NO. 23-15602

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; et al.,
Plaintiffs-Appellees

v.

DOUGLAS 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.

On Appeal from the United States District Court
for the District of Guam, Case No. 1:90-CV-13
Hon. Frances Tydingco-Gatewood

ANSWERING BRIEF OF APPELLEE LOURDES A. LEON GUERRERO, GOVERNOR OF GUAM

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INTRODUCTION

Without question, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022) represents a change in decisional law that courts must consider pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure in evaluating whether to modify injunctions previously entered against abortion laws based on *Roe v. Wade*, 410 U.S. 113, 118, 93 S. Ct. 705, 709, 35 L. Ed. 2d 147 (1973). However, while *Dobbs* may resolve part of the legal infirmity afflicting Guam Public Law 20-134, an abortion ban enacted in Guam in 1990, the law's invalidity extends beyond its prior non-compliance with *Roe*.

Appellant Douglas B. Moylan, Attorney General of Guam has appealed from the District Court of Guam's May 24, 2023 Order denying his Rule 60(b)(5) motion to vacate the court's 1990 injunction against P.L. 20-134's enforcement. The District Court denied AG Moylan's motion because AG Moylan had effectively conceded that P.L. 20-134, the law he seeks now to enforce, was void *ab initio*, a nullity. ER-002 (Order Denying Defendant Attorney General of Guam's Motion to Vacate Injunction ("2023 Order")).

AG Moylan seeks a determination from this Court that it does not matter that the law was void *ab initio*, that the change in law represented by *Dobbs* is the *only* factor the District Court was allowed to consider in its Rule 60(b)(5) review,

and that this Court's decision in *California ex. rel. Becerra v. EPA*, 978 F.3d 708, 713 (9th Cir. 2020) required the District Court to turn a blind eye to all other legal infirmities from which P.L. 20-134 suffers, including the conceded fact that the law was void at its inception.

Anticipating that this Court may agree that the District Court properly considered void *ab initio* issue in its Rule 60(b)(5) review, AG Moylan hedges his bets, attempting for the first time on appeal to undo his concessions before the District Court, without offering a justification or excuse for his failure to present such arguments below. Knowing that he had waived and conceded arguments on dispositive issues before the District Court, AG Moylan looks to this Court to provide him with a clean slate to argue that P.L. 20-134 was not void *ab initio*.

Though the District Court did not reach the issue, Governor Leon Guerrero also argued below that P.L. 20-134 had been impliedly repealed by other laws the Guam Legislature passed in the intervening 30 years between *Roe* and *Dobbs*, and that the implied repeal of P.L. 20-134 represented a change in statutory law the District Court should consider in its Rule 60(b)(5) analysis. Governor Leon Guerrero further argued that the implied repeal of P.L. 20-134 also mooted the Rule 60(b)(5) motion and the entire matter. Importantly, AG Moylan *expressly* conceded in the District Court, *twice*, that to the extent P.L. 20-134 was not void *ab initio* that it "did indeed conflict with the subsequently enacted legislation."

ER-012 and ER-128. This concession constitutes a secondary basis on which the Court may affirm the District Court's judgment.

On appeal, represented by new counsel, AG Moylan seeks a redo of his implied repeal argument. He offers this Court arguments he either never presented or that directly contradict the arguments he made below. He asks this Court to forgive and forget his prior statements, to consider his revamped arguments in the first instance, and, to the extent further Rule 60(b)(5) analysis is necessary, to save him from the District Court's review of the merits of his original arguments.

AG Moylan's strained arguments on appeal amount to little more than poorly disguised gamesmanship. The Court should decline to exercise its discretion to entertain these convenient, newfangled arguments in the first instance, hold AG Moylan to both his burden and his words in the District Court, and affirm the District Court's order denying AG Moylan's Motion to Vacate the 1990 injunction.

STATEMENT OF THE ISSUES

The primary issue on appeal is whether the Court should affirm the District Court of Guam's Order denying AG Moylan's Motion to Vacate Permanent Injunction Pursuant to Fed.R.Civ.P. 60(b)(5), where AG Moylan failed to refute dispositive issues raised in Plaintiffs' Opposition, thereby forfeiting or conceding those arguments, and, consequently, failing to meet his burden under Rule

60(b)(5). Inherent in review of this issue is the question of whether this Court's decision in *California* restricts the District Court's consideration in a Rule 60(b)(5) review to only the change in decisional law represented by Dobbs, or whether the court may also properly consider other legal infirmities from which the law suffers, including whether the law was otherwise void or had been repealed.

To the extent the Court believes additional analysis is necessary to resolve AG Moylan's Rule 60(b)(5) Motion, the Court should further consider whether to remand it to the District Court for additional findings, which is ordinarily the course, or whether the circumstances merit a rare exercise of the Court's discretion to consider the merits of the motion in the first instance on appeal.

In the event the Court decides to proceed with resolving the merits of AG Moylan's Rule 60(b)(5) Motion in this appeal, the Court should determine whether to further exercise its discretion to consider his arguments on appeal that are either new or inconsistent with positions he presented in the District Court.

Finally, if the Court proceeds with evaluating the merits of AG Moylan's motion, such review will require resolution of (1) whether Guam Public Law 20-134 is void *ab initio* – whether the 1990 Guam Legislature acted in excess of its Organic Act of Guam authority to pass only laws consistent with the Constitution and the Organic Act by enacting a law that was unquestionably contrary to *Roe v.*

Wade, and (2) whether P.L. 20-134 had indeed been repealed by inconsistent laws the Guam Legislature passed since 1990.

STATUTORY AUTHORITIES

AG Moylan did not include an addendum with his Opening Brief. Pursuant to Circuit Rule 28-2.7, Governor Leon Guerrero sets forth all relevant statutory authorities in the addendum to this brief.

STATEMENT OF THE CASE

I. Guam Public Law No. 20-134

On March 19, 1990, Governor Joseph A. Ada purported to sign into law P.L. 20-134, "An Act to Repeal and Reenact §31.20 of Title 9, Guam Code Annotated, to Repeal §§31.21 and 31.22 thereof, to Repeal Subsection 14 of Section 3107 of Title 10, Guam Code Annotated, Relative to Abortions, and to Conduct a Referendum Thereon." Guam Pub. L. No. 20-134. P.L. 20-134 purported to repeal the prior 1978 law regulating abortion services in Guam. *Id.* at §2.

P.L. 20-134 purported to enact a sweeping ban on the solicitation and provision of abortion services on Guam, setting criminal penalties for (1) persons providing drugs or employing other means to cause an abortion, including doctors; (2) women soliciting and taking a drug with intent to cause an abortion, or submitting to an operation or to the use of other means with intent to cause an

abortion; and (3) persons "soliciting" a woman to submit to an abortion. *Id.* §§2-5. While P.L. 20-134 did not further define "solicitation," the Guam's criminal code provides that a person is guilty of solicitation when he "commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime…" 9 GCA § 13.20.

P.L. 20-134 clearly violated *Roe v. Wade*, 410 U.S. 113, 118, 93 S. Ct. 705, 709, 35 L. Ed. 2d 147 (1973), the Supreme Court decision defining the constitutional basis for abortion rights, and the limitations on laws that restrict or circumscribe the provision of abortion services. The Legislature was advised that P.L. 20-134 ran afoul of *Roe* at the time the Legislature considered the bill. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1425 (D. Guam 1990) ("Senator Arriola's legal counsel had advised her that the Bill as introduced would probably be struck down because 'judges 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*.'").

II. 1990 Litigation in District Court of Guam and Ninth Circuit Court of Appeals.

On March 23, 1990, plaintiffs including local doctors, medical associations, and private citizens, filed suit against public officials including Governor Ada and then-Attorney General of Guam Elizabeth Barrett-Anderson in the District Court

of Guam, alleging that P.L. 20-134 violated the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the U.S. Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. On August 23, 1990, the District Court granted summary judgment to the Plaintiffs, permanently enjoining the enforcement of P.L. 20-134 ("1990 Injunction"). The District Court specifically found that *Roe v. Wade* applied in Guam, and because Sections 2, 3, 4, and 5 of P.L. 20-134 failed to make distinctions based on the stage of pregnancy and failed to recognize other constitutionally-protected interests, the law violated the Due Process Clause of the Fourteenth Amendment as it applied to Guam. *Id.* at 1428–29.

The Court separately found that Sections 4 and 5 of P.L. 20-134 violated the First Amendment because they attempt to prohibit freedom of speech; were 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;" and were invalid on their face "insofar as they purport to prohibit more general speech concerning abortion and its availability." *Id.* at 1428 n.9.

The defendants thereafter appealed to this Court, which affirmed the District Court's judgment, finding that the Due Process Clause of the Fourteenth Amendment upon which *Roe* was founded extended to Guam, and that P.L. 20-134 was unconstitutional, where it "ma[de] no attempt to comply with *Roe*." *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th

Cir. 1992). The Court further acknowledged the District Court's separate holding that Sections 4 and 5 of P.L. 20-134 violated the First Amendment, and observed that the ruling had not been appealed. *Id*. at 1369.

III. Post-Injunction Statutes

The original 1978 version of the law having been restored, the Guam Legislature passed several laws between 1994 and 2016 regulating abortion in Guam, including: the Parental Consent for Abortion Act (19 GCA § 4A101 *et seq*); the Women's Reproductive Health Information Act of 2012 (10 GCA §3218.1); the Partial-Birth Abortion Ban Act of 2009 (10 GCA § 91A101 *et seq*); and the Partial-Birth Abortion and Abortion Report law (10 GCA § 3218). These laws form a comprehensive scheme covering the subject of abortion in Guam.

IV. *Dobbs v. Jackson* and Guam Supreme Court Declaratory Judgment Action

On June 24, 2022, the Supreme Court issued *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), expressly overturning *Roe v. Wade*, and finding that the right to abortion is not expressly or implicitly protected by the Constitution. *Id.* at 2242. The *Dobbs* Court further concluded that, because the Constitution does not confer a right to abortion, "the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at 2279.

On January 23, 2023, Governor Leon Guerrero filed a Request for Declaratory Judgment in Supreme Court of Guam Case No. CRQ23-001, *In re Request of Lourdes Leon Guerrero Relative to the Validity and Enforceability of Public Law No. 20-134* ("Guam Supreme Court Case"), seeking a declaratory judgment[1] relative to the validity and enforceability of Guam Public Law 20-134 in light of *Dobbs*. GovSER-022–069 (Declaration of Counsel in Support of Motion for Abstention, Ex. A). The Guam Supreme Court determined that two issues presented in Governor Leon Guerrero's Request satisfied the jurisdictional requirements for a declaratory judgment action: (1) whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing Public Law 20-134; and (2) to the extent P.L. 20-134 is not void or otherwise unenforceable, whether it had been repealed by implication through subsequent changes in Guam law. GovSER-016–017 (Supplemental Declaration of Counsel in Support of Motion for Abstention, Ex. A).

[1] Though AG Moylan describes the Governor's Guam Supreme Court action as a "request for an advisory opinion," Moylan Br. at 9, the action was brought pursuant to 7 GCA § 4104, which grants the Guam Supreme Court "authority to issue 'declaratory judgments,' and not advisory opinions." *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 6. The Guam Supreme Court has held that, unlike other advisory opinion clauses, the declaratory judgments issued by the court pursuant to Section 4101 are binding. *Id.*

The Guam Supreme Court Case has been fully briefed and argued, and was taken under advisement on July 25, 2023.[2] A decision remains pending as of the time of this filing.

V. Post-*Dobbs* District Court Litigation

On February 1, 2023, after Governor Leon Guerrero filed her Request for Declaratory Judgment in the Guam Supreme Court, AG Moylan filed a Motion to Vacate the 1990 Injunction. ER-247. AG Moylan argued that the Court should vacate the permanent injunction because *Dobbs* reversed *Roe*, the legal authority upon which (AG Moylan argued) the injunction was predicated, and "there is no longer a legal basis to support the injunction." ER-234. AG Moylan further argued that Sections 4 and 5 of P.L. 20-134 did not violate the First Amendment of the Constitution because the underlying act being solicited, an abortion, is no longer constitutionally protected. ER-242–243.

On February 14, 2023, Governor Leon Guerrero filed a Motion for Abstention pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), requesting that the District Court abstain from further proceedings, including on the Motion to Vacate Injunction, pending resolution of the Guam Supreme Court Case. ER-215. Applying the *Pullman*

[2] TheJudiciaryofGuam, *OA – In re Req. of Leon Guerrero CRQ23-001*, YOUTUBE (July 25, 2023).

factors, Governor Leon Guerrero argued that the District Court should abstain because (1) the issue of whether P.L. 20-134 was impliedly repealed by subsequent changes in Guam law involves important and unsettled questions of Guam law; (2) a finding by the Guam Supreme Court that P.L. 20-134 had been impliedly repealed would terminate the controversy and further constitutional adjudication in this matter could therefore be avoided; and (3) the determinative issue of Guam law – the potential implied repeal of P.L. 20-134 – was unclear. ER-229–231.

