No. 23-15602

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.,
Plaintiffs-Appellees,
v.

DOUGLAS MOYLAN
Defendant-Appellant,
v.

LOURDES LEON GUERRERO, ET AL.
Defendants-Appellees.

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

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INTRODUCTION

This lawsuit implicates weighty and important interests. But because of the Guam Attorney General's unexplained failure to contest—or indeed mention—counterarguments raised in opposition to a motion on which he bore the burden of proof, the resolution of this appeal turns on far more mundane matters, including the abandonment of arguments, waiver, and abuse-of-discretion review.

In particular, after the Attorney General moved to vacate the District Court's longstanding injunction, one of the Plaintiffs and the proposed Plaintiff-Intervenors (together, "the Providers") filed a lengthy opposition brief explaining in detail why such relief was unwarranted. The Attorney General "fail[ed] to contest" the Providers' arguments in his "reply brief even after [they] had been squarely presented in the answering brief," *Sabra v. Maricopa County Community College District*, 44 F.4th 867, 882 (9th Cir. 2022), from which the District Court—applying familiar and settled principles—concluded that the Attorney General did not contest the Providers' dispositive counterargument, and denied the motion. Denying the Rule 60(b)(5) motion of a litigant who not only fails to sustain his burden but effectively defaults is the very opposite of an abuse of discretion.

Even if the Court ventures past the Attorney General's nonengagement on a dispositive issue below, the District Court's opinion must be affirmed. As a result of the Attorney General's failure to address the central issues in this case before the

lower court, and failure to justify his request that the Court consider newly raised issues in his opening brief, many of his arguments have been waived. And even on their terms, they are meritless—the precedent he invokes to contest the District Court's exercise of its discretion does not support his arguments, and only reinforces that the District Court did not abuse its discretion.

The decision below must be affirmed.

JURISDICTIONAL STATEMENT

Appellees agree with Appellant's jurisdictional statement.

STATEMENT OF ISSUES ON APPEAL

1. Does a district court abuse its discretion in denying a motion for relief under Federal Rule of Civil Procedure 60(b)(5) when the party opposing relief raises a dispositive counterargument in opposition, and the movant fails to contest the counterargument on reply?

2. Does a district court abuse its discretion in denying a motion to modify or vacate an injunction under Federal Rule of Civil Procedure 60(b)(5) where the non-movant has shown that an enjoined law is otherwise legally unenforceable and the movant fails to respond to that argument?

3. Has the Attorney General waived arguments that he had the opportunity and incentive to raise before the District Court, yet failed to address below without explanation, and now seeks to litigate for the first time on appeal?

STATUTORY AUTHORITIES

Except for 48 U.S.C. § 1421b(u) and 48 U.S.C. § 1423a, all applicable statutes are contained in the addendum of Appellee Lourdes A. Leon Guerrero.

STATEMENT OF THE CASE

I. Guam Public Law No. 20-134

Over three decades ago, the 20th Guam Legislature passed, and then-Governor Ada signed into law, Public Law 20-134 ("the Ban"). The Ban criminalizes essentially all abortion care in Guam, and also criminalizes the "solicitation" of abortion. Specifically, it establishes criminal penalties for (1) any Guam-licensed physician who provides or administers drugs or uses any instrument or other means with the intent to cause an abortion, P.L. 20-134, § 3 ("Section 3"); (2) anyone who solicits and takes any drug or medicine, or submits to any operation, or to the use of any other means, with the intent to cause an abortion, *id.*, § 4 ("Section 4"); and (3) anyone who solicits *another* to submit to any operation, or to the use of any means, to cause an abortion, *id.*, § 5 ("Section 5"). These criminal prohibitions apply to all abortions throughout pregnancy, with exceptions only for (1) abortions for ectopic pregnancies, and (2) abortions where two independently practicing physicians determine that there is a substantial risk that continuing the pregnancy would endanger the patient's life or gravely impair their health. *Id.*, § 2.

II. Original District Court Proceedings and Appeals

Plaintiffs filed the original Complaint on March 23, 1990. SER-003. They alleged that the Ban violated, *inter alia*, the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution; the Organic Act of Guam; and the Guam Equal Rights Statute. SER-017–20, 37–41. On August 23, 1990, the District Court entered summary judgment and permanently enjoined enforcement of the Ban. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1431 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *as amended* (June 8, 1992). The District Court held that *Roe v. Wade* applied to Guam, and that "[b]ecause Sections 2, 3, 4, and 5 . . . of the [Ban] fail to make distinctions based on the stage of the pregnancy" and fail to recognize "other constitutionally-protected interests involved, [the Ban] violates the Due Process Clause of the Fourteenth Amendment, as it applies to Guam via [the Organic Act]." *Id.* at 1428–29. The court also held that the Ban's solicitation prohibition violated the First Amendment. *Id.* at 1428 n.9. Governor Ada appealed,[1] this Court affirmed, and the Supreme Court denied certiorari. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369, 1374 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992).

[1] Governor Ada did not appeal the First Amendment holding. *See Ada*, 962 F.2d at 1369.

