S.C. §1421g(d)(1). Respondent is Lourdes Leon Guerrero, the Governor of Guam and the congressionally created head of Guam's executive branch. *Id.* §1422. In the case below, the Supreme Court of Guam, a congressionally created court, *see id.* §1424(a)(1), designated the Guam Attorney General as Respondent after the Governor of Guam filed a Request for a Declaratory Judgment under 7 Guam Code Ann. §4104. App.155. The Supreme Court of Guam also invited the Guam Legislature to participate as Respondent in the case below. While the Guam Legislature participated below, it does not join this petition for a writ of certiorari.

The related proceedings below are:

In Re: Request of Lourdes A. Leon Guerrero, I Maga'Hågan Guåhan, Relative to the Validity and Enforceability of Public Law No. 20-134, CRQ2023-001 (Guam) — Judgment entered on October 31, 2023.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

The Attorney General of Guam, Douglas B. Moylan, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Guam.

OPINION BELOW

The opinion of the Supreme Court of Guam is reported at 2023 Guam 11 and is available at 2023 WL 7178992. App.1-52. Because the proceedings below originated under 7 Guam Code Ann. §4104, which allows the Governor of Guam to request declaratory judgments directly from the Supreme Court of Guam, there is no decision of the Guam Superior Court.

JURISDICTION

The Supreme Court of Guam issued its decision on October 31, 2023. This Court's jurisdiction to review that decision rests on 28 U.S.C. §1257 and 48 U.S.C. §1424-2.

STATUTORY PROVISIONS INVOLVED

Section 22(a)(1) of the Guam Organic Act states in pertinent part:

"The judicial authority of Guam shall be vested in a court established by Congress designated as the 'District Court of Guam,' and a judicial branch of Guam which branch shall constitute a unified judicial system and include an appellate court designated as the 'Supreme Court of Guam'…." 48 U.S.C. §1424(a)(1).

Section 22A(a) of the Guam Organic Act states in pertinent part:

"The Supreme Court of Guam shall be the highest court of the judicial branch of Guam (excluding the

District Court of Guam) and shall [] have original jurisdiction over proceedings necessary to protect its appellate jurisdiction and supervisory authority and such other original jurisdiction as the laws of Guam may provide…." 48 U.S.C. §1424-1(a).

In relevant part, the Guam Code provides:

"[The Governor of Guam], in writing, *or* [the Legislature of Guam], by resolution, may request declaratory judgments from the Supreme Court of Guam as to the interpretation of any law, federal *or* local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of [the Governor] and the operation of the Executive Branch, or [the Legislature], respectively. The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments *shall* not be available to private parties." 7 Guam Code Ann. §4104.

INTRODUCTION

Congress created the Supreme Court of Guam and vested it with just one power—the "judicial authority of Guam." 48 U.S.C. §1424(a)(1). The Guam Legislature, however, has supplemented that authority. It passed a law allowing the Supreme Court of Guam to issue—in response to a request from Guam's governor or legislature—a declaratory judgment "as to the interpretation of any law, federal *or* local," on "a matter of great public interest." 7 Guam Code Ann. §4104.

In the proceeding below, Guam's governor invoked §4104 and asked the Supreme Court of Guam to declare that a Guam abortion law passed in 1990 had been impliedly repealed. The problem: That 1990 law

has never taken effect—Guam's federal district court enjoined it almost immediately upon its passage, and that injunction remains in place today—meaning no party in the proceedings below had an injury in fact. The Supreme Court of Guam expressly acknowledged as much. App.14, 17. Yet it still reached the merits, holding that Guam's abortion law had been impliedly repealed—a holding designed to thwart the federal courts' inquiry into whether the federal injunction against that law remained valid. App.146 (acknowledging that the Governor filed the §4104 action directly "[i]n response to the Attorney General's actions").

At bottom, the Guam Supreme Court's best efforts to justify reaching the merits confirm only that its decision exemplifies the exact kind of "distortion of … important but unrelated legal doctrines" this Court sought to end in *Dobbs v. Jackson Women's Health Organization*. 597 U.S. 215, 286 (2022). Since the U.S. Senate confirmed John Jay as the first Chief Justice of the United States, one of our judicial system's few never-disputed tenets has been that the "judicial authority"—the only power Congress has given to the Supreme Court of Guam—does not include authority to issue advisory opinions. In Guam, that's no longer true: The Guam Supreme Court's exercise of "judicial authority" in this case produced a quintessential advisory opinion. That opinion also built a framework so the Supreme Court of Guam can repeat that feat whenever it wants.

The Supreme Court of Guam's new advisory-opinion framework justifies this Court's efforts to preserve "appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that

may turn on questions of federal law." *Territory of Guam v. Olsen*, 431 U.S. 195, 201 (1977). If not vacated, the opinion below threatens grave consequences for Guam's system of government and for Guam's place within the federal system. That advisory-opinion framework simultaneously elevates the Supreme Court of Guam above the other branches of Guam's government and undermines the operations of Guam's federal courts. Indeed, this very case arose because the Governor of Guam successfully impeded the federal courts' review of a federal injunction by obtaining a ruling from the Guam Supreme Court on the underlying validity of that enjoined law. Nothing in the Guam Organic Act or the established history and understanding of judicial authority supports the Guam Supreme Court's interference with the work of federal courts.

This Court should grant the petition.

STATEMENT OF THE CASE

1. a. Guam is an unincorporated territory of the United States. Through the Guam Organic Act, Congress established a system of government for Guam. 48 U.S.C. §1421 *et seq*. The Organic Act continues to serve as Guam's constitution—the territory has never adopted its own constitution. *See* 48 U.S.C. §1421a.