Thereafter, Plaintiffs, Governor Leon Guererro, and Defendant Lillian Posadas, MN, RN, Administrator of the Guam Memorial Hospital Authority opposed AG Moylan's Motion to Vacate Injunction. Governor Leon Guerrero argued, *inter alia*, that FRCP 60(b)(5) relief required evaluation of not just the change in decisional law represented by *Dobbs*, but also changes to statutory law, including later-in-time laws passed by the Guam Legislature that impliedly repealed P.L. 20-134. ER-138–139. Governor Leon Guerrero further argued that Sections 4 and 5 of P.L. 20-134, which proscribe conduct described as "solicitation," remain overbroad and violated the First Amendment as the District Court held in 1990, and that *Dobbs* did not disturb that finding. ER-139. Administrator Posadas similarly argued, among other things, that Sections 4 and

5 of P.L. 20-134 were enjoined on First Amendment grounds not rooted in *Roe*, which were not appealed in 1990, and were not reversed by *Dobbs*. ER-042.

Plaintiffs opposed AG Moylan's Motion to Vacate Injunction on several bases. Unique to Plaintiffs' Opposition was the argument that *Dobbs* does not warrant vacating the injunction on P.L. 20-134's enforcement because the law is void *ab initio*; specifically, in passing P.L. 20-134 in 1990, the Guam Legislature exceeded its authority under the Organic Act of Guam, which restricts the Legislature to passing laws not inconsistent with the Organic Act and the Constitution. ER-076–081.

On March 22, 2023, AG Moylan filed a Reply to the Oppositions filed by Governor Leon Guerrero and Administrator Perez-Posadas. ER-006. Addressing Governor Leon Guerrero's arguments, AG Moylan conceded that "P.L. 20-134 did indeed conflict with the subsequently enacted legislation," ER-012, and further, that "[i]f P.L. 20-134 is not void, subsequently enacted legislation would repeal, by implication, P.L. 20-134." ER-013. AG Moylan did not submit a Reply to Plaintiffs' Opposition, or otherwise address their contention that P.L. 20-134 was void *ab initio* in his Reply to the other oppositions to his Motion to Vacate.

On March 24, 2023, the District Court issued its Order Denying Defendant Attorney General of Guam's Motion to Vacate Permanent Injunction ("2023

Order"). ER-002. Citing to this Court's precedent, the District Court found that AG Moylan did not respond to the issues raised in Plaintiffs' Opposition, and that "it is reasonable to presume that Defendant AG takes no position on their arguments or is not contesting them." ER-004. Finding that AG Moylan had not refuted Plaintiffs' argument that P.L. 20-134 was a legal nullity at the time it was passed, the District Court concluded that AG Moylan had not met his burden under FRCP 60(b)(5).[3]

On April 20, 2023, AG Moylan filed his Notice of Appeal of the District Court's Order. ER-250–253. AG Moylan filed his Opening Brief on August 28, 2023. 9th Cir. ECF Doc. 15 (Aug. 28, 2023). This brief follows.

SUMMARY OF THE ARGUMENT

The District Court of Guam properly denied AG Moylan's Motion to Vacate the court's 1990 injunction against the enforcement of P.L. 20-134, an abortion ban passed during a time when *Roe* was still the law of the land. Unlike in other jurisdictions considering similar motions, the law before the District Court was enacted in excess of the authority of the Legislature that passed it, an issue that AG Moylan did not contest in his briefing below. Finding that AG

[3] Having denied AG Moylan's Motion to Vacate Injunction, the District Court further found that pending motions, including Governor Leon Guerrero's Motion for Abstention, were moot. ER-005.

Moylan had conceded that, notwithstanding the change in law represented by *Dobbs*, P.L. 20-134 was void *ab initio*, a legal nullity, the District Court held that AG Moylan had failed to meet his burden of demonstrating that the 1990 injunction should be vacated pursuant to Rule 60(b)(5).

Relying on a strained interpretation of this Court's decision in *California ex. rel. Becerra v. EPA*, 978 F.3d 708, 713 (9th Cir. 2020), AG Moylan requests that the Court reverse the District Court's 2023 Order. However, as discussed herein, granting AG Moylan the relief he seeks would require the Court to extend its holding in *California* to absurd lengths, and prevent courts from considering the full legal landscape in determining whether to vacate an injunction, to the extent a law otherwise void or repealed would still be valid and enforceable.

Alternatively, AG Moylan seeks to reinvent his Motion to Vacate on appeal, which would require the Court to afford him undeserved latitude in every instance, forgive the procedural and substantive failings of AG Moylan's filings in the District Court, address the merits of AG Moylan's Motion to Vacate in the first instance on appeal, and consider arguments that are either new or inconsistent with AG Moylan's District Court filings. AG Moylan goes to great effort to cherry-pick selective and out-of-context excerpts from the record below to create the false impression that he had raised in the District Court the arguments he seeks to advance before this Court.

The Court should affirm the District Court's Order. While *California* prohibits a court from relying on equitable factors in denying a modification request under Rule 60(b)(5) when the legal basis for an injunction is no more, it does *not* require modification where other legal bases exist.

Alternatively, should the Court proceed with a merits review, it should affirm the District Court's Order because P.L. 20-134 was void *ab initio* as the Guam Legislature lacked authority to pass an abortion ban in 1990, and because subsequent Legislatures repealed P.L. 20-134 by implication. While the Court has discretion to consider the merits on appeal, and to consider new and inconsistent arguments on appeal, this case does not merit the exercise of such rare discretion. The Court should not indulge AG Moylan's attempt to swap a fresh plum here for the rotten apple he offered the District Court.

STANDARD OF REVIEW

This Court reviews for abuse of discretion a district court's denial of a Rule 60(b)(5) motion, and *de novo* any questions of law underlying the decision to deny the motion. *California ex. rel. Becerra v. EPA*, 978 F.3d 708, 713 (9th Cir. 2020). The Court "may not reverse a district court's exercise of its discretion unless [it has] a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *S.E.C. v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). Further, the Court "may

affirm on any ground supported by the record, including grounds the district court did not reach."[4] *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1130 (9th Cir. 2019); *see also Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.").

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides:

> (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:
>
> . . . .
>
> (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. Rule 60. "A request for relief from an order under Rule 60(b) is equitable in nature, and is committed to the sound discretion of the court." *United States v. Gov't of Guam*, CV 02-00022, 2015 WL 13776540, at

[4] In his Opening Brief, AG Moylan claims that "the Rule 60(b) standard does not mimic the well-known rule allowing this Court to affirm a judgment on any grounds apparent from the record." Moylan Br. at 30. AG Moylan has not offered authority for this position, and it is not supported by this Court's precedent. *See Burton v. Spokane Police Dep't*, 517 Fed. Appx. 554, 555 (9th Cir. 2013); *Norwood v. Vance*, 517 Fed. Appx. 557, 558 (9th Cir. 2013).

*3 (D. Guam Mar. 25, 2015) (citing *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008)).

"A party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Flores v. Lynch*, 828 F.3d 898, 909–10 (9th Cir. 2016) (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)). When the basis for modification is a change in law, the moving party must establish that the provision it seeks to modify has become impermissible. *Flores*, 828 F.3d 909-910.

A court considering a Rule 60(b)(5) motion "may recognize subsequent changes in either statutory or decisional law." *Agostini v. Felton*, 521 U.S. 203, 215, 117 S. Ct. 1997, 2006 (1997). Where subsequent changes to both statutory *and* decisional law have occurred, courts consider both. *See Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1251 (9th Cir. 1999) (determining that a congressional amendment to applicable law and a subsequent court decision supported modification of an injunction); *Planned Parenthood Arizona, Inc. v. Brnovich*, 2 CA-CV 2022-0116, 2022 WL 18015858, at *2 (Ariz. Ct. App. Dec. 30, 2022) (holding that, in considering Arizona Rule 60(b)(5) modification

of an injunction issued against abortion ban, "a determination cannot be made by artificially narrowing the inquiry to only part of the current legal landscape," and considering changes to both statutory law and to decisional law under *Dobbs*.). "Of course, a modification must not create or perpetuate a constitutional violation." *Rufo*, 502 U.S. at 391.

ARGUMENT

The District Court's 2023 Order, while brief, was clear. After delineating the standard under Rule 60(b)(5), ER-004, and observing that AG Moylan, as the party seeking relief, bore the burden of establishing that changed circumstances warranted relief, ER-005, the District Court concluded:

> While [AG Moylan] argues that the legal basis for the permanent injunction no longer exists, [AG Moylan] 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 nullity the moment it was passed and can have no force or effect today." [AG Moylan] has not refuted this argument, and after having reviewed the relevant statutes and the legal authority provided by Plaintiffs in their opposition, to which [AG Moylan] did not respond, the court finds that [AG Moylan] has not met his burden under Rule 60(b)(5).

ER-004–005. Having determined that AG Moylan effectively conceded that P.L. 20-134 was void *ab initio*, a dispositive argument, the District Court did not reach the merits of AG Moylan's Motion to Vacate Injunction.

In his Opening Brief, AG Moylan argues that the District Court's Order "contains numerous legal and factual errors, each of which constitutes an abuse of discretion that this Court should correct." Moylan Br. at 13. Specifically, AG Moylan argues: (1) the District Court abused its discretion in denying AG Moylan's Rule 60(b) motion despite the changed circumstances after *Dobbs*; (2) the District Court incorrectly concluded that AG Moylan forfeited some arguments though such arguments were irrelevant to the questions before the court; and (3) that the District Court "seemed to suggest that" P.L. 20-134 may be void *ab initio* or repealed by implication. *Id.* He further mischaracterizes the 2023 Order, describing the District Court as the "only federal court in the country currently using *Roe* to block abortion laws," *id.* at 14, and Guam as "the *only* place in the United States whose local abortion law remain captive to the now-defunct *Roe*." *Id.* at 20-21.

As discussed herein, the District Court did not rely on *Roe* in denying AG Moylan's motion to vacate the 1990 injunction. The court in fact readily recognized the change in law represented by *Dobbs*. However, the District Court correctly determined that AG Moylan had effectively conceded that P.L. 20-134 was void *ab initio*, and properly relied on AG Moylan's concession in determining that AG Moylan had failed to meet his burden under FRCP 60(b).

Further, to the extent AG Moylan seeks to argue the merits of the void *ab initio* and implied repeal arguments before this Court in the first instance, the Court should decline to exercise its discretion to consider such arguments, which are either new or contrary to his position in the District Court, and are therefore waived. Finally, if the Court proceeds to evaluate the merits of these issues, both represent independent grounds upon which the 2023 Order may be affirmed.

I. The District Court did not abuse its discretion in finding that AG Moylan failed to meet his burden under Rule 60(b)(5).

A. AG Moylan did not respond to Plaintiffs' argument that P.L. 20-134 was void *ab initio* in the District Court, and forfeited any argument against it.

While decrying Plaintiffs' void *ab initio* argument as a "red herring," Moylan Br. at 28, AG Moylan goes to great lengths to claim that, contrary to the District Court's finding, he *did* in fact respond to the argument below:

> Second, and in any event, the Attorney General *did* respond to Plaintiffs' void *ab initio* arguments – but apparently not in a way that satisfied the district court…[T]he district court's apparent suggestion that the Attorney General did not respond to those arguments misstates the proceedings below.

Id. at 31-32 (emphasis in original). It is AG Moylan, not the District Court, who misstates the proceedings below.

AG Moylan did not file a Reply to Plaintiffs' Opposition to his Motion to Vacate, and did not discuss the void *ab initio* argument in the consolidated reply

he filed to the Oppositions filed by Governor Leon Guerrero and Administrator Perez-Posadas. The references to the record AG Moylan cites to support his position that he had responded to Plaintiffs' void *ab initio* argument are from his Opposition to Governor Leon Guerrero's Motion for Abstention. *Id.* at 31.

AG Moylan is arguing that the District Court should have treated his arguments against Governor Leon Guerrero's Motion for Abstention as a response to the Plaintiffs' Opposition to his Motion to Vacate Injunction. While Rule 7(b) of the Civil Local Rules of Practice for the District Court of Guam provides that a party may call the Court's attention to the contents of previous pleadings or motions by incorporation by reference, *see* CVLR 7(b), AG Moylan did not notify the District Court of his apparent intent to rely on arguments from his Opposition to the Motion for Abstention for his response to arguments in Plaintiffs' Opposition to his Motion to Vacate Injunction.