The case was then closed and sat undisturbed for over thirty years. In the intervening decades, successive Guam legislatures replaced the enjoined Ban with a comprehensive statutory framework regulating abortion as lawful medical care and establishing the circumstances under which this care can be provided in Guam. *See, e.g.*, 9 Guam Code Ann. § 31.20 ("reinstat[ing]" provisions authorizing abortion as operative law after by P.L. 20-134 was "declared null and void"); 10 Guam Code Ann. § 3218 (setting forth reporting requirements); *id.* §§ 91A101–91A111 (restricting certain abortion method); 19 Guam Code Ann. §§ 4A101–4A111 (requiring parental consent for a minor's abortion); 10 Guam Code Ann. § 3218.1 (establishing informed consent requirements).

III. Subsequent Proceedings

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973). Following *Dobbs*, in response to a request from members of the 36th Guam Legislature, then-Attorney General Camacho issued an opinion that the Guam Legislature had exceeded its Organic Act authority in enacting the Ban, and that the Ban was void *ab initio* and "has had no legal effect on Guam since its passage." Guam Att'y Gen. Op. No. LEG-22-0324 (July 6, 2022) at 5. Based on this opinion, the provisions of P.L. 20-134 have not been codified in the Guam Code. *See* 9 Guam Code Ann. § 31.20.

In November 2022, Moylan defeated Camacho in the general election for Attorney General of Guam. Days after the election, Attorney General-elect Moylan publicly announced that once he assumed office, he would move to dissolve the injunction in this case.[2] On January 23, 2023, in anticipation of that promised motion, Governor Leon Guerrero requested a declaratory judgment from the Supreme Court of Guam on whether (1) the Ban is void forever, and cannot be revived following the reversal of *Roe*; (2) the passage of the Ban in 1990 was an *ultra vires* act, because it exceeded the Guam Legislature's authority under the Organic Act; and (3) to the extent it is not void or otherwise unenforceable, the Ban has been "impliedly repealed by subsequent legislation the Guam Legislature passed regulating abortion on Guam." Request for Declaratory Judgment, *In re Request of Lourdes A. Leon Guerrero*, No. CRQ23-001, at 18 (Guam Jan. 23, 2023). The Guam Supreme Court accepted jurisdiction over Questions 2 and 3, heard argument on July 25, 2023, and has yet to issue its decision. 3-ER-478–79.

Meanwhile, on February 1, 2023, the Attorney General, citing *Dobbs*, moved pursuant to Federal Rule of Civil Procedure 60(b)(5) to dissolve the injunction and

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[2] John O'Connor, *Incoming AG Seeks to Dissolve Court Injunction Over Guam's Abortion Ban*, Guam Daily Post (Nov. 27, 2022), https://www.postguam.com/news/local/incoming-ag-seeks-to-dissolve-court-injunction-over-guams-abortion-ban/article_34d806fc-6c8f-11ed-ab59-4f407698e570.html.

dismiss this case with prejudice. 2-ER-247–50. Three categories of litigants filed three separate briefs in opposition to the Attorney General's motion.

First, the Governor—a co-defendant in the case—filed a brief opposing dissolution of the injunction, arguing that Guam's Legislature had impliedly repealed the Ban through its subsequent enactment of a statutory framework governing abortion in Guam, and, alternatively, that the Attorney General had failed to establish a significant change in law as to the solicitation prohibition, which continued to violate the First Amendment. 2-ER-132–64.

Second, co-defendant Guam Memorial Hospital ("GMH") filed a brief arguing that Sections 4 and 5 of the Ban criminalized speech protected by the First Amendment and Organic Act, and that the injunction should remain in place at minimum as to those sections or, if the sections were deemed non-severable, in its entirety. GMH further argued that by failing to contest the District Court's holding that these sections violated the First Amendment when Governor Ada appealed in 1990, the government waived argument as to those sections. 2-ER-033–61.

Third, and most important for purposes of this appeal, the Providers filed a thirty-one-page opposition brief explaining in substantial detail why the Attorney General was not entitled to relief. 2-ER-062–102. The Providers argued that the Attorney General could not sustain his burden on either of Rule 60(b)(5)'s prongs—"(1) that there has been 'a significant change in facts or law [that] *warrants revision*

of the decree,' and (2) that 'the proposed modification [is] suitably tailored to the changed circumstance.'" 2-ER-076 (emphasis added) (quoting *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999)).

With respect to the first prong, they explained that although *Dobbs* worked a "significant change" in the law, Fed. R. Civ. P. 60(b)(5), the Attorney General failed to show that this change "warrant[ed] revision" of the injunction, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393 (1992), because the Ban "was void *ab initio* because it exceeded the 20th Guam Legislature's authority under the Organic Act," and was thus *ultra vires* and unenforceable, 2-ER-077–85. And as to the second prong, the Providers argued that the Attorney General failed to show that lifting the entire injunction was suitably tailored to the changed circumstances because the Ban suffered from numerous constitutional infirmities irrespective of *Dobbs*. 2-ER-085–100. These infirmities included Section 5, which criminalizes significant swaths of protected speech—including speech about legal abortion, speech without intent that an illegal abortion occur, and abstract advocacy in favor of abortion—in violation of the First Amendment's overbreadth doctrine. 2-ER-086–96. The infirmities also extended to Sections 3 and 4, which violate the Due Process Clause to the extent they criminalize conduct that is legal where it occurs. 2-ER-096–100.