In the Guam Organic Act, Congress borrowed from a familiar model. It created "a representative local government formed in the American tradition." S. Rep. No. 81-2109, at 2841 (1950). Its purpose was to "permi[t] the people of Guam to govern themselves" and provide for "democratic local government." *Id*. at 2840.

Consistent with those goals, in 1950 Congress created for Guam a system of separation of powers that mirrors the federal system, vesting the executive, legislative, and judicial powers in three separate branches of government. Guam's "executive power" is "vested" in the "Governor of Guam." 48 U.S.C. §1422 (originally enacted as Guam Organic Act of Aug. 1, 1950, ch. 512, §6, 64 Stat. 386). "The legislative power and authority of Guam" is "vested" in the "Legislature of Guam." *Id.* §1423(a) (originally enacted as Guam Organic Act of Aug. 1, 1950, ch. 512, §10, 64 Stat. 387). Finally, the Organic Act "vested" the "judicial authority of Guam" in "the District Court of Guam" established by Congress and in "such local court or courts as may have been or may hereafter be established by the laws of Guam." Guam Organic Act of Aug. 1, 1950, ch. 512, §22, 64 Stat. 389 (amended 1954).

b. The nature of the judicial authority in Guam has never changed, even though the entities within Guam's judicial branch that exercise that authority have varied over time. For instance, in the original 1950 Organic Act, Congress did not establish a Supreme Court of Guam. Instead, it gave the federal District Court of Guam "such appellate jurisdiction as the legislature may determine." *Id.*

The Guam Legislature waited more than 20 years after that to invoke its Organic Act power to "establish[]" "other … court[s]," *id.*, and pass the Court Reorganization Act of 1974, Guam Pub. L. No. 12-85 (1973). That law created a Guam Supreme Court for the first time and purported to give it "jurisdiction of appeals from the judgments, orders and decrees of the Superior Court in criminal cases … and in civil causes

and proceedings." *Id.* §3. But in that law the Guam Legislature did not purport to confer any original jurisdiction on the first Guam Supreme Court.

That first Guam Supreme Court was short lived. In *Olsen*, this Court held that the Organic Act's grant of authority to create local courts did not permit the Guam Legislature to transfer the federal District Court's appellate jurisdiction to a Guam Supreme Court: "[N]othing in the legislative history of the Organic Act of 1950 even remotely suggests that Congress intended … to give the Guam Legislature the option of creating a local Supreme Court having the power of ultimate review of cases involving local matters." 431 U.S. at 202. The jurisdiction that the Guam Legislature had tried to give to the Guam Supreme Court was "essentially the same appellate jurisdiction as had previously been exercised by the District Court." *Id*. at 198. That ran afoul of the Organic Act's text, which allowed the Guam Legislature to "transfer" the District Court's "original jurisdiction" over local disputes to local courts, but "withheld" from the Guam Legislature "a like power" to transfer the District Court's "appellate jurisdiction." *Id*. at 201. Besides this textual limit, the Court was also "reluctant," absent "a clear signal from Congress," to find that the Guam Legislature could "foreclose appellate review by Art. III courts" of "decisions of territorial courts in cases that may turn on questions of federal law." *Id*.

After *Olsen*, Congress amended the Organic Act and gave the Guam Legislature express authority "in its discretion" to "establish an appellate court." Act of Oct. 5, 1984, Pub. L. No. 98-454, §801. But Congress did not expand the power it had previously vested in Guam's courts. Instead, it left in place the same text

giving the "judicial authority of Guam" to both the "District Court of Guam" and to "such local courts or courts as may have been or shall hereafter be established by the laws of Guam." *Id.*

About ten years later, the Guam Legislature exercised its discretion and created a Supreme Court. *See* Act of Jan. 14, 1993, Guam Pub. L. No. 21-147, §2, *repealed and reenacted by* Guam Pub. L. No. 24-61, §3 (Sept. 17, 1997). But the Organic Act operative in the early 1990s left that court subject to the Guam Legislature's "discretion." Pub. L. No. 98-454, §801. This led to concerns that the Guam Supreme Court would be subject to the political whims of the day. *See S. Hearing on H.R. 2400 Before S. Comm. Energy and Nat. Resources, Subcomm. on Public Lands and Forests*, 108th Cong. 7-8 (2004) (Statement of Del. Madeleine Z. Bordallo).

Congress addressed that concern in 2004 by amending the Organic Act to create "an appellate court designated as the 'Supreme Court of Guam.'" 48 U.S.C. §1424(a)(1). Congress gave the Guam Supreme Court appellate jurisdiction over local courts, including the Superior Court of Guam, and "original jurisdiction over proceedings necessary to protect its appellate jurisdiction and supervisory authority and such other original jurisdiction as the laws of Guam may provide." *Id.* §1424-1(a)(1).