The District Court was not required to sift through AG Moylan's previous filings to identify arguments it could repurpose to defend his Motion to Vacate Injunction. Courts cannot manufacture arguments for the parties. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). As this Court has repeatedly recognized, "judges are not like pigs, hunting for truffles buried in briefs." *Ramsey v. Muna*, 819 Fed. Appx. 505, 507 (9th Cir. 2020) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *cf. Carmen v. San Francisco*

Unified Sch. Dist., 237 F.3d 1026, 1029 (9th Cir. 2001) ("…[E]ven if an affidavit is on file, a district court need not consider it in opposition to summary judgment unless it is brought to the district court's attention…A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

Because AG Moylan failed to address Plaintiffs' void *ab initio* argument, and consistent with this Court's precedent, the District Court properly held that AG Moylan had conceded the argument. *See Maciel v. Cate*, 731 F.3d 928, 932 (9th Cir. 2013) ("Maciel has forfeited this argument by failing to address it in his reply brief even though the state raised mootness in its answering brief."); *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 881–82 (9th Cir. 2022) ("Though our rules do not require appellants to file reply briefs, nothing about that fact suggests that appellants can avoid the effect of disregarding an argument presented by the appellee. That is true whether an appellant fails to file any reply brief or in filing a reply brief fails to address an issue squarely raised in the appellee's answering brief.").

Further, AG Moylan's purportedly responsive arguments from his Opposition to the Motion for Abstention, considered in context, do not actually

refute Plaintiffs' argument that P.L. 20-134 was void *ab initio*. In fact, AG Moylan sidesteps the issue entirely:

> The Guam Supreme Court infers from the Attorney General's motion to vacate here that "he does not view P.L. 20-134 as void *ab initio* and/or as having been impliedly repealed." Whether or not that inference is accurate, prosecution decisions are made on a case-by-case basis, and the Attorney General would necessarily have to factor into those decisions the question the Guam Supreme Court says it now intends to address. *But until the injunction in this case is vacated*, the question whether the Guam Legislature was acting *ultra vires* in violation of Guam's Organic Act when it enacted Public Law 20-134 [is an] abstract construct."

ER-111–112 (emphasis in original). In his Opening Brief here, AG Moylan has framed these statements from his Opposition to the Motion for Abstention as additional arguments that the void *ab initio* argument is irrelevant to the Rule 60(b)(5) review, tacitly acknowledging the fact that even these statements buried in his Opposition to the Motion for Abstention do not oppose the merits of Plaintiffs' argument that P.L. 20-134 is void *ab initio*.

B. The District Court properly considered AG Moylan's concession of the dispositive void *ab initio* argument in denying AG Moylan's Motion to Vacate Injunction.

The crux of AG Moylan's argument that the District Court abused its discretion is that (he argues) the void *ab initio* argument was not relevant to his Motion to Vacate Injunction, and, relying heavily on *California ex rel. Becerra v. EPA*, 978 F.3d 708 (9th Cir. 2020), that the District Court had no discretion to deny his motion where *Roe*, which he describes as the "sole basis for the

injunction," was overturned. Moylan Br. at 19. AG Moylan has vastly oversimplified and misapplied the Court's ruling in *California*.

In that case, the district court entered an injunction against the Environmental Protection Agency ("EPA"), requiring it to promulgate a federal plan to govern implementation of new landfill emissions guidelines. *Id.* at 711. Existing regulations at the time of the injunction required EPA to take certain actions, including promulgation of the plan, consistent with a specific regulatory timeline. *Id.*

After the court entered the injunction, EPA amended its regulations to extend its deadlines and sought modification of the injunction. *Id.* The district court declined to modify the injunction despite the new regulations, finding that "all other circumstances indicate that enforcement of the judgment is still equitable." *Id.* (quoting *California v. EPA*, No. 18-CV-03237-HSG, 2019 WL 5722571, at *3 (N.D. Cal. Nov. 5, 2019)). Reversing the district court's order, this Court determined that, notwithstanding factually equitable factors, "once the legal basis for an injunction has been removed, such that the law now permits what was previously forbidden, it is an abuse of discretion to not modify the injunction." *Id.* at 717.

Relying on *California*, AG Moylan argues that the District Court abused its discretion in denying his Motion to Vacate the 1990 injunction, which he

erroneously claims was solely based on *Roe*. Moylan Br. At 15. He describes the void *ab initio* and implied repeal arguments as "untimely," because they were not raised in 1990, *id.* at 32 and 39, though he fails to address the reality that "changes in law" necessarily occur *after* an injunction is entered. He submits that the question of whether P.L. 20-134 is void is a "red herring," irrelevant to a Rule 60(b)(5) analysis, and suggests that this Court's precedent requires that the abortion ban be permitted to proceed, even if the law is otherwise void or invalid. *California* does not compel this absurd result.

While the Court's ultimate holding in *California* is that a court abuses its discretion in declining to modify an injunction where the legal basis underlying the injunction had been changed "to permit what was previously forbidden," *California*, 978 F.3d 713-714, it does not follow that courts must automatically vacate affected injunctions notwithstanding other legal bases justifying the continued application of the injunction that may themselves represent intervening changes to statutory and decisional law relevant to a Rule 60(b)(5) review. Prohibiting courts from weighing *equitable* factors to sustain an injunction when the legal basis for the injunction has dissolved does not mean courts cannot rely on other *legal* factors to support the injunction.

Dobbs is not the cure-all AG Moylan argues it is. It does not modify the Organic Act's prohibition of P.L. 20-134's enactment in 1990, magically strike

out the later-in-time laws that repealed P.L. 20-134, or, even more basically, resolve P.L. 20-134's First Amendment infirmities (discussed below). The Court should not, as AG Moylan advocates, close its eyes to P.L. 20-134's continued unlawfulness in light of the full scope of changes to the broader legal landscape since the 1990 injunction was entered. *See Agostini v. Felton*, 521 U.S. 203, 216, 117 S. Ct. 1997, 2007, 138 L. Ed. 2d 391 (1997) (reviewing "whether the factual or legal landscape has changed" in Rule 60(b)(5) motion).

In *California*, the Court did not have before it (and therefore did not consider) other legal factors and changes to the broader statutory scheme that affected the enforceability of the underlying regulation. Due to the short time that had elapsed between entry of the injunction in *California* and the amendment to the regulatory timeline, no further developments in the law occurred that required consideration in the Court's Rule 60(b)(5) review. There was simply no alternative legal basis presented in *California* to sustain the injunction's continued application, and, in the absence of such legal basis, plaintiffs and the district court resorted to weighing the equities of the continued injunction.

In contrast, P.L. 20-134 was passed in 1990 and enjoined in the same year, over thirty (30) years ago. Numerous changes to both statutory and decisional law have occurred that affect P.L. 20-134's application and enforceability. As Governor Leon Guerrero discussed in her filings before the District Court, the

Supreme Court of Guam was established in 1996, six (6) years after the 1990 injunction was entered. ER-230 (Motion for Abstention). In the intervening time, the Guam Supreme Court has developed substantial decisional law finding that the Guam Legislature has no authority to pass legislation inconsistent with the Organic Act or the U.S. Constitution, and that attempts to do so are invalid and void. *See In re Request of Calvo*, 2017 Guam 14 ¶ 50. Similarly, as discussed below, the Guam Legislature passed several laws after the 1990 injunction was entered, in some instances decades later, that represent changes in the statutory law that must be weighed in a Rule 60(b)(5) review.

While *California* held that it was an abuse of discretion to refuse to modify an injunction based on equitable factors where the only legal basis for the injunction had been dissolved, the 1990 injunction continues to be anchored by the First Amendment basis the District Court independently found regarding Sections 4 and 5 of P.L. 20-134, and both the void *ab initio* and implied repeal arguments represent independent legal bases supporting the continued injunction against P.L. 20-134's enforcement. These factors render AG Moylan's proposed enforcement of P.L. 20-134 not merely inequitable, but contrary to law.

C. AG Moylan failed to establish a significant change to the law as to Sections 4 and 5 of P.L. 20-134.

While *Dobbs* represents a substantial change to the decisional law on the issue of abortion, vacatur of the 1990 injunction does not automatically follow

because Sections 4 and 5 of P.L. 20-134 remain legally infirm notwithstanding *Dobbs*.

The burden is on the moving party to demonstrate that the provision it seeks to modify is now impermissible, *Lynch*, 828 F.3d at 909-910, converting the injunction into "an instrument of wrong." *Flores v. Sessions*, 862 F.3d 863, 874 (9th Cir. 2017) (quoting *Sys. Fed. No. 91 Ry. Emps. Dep't v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961). To the extent a change in law merits modification of an injunction, the proposed modification must be suitably tailored to the changed circumstance. *Lynch*, 828 F.3d at 909–10 (quoting *Rufo*, 502 U.S. at 383.) "[A] modification must not create or perpetuate a constitutional violation." *Id.* at 391.

In his Opening Brief, AG Moylan asserts that to the extent the District Court denied his Motion to Vacate Injunction because *Dobbs* did not change the basis for enjoining Sections 4 and 5 (that such sections violated the First Amendment),[5] this too was legal error, because the speech or conduct proscribed

[5] AG Moylan's revisionist attempt to reduce the District Court's finding that Sections 4 and 5 of P.L. 20-134 violated the First Amendment to mere *dicta* should be summarily disregarded. This Court has already acknowledged that "[t]he district court *held* that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal from that ruling." *Ada*, 962 F.2d at 1369 (emphasis added).

therein constitute offers to engage in illegal transactions, which are excluded from First Amendment Protection. Moylan Br. at 26-27.

Echoing his arguments before the District Court, AG Moylan again cites to *United States v. Williams*, 553 U.S. 285. 297 (2008), for the proposition that the First Amendment does not protect speech that amounts to solicitation when the act being solicited is not itself constitutionally protected. Moylan Br. at 27. AG Moylan has failed to establish a significant change to the law that the District Court relied on when it entered the injunction against Sections 4 and 5 of P.L. 20-134, which remain impermissibly broad.

A law may be invalidated as overbroad in a facial challenge under the First Amendment "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010). The overbreadth doctrine arises "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

P.L. 20-134 does more than prohibit offers to provide or requests to obtain abortions in Guam. Conduct that constitutes solicitation in Guam's criminal code includes (1) commanding, (2) encouraging, or (3) requesting. *See* 9 GCA §

13.20. This "string of operative verbs" is substantially different from that which *Williams* recognized as sufficiently specific to survive an overbreadth analysis. The verb "encouraging" is particularly susceptible of multiple and wide-ranging meanings. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236, 122 S. Ct. 1389, 1394, 152 L. Ed. 2d 403 (2002) (observing that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," and finding that the Government may not prohibit speech on grounds that it may encourage illegal conduct.).

As the Court noted in the 1990 injunction, Sections 4 and 5 would make criminal any discussion between a woman and her doctor concerning the need for, and access to, an abortion. Notably, though the definition of "abortion" under P.L. 20-134 expressly excludes medical intervention 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, Sections 4 and 5 would chill any speech between a woman and the individual physicians to determine whether termination of a pregnancy is advisable.

In a Memorandum to the Chief of Police dated March 21, 1990, Elizabeth Barrett-Anderson, Attorney General of Guam at the time, advised that "sections

4 and 5 regarding solicitation would prevent a medical professional or any other person from recommending to a woman that she seek an abortion in a location other than Guam by making such recommendations a crime." GovSER-099 (Second Amended Complaint – Exhibit B). In fact, this exact scenario played out just the day before Attorney General Barrett-Anderson issued her Memorandum to the Chief of Police:

> 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.).

Guam Soc. of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1426 (D. Guam 1990). The Affidavit of Probable Cause for Ms. Benshoof's criminal complaint asserted the following:

> That during her presentation Ms. Benshoof indicated that she was aware that Guam's Anti-Abortion law prohibited the solicitation of pregnant women interested in getting abortions by advising them where they could obtain abortions.
>
> That in the presence of members of the Guam Press Club and others attending this meeting, Ms. Benshoof publicly *encouraged* women seeking abortions on Guam to have the abortion and travel to Honolulu, Hawaii. She mentioned that there were places in Honolulu where women could obtain low cost abortions. Benshoof then gave a telephone number which women traveling to Honolulu to have abortions should call.

William J. Swift, *Prohibiting the Solicitation of Abortion--Viewpoint Discrimination and Other Free Speech Problems: Will Free Speech Guarantees Be A Casualty of the Moral Debate on Abortion?*, 21 U. Balt. L. Rev. 107, 119–20 (1991) (emphasis added).