On March 9, 2023, after all the aforementioned Oppositions had been filed, the District Court issued an order setting March 22 as the deadline for the Attorney General "to file a Reply to all Oppositions." SER-054.

IV. The Attorney General's Failure to Contest the Providers' Counterarguments and the District Court's Order

On March 22, 2023, the Attorney General filed a seven-page reply brief that only addressed the arguments raised by the Governor and GMH. 2-ER-007–014. Tellingly entitled "Defendant Attorney General of Guam Douglas B. Moylan's Reply to 1) Brief Filed by Defendant Lillian Perez-Posadas in her Capacity as Administrator of Guam Memorial Hospital Authority . . . ; and 2) Brief Filed by Defendant Lourdes A. Leon Guerrero in her Official Capacity as *I Maga'hågan Guåhan* in Opposition to Motion to Vacate Permanent Injunction Pursuant to Fed. R. Civ. P. 60(b)(5) and to Dismiss this Case with Prejudice," 2-ER-007, the brief did not mention (let alone contest) the Providers' arguments. Because the Attorney General did not respond to any of the Providers' arguments, many points that the Providers raised, but other parties opposing the motion had not, went entirely unopposed. This includes the Providers' lead argument that *Dobbs* did not warrant modification of the injunction because the Ban was void *ab initio* and is thus unenforceable, as well as multiple reasons why the requested relief was not suitably tailored. The Attorney General is thus wrong to contend that the "main points of dispute" below included whether the Ban "was void *ab initio*." Appellant's Opening

Br. ("AG Br.") at 10. The Attorney General's Rule 60(b)(5) briefing did not dispute that point—or mention the phrase "void *ab initio*"—at all.

On March 24, 2023, the District Court denied the Attorney General's motion. 1-ER-002–005. The court acknowledged that *Dobbs* was a significant change in law, *see* 1-ER-003 n.3, and, applying settled precedent establishing that a Rule 60(b)(5) movant bears the burden of "establishing that [such] changed circumstances *warrant* relief," 1-ER-005 (emphasis added) (citing *Rufo*, 502 U.S. at 393), considered whether the Attorney General had met his burden here.

The court concluded that he had not. As it explained, dissolving the injunction was unwarranted because, "[a]s Plaintiffs have argued, irrespective of *Dobbs* or any other Supreme Court decision concerning abortion issued after [the Ban] was enacted, the [Ban] was a legal nullity the moment it was passed and can have no force or effect today." *Id.* (quotation marks and citation omitted); *see also* 1-ER-004 (reviewing Providers' argument that "because the Guam Legislature lacked the authority" to enact it, the Ban "was void *ab initio*"). The court explained that the Attorney General's reply brief "did not respond to the issues raised in the Plaintiffs' Opposition," and reasoned that, "[b]ased on Defendant AG's lack of response to Plaintiffs' arguments, especially those that did not overlap with the arguments raised by Defendants Governor and GMH Administrator, it is reasonable to presume that Defendant AG takes no position on their arguments or is not contesting them." 1-

ER-004 (citing *Sabra*, 44 F.4th at 881–882; *Maciel v. Cate*, 731 F.3d 928, 932 n.4 (9th Cir. 2013)). The court "reviewed the relevant statutes and the legal authority provided by Plaintiffs in their opposition, to which Defendant AG did not respond," and determined that the Attorney General failed to meet his burden to show that the changed legal circumstances warranted dissolving the injunction against enforcement of a statute that was a "legal nullity." 1-ER-005. Because the District Court concluded at step one of the analysis that the Attorney General failed to prove that modifying the injunction was warranted, it did not proceed to step two to address the substantial tailoring concerns identified in the opposition briefs. *Id.*

The Attorney General never sought leave to file an out-of-time response to the Providers' arguments (which, as far as the District Court's docket is concerned, remain wholly uncontested to this day). Nor did he move for reconsideration of the District Court's decision. He instead took this appeal.

SUMMARY OF ARGUMENT

The District Court correctly denied the Attorney General's motion and did not abuse its discretion in doing so. A Rule 60(b)(5) movant bears the burden of proving not only changed circumstances, but also that those circumstances warrant modifying the injunction and that the proposed modification is suitably tailored. Where an enjoined statute suffers from independent legal infirmities that are unaffected by the change in law—such that the changed legal circumstances are not

sufficient to render permissible what was previously forbidden—modification is unwarranted. That is what the Providers demonstrated in their opposition to the Attorney General's motion: From inception, the Ban exceeded the Guam Legislature's authority under the Organic Act, rendering it void *ab initio* and making dissolution of the injunction unwarranted, irrespective of *Dobbs*.

The Attorney General filed a reply brief that did not dispute—or mention—this or any of the Providers' arguments. Applying well-established Circuit precedent, the District Court correctly determined that such unexplained failure to participate in the adversarial process compelled the conclusion that the Attorney General did not contest the Providers' dispositive counterargument to his motion. Denying the Rule 60(b) motion of a party who bore the burden and not only failed to sustain it, but effectively defaulted, was the very opposite of an abuse of discretion.