Even in those 2004 amendments, however, the Organic Act did not change the scope of authority granted to the Guam judiciary. Instead, Congress left in place the same text that appeared in the original 1950 Organic Act—text that "vest[s]" those courts only with the "judicial authority of Guam." *Id.* As things stand now, Congress has vested that judicial

authority in both the "District Court of Guam" and a "judicial branch of Guam" that includes the "Supreme Court of Guam." *Id.*

2. Meanwhile, during the past three decades, the Guam Legislature has tried to mold the Guam Supreme Court's authority with a series of whiplash-inducing laws. Things started when the Guam Legislature created the Guam Supreme Court and gave that court authority to issue declaratory judgments. Guam Pub. L. No. 21-147, §2, *repealed and reenacted by* Guam Pub. L. 24-061, §3. A declaratory judgment could be had when requested by the Governor, in writing, or by the Legislature, by resolution, on "any question affecting the powers and duties of the Governor and the operation of the Executive Branch." *Id.*

But nearly a decade later, the Legislature changed its mind and—in a case under §4104 brought by Guam's governor—tried to invalidate the court's authority to issue a declaratory judgment. The Legislature argued that it lacked authority under the Organic Act "to vest [the Guam Supreme Court] with original jurisdiction to consider requests for declaratory judgment." *In re Request of Gutierrez*, 2002 Guam 1, at 1 (Guam 2002). The Guam Supreme Court rejected the Legislature's argument and upheld §4104 as a statute permissibly giving it "jurisdiction to issue declaratory judgments." *Id.*

Dissatisfied, the Legislature revoked the Guam Supreme Court's grant of jurisdiction over declaratory judgments the next legislative session. Act of Aug. 17, 2006, Guam Pub. L. No. 28-146. In the Judiciary Committee's "Findings & recommendations," the Committee raised serious concerns about "the separation of powers," particularly given that the

declaratory-judgment provision did not appear to require an "adversary proceeding involving a real case or controversy between real parties who have standing." *Hearing Before the Committee on Judiciary, Governmental Operations, and Reorganization on Bill 309 (EC)*, 28th Guam Leg. (2006), perma.cc/9PDP-HPME. The Governor vetoed that bill, but the Legislature voted to override that veto, thereby revoking (and appearing to finally settle the question of) the Guam Supreme Court's authority to issue declaratory judgments.

But two years later, the political tide changed yet again, and the Guam Legislature reinstated the provision permitting declaratory judgments by request from the governor or legislature "as to the interpretation of any law, federal *or* local," "where it is a matter of great public interest and the normal process of law would cause undue delay." Act of July 22, 2008, Guam Pub. L. No. 29-103, codified at 7 Guam Code Ann. §4104. This provision remains in place today. And it served as the basis for the Guam Supreme Court's decision below.

3. Separately, in the early 1990s, the Guam Legislature (like many state legislatures) was grappling with abortion regulations after *Roe v. Wade*, 410 U.S. 113 (1973). State legislative activity in this area led this Court to decide a significant number of follow-on abortion cases, including *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In *Webster*, a three-Justice plurality expressed a willingness to "modify and narrow *Roe* and succeeding cases" in a proper case. 492 U.S. at 521. Writing separately, Justice Scalia stated that the Court should not just "effectively" overrule *Roe*, as the plurality opinion

would have done, but should overrule *Roe* "more explicitly." *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).

Taking note of those four votes, the Guam Legislature enacted Public Law 20-134 the following year. *See* Act of Mar. 19, 1990, Guam Pub. L. No. 20-134. Public Law 20-134 copied part of the Missouri law upheld in *Webster* by including a legislative finding that "every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being." *Id.* §1. Based on this finding, the Guam Legislature prohibited any person from "[p]roviding or administering drug[s] or employing means to cause an abortion." *Id.* §3. A violation constituted a third-degree felony and could result in disciplinary action before the Guam Medical Licensure Board.

Within days, a group of plaintiffs sued both the Governor and the Attorney General, challenging the law under the United States Constitution and the Organic Act of Guam. *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 776 F. Supp. 1422, 1426 (D. Guam 1992). The district court immediately entered a temporary restraining order, which it ultimately converted to a permanent injunction. *Id.* The Court granted the injunction solely "because" "*Roe v. Wade* [was] the law in the Territory of Guam." 776 F. Supp. at 1426 (footnote omitted). An unsuccessful appeal to the Ninth Circuit followed, *see Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992), and the permanent injunction of Public Law 20-134 has remained in place ever since.

4. In 2022, this Court overruled both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v.*

Casey, 505 U.S. 833 (1992), holding in *Dobbs v. Jackson Women's Health Organization* 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. As explained below, *Dobbs* triggered a set of dueling proceedings in Guam's federal and territorial courts that have ultimately led to this petition.

First, in Guam federal district court: About five months after *Dobbs* was issued, Petitioner Douglas Moylan became the Attorney General of Guam. Shortly after taking office, he moved the Guam federal district court under Federal Rule of Civil Procedure 60(b) to vacate its permanent injunction of Guam P.L. 20-134 in light of *Dobbs*. Attorney General Motion to Vacate, *Guam Soc'y of Obstetricians and Gynecologists v. Moylan*, 1:90-cv-13 (D. Guam Geb. 1, 2023), ECF 252. He argued that because *Roe* was the sole basis for that injunction, the district court had to lift the injunction in its entirety. *Compare Ada*, 776 F. Supp. at 1426 ("*Roe v. Wade* [is] the law in the Territory of Guam," so the defendants "are permanently enjoined from enforcing any of the provisions of Public Law 20-134."); *with California ex rel. Becerra v. EPA*, 978 F.3d 708, 718-19 (9th Cir. 2020) ("[W]hen a district court reviews an injunction based solely on law that has since been altered to permit what was previously forbidden, it is an abuse of discretion to refuse to modify the injunction in the light of the changed law."). Guam's current Governor, whose predecessor was a named defendant in the *Ada* litigation, opposed Attorney General Moylan's Rule 60(b) motion to vacate, as did the plaintiffs and other named defendants. *Guam Soc'y of Obstetricians and Gynecologists v. Guerrero*,

90-00013, 2023 WL 2631836, at *1 (D. Guam March 24, 2023).