However, the act of informing others regarding the availability of lawful abortion services in another jurisdiction is unquestionably lawful even if abortion were illegal in Guam. *See Bigelow v. Virginia*, 421 U.S. 809, 824–25, 95 S. Ct. 2222, 2234, 44 L. Ed. 2d 600 (1975) (holding that Virginia statute that made it a crime to "encourage" the procurement of an abortion violated the First Amendment where Defendant's newspaper published an advertisement informing readers that abortion remained legal in New York). Notably, *Dobbs* did not reverse or otherwise affect the holding in *Bigelow*.

Accordingly, the remedy AG Moylan seeks – vacatur of the 1990 injunction – is not suitably tailored to the actual change in law represented by *Dobbs*.

D. If the Court requires further FRCP 60(b)(5) analysis, the appropriate remedy is remand to the District Court for consideration of all pending motions

As discussed, the District Court did not abuse its discretion denying AG Moylan's Motion to Vacate Injunction where it found that AG Moylan, by conceding the law was otherwise void *ab initio*, failed to carry his burden under

FRCP 60(b)(5) of demonstrating that the change in law represented by *Dobbs* warranted vacatur of the 1990 injunction. However, if the Court determines that AG Moylan's failure to respond to Plaintiffs' void *ab initio* argument does not in itself sufficiently resolve the Motion to Vacate Injunction, or, as AG Moylan contends, the District Court's reasoning was not sufficiently articulated, the appropriate course is to remand this matter to the District Court for further proceedings. *See Horne v. Flores*, 557 U.S. 433, 471, 129 S. Ct. 2579, 2606, 174 L. Ed. 2d 406 (2009) (ordering remand to the District Court for Rule 60(b)(5) analysis); *see also Coca-Cola Co. v. M.R.S. Distributors Inc.*, 224 Fed. Appx. 646, 646–47 (9th Cir. 2007) (remanding where district court failed to provide "reasoned basis for its decision" and Court could not "meaningfully review the district court's denial" of Rule 60(b)(5) motion); *cf. Jones v. Ryan*, 733 F.3d 825, 838–39 (9th Cir. 2013) (acknowledging that district court ordinarily conducts Rule 60(b) inquiry in the first instance).

II. Changed circumstances represented by *Dobbs* do not require the Court to vacate the 1990 injunction.

A. The federal courts should abstain from determining the merits of the Motion to Vacate pending resolution of the Guam Supreme Court Case.

As discussed, the issue of whether P.L. 20-134 has been impliedly repealed by later-in-time laws has been fully briefed and argued, and is pending a decision

from the Supreme Court of Guam, the court of last resort in Guam. As further discussed, resolution of the impact of *Dobbs* on the 1990 injunction, particularly as it pertains to Sections 4 and 5 of P.L. 20-134, which the District Court separately held to be unconstitutional and void under the First Amendment, may be avoided if the Guam Supreme Court determines that the P.L. 20-134 has been impliedly repealed, which constitutes an important and unsettled question of Guam law.

The Court should therefore invoke an abstention pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 644, 85 L. Ed. 971 (1941) to allow the Guam Supreme Court to resolve the implied repeal issue and prevent the federal courts from issuing premature constitutional adjudication, and to avoid federal-court issuance of advisory opinions on important issues of Guam law. *Planned Parenthood of Greater Texas Surgical Health Servs. v. City of Lubbock*, Texas, 542 F. Supp. 3d 465, 487 (N.D. Tex. 2021) ("*Pullman* avoids 'federal-court error in deciding state-law questions antecedent to federal constitutional issues,' by allowing for parties to adjudicate disputes involving 'unsettled state-law issues' in state courts.") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S. Ct. 1519, 1526, 95 L. Ed. 2d 1 (1987) ("[I]n some cases, the probability that any federal adjudication would

be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.").

B. Because AG Moylan forfeited his argument against Plaintiffs' void *ab initio*[6] argument before the District Court, this Court should decline to consider such arguments for the first time on appeal.

If the Court exercises its discretion to proceed with its own analysis of the FRCP 60(b)(5) factors in this appeal, the Court should decline to exercise its discretion to entertain the new arguments AG Moylan presented in pages 32 through 38 of his Opening Brief, that P.L. 20-134 is not void *ab initio*. Moylan Br. at 32-38.

As a general rule, the Court does not consider arguments raised for the first time on appeal. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 419 Fed. Appx. 740, 742 (9th Cir. 2011); *Manunga v. Louis*, 798 Fed. Appx. 175, 176–77 (9th Cir. 2020) ("…[A]rguments raised for the first time on appeal, or in the reply brief, are waived."). "Waiver and forfeiture are an important part of any adjudicative system, whether judicial or administrative. These doctrines preserve the integrity of the appellate structure by ensuring that an issue must be presented to,

[6] Pursuant to FRAP 28(i) Governor Leon Guerrero adopts by reference substantive arguments in Plaintiffs-Proposed Intervenors' Answering Brief that P.L. 20-134 is void *ab initio*.

considered and decided by the trial court before it can be raised on appeal." *Honcharov v. Barr*, 924 F.3d 1293, 1295–96 (9th Cir. 2019) (quotations omitted).

The Court has recognized limited circumstances in which it may exercise discretion to consider such arguments, including (1) exceptional cases in which review is necessary to prevent a miscarriage of justice or preserve the integrity of the judicial process; (2) when a new issue arises while appeal is pending because of a change in law; and (3) when the issue is purely one of law. *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (1985). However, "even if a case falls within one of these exceptions, [the Court] must still decide whether the particular circumstances of the case overcome the presumption against hearing new arguments." *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–14 (9th Cir. 2020) (quotations omitted).

In determining whether a case's circumstances merit the exercise of such discretion, courts "adhere to 'the principle of party presentation.' It is the parties who 'frame the issues for decision,' and [appellate courts] may entertain only those arguments 'bearing a fair resemblance to the case shaped by the parties.'" *Id*. (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 1582, 206 L. Ed. 2d 866 (2020)). "Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only

questions presented by the parties." *Sineneng-Smith*, 140 S. Ct. at 1579. This Court has similarly held that it "will not reframe an appeal to review what would be in effect a different case than the one decided by the district court." *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011).

Applying this doctrine, this Court has specifically declined to exercise discretion to consider waived arguments on appeal, even if one of the exceptions is met, where a party "has no excuse for its failure to raise [the] arguments below," "had ample opportunity to craft its response to the district court," and "there is no special feature of [the] case" that merits consideration of the arguments on appeal despite the waiver. *Armstrong v. Brown*, 768 F.3d 975, 981–82 (9th Cir. 2014); *see also Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 966 (9th Cir. 2020) (finding that plaintiff waived an argument by not raising it sufficiently for the trial court to rule on, and that courts "routinely prevent parties from sandbagging their opponents and the district court with new arguments on appeal.").

No special circumstances exist here. AG Moylan, the Attorney General of Guam, for whom three (3) attorneys had entered appearances as co-counsel,[7] had

[7] *See* GovSER-070–071 (Amended/Corrected Appearance of Counsel – Robert Weinberg); GovSER-072–073 (Notice of Appearance of Co-Counsel – Heather Zona); GovSER-006–008 (Notice of Appearance of Co-Counsel – Joseph Guthrie).

a full and fair opportunity to present the void *ab initio* argument he seeks to advance for the first time on appeal. In fact, because AG Moylan initially filed a separate reply brief to Governor Leon Guerrero's Opposition to the Motion to Vacate Injunction on March 7, 2023, in violation of the local rule requiring AG Moylan to file a consolidated reply to all oppositions, *see* CVLR 7(f), the District Court issued an Order on March 9, 2023, stating that it would not consider AG Moylan's errant opposition, and "expects [AG Moylan] to file one Reply to all Oppositions…" GovSER-004 (March 9, 2023 Order). AG Moylan was not only required by the local rules to file a consolidated reply to all oppositions to his motion, including Plaintiffs, the District Court also *reminded* AG Moylan to do so.

In his Opening Brief, AG Moylan simply proceeds with presenting his void *ab initio* argument as though he had preserved his argument below. He has not requested that the Court exercise discretion to consider his new argument, let alone offered authorities to support the Court's consideration of his new arguments on appeal, and he has offered no excuse for his failure to respond to the void *ab initio* argument below. Instead, as discussed, he has resorted to trying to gaslight the Court, claiming that he did, in fact, respond below. The record is clear he did not.

The circumstances of this case do not justify the exceptional exercise of this Court's discretion to consider new arguments raised for the first time on appeal. AG Moylan has waived his arguments against Plaintiffs' void *ab initio* argument, and the Court should decline to consider them.

C. P.L. 20-134 has been impliedly repealed by later-in-time laws.

1. By expressly conceding that P.L. 20-134 has been impliedly repealed by subsequently enacted laws, AG Moylan has also forfeited contrary arguments on appeal.

In pages 38-47 of his Opening Brief, AG Moylan also argues for the first time that P.L 20-134 was not impliedly repealed by subsequently enacted legislation because "none of these laws presents an 'irreconcilable conflict' with P.L. 20-134." Moylan Br. at 40. He proceeds to analyze each of these later-in-time laws, which regulate parental consent, informed consent, partial-birth abortion, and reporting for abortions in Guam, delineating the reasons each is purportedly consistent with P.L. 20-134. Moylan Br. at 40-47. Though, notably, AG Moylan's Opening Brief does not reference supporting arguments in the record below, AG Moylan again proceeds with these arguments in his Opening Brief as though he had developed a record of consistent arguments in the District Court. However, as the record demonstrates, AG Moylan treated this issue differently in the District Court – he conceded it.

As discussed, AG Moylan addressed Governor Leon Guerrero's implied repeal arguments twice: (1) in his March 7, 2023 Reply, ER-126, which the District Court declined to consider because it did not comply with the local rules requiring AG Moylan to submit a consolidated reply, *see* GovSER-004 (March 9, 2023 Order); and (2) in the March 22, 2023 Reply he submitted in response to oppositions Governor Leon Guerrero and Administrator Perez-Posadas had filed. *See* ER-006.

In both replies, AG Moylan conceded that "P.L. 20-134 did indeed conflict with the subsequently enacted legislation." ER-128 and ER-012. In both replies, AG Moylan also expressly agreed that, to the extent P.L. 20-134 was not otherwise void, it had been impliedly repealed by these other laws:

> If P.L. 20-134 is void, it stands to reason that it would not be repealed by subsequently enacted legislation, as there is *no conflict* between statutes.
>
> If P.L. 20-134 is not void, subsequently enacted legislation would repeal, by implication, P.L. 20-134.
>
> The upshot: the determination of whether P.L. 20-134 was repealed, by implication, by subsequently enacted legislation must await determination of whether P.L. 20-134 is void.

ER-130 and ER-013. AG Moylan's arguments on appeal are completely inconsistent with his arguments before the District Court, again without justification or even acknowledgment. Again, he has not deigned to explain why he is entitled to a clean slate on appeal.

Importantly, AG Moylan's new arguments are also inconsistent with arguments he advanced in the Supreme Court of Guam, which is directly considering the question of whether P.L. 20-134 has been impliedly repealed by later-in-time laws, and has taken the matter under advisement relying on AG Moylan's concession.[8] While AG Moylan argues in his brief before the Guam Supreme Court that P.L. 20-134 can be reconciled with the Reporting Law and the Partial-Birth Abortion Ban, AG Moylan concedes that P.L. 20-134 cannot be reconciled with the Parental Consent Law and the Informed Consent Law, in which case P.L. 20-134 "removes the Parental Consent Law and the Informed Consent Law from Guam's statutory code." *Id.* He further argues that "[i]n Guam, *Dobbs* rendered the Parental Consent and the Informed Consent laws moot." *Id.* at 35. Though AG Moylan sought to advance, without authority, the novel proposition that the older law, P.L. 20-134, should be held to "remove" or "moot" the later-in-time laws, this position is based on AG Moylan's fundamental concession that the laws cannot be reconciled.

Because AG Moylan has conceded that P.L. 20-134 is irreconcilable with, and has been impliedly repealed by, later-in-time laws, he waives the ability to present a conflicting argument in this appeal. *See California United Terminals, v.*

[8] *See*, Request for Judicial Notice (submitted concurrently herewith), Exhibit 1 at 34.

Towne, 414 Fed. Appx. 941, 941–42 (9th Cir. 2011) (finding that party waived opportunity to argue contrary position on appeal where he conceded argument in district court); *Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990) (declining to depart from general rule that appellate courts will not consider arguments not first raised before district court where party agreed to choice of law issue in the district court); *Walker v. Am. Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1068 (9th Cir. 1999) (finding that party waived issue by conceding position before the district court); *Cf. In re Hoopai*, 581 F.3d 1090, 1097 (9th Cir. 2009) (invoking judicial estoppel "to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts.").