The Attorney General's contrary arguments are meritless. His principal contention is that this Court's precedents—particularly *California by and through Becerra v. Environmental Protection Agency*, 978 F.3d 708 (9th Cir. 2020)—compelled the District Court to follow his lead in ignoring the Providers' legal arguments why the Ban was unenforceable irrespective of *Dobbs*. But *Becerra* does not support the Attorney General's argument. The decision holds that courts cannot maintain injunctions based on *equitable* factors alone, which the District Court here did not do. Neither *Becerra* nor any case the Attorney General cites requires courts

to disregard independent *legal* reasons why a request to modify an injunction is unwarranted. Indeed, precedent the Attorney General himself invokes stands for precisely the opposite conclusion.

His remaining points fare no better. After failing to contest the Providers' arguments below that the Ban was void *ab initio*, and that dissolving the injunction *in toto* is not a suitably tailored remedy, the Attorney General has decided—for the first time on appeal—that he would like to be heard on those issues after all. But his arguments (along with any thirteenth-hour justifications he might attempt to raise for the first time in a forthcoming reply brief) have been waived.

The arguments are also wrong on the merits. His argument that the Ban was not void *ab initio* under the Organic Act fails to reckon with that Act altogether, relying instead on the inapposite laws of other jurisdictions that do not impose comparable strictures on legislative authority. As for his newly minted—and waived—suitable tailoring arguments, there is no need for any court to address the myriad tailoring problems that would arise from dissolving the injunction, because the District Court did not abuse its discretion in concluding that modification is unwarranted. But in any event, the Attorney General's request that this Court conduct the tailoring analysis itself and vacate the injunction is wrong procedurally (because tailoring is a matter for district courts to address in the first instance) and substantively (because the Ban violates the First Amendment and the Due Process

Clause and dissolving the injunction would create and perpetuate constitutional violations).

In short, the decision below must be affirmed.

STANDARD OF REVIEW

This Court reviews the resolution of a Rule 60(b) motion for abuse of discretion. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021). "Abuse-of-discretion review is highly deferential," *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012), and this Court "cannot simply substitute [its] judgment for that of the district court," *Flores v. Huppenthal*, 789 F.3d 994, 1001 (9th Cir. 2015) (citation omitted). The decision below must be upheld if it "falls within a broad range of permissible conclusions in the absence of an erroneous application of law." *Microsoft Corp.*, 696 F.3d at 881 (citation omitted).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Determining That the Attorney General Failed to Meet His Burden Under Rule 60(b)(5).

The District Court acted well within its discretion in concluding that the Attorney General failed to satisfy his burden under Rule 60(b)(5). Given that the Attorney General failed not only to refute the Providers' arguments demonstrating the legal insufficiency of his motion, but failed even to file a reply brief in response to those arguments for a motion on which he bore the burden of proof, his challenge is untenable.

Rule 60(b) is a narrow exception to the general rule of finality that balances the demands of res judicata with courts' inherent authority to modify final orders. *Rousseau*, 985 F.3d at 1097. "A district court's authority to modify an injunction is more limited than its authority to formulate an injunction in the first instance because of the additional interest in the finality of judgments." *Id.*; *accord* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2851 (3d ed.). The Rule provides that a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" in limited circumstances, including when "applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Under Rule 60(b)(5), the movant bears the burden of establishing both (1) that there has been "a significant change in facts or law [that] warrants revision of the decree," and (2) that "the proposed modification [is] suitably tailored to the changed circumstance." *Bellevue*, 165 F.3d at 1255 (quoting *Rufo*, 502 U.S. at 393).

Here, the District Court correctly held—and did not abuse its discretion in holding—that the Attorney General failed to sustain his burden of establishing that a change in law "warrants revision" of the injunction at step one of this test. *Rufo*, 502 U.S. at 393. No one disputes that *Dobbs* worked a significant change in decisional law. However, as the District Court correctly recognized, 1-ER-005, under Rule 60(b)(5), simply pointing to a change in decisional law may not suffice to establish a change that "warrant[s] modification" of an injunction. *Rousseau*, 985

F.3d at 1097 (citation omitted). Where an enjoined statute suffers from independent legal infirmities that are unaffected by the asserted change in decisional law—such that the change in law does not make "what was previously forbidden" now "permi[ssible]," *Becerra*, 978 F.3d at 717—modification is unwarranted, *see Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 914 (8th Cir. 2005); *see also* Section II.A.1, *infra*. That is exactly what the Providers showed, what the Attorney General failed outright to contest, and what the District Court correctly concluded here.