Second, in the Guam Supreme Court: Before the federal district court could rule on Attorney General Moylan's Rule 60(b) motion, the Governor took matters into her own hands. She invoked 7 Guam Code Ann. §4104 and filed an original action in the Guam Supreme Court. She sought from the Guam Supreme Court a declaratory judgment on questions that were simultaneously pending before the federal district court due to the Attorney General's Rule 60(b) motion. Specifically, the Governor asked the Guam Supreme Court to address (1) whether P.L. 20-134 was "void at the time of its passage" and "void forever" such that it could not be revived after *Dobbs*; (2) whether P.L. 20-134 was an *ultra vires* act; and (3) whether P.L. 20-134 was impliedly repealed by later legislation. App.163-64. The Guam Supreme Court declined to address the first question, but "invite[d]" briefing on the second and third questions. App.152.

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

After the parties filed opening and response briefs (including the Governor's separate response brief defending the injunction) in that Ninth Circuit appeal—but before appellants had filed their Ninth Circuit reply brief—the Guam Supreme Court issued its

decision in *Leon Guerrero*. This petition for a writ of certiorari arises from that decision. In it, the Guam Supreme 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." 2023 WL 7178992, at *1 (Guam Oct. 31, 2023).

That merits conclusion, however, rested on the Guam Supreme Court's predicate holding that it could answer the Governor's questions *even though* no party before it had suffered an injury sufficient for standing. The court acknowledged that the Organic Act's system of separation of powers "compels our independent judiciary to require standing to assert claims before our courts." App.12. "[S]tanding is how" the "balance struck by the Organic Act … is effectuated." *Id.* But still, the Guam Supreme Court held that it could "reach the merits" of this §4104 declaratory action "despite the lack of an injury in fact" required for standing. App.14. It reasoned that standing should be treated as a self-imposed prudential limit to "reconcile[]" the Organic Act's textual limits on the judiciary's power with the Act's grant of power to the Guam Legislature to "expand this court's original jurisdiction by law." App.12. The Court also viewed a New Mexico Supreme Court decision creating an exception to New Mexico's state-law standing requirement as "consistent with Guam jurisprudence." App.15.

In short, the Guam Supreme Court announced that it would not require an "injury in fact" when a declaratory action under §4104 "presents a purely legal issue in an adversary context" and the question is one of "great public interest." App.17. The Court

explained that it adopted this position "because we are committed to a clear separation of powers." *Id.*

Within days, the Guam Society of Obstetricians and Gynecologists filed a letter with the Ninth Circuit arguing that the Attorney General's Rule 60(b) appeal "is moot" and "should be dismissed." Citation of Supplemental Authorities, *Guam Soc'y of Obstetricians & Gynecologists, et. al v. Moylan*, No. 23-15602 (9th Cir. Nov. 6, 2023), ECF 38.[1] On this view, the Governor of Guam, who is a nominal co-defendant in the federal litigation along with the Attorney General but has opposed vacating the injunction, mooted that very case by running to the Guam Supreme Court and—absent any injury—asking that court to declare the enjoined law invalid.[2]

---

[1] The Attorney General does not dispute that the Guam Supreme Court's decision—left undisturbed—will affect the Ninth Circuit appeal. Whatever can be said about the Guam Supreme Court's decision, the Attorney General agrees that if it stands, the Ninth Circuit will need to decide whether that decision moots the Ninth Circuit appeal and what a potential mootness finding means for the original 1990 injunction. *See* Motion to Stay Appellate Proceedings, *Guam Soc'y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602 (9th Cir. Dec. 1, 2023), ECF No. 47.

[2] The parties agreed to stay the Ninth Circuit appeal pending resolution of this petition. *See* Motion to Stay Appellate Proceedings, *Guam Soc'y of Obstetricians & Gynecologists, et. al v. Moylan*, No. 23-15602 (9th Cir. Dec. 1, 2023), ECF No. 47; Order Staying Appellate Proceedings, *Guam Soc'y of Obstetricians & Gynecologists v. Moylan*, No. 23-15602 (9th Cir. Dec. 14, 2023), ECF No. 49.

REASONS FOR GRANTING THE PETITION

Territories "are the creations, exclusively, of" Congress. *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850). Article IV of the Constitution gives Congress "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." *First Nat'l Bank v. Cnty. of Yankton*, 101 U.S. 129, 133 (1880). This legislative power is "absolute and undisputed" and "is the inevitable consequence of the right to acquire and to hold territory." *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336-67 (1810).

Using that power, Congress passed the Guam Organic Act, which serves as Guam's constitution and defines both the structure of Guam's territorial government and the powers that its territorial government may exercise. 48 U.S.C. §1421 *et seq*. Congress created for Guam a system of separation of powers, including a Supreme Court of Guam that holds only "judicial authority." *Id.* §1424(a)(1).

This Court should grant the Attorney General of Guam's petition and review whether the advisory opinion below constitutes a proper exercise of that judicial authority. Whether the Supreme Court of Guam has transgressed the limits on the judicial authority that Congress has vested in it constitutes an issue of great public importance—a conclusion self-evident from this Court's two prior merits opinions construing the Organic Act's grant of judicial authority. *See Olsen*, 431 U.S. at 196 (addressing whether the Legislature of Guam could properly divest the Guam federal district court of appellate jurisdiction under Section 22 of the Organic Act); *Chase Manhattan Bank (Nat'l Ass'n) v. South Acres Dev. Co.*, 434 U.S.

236, 236 (1978) (addressing "whether Congress has authorized the District Court of Guam to exercise federal diversity jurisdiction"). Like *Olsen* and *South Acres Development*, the decision below implicates the manifest public interest in respecting Congress's design of Guam's core judicial function, and warrants plenary review for the same reasons those splitless cases did.