Because AG Moylan conceded before the District Court that P.L. 20-134 is irreconcilable with later-in-time laws, the Court should decline to exercise its discretion to consider these new and contrary arguments for the first time on appeal.

2. P.L. 20-134 has been impliedly repealed by subsequent changes in Guam statutory law

A federal court interpreting state or territorial statutes is bound by the interpretation of such statutes by the state's or territory's highest court. *Missouri v. Hunter,* 459 U.S. 359, 366–68, 103 S.Ct. 673, 678–79, 74 L.Ed.2d 535 (1983); *see also Limtiaco v. Camacho,* 549 U.S. 483, 491–92, 127 S. Ct. 1413, 1420, 167 L. Ed. 2d 212 (2007) ("It may be true that we accord deference to territorial

courts over matters of purely local concern"). "Absent controlling authority from the state supreme court, a federal court must predict how the highest state court would decide the state law issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Killgore v. SpecPro Prof'l Servs*., LLC, 51 F.4th 973, 982 (9th Cir. 2022) (cleaned up).

Guam law provides that "[a]ny statute, law, or rule which is inconsistent with the provisions of this Title (or other Titles of the Guam Code Annotated as the same are enacted into law) on the same subject is repealed to the extent of such inconsistency." 1 GCA § 106. Further, "it is a well-settled rule that later statutes repeal by implication earlier irreconcilable statutes." *People of Territory of Guam v. Quinata,* 1982 WL 30546, at *2 (D. Guam App. Div. 1982), aff'd, 704 F.2d 1085 (9th Cir. 1983); *see also Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 16 ("Implied repeals can be found in two instances: (1) where provisions in the two acts are in irreconcilable conflict, or (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.")(cleaned up); 1A Sutherland Statutory Construction § 23:9 (7th ed.) ("…[W]hen two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.").

While "[c]ourts can avoid a finding of implied repeal if the two statutes can be reconciled," *Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶16, "the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." *State Dep't of Pub. Health v. Superior Court*, 60 Cal. 4th 940, 955–56, 342 P.3d 1217, 1225–26, 184 Cal. Rptr. 3d 60, 70–71 (2015) ("The cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute…This canon of construction, like all such canons, does not authorize courts to rewrite statutes."); *see also Todd v. Bigham*, 238 Or. 374, 393, 395 P.2d 163, 165 (1964) ("Courts go a long way at times to harmonize apparently conflicting statutory provisions, but they do not, or at least should not, rewrite statutes, even to accomplish what may appear to be a desirable result. That is the job of the legislature."); *Cf. People v. 9660 Cherokee Lane, Newcastle*, 48 Cal. Rptr. 2d 406, 411 (Cal. Ct. App. 1995) ("…[O]ur job is to interpret what the Legislature has given us, not to weave a more desirable legislative scheme from tattered cloth.").

P.L. 20-134 cannot be harmonized with laws the Guam Legislature subsequently passed that regulate abortion in Guam. As discussed, in the years since the Court entered an injunction against enforcement of P.L. 20-134, the

Guam Legislature passed several laws that form a comprehensive statutory scheme covering the subject of abortion in Guam, and which conflict irreconcilably with P.L. 20-134, including: (1) the Parental Consent for Abortion Act ("Parental Consent law") (19 GCA § 4A101 *et seq*); (2) the Women's Reproductive Health Information Act of 2012 ("Informed Consent law")(10 GCA §3218.1); (3) the Partial-Birth Abortion Ban Act of 2009 ("Partial-Birth Abortion Ban") (10 GCA § 91A101 *et seq*); and (4) the Partial-Birth Abortion and Abortion Report law ("Reporting Law") (10 GCA § 3218). These statutes were enacted to further refine the 1978 law regulating abortion, codified at 9 GCA §§ 31.20 and 31.21, and together with the 1978 law, form a comprehensive statutory scheme that cover the subject of abortion in Guam.

a. The Parental Consent law conflicts with P.L. 20-134.

The Parental Consent law provides that, generally, no person shall perform an abortion upon a minor without first obtaining the consent of both the minor and one of her parents. 19 GCA § 4A102. If the minor is the victim of abuse by a parent or legal guardian, an adult sibling, stepparent, or grandparent may provide the required consent. 19 GCA § 4A103. Consent is not required if the physician certifies a medical emergency, *see* 19 GCA § 4A104, which is defined as "a condition that, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to

necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a bodily function." 19 GCA § 4A101(g).

Further, a minor may petition for a judicial waiver of the parental consent requirement. 19 GCA § 4A107(b). If the court finds that the minor is sufficiently mature or well-informed to decide whether to have an abortion, the court "*shall* issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent or guardian, and the court *shall* execute the required forms." 19 GCA § 4A107(d) (emphasis in original). If the court finds evidence of, among other things, abuse of the minor by a parent, guardian or custodian, or that notification of a parent, guardian or custodian is not in the best interest of the minor, the court "*shall* issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of the parent, guardian or custodian." 19 GCA § 4A107(e) (emphasis in original).

AG Moylan appears to argue in his Opening Brief that the Parental Consent law can be reconciled with P.L. 20-134 because the former will not restrict a minor's ability to *seek* an abortion, just a doctor's ability to *perform* an abortion except in narrow cases. Moylan Br. at 44. According to AG Moylan, read together, the law will only allow a doctor to perform an abortion for a minor

where there is an emergency pursuant to 19 GCA §4A104, or where two physicians independently determine that an abortion is permitted under Section 2 of P.L. 20-134. This reading yields a confusing and absurd result, and is inconsistent with the plain language of the Parental Consent law.

The Parental Consent law provides in relevant part that "no person shall perform an abortion upon her *unless*, in the case of a female who is less than eighteen (18) years of age, he or she first obtains the written consent of both the pregnant female and one (1) of her parents or a legal guardian; or, in the case of a female who is an incompetent person, he or she first obtains the written consent of her guardian." 19 GCA § 4A102 (emphasis added). This language directly conflicts with Section 3 of P.L. 20-134, which restricts the performance of all abortions. The language in the Parental Consent law does not merely authorize a minor to seek an abortion with her parents' consent or court approval, as AG Moylan contends, it removes the restrictions on performing an abortion on the minor in the event she received her parents' consent or court approval.

The Parental Consent law also provides that a minor must herself provide consent for an abortion to be performed, or take action to seek court approval for an abortion, 19 GCA §§ 4A102 and 4A107, respectively. This language conflicts with Section 4 of P.L. 20-134, which restricts a woman from soliciting and submitting to an abortion.

Further, the Parental Consent law authorizes a minor's parents to consent to the performance of an abortion, or, alternatively, for the court to waive the requirement of parental consent, and authorize the minor to consent to an abortion. All of these acts would violate Section 5 P.L. 20-134, which prohibits "every person" from "soliciting" a woman to submit to an abortion. As discussed, Guam's criminal code defines solicitation as commanding, encouraging, or requesting the performance of a criminal act. 9 GCA § 13.20. Providing parental consent to an abortion or court authorization for an abortion would meet the definition for solicitation under the criminal code.

The Parental Consent law further provides that parental consent to an abortion is not required in the event of a medical emergency. This provision cannot be reconciled with P.L. 20-134, which provides no exceptions to the ban on abortion. If a doctor proceeds with the performance of an abortion without parental consent, as authorized by the Parental Consent law, such abortion would violate the Section 31.21 prohibition on the performance of an abortion. Even the medical intervention P.L. 20-134 permits in instances where the pregnancy would endanger a mother's life, which is expressly excluded from the definition of "abortion," would require the determination of two (2) independent physicians and subsequent peer review by the Guam Medical Licensing Board, contrary to the medical exception to the Parental Consent law which does not.

As AG Moylan concedes, if the provisions of two acts irreconcilably conflict, the later enacted provisions "carries the day." Moylan Br. at 39. Because the Parental Consent law was enacted later in time, the clear conflicting language in P.L. 20-134 must yield to it.

b. The Informed Consent law conflicts with P.L. 20-134.

The Informed Consent law similarly conflicts with P.L. 20-134. It provides that "[n]o abortion shall be performed without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced." 10 GCA § 3218.1(b). Informed consent requires that certain information be provided to a woman prior to consent, including, among other things, a description of the abortion method, risks associated with the abortion method, the probable gestational age of the fetus, the probable anatomical characteristics of the fetus, the medical risks of carrying the pregnancy to term, information regarding medical assistance benefits for prenatal care, childbirth, and neonatal care, available public assistance such as medical insurance for her child, adoption services, a description of the fetus, and possible child support assistance. *Id.*

The Informed Consent law provides conditions under which a woman's consent to an abortion is considered voluntary and informed, and requires that a woman be provided with materials within a certain time from the scheduled

abortion by the doctor performing the abortion. *See* ER-155 and ER-194. These forms document the consent of signatories to the performance of abortions. They have been in use since 2012, and the Guam Legislature has not challenged them. The Legislature should therefore be presumed to be aware of these forms and DPHSS's construction of the consent laws. *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1017–18, 831 P.2d 798, 809, 9 Cal. Rptr. 2d 358, 369 (1992) ("[A] presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it."). Like the Parental Consent law, the Informed Consent law provides a waiver to the informed consent requirements in the event of a medical emergency requiring immediate termination of a pregnancy. 10 GCA §§ 3218.1(b)(7) and (e). Again, these sections cannot be reconciled with a complete abortion ban.

c. The Partial-Birth Abortion Ban conflicts with P.L. 20-134.

Contrary to AG Moylan's arguments, the Partial-Birth Abortion Ban does conflict with P.L. 20-134, by expanding the circumstances under which a woman may seek and receive an abortion. Similar to the Parental Consent and Informed Consent laws, the prohibition on partial-birth abortions does not apply to abortions "necessary to save the life of a mother whose life is endangered by a

physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." 10 GCA § 91A104. Section 91A108 clarifies that the determination of whether an abortion under the law is necessary to save the life of the mother is conducted by a single physician, not the two physicians necessary to make the "substantial risk" determination in Section 2 of P.L. 20-134. Accordingly, under the Partial-Birth Abortion Ban, a single physician, having determined that a partial-birth abortion is necessary to save the life of a mother, may perform such abortion, contrary to the prohibition in P.L. 20-134.

The entire statutory scheme regulating abortion in Guam is centered on the continued operation of the 1978 law, which authorizes abortions subject to various conditions. The subsequent laws were enacted when *Roe* was still in effect, and were apparently intended to work as a *Roe*-compliant scheme. *See People of Territory of Guam v. Quinata*, 704 F.2d 1085, 1088 (9th Cir. 1983) (finding implied repeal to Guam statute where "it is apparent that the Guam legislature must have taken the [case interpreting the prior law] at face value and sought to overcome it by enacting § 7.10."). These statutes do not contain provisions triggering their automatic repeal in the event *Roe* was overturned, and are fully effective today notwithstanding *Dobbs*.

By imposing conditions on the performance of legal abortion, including informed consent, reporting, methods, and parental consent, these statutes provide a modern and harmonious regulatory scheme that authorizes the performance of legal abortions. *Smith v. Bentley*, 493 F. Supp. 916, 924 (E.D. Ark. 1980) (finding an implied repeal where later enacted law "sets forth in detail the conditions which make abortions legal and the restrictions which are placed on the performance of legal abortions."). The later-enacted statutes serve the purpose of defining offenses under the criminal code, to "limit the condemnation of conduct as criminal when it is without fault." 9 GCA § 1.14.

An abortion ban would effectively nullify the comprehensive regulatory requirements in these later-enacted statutes, which can only operate where abortion is permissible in some instances. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (finding that pre-*Roe* abortion statute was repealed by implication where "comprehensive regulations governing the availability of abortion for minors, the practices of abortion clinics and state funding for abortions could not be harmonized with provisions purporting to criminalize abortion"); *see also Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990) ("[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions

are criminally prohibited. …A blanket criminal prohibition of abortions and the use of abortifacients is inconsistent with these regulations.").

Because these later statutes are irreconcilably inconsistent with an abortion ban, P.L. 20-134 has been repealed.

3. Because the Guam Legislature has repealed P.L. 20-134 by implication, AG Moylan's Rule 60(b)(5) motion, and the entire case, are moot.

Repeal of a challenged statute, whether express or implied, presumptively moots the entirety of an action based on the repealed statute for lack of a live case or controversy. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (in review of district court denial of FRCP 60(b)(5) motion for relief from judgment, first considering antecedent question of justiciability, and dismissing appeal where abortion statute at issue was repealed by implication by subsequent regulation, rendering 60(b) motion and underlying claims moot for lack of live case or controversy); *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) ("[W]e, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar."); *Diffenderfer v. Central Baptist Church,* 404 U.S.