In particular, the Providers demonstrated that the Attorney General had not established a change in law warranting modification of the injunction because the enjoined Ban exceeded the 20th Guam Legislature's authority under the Organic Act and was thus void *ab initio*. 2-ER-077–085. "The Organic Act serves the function of a constitution for Guam." *Haeuser v. Dep't of L.*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also In re Request of Guerrero*, 2021 Guam 6 ¶ 33 (Guam July 2, 2021). "[I]t provides for the three branches of government consistent with the constitutional structure of the United States and the powers of each branch flow from, and are limited by the Organic Act." *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980). Under the Organic Act, the Guam Legislature's authority to pass laws extends only to "rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a; *see also*

United States v. Borja, 191 F. Supp. 563, 566 (D. Guam 1961) ("[T]he Guam Legislature's power to legislate is prescribed and limited by the Organic Act, by other acts of Congress and by provisions of the United States Constitution."). In other words, the legislature has no authority to pass laws that violate the Organic Act or the laws of the United States applicable to Guam. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 36 (Guam Feb. 7, 2002) ("[T]he Legislature is prohibited from enacting laws that are inconsistent with the Organic Act.").

Under the Organic Act and precedent interpreting it, legislation that exceeds the Guam Legislature's authority is deemed inorganic, invalid and void from inception. *See Baldwin*, 624 F.2d at 934–35 (holding legislation limiting Governor's authority exceeded legislature's power under the Organic Act and was invalid); *In re Request of Guerrero*, 2021 Guam 6 ¶ 55 (holding that where the "Legislature . . . exceeded its power" under the Organic Act, its legislative act was "inorganic and void"); *In re Request of Calvo*, 2017 Guam 14 ¶¶ 21, 50 (Guam Nov. 29, 2017) (holding legislation exceeding legislature's authority under the Organic Act was inorganic, "invalid and void").

As the Providers argued in opposition to the Attorney General's Rule 60(b)(5) motion, when the Ban was passed in 1990, the United States Constitution and binding Supreme Court precedent interpreting it—including *Roe v. Wade*—were established United States law applicable to Guam. *See* 48 U.S.C. § 1421b(u)

(extending, *inter alia*, "the second sentence of section 1 of the fourteenth amendment" to Guam, and stating that these amendments "shall have the same force and effect [in Guam] as in the United States or in any State of the United States"); *Ada*, 962 F.2d at 1371 ("The first issue is not hard to resolve. Guam's [Ban] makes no attempt to comply with *Roe*."); *Ada*, 776 F. Supp. at 1429.[3] And because the Ban was, at the time of its enactment, plainly "inconsistent with . . . the laws of the U.S. applicable to Guam," 48 U.S.C. § 1423a, its passage was an inorganic, *ultra vires* act that exceeded the legislature's authority. It was thus a legal nullity from the moment of its enactment that cannot be enforced. *See Gutierrez v. Guam Election Comm'n*, 2011 Guam 3, ¶ 38 (Guam Feb. 3, 2011) (*ultra vires* acts are void). Indeed, that was the precise conclusion of the Attorney General's immediate predecessor, who rendered a formal opinion days after *Dobbs* was decided announcing that "[b]ecause the 20th Guam Legislature did not have the power to pass [the Ban] in the first place, it is void *ab initio* and has had no legal effect in Guam since its passage." Guam Att'y Gen. Op. No. LEG-22-0324 at 5.

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[3] Even the Ban's sponsor, Senator Arriola, and then-Attorney General Barrett-Anderson conceded at the time that the Ban was unconstitutional under *Roe*. *See* Amy Goodman, *Guam Territory in Turmoil*, On The Issues Magazine (Dec. 14, 1990), https://ontheissuesmagazine.com/international/guam-territory-in-turmoil/ (quoting Senator Arriola stating that, "I knew if [the judge] went according to *Roe v. Wade*, he would rule this way."); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 718–20 (9th Cir. 1996) (reproducing "Guam attorney general's opinion letter predicting unconstitutionality of legislation that became Guam abortion statute").

The Attorney General's answer to these arguments? Dead silence. His reply brief to the District Court in support of a motion on which he bore the burden of proof, *Rufo*, 502 U.S. at 383, ignored the Providers' argument that the Ban was void *ab initio*—and indeed their opposition brief altogether—without explanation. In none of his Rule 60(b)(5) briefing below did he contest or even mention the void *ab initio* concept at all.[4] And he never sought to rectify those deficiencies by, *e.g.*, seeking leave to file an out-of-time response. *See Swaim v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir. 1996) (when "a party chooses to utilize the attention and limited resources of a district court in a motion under Rule 60(b), we think it just and proper that it be required to put before the district court whatever infirmities support" its motion).

It is a gross understatement to say that the District Court did not abuse its discretion in denying the Attorney General's motion under these circumstances. Applying well-settled principles governing the abandonment of arguments and claims, *see, e.g.*, *Sabra*, 44 F.4th at 882, the District Court appropriately reasoned that the Attorney General took "no position on," or did "not contest[]," the

[4] The Attorney General says that he "did respond to Plaintiffs' void *ab initio* arguments." AG Br. at 31. As set forth in detail in Section II.B.1, *infra*, that is false—the Attorney General addressed the void *ab initio* topic in a response to the Governor's motion for abstention that preceded the Providers' filing, but in that response took no substantive position on whether or not the Ban was, in fact, void. 2-ER-112–13.