And though the decision below directly concerns only Guam's judicial power, its practical consequences for all of Guam's government and all Guamanians—and for relations between Guam's federal and territorial courts—cannot be overstated. If not vacated, the decision below would remake the system of separation of powers Congress devised. The Supreme Court of Guam claimed the authority to declare a Guam law invalid in a proceeding where no party had suffered a legal injury. And it claimed this authority with no explanation of how its advisory opinion—a type of opinion always deemed non-judicial in this country—could be a proper exercise of the only authority Congress has given it: "judicial authority." *Id.* If allowed to stand, this decision will make the Supreme Court of Guam the arbiter of political disputes between Guam's political branches, thus disregarding the way Congress separated power between Guam's branches of government. It will also sow conflict between territorial and federal courts by encouraging Guam's political leaders to seek advice from the Supreme Court of Guam on matters pending before Guam's federal courts before the federal courts can answer them—exactly what happened here.

In short, Congress's grant of judicial authority to the Supreme Court of Guam appears in "the Organic

Act"—"a federal statute … which [this Court is] bound to construe according to its terms" with no "deference" to any other court's view. *Limtiaco v. Camacho*, 549 U.S. 483, 491-92 (2007). And only this Court's final word can ensure that territorial governments function within the limits Congress has drawn using its "absolute and undisputed" Article IV power, *Sere*, 10 U.S. (6 Cranch) at 336-67, over "all the[ir] departments," *First Nat'l Bank*, 101 U.S. at 133. The Court should grant the petition and vacate the decision below.

I. The Guam Supreme Court's Decision Rewrites Guam's System of Separation of Powers Created by Congress.

A. The Guam Supreme Court's Decision Defies the Organic Act's Text.

1. Because the Guam Supreme Court was created by Congress, it can exercise only the powers that Congress gave to it. *Am. Ins. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828); *see also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) ("Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. §1421a, the Government of Guam is in essence an instrumentality of the federal government."). And in the Guam Organic Act, Congress "vested" Guam's courts with only one kind of power: "judicial authority." 48 U.S.C. §1424(a)(1). The Guam Supreme Court's announcement that it can render a decision in a case under 7 Guam Code Ann. §4104 where no party has an injury in fact defies that limitation.

When a statute grants authority without any "attempt to define" its contours, courts interpreting that authority's scope must look to the "common

understanding" of the terms. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *see also Limtiaco*, 549 U.S. at 492 ("[T]he Organic Act is a federal statute, which we are bound to construe according to its terms."). The "judicial authority" granted by the Organic Act has a well-established common understanding: It includes only the authority to perform "activities … appropriate … to courts." *Id.* at 560. The Organic Act thus gives authority to resolve only "disputes which are appropriately resolved through the judicial process." *Id.* (quotation marks and citation omitted); *see also Olsen*, 431 U.S. at 206 (Marshall, J., dissenting) ("Both [Article III and §22(a) of the Guam Organic Act] describe the bodies that will exercise the judicial power.").

Our unbroken tradition confirms that the "judicial authority" does not include the power to issue advisory opinions on abstract issues of law. Instead, it reaches "only a real controversy with a real impact on real persons." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (internal quotation marks omitted). That kind of real-world impact is not present when the party seeking relief has not suffered an injury-in-fact. *See id.*

The prohibition on advisory opinions has been the quintessential limit on judicial power since the Republic's dawn. In its famous letter declining to respond to a series of questions from Secretary of State Thomas Jefferson on behalf of President George Washington, the Jay Court explained that it would not be proper to "extra-judicially decid[e] the questions alluded to." 3 Correspondence and Public Papers of John Jay 488-489 (Johnston ed. 1891). This letter confirmed what the Justices had said a year earlier in

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). Though the full Court never passed on the statutory scheme underlying that case—in which courts would review veterans' pension applications—five of the six Justices found while riding circuit that review of those applications was not judicial. 2 U.S. at 410 n.* (Justices Jay and Cushing noting that the duties were "not" "properly judicial, and to be performed in a judicial manner"); *id.* (Justices Wilson and Blair noting that "the business directed by this act is not of a judicial nature"); *id.* (Justice Iredell noting that courts could not exercise "any power not in its nature judicial"). Those decisions reflect what the founding generation understood: courts' "right of expounding" the law is limited to matters "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966).

This persistent refusal to issue advisory opinions confirms the common understanding that courts act judicially only when they decide "the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). And a court is not called on to resolve the rights of an individual when a party who has not suffered an injury seeks a declaration of the law. *See Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867) ("No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."). Instead, the "judicial power" reaches only to "actual controversies arising between adverse litigants." *Muskrat v. United States*, 219 U.S. 346, 361 (1911); *Chi. & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

That holds true in all cases before federal courts but has long been the rule in cases that challenge legislation. After all, the resolution of the "validity of any act of any legislature" is "legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy." *Chi. & G.T. Ry.*, 143 U.S. at 345.

So by the time Congress first granted "judicial authority" to Guam's courts in the 1950 Organic Act, precedent and history and practice all confirmed that only an injured party could invoke the judicial power. This Court had repeatedly explained that a party seeking relief must show "an injury or threat to a particular right of their own." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *see also, e.g.*, *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (requiring "some direct injury suffered or threatened"); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 262 (1933) (requiring "valuable legal rights asserted by the complainant and threatened with imminent invasion"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 321 (1936) (finding a "proprietary interest … subject to injury"); *UPWA v. Mitchell*, 330 U.S. 75, 90-91 (1947) (no "judicial power" where there was "[n]o threat of interference…with rights of these appellants"). Without a personal injury, a dispute "is political, and not judicial in character," and "is not a matter which admits of the exercise of the judicial power." *Mellon*, 262 U.S. at 483.