412, 414–15, 92 S.Ct. 574, 575–76, 30 L.Ed.2d 567 (1972)(finding that suit regarding a statute's constitutionality was moot where statute was repealed).

This Court has held that courts "should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019); *see also Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) ("The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings. When subsequent events resolve the dispute, such that no live issues remain or the parties lack a legally cognizable interest in the outcome, a case becomes moot.") (cleaned up).

Because P.L. 20-134 has been repealed, and there is no indication the Guam legislature will reenact it, the action before the District Court is moot and should be dismissed.

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VII. CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment.

Respectfully submitted this 27th day of October, 2023 (PDT).

OFFICE OF THE GOVERNOR OF GUAM

/s/ Jeffrey A. Moots
JEFFREY A. MOOTS
Attorney for Defendant-Appellee
Lourdes A. Leon Guerrero, Governor of Guam

STATEMENT OF RELATED CASES

On behalf of Defendant-Appellee Lourdes A. Leon Guerrero, Governor of Guam, the undersigned is not aware of any related case pending in this Court.

OFFICE OF THE GOVERNOR OF GUAM

/s/ Jeffrey A. Moots
JEFFREY A. MOOTS
Attorney for Defendant-Appellee
Lourdes A. Leon Guerrero, Governor of Guam

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system on October 27, 2023 (PDT).

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

OFFICE OF THE GOVERNOR OF GUAM

/s/ Jeffrey A. Moots
JEFFREY A. MOOTS
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Lourdes A. Leon Guerrero, Governor of Guam

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§ 4104. I Maga'lahi and I Liheslatura May Request Declaratory Judgment.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
I Maga'lahen Guåhan, in writing, *or I Liheslaturan Guåhan*, 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 *I Maga'lahi* and the operation of the Executive Branch, or *I Liheslaturan Guåhan*, 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. The Supreme Court of Guam *shall*, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented and *shall* render its written judgment thereon.

Credits
SOURCE: Added by P.L. 21–147:2 (Jan. 14, 1993), repealed and reenacted by P.L. 24–061:3 (Sept. 17, 1997). Repealed by P.L. 28–146:1 (August 15, 2006). Added by P.L. 29–103:2 (July 22, 2008).

Updated Through P.L. 36–100(June 15, 2022)

1985 SOURCE: Article 4(c) Constitution of Florida, as modified by Massachusetts Constitution, Article of Amendment No. 85 amending Art. 2 of Ch. 3 of the Mass. Constitution.

1985 COMMENT: Several states permit the governor, and Massachusetts permits the Governor, Legislature and Council, to seek opinions from their respective Supreme Courts on matters respecting the duties of the Governor and Legislature. It has been this drafter's experience that such a grant of jurisdiction would have solved many serious questions which have arisen, but which have lacked a forum for decision.

Under the usual rule, no case may be brought until it has ripened into a “case or controversy”. This section will permit important issues to be decided before that time and will avoid the necessity of creating harm to some party in order to have a decision. Thus, a Massachusetts Opinion of the Justices determined certain powers of the Legislature and Governor before any employees had to be laid off. This Section would permit a better resolution of serious questions than occurred in the 1978 District Court decision of *Wong v. Camina* wherein the Court decided a question relating to federal grants. No defendant was forthcoming, so the case was decided essentially on a default. This Section would permit a full hearing in such cases and decisions rendered under this Section would be binding.

Note that the language permits the Governor to request opinions as the operation of the Executive Branch, including questions involving separation of powers, and the Legislature to request opinions on the operation of that Branch, but does not permit one Branch to request opinions as to the operation of the other where that operation does not impinge on the requesting branch's operations. The purpose of this limitation is to avoid one branch trying to regulate the other through the courts.

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7 G.C.A. § 4104, GU ST T. 7, § 4104

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Guam Code Annotated Currentness
Title 9. Crimes and Corrections
Chapter 13. Attempt, Solicitation, Conspiracy (Refs & Annos)

9 G.C.A. § 13.20

§ 13.20. Solicitation: Defined.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
A person is guilty of solicitation to commit a felony when with intent to promote or facilitate its commission he commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

Credits
SOURCE: G.P.C. § 653b; M.P.C. § 5.02(1); *Calif. § 805 (T.D.2 1968); Calif. § 710 (1971); Mass. ch. 263 § 47(a); N.J. § 2C:5–1(b)(7).

Updated Through P.L. 36–101(June 15, 2022)

COMMENT: By § 13.20, the criminal liability formerly provided by § 653b of the Penal Code is expanded to include the solicitation of any felony. It should be noted that this Section does not make criminal a solicitation to commit a misdemeanor or petty misdemeanor.

9 G.C.A. § 13.20, GU ST T. 9, § 13.20

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Guam Code Annotated Currentness
Title 9. Crimes and Corrections
Chapter 31. Offenses Against the Family (Refs & Annos)

9 G.C.A. § 31.20

§ 31.20. Abortion.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
(a) *Abortion* means the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

(b) An *abortion* may be performed:

(1) by a physician licensed to practice medicine this Territory or by a physician practicing medicine in the employ of the government of the United States;

(2) in the physician's adequately equipped medical clinic or in a hospital approved or operated by the United States or this Territory; and

(3) (A) within 13 weeks after the commencement of the pregnancy; or

(B) within 26 weeks after the commencement of the pregnancy if the physician has reasonably determined using all available means:

(i) that the child would be born with a grave physical or mental defect; or

(ii) that the pregnancy resulted from rape or incest; or

(C) at any time after the commencement of pregnancy if the physician reasonably determines 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 physical or mental health of the mother.

Credits
SOURCE: Enacted in 1978 as part of the original Criminal & Correctional Code.

Updated Through P.L. 36–101(June 15, 2022)

2022 NOTE: Past publications of the GCA included the following annotations:

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COMMENT: The Law Revision Commission made no recommendation as to the regulation of abortion. This section was added by the Legislature, which committed a serious error in its adoption (since rectified). Initially (1978), no sanctions were provided for the performing of illegal abortions. However, this has been changed in later sections of this Chapter.

COURT DECISIONS: Sections 31.20, 31.21, 31.22 and 31.33, as reenacted by P.L. 20–134, were declared null and void as contrary to the U.S. Constitution. As a result, the original sections of law were reinstated. *Guam Society of Obstetricians & Gynecologists, et al. v. Ada, Governor of Guam, et al.*, No. 90–16706, C.A.9 (1992), 962 F.2d 1366.

Past publications also included an undated Compiler's Note that set forth the following statutory provisions added by P.L. 20–134 (Mar. 19, 1990):

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

§ 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.

§ 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.

§ 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.

In *Guam Society of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir 1992), *cert. denied*, 506 U.S. 1011 (1992), the Ninth Circuit Court invalidated these provisions, relying on *Roe v. Wade*, 410 U.S. 113 (1972), and also permanently enjoined enforcement of P.L. 20–134. *Roe v. Wade* was overturned by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. -- (2022), and in response to a request from members of the 36th Guam Legislature, the Attorney General of Guam issued Opinion Memorandum LEG–22–0324, finding that the 20th Guam Legislature had exceeded its Organic Act authority in enacting P.L. 20–134, and that P.L. 20–134 was void *ab initio*. *See* Att'y. Gen. Op. Mem LEG–22–034 (July 6, 2022). Based on this guidance, the provisions of P.L. 20–134 will not be codified in the GCA.

9 G.C.A. § 31.20, GU ST T. 9, § 31.20

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Guam Code Annotated Currentness
Title 9. Crimes and Corrections
Chapter 31. Offenses Against the Family (Refs & Annos)

9 G.C.A. § 31.21

§ 31.21. Illegal Abortions Punished.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
Any person performing an abortion in circumstances other than permitted by § 31.20 shall be guilty of a third degree felony.

Credits
SOURCE: Added by P.L. 14–122 (4/19/78).

Updated Through P.L. 36–101(June 15, 2022)

COMMENT: This Section was added after it was discovered that the Legislature, while regulating abortions, had neglected to provide any penalty for performing abortions in situations other than those permitted by law.

9 G.C.A. § 31.21, GU ST T. 9, § 31.21

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Guam Code Annotated Currentness
Title 10. Health and Safety
Division 4. Guam Health Act
Chapter 91A. The Partial-Birth Abortion Ban Act of 2008 (Refs & Annos)

G.C.A. § 91A101

§ 91A101. Title.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
This Chapter may be cited and referred to as *"The Partial-Birth Abortion Ban Act of 2008"*.
Updated Through P.L. 36–115(October 12, 2022)

G.C.A. § 91A101, GU ST § 91A101

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Guam Code Annotated Currentness
Title 10. Health and Safety
Division 4. Guam Health Act
Chapter 91A. The Partial-Birth Abortion Ban Act of 2008 (Refs & Annos)

G.C.A. § 91A104

§ 91A104. Prohibition.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
A person *shall* not knowingly perform *or* attempt to perform a partial-birth abortion. Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus *shall* be fined under this Title *or* imprisoned *not more than* ten (10) years, *or* both. This Subsection takes effect one (1) day after the enactment. This Subsection does *not* apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, *or* physical injury, including a life-endangering physical condition caused by *or* arising from the pregnancy itself.
Updated Through P.L. 36–115(October 12, 2022)

G.C.A. § 91A104, GU ST § 91A104

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Guam Code Annotated Currentness
Title 10. Health and Safety
Division 4. Guam Health Act
Chapter 91A. The Partial-Birth Abortion Ban Act of 2008 (Refs & Annos)

G.C.A. § 91A108

§ 91A108. Review by the Guam Board of Medical Examiners.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
(a) A defendant accused of an offense under this Section may seek a hearing before the Guam Board of Medical Examiners as to whether the physician's conduct was necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, *or* physical injury, including a life-endangering physical condition caused by *or* arising from the pregnancy itself.

(b) The findings on the issue are admissible at the civil and/or criminal trial(s) of the defendant. Upon a motion of the defendant, the court *shall* delay the beginning of the trial(s) for *not more than* thirty (30) days to permit such a hearing to take place.

(c) A defendant convicted of an offense under this Act *shall* have his medical license revoked by the Guam Board of Medical Examiners.
Updated Through P.L. 36–115(October 12, 2022)

G.C.A. § 91A108, GU ST § 91A108

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Guam Code Annotated Currentness
Title 10. Health and Safety
Division 1. Public Health
Chapter 3. Public Health and Social Services
Article 2. Vital Statistics (Refs & Annos)

G.C.A. § 3218

§ 3218. Partial-Birth Abortion and Abortion Report.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
(a) An individual abortion report for each abortion *shall* be completed by the mother's attending physician, and *shall* be transmitted directly to the Office of Vital Statistics of the Department of Public Health and Social Services. The report *shall* be confidential and it *shall not* contain the name of the mother involved. This report *shall* include:

(1) patient number;

(2) name and address of the abortion facility or hospital;

(3) date of the abortion;

(4) zip code or other residential identification of the pregnant woman;

(5) age of the pregnant woman;

(6) ethnic origin of the pregnant woman;

(7) marital status of the pregnant woman;

(8) number of previous pregnancies;

(9) number of years of education of the pregnant woman;

(10) number of living children;

(11) number of previous induced abortions;

(12) date of the last induced abortion;

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(13) date of the last live birth;

(14) method of contraception used, if any, at the time of conception;

(15) date of the beginning of the last menstrual period;

(16) medical condition of the pregnant woman at the time of abortion;

(17) RH type of the pregnant woman;

(18) type of abortion procedure used;

(19) complications, if any;

(20) type of procedure done after the abortion;

(21) type of family planning recommended;

(22) type of additional counseling given, if any;

(23) signature of attending physician;

(24) certification provided for in this Section; and

(25) gestational age, as measured in weeks, of the unborn child terminated by the abortion.

(b) An individual complication report for any post-abortion care performed upon a woman *shall* be completed by the physician providing such post-abortion care. This report *shall* include:

(1) date of the abortion;

(2) name and the address of the medical facility, abortion facility or hospital where the abortion was performed; and

(3) nature of the abortion complication diagnosed or treated.

(c) All abortion reports shall be signed by the attending physician under penalty of perjury and shall be filed with the Guam Registrar of Vital Statistics within seven (7) days from the date of the abortion. All complication reports shall be signed by the

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physician providing the post-abortion care under penalty of perjury and filed with the Guam Registrar of Vital Statistics within seven (7) days from the date of the post-abortion care.