Providers' lead counterargument that modification of the injunction was unwarranted because the Ban was an unenforceable legal nullity, 1-ER-004. Given that "[o]ur system of justice is adversarial, and our judges are busy people," if courts are "given plausible reasons" to deny a motion, they will not "do the [movant's] research and try to discover whether there might be something to say against the [adversary's] reasoning." *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999). Nevertheless, the District Court undertook to do what the Attorney General did not, "review[ing] the relevant statutes and the legal authority provided by [the Providers] in their opposition," before ultimately confirming under these unrefuted authorities that the Attorney General failed to meet his burden under Rule 60(b)(5). 1-ER-005.

This decision was not an abuse of discretion—this Court has, on numerous occasions, concluded that Rule 60(b) movants failed to sustain their burden in more closely contested circumstances. *See, e.g.*, *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008); *United States v. Asarco Inc.*, 430 F.3d 972, 984 (9th Cir. 2005); *Jeff D. v. Kempthorne*, 365 F.3d 844, 854 (9th Cir. 2004); *S.E.C. v. Coldicutt*, 258 F.3d 939, 945 (9th Cir. 2001). No less fundamentally, as a practical matter, endorsing the Attorney General's position here—that a district court somehow *abuses its discretion* when it denies a motion that the movant has failed outright to sustain on reply—would put district courts faced with similar defaults in the impossible

position of divining a movant's unspoken, abandoned arguments. That is not how our adversarial system or abuse-of-discretion review works, *see Kirksey*, 168 F.3d at 1041—particularly in the case of a sophisticated litigant, who is himself an attorney (and indeed Guam's chief legal officer), and who is represented by counsel.

Because the District Court did not abuse its discretion in determining that the Attorney General failed to establish a change in law that warranted modification of the injunction under these circumstances, the decision below must be affirmed.

II. The Attorney General's Arguments to the Contrary Are Unavailing.

Glossing over his abject nonengagement on the dispositive issue below, the Attorney General advances a series of arguments, many of which are waived and all of which are meritless. *First*, he asserts that the District Court should have followed his lead in ignoring the Providers' void *ab initio* arguments, contending that this Court's Rule 60(b)(5) precedents directed the District Court to disregard independent legal reasons why a request to modify an injunction is unwarranted. But that argument is unsupported by the cases he cites, which point in exactly the opposite direction. *Second*, for the first time in this litigation, the Attorney General addresses the substance of the void *ab initio* argument, but his failure to make these arguments below forecloses his attempt to do so on appeal. And in any event, the arguments are wrong on the merits, due in large measure to his failure to reckon with Guam's Organic Act and applicable precedent. *Third*, the Attorney General seeks to

contest some of the Providers' suitable-tailoring arguments for the first time on appeal. But those arguments are waived (because the Attorney General did not raise them below); irrelevant (because the District Court's ruling on the first *Rufo* prong was correct, so no court need address the tailoring problems that would arise from dissolving the injunction); procedurally unsound (because tailoring is a question for district courts to answer in the first instance); and substantively incorrect. The decision below must be affirmed.

A. The District Court Applied the Correct Rule 60(b)(5) Standard.

1. *Where a Legal Basis for Not Dissolving an Injunction Exists, Modification Is Unwarranted.*

The centerpiece of the Attorney General's argument is his repeated contention that once *Roe* was overturned, this Court's decision in *Becerra* compelled the District Court to ignore the Ban's remaining legal infirmities and mechanically dissolve the injunction. AG Br. at 15–20, 29–30. But *Becerra* held no such thing. To the contrary, while *Becerra* bars courts from maintaining injunctions based on *equitable* factors alone, neither it nor any case the Attorney General cites requires courts to disregard independent *legal* reasons why a request to modify an injunction is unwarranted. Indeed, precedent the Attorney General himself invokes holds exactly the opposite, establishing that a change in law does not warrant dissolution of an injunction where an enjoined statute is unenforceable for reasons unaffected by the changed legal circumstances.

In *Becerra*, this Court addressed the question of whether a district court faced with a Rule 60(b)(5) motion may undertake a "broad, fact-intensive inquiry" into the equities of maintaining an injunction even when there exist no legal grounds warranting continued injunctive relief. 978 F.3d at 715–16. The district court had entered an injunction requiring the EPA to promulgate landfill emissions guidelines within six months because the agency missed a deadline established by the agency's own prior regulations. *Id.* at 710–11. Thereafter, the EPA promulgated new regulations establishing a later regulatory timeline. *Id.* at 711. Since the new regulations eliminated the sole legal reason that could justify ordering the EPA to act by the date set forth in the injunction, the agency moved for Rule 60(b)(5) relief. *Id.* The district court denied the motion, basing its decision not on whether the plaintiff-states had any *legal* entitlement to ongoing injunctive relief, but instead on *equitable* considerations involving a "balancing of the harms to the parties." *Id.* at 714. This Court reversed, holding that "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 (emphasis added).