Nothing had changed in 2004, when Congress conferred "judicial authority" on the Guam Supreme Court. 48 U.S.C. §1424(a). If anything, this Court's cases had by then made the requirement of injury-in-fact only clearer. A plaintiff's obligation to show "an

injury in fact" was a "landmark" requirement for the exercise of "judicial power." *Lujan*, 504 U.S. at 559-60; *see also, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). This requirement came from "common understanding of what activities are appropriate to … courts." *Lujan*, 504 U.S. at 560; *see also, e.g.*, *Steel Co.*, 523 U.S. at 102 (injury-in-fact defines "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process").

That's why the injury-in-fact requirement for an exercise of judicial power was not unique to Article III courts. Other congressionally created courts also required a showing of injury-in-fact. *See, e.g.*, *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003) ("The Court of Federal Claims, though an Article I court … applies the same standing requirements enforced by other federal courts created under Article III.") (citation omitted)); *Am. Legion v. Nicholson*, 21 Vet. App. 1 (2007); *United States v. Lane*, 60 M.J. 781, 786-87 (A.F.C.C.A. 2004) (collecting cases about military courts applying Article III standing requirements), *set aside by United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006) (collecting cases about military courts applying Article III standing requirements); *Anthony v. Comm'r*, 66 T.C. 367 (1976) (Article III standing principles apply to the Tax Court). So did other territorial courts. *See, e.g.*, *Bank of Saipan, Inc. v. Superior Ct.*, 2004 WL 3704882, at (N. Mar. I. Aug. 12) ("[A]ny decision issued by this Court on the matter would be completely abstract and …. [i]t is consequently impossible for the Court to craft a remedy here when there is no specific harm which the Bank is currently suffering."); *Suarez v. C.E.E.I.*, 163 D.P.R. 347 (P.R. 2004) ("'The advisory opinion doctrine is an integral part of the constitutional concept of

'justiciability' that governs in our jurisdiction and that establishes as a requirement the existence of a real case or controversy for the valid exercise of judicial power.'" (quoting *Ortiz v. Panel F.E.I.*, 155 D.P.R. 219 (P.R. 2001))); *Hall v. Hall*, 2018 WL 1888496, at *1 (V.I. Apr. 18) (declining jurisdiction where "it [wa]s not clear that the opinion issued by this Court … would be outcome-determinative"). Even the Guam Supreme Court previously agreed this requirement "appl[ied] to claims asserted in Guam's courts." *In re A.B. Won Pat Int'l Airport Auth., Guam*, 2019 WL 3072570, at *3 (Guam June 12).

Our unbroken tradition thus confirms that a dispute is not "judicial in character" without some legal injury. *Mellon*, 262 U.S. at 483. The injury-in-fact requirement was a key component of the "common understanding" of judicial power. *Lujan*, 504 U.S. at 560. That means only a party with an injury-in-fact can invoke the "judicial authority of Guam" that Congress conferred in the Organic Act.

2. The statutory context further confirms that the judicial authority Congress conferred in the Organic Act requires injury-in-fact. The Organic Act vests the same "judicial authority" in both the Guam Supreme Court and the District Court of Guam. 48 U.S.C. §1424(a)(1). But decisions of the District Court of Guam are subject to review by the United States Court of Appeals for the Ninth Circuit. And the Ninth Circuit is subject to Article III's injury-in-fact requirement. *E.g.*, *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 779 (9th Cir. 2018). Lest the District Court of Guam have power to decide cases that the Ninth Circuit cannot then review, the "judicial authority" granted in 48 U.S.C. §1424(a)(1) must therefore

impose the same injury-in-fact requirement that satisfies Article III jurisdiction. And because §1424(a)(1) grants the same "judicial authority" to both the District Court of Guam and the Guam Supreme Court, that judicial authority must impose the same limits on both courts; the same words in the same statutory subsection cannot grant more power to the Guam Supreme Court than they do to the District Court of Guam.

3. The Guam Supreme Court gave no coherent reason for departing from this established meaning of judicial authority. In fact, the court conceded that the Organic Act "compels our independent judiciary to require standing." App.12. Even so, it announced that it would reach the merits of cases of "great public importance" under 7 Guam Code Ann. §4104 even "in the absence of an injury in fact." App.17.

The court stated that its approach would "reconcile[]" the Organic Act's grant of "judicial authority" to Guam's courts, 48 U.S.C. §1424(a)(1), with its grant of power to the Guam Legislature to pass "laws of Guam" that "provide" "original jurisdiction" to the "Supreme Court of Guam," *id.* §1424-1(a)(1). But no conflict exists between those two statutes for the Guam Supreme Court to reconcile. The Organic Act gives the Guam Supreme Court only "judicial authority." *Id.* §1424(a)(1). The Legislature's authority to provide for the Guam Supreme Court's original jurisdiction, *id.* §1424-1(a)(1), is not in tension with that grant: It gives the Legislature authority to expand jurisdiction *over disputes that can be reached by the judicial power*. This system would have been familiar to Congress when it enacted the Organic Act, since Article III follows a similar model.