(d) A copy of the abortion report *shall* be made a part of the medical record of the patient in the facility or hospital in which the abortion was performed.

(e) The Guam Registrar of Vital Statistics *shall* collect and_annually publish a statistical report based on such data from abortions performed in the previous calendar year.

(f) The Office of Vital Statistics *shall* make available to physicians performing abortions on Guam, forms for both abortion reports and post-abortion care reports, as provided in Subsections (a) and (b) of this Section.

(g) All information in abortion reports and post-abortion care reports and the reports themselves *shall* be confidential. Information and records may be disclosed *only* in communications between qualified professional persons in the provision of services or in statistical form for research purposes as required by Subsection (e) of this Section.

(h) Any person who releases confidential information in violation of Subsection (g) of this Section *shall* be guilty of a misdemeanor.

(i) Any person may bring an action against an individual who has willfully and knowingly released confidential information about such person in violation of Subsection (g) of this Section for the greater of the following amounts:

(1) Five Hundred Dollars ($500); or

(2) Three (3) times the amount of actual damages, *if* any, sustained by the plaintiff, reasonable attorney's fees and the costs of the action. It is *not* a prerequisite to an action under this Subsection that the plaintiff suffer or be threatened with actual damages.

(j) *If* a physician performs a partial-birth abortion on the woman, the physician *shall* report such determination and the reasons for such determination in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the Office of Vital Statistics and to the Guam Board of Medical Examiners, *or if* the abortion is *not* performed in a medical care facility, the physician *shall* report the reasons for such determination in writing to the Office of Vital Statistics and to the Guam Board of Medical Examiners as part of the written report made by the physician to the Office of Vital Statistics and to the Guam Board of Medical Examiners. The physician *shall* retain a copy of the written reports required under this Section for *not less than* five (5) years.

(k) Failure to file a complete individual abortion report for each abortion with the Guam Registrar of Vital Statistics within seven (7) days from the date of the abortion is a misdemeanor, pursuant to § 55.65 of Chapter 55, Title 9, Guam Code Annotated.

(l) Subsection (k) *does not* preclude sanctions, or disciplinary action, or any other appropriate action by the Guam Board of Medical Examiners.

(m) The Guam Registrar of Vital Statistics *shall* receive, ascertain the completeness of, compile, and retain all partial-birth abortion reports filed with her under this Section, and collate and evaluate all data gathered therefrom, and *shall* annually publish a statistical report based on such data from partial-birth abortions performed in the previous calendar year *no later than* January 31st of the following calendar year.

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(n) The Office of Vital Statistics *shall* make available to physicians performing partial-birth abortions on Guam and the Guam Board of Medical Examiners forms for partial-birth abortion reports.

(o) All information in partial-birth abortion reports the Office of Vital Statistics receives *shall* be confidential. Information and reports may be disclosed *only* in communications between qualified professional persons in the provisions of services, or in statistical form for research purposes.

(p) Any person who releases confidential information in violation of Subsection (o) of this Section *shall* be guilty of a misdemeanor.

Credits

SOURCE: Added by P.L. 22–130:2 (May 31, 1994). Amended by P.L. 29–115:1 (Nov. 18, 2008), P.L. 32–073:3 (Nov. 27, 2013). Subsections (j-p) added by P.L. 29–115:2 (Nov. 18, 2008). Subsections (a)(23) and (24) amended by P.L. 32–217:2 (Dec. 29, 2014, and subsection (a)(25) added by P.L. 32–217:2 (Dec. 29, 2014), effective 30 days after enactment pursuant to P.L. 32–217:3. Subsection (a) amended by P.L. 33–218:3 (Dec. 15, 2016); subsection (c) amended by P.L. 33–218:4 (Dec. 15, 2016); subsection (e) amended by P.L. 33–218:5 (Dec. 15, 2016); and subsection (k) amended by P.L. 33–218:6 (Dec. 15, 2016); and subsection (m) amended by P.L. 33–218:7 (Dec. 15, 2016);.

Updated Through P.L. 36–115(October 12, 2022)

2017 NOTE: References to "territory" and "territorial" removed and/or altered to "Guam" pursuant to 1 GCA § 420.

NOTE: This provision was to become effective sixty (60) days after the "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were approved by the Department of Public Health and Social Services (DPHSS) pursuant to the rule-making process set forth in Title 5, Chapter 9, Article 3 of the Guam Code Annotated. P.L. 31–235:4 (Nov. 1, 2012). P.L. 32–089:2 (Nov. 27, 2013) amended the approving authority from DPHSS to "a majority vote of a team consisting of the Director of DPHSS, who shall serve as the Chairperson, the Medical Director of the DPHSS; and OB/GYN doctor from the Guam Medical Association; a Social Worker from the National Association of Social Workers; and a Psychiatrist from the Guam Behavioral Health and Wellness Center." The "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were to be approved no later than 120 days after enactment, pursuant to P.L. 32–089:2.

G.C.A. § 3218, GU ST § 3218

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Guam Code Annotated Currentness
Title 10. Health and Safety
Division 1. Public Health
Chapter 3. Public Health and Social Services
Article 2. Vital Statistics (Refs & Annos)

G.C.A. § 3218.1

§ 3218.1. The Women's Reproductive Health Information Act of 2012.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
(a) Definitions. For the purposes of this § 3218.1, the following words and phrases are defined to mean:

(1) Abortion means the use or prescription of any instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to act upon an ectopic pregnancy, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on a pregnant woman or her unborn child, and which causes the premature termination of the pregnancy;

(2) Act means the Women's Reproductive Health Information Act of 2012 codified at Title 10 GCA § 3218.1;

(3) Complication means that condition which includes but is not limited to hemorrhage, infection, uterine perforation, cervical laceration, pelvic inflammatory disease, endometriosis, and retained products. The Department may further define the term “complication” as necessary and in a manner not inconsistent with this § 3218.1;

(4) Conception means the fusion of a human spermatozoon with a human ovum;

(5) Department means the Department of Public Health and Social Services;

(6) Facility or medical facility means any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person;

(7) First trimester means the first twelve (12) weeks of gestation;

(8) Gestational age means the time that has elapsed since the first day of the woman's last occurring menstruation;

(9) Hospital means any building, structure, institution or place, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment and provision of medical or surgical care for three (3) or more non-related individuals, admitted for overnight stay or longer in order to obtain medical, including obstetric,

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psychiatric and nursing care of illness, disease, injury or deformity, whether physical or mental and regularly making available at least clinical laboratory services and diagnostic x-ray services and treatment facilities for surgery or obstetrical care or other definitive medical treatment;

(10) Medical emergency means a condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function;

(11) Physician means any person licensed to practice medicine or surgery or osteopathic medicine under the Physicians Practice Act (Title 10 GCA § 12201, et seq.) or in another jurisdiction of the United States;

(12) Pregnant or pregnancy means that female reproductive condition of having an unborn child in the mother's uterus;

(13) Qualified person means an agent of a physician who is a psychologist, licensed social worker, licensed professional counselor, registered nurse, or physician;

(14) Records Section means the Guam Memorial Hospital Medical Records Section;

(15) Unborn child or fetus each means an individual organism of the species homo sapiens from conception until live birth;

(16) Viability means the state of fetal development when, in the reasonable judgment of a physician based on the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support; and

(17) Woman means a female human being whether or not she has reached the age of majority.

(b) Informed Consent Requirement. No abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) at least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has informed the woman in person of the following:

(A) the name of the physician who will perform the abortion;

(B) the following medically accurate information that a reasonable person would consider material to the decision of whether or not to undergo the abortion:

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(i) a description of the proposed abortion method and

(ii) the immediate and long-term medical risks associated with the proposed abortion method, including but not limited to any risks of infection, hemorrhage, cervical or uterine perforation, and any potential effect upon future capability to conceive as well as to sustain a pregnancy to full term;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed;

(D) the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(E) the medical risks associated with carrying the child to term;

(F) any need for anti-Rh immune globulin therapy if she is Rh negative, the likely consequences of refusing such therapy, and the cost of the therapy;

(2) at least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has informed the woman in person, that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(B) public assistance may be available to provide medical insurance and other support for her child while he or she is a dependent and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(C) public services exist which will help to facilitate the adoption of her child and that more detailed information on the availability of such services is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(D) the printed materials in Subsection (c) of this Section 3218.1 describe the unborn child;

(E) the father of the unborn child is liable to assist in the support of this child, even in instances where he has offered to pay for the abortion. In the case of rape or incest, this information may be omitted; and

(F) she is free to withhold or withdraw her consent to the abortion at any time without affecting her right to future care or treatment and without the loss of any locally or federally funded benefits to which she might otherwise be entitled.

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(3) At least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has given the woman a copy of the printed materials described in Subsection (c) of this § 3218.1. If the woman is unable to read the materials, they shall be read to her. If the woman asks questions concerning any of the information or materials, answers shall be provided to her in a language she can understand.

(4) The information in Subsections (b)(l), (b)(2) and (b)(3) of this § 3218.1 is provided to the woman individually and in a private room to protect her privacy and maintain the confidentiality of her decision and to ensure that the information focuses on her individual circumstances and that she has an adequate opportunity to ask questions.

(5) Prior to the abortion, the woman certifies in writing on a checklist certification provided by the Department that the information required to be provided under Subsections (b)(l), (b)(2) and (b)(3) of this § 3218.1 has been provided. All physicians who perform abortions shall report the total number of certifications received monthly to the Records Section. The Records Section shall make the number of certifications received available to the public on an annual basis.

(6) Except in the case of a medical emergency, the physician who is to perform the abortion shall receive and sign a copy of the written checklist certification prescribed in Subsection (b)(5) of this § 3218.1 prior to performing the abortion. The physician shall retain a copy of the checklist certification in the woman's medical record.

(7) In the event of a medical emergency requiring an immediate termination of the pregnancy, the physician who performed the abortion shall clearly certify in writing the nature of the medical emergency and the circumstances which necessitated the waiving of the informed consent requirements of this § 3218.1. This certification shall be signed by the physician who performed the emergency termination of pregnancy, and shall be permanently filed in both the patient records maintained by the physician performing the emergency procedure and the records maintained by the facility where the emergency procedure occurred.

(8) A physician shall not require or obtain payment from anyone for providing the information and certification required by this § 3218.1 until the expiration of the twenty-four (24) hour reflection period required by this § 3218.1.

(c) Publication of Materials. The Department shall cause to be published printed materials in English and any other culturally sensitive languages which the Department deems appropriate within one hundred eighty (180) days after this Act becomes law. The printed materials shall be printed in a typeface large enough to be clearly legible and shall be presented in an objective, unbiased manner designed to convey only accurate scientific information. On an annual basis, the Department shall review and update, if necessary, the following easily comprehensible printed materials:

(1) Printed materials that inform the woman of any entities available to assist a woman through pregnancy, upon childbirth and while her child is dependent, including but not limited to adoption services.

The printed materials shall include a list of the entities, a description of the services they offer, and the telephone numbers of the entities, and shall inform the woman about available medical assistance benefits for prenatal care, childbirth, and neonatal care. The Department shall ensure that the materials described in this § 3218.1 are comprehensive and do not directly or indirectly promote, exclude, or discourage the use of any entity described in this § 3218.1.

These printed materials shall state that it is unlawful for any individual to coerce a woman to undergo an abortion. The printed materials shall also state that any physician who performs an abortion upon a woman without her informed consent may be

liable to her for damages in a civil action and that the law permits adoptive parents to pay costs of prenatal care, childbirth, and neonatal care. The printed materials shall include the following statement:

> "The Territory of Guam strongly urges you to contact the resources provided in this booklet before making a final decision about abortion. The law requires that your physician or his or her agent give you the opportunity to call agencies and service providers like these before you undergo an abortion."

(2) Printed materials that include information on the support obligations of the father of a child who is born alive, including but not limited to the father's legal duty to support his child, which may include child support payments and health insurance, and the fact that paternity may be established by written declaration of paternity or by court action. The printed material shall also state that more information concerning paternity establishment and child support services and enforcement may be obtained by calling the Office of the Attorney General of Guam, Child Support Enforcement Division.

(3) Printed materials that inform the pregnant woman of the probable anatomical and physiological characteristics of an unborn child at two (2) - week gestational increments from fertilization to full term, including color photographs of the developing unborn child at two (2) - week gestational increments. The descriptions shall include information about brain and heart functions, the presence of external members and internal organs during the applicable stages of development, and any relevant information on the possibility of the child's survival at several and equidistant increments throughout a full term pregnancy. If a photograph is not available, a picture must contain the dimensions of the unborn child and must be anatomically accurate and realistic. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

(4) Printed materials which contain objective information describing the various surgical and drug-induced methods of abortion, as well as the immediate and long-term medical risks commonly associated with each abortion method including but not limited to the risks of infection, hemorrhage, cervical or uterine perforation or rupture, any potential effect upon future capability to conceive as well as to sustain a pregnancy to full term, the possible adverse psychological effects associated with an abortion, and the medical risks associated with carrying a child to term.