The Attorney General stretches *Becerra* well beyond its holding. He insists that the decision bars district courts from addressing whether an enjoined law suffers from independent legal infirmities distinct from those affected by the "significant change in . . . law." Fed. R. Civ. P. 60(b)(5). But *Becerra* did not consider, let alone

decide, whether courts reviewing Rule 60(b)(5) motions must pretend that such unaffected legal infirmities do not exist. To the contrary, the plaintiff-states in that case conceded that there were no remaining *legal* grounds that could justify ongoing injunctive relief;[5] the district court's refusal to dissolve the injunction turned on purely equitable, non-legal considerations, *Becerra*, 978 F.3d at 718; and this Court held that such balance-of-hardship equities, standing alone, cannot justify ongoing injunctive relief because there must always be "an operative *legal* basis for imposing and maintaining an injunction," *id.* at 717 (emphasis added). In contending that *Becerra*'s holding extends beyond prohibiting courts from maintaining injunctions based exclusively on non-legal equities, the Attorney General mischaracterizes the decision.[6]

Nor are there sound reasons for this Court to extend *Becerra* to fit the Attorney General's misapprehension. Consider the following hypothetical: A state law

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[5] *See* Appellees' Br., *Becerra*, 978 F.3d 708, 2020 WL 1452838, at *23 (asserting entitlement to relief even if "the law no longer requires what the judgment commands").

[6] Contrary to the Attorney General's contention, the Providers have not argued that a different Rule 60(b)(5) standard applies to mandatory and prohibitory injunctions. AG Br. at 18. Rather, the Providers drew the distinction between the mandatory injunction in *Becerra*, which required the government to comply with a specific legal duty to act that had since been eliminated, and the prohibitory injunction in this case, which restrained Guam from enforcing a statute that exceeded limits on its authority. Here, "what was previously forbidden" *remains* forbidden, *Becerra*, 978 F.3d at 717, and therefore, unlike *Becerra*, a legal basis for not dissolving the injunction exists.

prohibits non-white people from purchasing firearms, which a district court enjoins on Second Amendment grounds. Thereafter, the Supreme Court overturns *District of Columbia v. Heller*, 554 U.S. 570 (2008), on which the district court's injunction was based, and the state moves to lift the injunction pursuant to Rule 60(b)(5). In the Attorney General's telling, *Becerra* dictates that a district court must reflexively allow this racially discriminatory, patently unconstitutional statute to take effect. It requires this outcome, the Attorney General insists, notwithstanding that racially discriminatory laws are "forbidden," not "permit[ted]," *Becerra*, 978 F.3d at 717; notwithstanding precedent uniformly holding that a Rule 60(b)(5) movant must establish that a change in law "justifies" lifting the injunction, *Nat'l Lab. Rels. Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Loc. 433*, 891 F.3d 1182, 1186 (9th Cir. 2018); and notwithstanding the Supreme Court's unequivocal command that courts weighing Rule 60(b)(5) motions "must not create or perpetuate a constitutional violation," *Rufo*, 502 U.S. at 391. And *Becerra* compels this outcome, again per the Attorney General, notwithstanding that "an operative legal basis" for continuing to block the law—namely, its flagrant unconstitutionality as a race-based classification—plainly exists. *Becerra*, 978 F.3d at 717.

To state this premise is to refute it. *Becerra* did not adopt the holding the Attorney General misattributes to it because the question of whether courts must

disregard separate *legal* bases for an enjoined law's invalidity was not remotely at issue, and extending *Becerra* to align with the Attorney General's misreading would lead to absurd results.

Unsurprisingly, courts have not adopted the rule the Attorney General erroneously ascribes to *Becerra*. Indeed, *Prudential Insurance Company v. National Park Medical Center*, cited (but again misinterpreted) by the Attorney General, *see* AG Br. at 19, stands for exactly the opposite proposition, 413 F.3d 897 (8th Cir. 2005). There, the Eighth Circuit addressed whether recent changes in ERISA law required the dissolution of an injunction that had blocked enforcement of an Arkansas statute under ERISA's express preemption provision, Section 514. *Id.* at 907. Directly contrary to the Attorney General's arguments here, the Eighth Circuit explained that it was "*compel[led]*" to consider two legal arguments for maintaining the injunction that were unrelated to the order's original basis, *id.* (emphasis added)—first, that the Arkansas legislature had impliedly repealed the enjoined statute, *id.* at 905–06; and second, that provisions of the statute were invalid under a different ERISA provision governing complete preemption, Section 502, *id.* at 913 (describing the latter argument as "an issue that was not presented" to the Eighth Circuit at earlier stages of the case).

Prudential held that aspects of the injunction had to be preserved under this second theory. 413 F.3d at 914–15. That's because, in *Becerra*'s terminology,

ERISA Section 502 afforded "an operative legal basis" for continuing to block those provisions of the statute, which remained legally "forbidden," not "permit[ted]," under it. *Becerra*, 978 F.3d at 717.