The only other authority the Guam Supreme Court relied on was a single decision of the New Mexico Supreme Court. *See* App.14. But the Guam Supreme Court never explained how that state-court decision interpreting state law could change the meaning of "judicial authority" in the Organic Act. The New Mexico decision couldn't do that anyway, since it rested on an announcement that there was no standing requirement "derived from the state constitution." *ACLU of N.M. v. City of Albuquerque*, 188 P.3d 1222, 1226 (N.M. 2008). Meanwhile, the Guam Supreme Court admits that the Organic Act "compels" it to "require standing." App.12. And the established meaning of "judicial authority" confirms this standing requirement. *Supra* Section I.A.1.

Nor can the Guam Supreme Court's decision be salvaged by its attempt to limit the standing exception to legal issues presented "in an adversary context that is capable of judicial resolution." App.17.[3] This purported limit only highlights the court's misunderstanding of judicial authority. The adverseness required for a judicial decision is "adverse *legal* interests." *See Flast*, 392 U.S. at 101 (emphasis

[3] This lack of adverseness here is made apparent by the fact that the Guam Supreme Court had to "designate[] the Attorney General of Guam as a Respondent" after "inferr[ing]" from his Rule 60 motion *in federal court* that the Attorney General had a different "view" from the Governor. App.153. The Guam Supreme Court further "invite[d] the Legislature to participate in this matter as a Respondent." App.153. Without this designation and invitation, the Governor would have been the sole party and would have filed the sole briefing on the issues raised. By ordering the Attorney General (and inviting the Legislature) to respond, the Guam Supreme Court tried to manufacture adverseness. Legal adverseness, though, requires more than just opposing briefs. *Flast*, 392 U.S. at 101.

added). Only that kind of adverseness ensures that a judicial "decision will have real meaning." *United States v. Windsor*, 570 U.S. 744, 758 (2013) (quoting *INS v. Chadha*, 462 U.S. 919, 939-40 (1983)). And that kind of adverseness is missing when a dispute does not involve an actual injury. *See id.* at 758 (finding adverseness satisfied based on "a real and immediate economic injury") (quotation marks and citation omitted)).

B. The Guam Supreme Court's Decision Conflicts with the Organic Act's Separation of Powers.

The Guam Supreme Court's rejection of the injury-in-fact requirement also conflicts with Congress's purpose in the Organic Act. Congress set out to establish a system of separation of powers, dividing power between "a legislative, an executive, and a judiciary." *Sere*, 10 U.S. at 337. Consistent with that goal, the Guam Supreme Court has long recognized that "the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions." *Taisipic v. Marion*, 1996 WL 870802, at *5 (Guam Dec. 13); *see also Hamlet v. Charfauros*, 1999 WL 359191, at *2 (Guam June 4) ("This court has zealously protected, through strict adherence, the doctrine of separation of powers." (citing authorities)).

Limitations on judicial power—including the requirement of injury-in-fact—are key features of a system of separation of powers. The standing requirements are "built on a single basic idea—the idea of separation of powers." *TransUnion*, 594 U.S. at 422 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (2021)). Only by limiting review to cases where a plaintiff

establishes adequate injury can courts ensure that they perform "their proper function in a limited and separated government." *Id.* at 423 (quoting Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993)).

But rather than respect the familiar system of separation of powers that Congress instituted, the Guam Supreme Court built one of its own. The court recognized that "standing" is how the "balance struck by the Organic Act" is given effect—only to also find that its rejection of injury-in-fact "does not raise separation of powers problems." App.17. It justified this conclusion by rejecting the injury-in-fact limit on judicial authority "only when the matter is of great public interest." *Id.*

This reasoning gets separation of powers backwards. Limits on judicial authority exist precisely to ensure that courts "put aside the natural urge" to reach the merits of an "important dispute and to 'settle' it." *Raines*, 521 U.S. at 820. No doubt the Washington Administration thought its request for an advisory opinion presented important issues. But the limits on judicial power "restrain[] courts from acting at certain times," *Steel Co.*, 523 U.S. at 101, no matter how "great" the "public interest," App.17.

II. The Guam Supreme Court's Decision Will Have Serious Practical Consequences for Guam's Three Coordinate Branches and Threatens the Role of Federal Courts.

The Guam Supreme Court's reworking of the separation of powers threatens serious practical consequences for (what was supposed to be) Guam's

three coequal branches and for Guam's place within the federal system.

1. As explained, the decision remakes the separation of powers created under the Organic Act. The Guam Supreme Court held that it could resolve an issue that "will substantially affect the operations of the Legislature, the Governor and subordinate agencies, and the Judiciary." App.18. Under traditional separation-of-powers principles, the judiciary determines a law's validity only in a dispute between legally adverse parties. That means the party bringing the challenge has been, or will imminently be, injured. Ordinarily, those restrictions mean that the judiciary will not pass on a law until after the Legislature has enacted it and the executive has enforced it. This system ensures that the judiciary does not interfere with the political functions of the other branches, but instead weighs in only as a last resort.

The Guam Supreme Court's decision inverts that order. Based on the decision below, if the Governor opposes a legislative proposal, she could ask the Guam Supreme Court to weigh in before the Legislature has even enacted that law. There is little doubt that a decision on the validity of a proposed law would "substantially affect the operations of the Legislature, the Governor and subordinate agencies, and the Judiciary." App.18. That impact on the political process is exactly why the ordinary prohibition on advisory opinions is "the oldest and most consistent thread in the federal law of justiciability." *Flast*, 392 U.S. at 96.