(5) A checklist certification to be used by the physician or a qualified person under Subsection (b)(5) of this § 3218.1, which will list all the items of information which are to be given to the woman by the physician or a qualified person under this § 3218.1.

(d) Cost of Materials. The Department shall make available the materials enumerated in Subsection (c) of this § 3218.1 for purchase by the physician or qualified person who is required to provide these materials to women pursuant to Subsection (b)(3) of this § 3218.1 at such cost as reasonably determined by the Department. No claim of inability to pay the cost charged by the Department for these materials will excuse any party from complying with the requirements set forth in this § 3218.1.

(e) Emergencies. When a medical emergency compels the performance of an abortion or termination of pregnancy, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an immediate abortion or termination of pregnancy is necessary to avert her death or that a twenty-four (24) hour delay would cause substantial and irreversible impairment of a major bodily function.

(f) Criminal Penalties. Any person who intentionally, knowingly, or recklessly violates this Act is guilty of a misdemeanor.

(g) Civil and Administrative Claims. In addition to whatever remedies are available under the common law or statutory laws of Guam, failure to comply with the requirements of this Act shall:

(1) in the case of an intentional violation of the Act, constitute prima facie evidence of a failure to obtain informed consent. When requested, the court shall allow a woman upon whom an abortion was performed or attempted to be performed allegedly in violation of this Act to be identified in any action brought pursuant to this Act using solely her initials or the pseudonym "Jane Doe." Further, with or without a request, the court may close any proceedings in the case from public attendance, and the court may enter other protective orders in its discretion to preserve the privacy of the woman upon whom the abortion was performed or attempted to be performed allegedly in violation of this Act.

(2) Provide a basis for professional disciplinary action under 10 GCA § 11110.

(3) Provide a basis for recovery for the woman for the wrongful death of her unborn child under Title 7 GCA § 12109, whether or not the unborn child was born alive or was viable at the time the abortion was performed.

Credits

SOURCE: Added by P.L. 31–235:2 (Nov. 1, 2012).

Updated Through P.L. 36–115(October 12, 2022)

2013 NOTE: This provision was to become effective sixty (60) days after the "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were approved by the Department of Public Health and Social Services (DPHSS) pursuant to the rule-making process set forth in Title 5, Chapter 9, Article 3 of the Guam Code Annotated. P.L. 31–235:4 (Nov. 1, 2012). P.L. 32–089:2 (Nov. 27, 2013) amended the approving authority from DPHSS to "a majority vote of a team consisting of the Director of DPHSS, who shall serve as the Chairperson, the Medical Director of the DPHSS; and OB/GYN doctor from the Guam Medical Association; a Social Worker from the National Association of Social Workers; and a Psychiatrist from the Guam Behavioral Health and Wellness Center." The "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were to be approved no later than 120 days after enactment, pursuant to P.L. 32–089:2.

2012 NOTE: Subsection designations in subsection (b) were altered to adhere to the Compiler's alpha-numeric scheme in accordance with the authority granted by 1 GCA § 1606.

G.C.A. § 3218.1, GU ST § 3218.1

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Guam Code Annotated Currentness
Title 19. Personal Relations
Division 1. Persons & Personal Relations
Chapter 4A. Parental or Guardian Consent Required for Abortion (Refs & Annos)

19 G.C.A. § 4A101

§ 4A101. Definitions.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
As used in this Chapter:

(a) *Abortion* means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is *not* an abortion if done with intent to:

(1) save the life or preserve the health of an unborn child;

(2) remove a dead unborn child caused by spontaneous abortion; or

(3) remove an ectopic pregnancy.

(b) *Coercion* means restraining or dominating the choice of a minor female by force, threat of force, or deprivation of food and shelter.

(c) *Consent* means a written statement signed by the mother, father, or legal guardian (or alternate person as described in § 4A103) of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(d) *Department* means the Department of Public Health and Social Services.

(e) *Emancipated minor* means any person under eighteen (18) years of age who is *or* has been married, *or* who has been legally emancipated.

(f) *Incompetent* means any person who has been adjudged a disabled person and has had a guardian appointed for her pursuant to judicial proceeding and determination.

(g) *Medical emergency* means a condition that, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death *or* for which a delay will create serious risk of substantial and irreversible impairment of a bodily function.

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(h) *Neglect* means the failure of a parent or legal guardian to supply a child with necessary food, clothing, shelter, or medical care when reasonably able to do so, *or* the failure to protect a child from conditions or actions that immediately and seriously endanger the child's physical or mental health when reasonably able to do so.

(i) *Physical abuse* means any physical injury intentionally inflicted by a parent or legal guardian on a child.

(j) *Physician* or *attending physician* means any person licensed to practice medicine on Guam. The term includes medical doctors and doctors of osteopathy.

(k) *Sexual abuse* means any sexual contact or sexual penetration as defined in § 25.10(a)(8) and (9) of Chapter 25, Title 9, Guam Code Annotated, and committed against a minor by an adult family member as defined in this Act, or a family member as defined in Chapter 13 of Division 1, Title 19, Guam Code Annotated, and as further provided for in Chapter 25, Title 9, Guam Code Annotated.

Updated Through P.L. 36–093(April 11, 2022)

19 G.C.A. § 4A101, GU ST T. 19, § 4A101

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Guam Code Annotated Currentness
Title 19. Personal Relations
Division 1. Persons & Personal Relations
Chapter 4A. Parental or Guardian Consent Required for Abortion (Refs & Annos)

19 G.C.A. § 4A102

§ 4A102. Consent of One (1) Parent Required.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
Except in the case of a medical emergency, or *except* as provided in §§ 4A103, 4A104, or 4A107, if a pregnant female is less than eighteen (18) years of age and not emancipated, or if she has been adjudged an incompetent person pursuant to judicial proceeding and determination, no person shall perform an abortion upon her unless, in the case of a female who is less than eighteen (18) years of age, he or she first obtains the written consent of both the pregnant female and one (1) of her parents or a legal guardian; or, in the case of a female who is an incompetent person, he or she first obtains the written consent of her guardian. In deciding whether to grant such consent, a pregnant female's parent or guardian *shall* be advised of the risks involved in the abortion procedure, the risks of post-partum syndrome, and alternative to the abortion, and *shall* consider only the child's or ward's best interests.
Updated Through P.L. 36–093(April 11, 2022)

19 G.C.A. § 4A102, GU ST T. 19, § 4A102

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Chapter 4A. Parental or Guardian Consent Required for Abortion (Refs & Annos)

19 G.C.A. § 4A103

§ 4A103. Alternate Consent.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
If the minor patient declares in a signed written statement that she is a victim of sexual abuse, neglect, or physical abuse by either of her parents or legal guardian(s), then the attending physician *shall* obtain the written consent required by this Act from a brother or sister of the minor who is over twenty-one (21) years of age, or from a stepparent or grandparent specified by the minor. The physician who intends to perform the abortion must certify in the patient's medical record that he or she has received the written declaration of abuse or neglect. Any physician relying in good faith on a written statement under this Section *shall not* be civilly or criminally liable under any provisions of this Act for failure to obtain consent.
Updated Through P.L. 36–093(April 11, 2022)

19 G.C.A. § 4A103, GU ST T. 19, § 4A103

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Title 19. Personal Relations
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Chapter 4A. Parental or Guardian Consent Required for Abortion (Refs & Annos)

19 G.C.A. § 4A104

§ 4A104. Exceptions.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
Consent *shall not* be required under § 4A102 or § 4A103 of this Act if:

(a) the attending physician certifies in the patient's medical record that a medical emergency exists and there is insufficient time to obtain the required consent; *or*

(b) consent is waived under § 4A107 of this Chapter.
Updated Through P.L. 36–093(April 11, 2022)

19 G.C.A. § 4A104, GU ST T. 19, § 4A104

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Title 19. Personal Relations
Division 1. Persons & Personal Relations
Chapter 4A. Parental or Guardian Consent Required for Abortion (Refs & Annos)

19 G.C.A. § 4A107

§ 4A107. Procedure for Judicial Waiver of Consent.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)
(a) The requirements and procedures under this Section are available to minors and incompetent persons whether or not they are residents of Guam.

(b) The minor or incompetent person may petition the Superior Court of Guam for a waiver of the consent requirement and may participate in proceedings on her own behalf. The petition *shall* include a statement that the complainant is pregnant and unemancipated. The petition *shall* also include a statement that consent has *not* been waived, that the pregnant minor has been advised by her attending physician of the risks involved in an abortion and the risk of post-partum syndrome, and that the complainant wishes to abort without obtaining consent, as provided pursuant to this Chapter. The court *shall* appoint a guardian *ad litem* for her. Any guardian *ad litem* appointed under this Act *shall* act to maintain the confidentiality of the proceedings.

The court *shall* advise her that she has a right to court-appointed counsel, and *shall* provide her with counsel upon her request.

(c) Court proceedings under this Section *shall* be confidential and *shall* ensure the anonymity of the minor or incompetent person. All court proceedings under this Section *shall* be sealed. The minor or incompetent person *shall* have the right to file her petition in the court using a pseudonym, *or* using solely her initials. All documents related to this petition *shall* be confidential and *shall not* be available to the public. These proceedings *shall* be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court *shall* rule, and issue written findings of fact and conclusions of law, within forty-eight (48) hours of the time the petition was filed, *except* that the forty-eight (48)-hour limitation may be extended at the request of the minor or incompetent person. If the court fails to rule within the forty-eight (48)-hour period and an extension was *not* requested, then the petition *shall* be deemed to have been granted, and the consent requirement *shall* be waived.

(d) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature or well-informed to decide whether to have an abortion, the court *shall* issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent or guardian, and the court *shall* execute the required forms. If the court does *not* make the finding specified in this Subsection or Subsection (e) of this Section, it *shall* dismiss the petition.

(e) If the court finds evidence that there is an incidence of physical, sexual, or emotional abuse of the complainant by one (1) or both of her parents, her guardian, or her custodian, or by a male person regardless of the family relationship, if any, who has physically, sexually, or emotionally abused her or caused her pregnancy, or that the notification of a parent, guardian or custodian is *not* in the best interest of the complainant, the court *shall* issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of the parent guardian, or custodian. If the court does *not* make a finding specified in this Subsection or Subsection (d) of this Section, it *shall* dismiss the petition.

(f) A court that conducts proceedings under this Section *shall* issue written and specific factual findings and legal conclusions supporting its decision, and *shall* order that a confidential record of the evidence and the judge's findings and conclusions

be maintained. At the hearing, the court *shall* hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor.

(g) An expedited confidential appeal *shall* be available, as the Supreme Court of Guam provides by rule, to any minor or incompetent person to whom the [circuit] court denies a waiver of consent. An order authorizing an abortion without consent *shall not* be subject to appeal.

(h) No filing fees shall be required of any pregnant minor who petitions the court for a waiver of parental consent pursuant to this Act at either the trial or appellate level.

Updated Through P.L. 36–093(April 11, 2022)

19 G.C.A. § 4A107, GU ST T. 19, § 4A107

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Section 8. Two Hundred Thousand Dollars ($200,000) are appropriated from the General Fund to the Department of Land Management for the surveying, mapping, and engineering of the Umatac Subdivision Expansion Project.

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).
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 that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

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

"**§31.21.** Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in §31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

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

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

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

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

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

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

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

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

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

PUBLIC LAW NO. 20-135

Bill No. 896 (LS)
Date Became Law: Mar 20, 1990
Governor's Action: Approved

Introduced by:
J.P. Aguon
T.S. Nelson
E.P. Arriola
J.G. Bamba
E.R. Duenas
C.T.C. Gutierrez
M.D.A. Manibusan
F.J.A. Quitugua
M.C. Ruth
T.V.C. Tanaka
P.C. Lujan
M.Z. Bordallo
H.D. Dierking
J.T. San Agustin
D.F. Brooks
E.M. Espaldon
G. Mailloux
D. Parkinson
E.D. Reyes
F.R. Santos
A.R. Unpingco

AN ACT TO AMEND SECTION 73111 OF CHAPTER 73, TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO FIRE PREVENTION.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 23-15602

I am the attorney or self-represented party.

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[ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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- [ ] a party or parties are filing a single brief in response to multiple briefs.
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Jeffrey A. Moots **Date** October 27, 2023 PDT

*(use "*s/[typed name]*" to sign electronically-filed documents)*