2. The decision below frustrates the role of Article III and Article IV courts and promotes conflict between the local and federal courts. This matter shows how. The Governor filed this §4104 action only *after*

the Guam Attorney General asked the Guam federal district court to lift its permanent injunction of Public Law 20-134. App.146. The Governor used Guam Supreme Court proceedings under §4104 to short-circuit review by the Guam District Court and Ninth Circuit of a federal injunction based solely on *Roe*. App.155. If this Court allows the Guam Supreme Court's decision to stand, it will impede full federal review of a federal-court-imposed regime that *Dobbs* held was "egregiously wrong from the start." 597 U.S. at 231. The Governor's reasons for impeding review are no surprise; nearly every court that has addressed this issue has held that *Dobbs*'s changes to the legal landscape make pre-*Dobbs* injunctions of abortion regulations no longer lawful.[4]

---

[4] *See, e.g.*, *Preterm-Cleveland v. Yost*, No. 1:19-cv-360, 2022 WL 2290526 (S.D. Ohio June 24, 2022) (granting opposed emergency motion to dissolve preliminary injunction); *Robinson v. Marshall*, No. 2:29-cv-365, 2022 WL 2314402 (M.D. Ala. June 24, 2022) (granting unopposed emergency motion to dissolve preliminary injunction). Other courts soon followed suit. *See Raidoo v. Moylan*, 75 F.4th 1115, 1118 (9th Cir. 2023) ("[V]acat[ing] district court's preliminary injunction against Guam's in-person informed-consent law."); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022) (vacating preliminary injunction); *Little Rock Family Planning Servs. v. Jegley*, No. 21-2857 (8th Cir. July 26, 2022) (same); *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-508, 2022 WL 2905496, at *4 (D.S.C. July 22, 2022) (same); *see also Bernard v. Indiv. Members of Ind. Med. Licensing Bd.*, No. 1:19-cv-1660, 2023 WL 2742321, at *6 (S.D. Ind. Mar. 31, 2023) (entering judgment on the pleadings for Defendants despite pre-*Dobbs* preliminary injunction); *see also Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 962 (Ind. 2023) (same); *Whole Woman's Health v. Young*, 37 F.4th 1098 (5th Cir. 2022); *Bryant v. Woodall*, 622 F.Supp.3d 147, 150 (M.D.N.C. 2022); *EMW Women's Surgical Ctr. P.S.C. v. Cameron*, No. 3:18-cv-224, 2022

Nor would this be the only example of conflict between federal and territorial courts under the Guam Supreme Court's view. If the decision below stands, the Governor or Legislature could always seek a declaratory judgment from the Guam Supreme Court when it thinks that venue will be more favorable than the Guam federal court. And the Guam Supreme Court has every incentive to beat the Guam federal court to a decision. *See* 7 Guam Code Ann. §4104 (declaratory actions are proper when "the normal process of law would cause undue delay"). These circumstances will result in the federal court's deferring to the Guam Supreme Court or issuing a potentially conflicting judgment on the same issue. And this strategy could be employed regardless of whether the issue is "federal *or* local." *Id.*

3. The Guam Supreme Court's decision gives that court the authority to render decisions free of all but the most limited chances for Article III review. Yet "Congress has consistently provided for appellate review by Art. III courts of decisions of local courts of the other Territories." *Olsen*, 431 U.S. at 203. In fact, this Court has already refused to allow the Guam Supreme Court to issue decisions free from Article III review. *Olsen* explained that it would not "allow the Guam Legislature to foreclose appellate review by Art. III courts … of decisions of territorial courts in cases that may turn on questions of federal law" in the

---

WL 19560712, at *1 (W.D. Ky. Aug. 17, 2022); *June Med. Servs. LLC v. La. Dep't of Health*, No. 3:14-cv-525, 2022 WL 16924100, at *15 (M.D. La. Nov. 14, 2022); *see also Sistersong Women of Color Reprod. Just. Collective v. Carr*, 40 F.4th 1320 (11th Cir. 2022) (vacating permanent injunction after *Dobbs* was decided while appeal pending).

absence of "a clear signal from Congress." *Id.* at 201. The Guam Supreme Court's decision, however, portends a severe limitation of Article III review in a host of critical future contexts. In just this case, a party has already argued that it prevents federal review of a permanent injunction that no longer has a basis in federal law after *Dobbs*. And it creates a rule under 7 Guam Code Ann. §4104 that would allow future decisions on federal law to be largely insulated from Article III review.

4. Finally, this decision has broad implications for other territorial courts. For example, the Virgin Islands are also governed by their own Organic Act that vests "the judicial power of the Virgin Islands" in both the "District Court of the Virgin Islands" and in local courts. The Supreme Court of the Virgin Islands has held that its jurisdiction extends only to justiciable cases. *See Donastorg v. Gov't of the Virgin Islands*, 2003 WL 21653354 (V.I. 2003). But if the Guam Supreme Court's decision stands, the Virgin Islands court (or other territorial courts) might conclude that Congress's grant of "judicial" power will not be enforced, and those courts too might expand their jurisdiction beyond what Congress provided.

***

The decision below did not commit simple legal errors. It committed structural errors that redefine the Supreme Court of Guam's power and give that court virtually unlimited authority to make broad declarations about the other branches of government and about any federal or local law. App.9-18. This petition raises a question of obvious public importance about the Supreme Court of Guam's role in Guam's system

of coequal branches of government and in relation to Guam's federal courts. Plenary review is warranted.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Douglas B. Moylan
Attorney General
OFFICE OF THE ATTORNEY GENERAL OF GUAM
590 S. Marine Corps Drive
Suite 901
Tamuning, GU 96913
(671) 475-3324
dbmoylan@oagguam.org

Tyler R. Green
Counsel of Record
CONSOVOY MCCARTHY PLLC
222 S. Main St., 5th Fl.
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Gilbert C. Dickey
Kathleen L. Smithgall
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

January 29, 2024

Counsel for Petitioner