And although the Eighth Circuit concluded under the circumstances that the Arkansas legislature had not impliedly repealed the enjoined law, *Prudential* further underscores the irrationality of the Attorney General's remarkable contention that the "validity" of an enjoined statute is "irrelevant" because Rule 60(b)(5) requires courts to focus myopically on the "law the . . . injunction was based on" and disregard any other grounds for the statute's invalidity. AG Br. at 29; *see also id.* at 31. Were that astonishing position correct, a court would be compelled to mechanically dissolve an injunction, no matter that the legislature had since repealed (impliedly or otherwise) the enjoined statute. That is not the law. *See Prudential*, 413 F.3d at 905–06; *cf. Planned Parenthood Ariz. v. Brnovich* ("*PPAZ*"), 524 P.3d 262, 265 (Ariz. Ct. App. 2022) (under Arizona analogue to Rule 60(b)(5), rejecting argument that courts are "not permitted to consider anything other than whether the constitutional principles forming the basis for the injunction were still valid"), *cert. granted sub nom. Planned Parenthood Ariz. v. Mayes*, 23-0005-PR (Aug. 22, 2023).[7]

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[7] *Prudential* likewise refutes the Attorney General's unsupported statement that courts must permit invalid laws to take effect and await "a new lawsuit" to block them. AG Br. at 39. The Eighth Circuit did not require such hoop-jumping, but instead directed that the injunction be reinstated to block aspects of the Arkansas law that violated ERISA Section 502. *Prudential*, 413 F.3d at 914.

None of the Attorney General's remaining cases are to the contrary. *See* AG Br. at 17, 19–20. He invokes cases standing for the unremarkable premise that a "court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Sys. Fed'n No. 91, Ry. Emps. v. Wright*, 364 U.S. 642, 647 (1961)); *accord State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431–32 (1855) (where no ongoing legal basis for a decree exists, modification is warranted); *Cal. Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1032 (9th Cir. 2008) (same as to injunctions); *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) (same), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). But he does not cite a single case holding that courts must disregard independent legal bases for an enjoined statute's invalidity when considering whether dissolution of an injunction is warranted. The only decision he cites where such alternative bases were raised makes clear that courts "must address" them. *Prudential*, 413 F.3d at 905.

The Attorney General fares no better when he says that the decision below "directly conflicts with similar post-*Dobbs* decisions" in federal and state court. AG Br. at 20–22. As an initial matter, many of the cited orders are not remotely analogous because they involved, *e.g.*, motions by plaintiffs to dismiss their own

cases and vacate injunctions (including preliminary injunctions), not contested Rule 60(b)(5) motions. *See, e.g.*, *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022) (vacating preliminary injunction "with the parties' consent"); *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, No. 3:18-224-DJH, 2022 WL 19560712, at *1 (W.D. Ky. Aug. 17, 2022) (granting parties' joint motion to vacate injunction); *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-00508-MGL, 2022 WL 2905496, at *4 (D.S.C. July 22, 2022) (granting plaintiffs' motion to dismiss without prejudice).

Far more importantly, in *none* of the cited cases did a party opposing dissolution of an injunction show that modification was unwarranted due to a separate legal basis for the enjoined statute's unenforceability. By contrast, in a post-*Dobbs* decision conspicuously absent from the Attorney General's brief, the Court of Appeals of Arizona held that the trial court committed reversible error when it did exactly what the Attorney General argues was required here. *PPAZ*, 524 P.3d at 265. The trial court in *PPAZ* had mechanically dissolved an injunction against an abortion ban because it believed that "it lacked authority" under Arizona's analogue to Rule 60(b)(5) to look anywhere "beyond [the question of] whether *Roe* was still in force." *Id*. The Court of Appeals reasoned that this crabbed approach—the exact approach urged by the Attorney General here—was incorrect, because it was necessary to consider other arguable legal bases for preserving or modifying the injunction (there,

whether the ban had been impliedly repealed and, separately, whether it could be harmonized with other Arizona statutes). *Id.* at 265–66. So too here.[8]

In sum, the Attorney General's argument that courts must ignore an enjoined statute's potential legal infirmities that are unaffected by changed legal circumstances is unsupported by *Becerra* or the other cases he cites. Those decisions instead require affirmance of the decision below. The District Court did not engage in a "broad, fact-intensive inquiry" into non-legal equities or a "balancing of the harms to the parties." *Becerra*, 978 F.3d at 714–16. Instead, it correctly determined that the changed legal circumstances the Attorney General identified did not warrant dissolving the injunction because under Guam's Organic Act, the Ban "was a legal nullity the moment it was passed and can have no force or effect today," 1-ER-005 (quotation marks and citation omitted)—a point the Attorney General did not even bother to contest. In other words, irrespective of *Dobbs*, enforcement of the Ban was legally "forbidden," not "permi[ssible]." *Becerra*, 978 F.3d at 717; *accord Prudential*, 413 F.3d at 914. The Attorney General's cases only reinforce that the District Court applied the correct standard and did not abuse its discretion.

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[8] That the Ban is void under Guam's Organic Act does not mean that Guam is "captive to the now-defunct *Roe*," AG Br. at 21, any more than the implied repeal and statutory harmonization issues in *PPAZ* threatened to impose *Roe* on Arizona. In both cases, legal concerns with the statutes independent of *Dobbs* required analysis of whether lifting the injunctions was warranted, just as ERISA Section 502 provided a basis for not dissolving portions of the injunction in *Prudential*, 413 F.3d at 914.

2. *The District Court Did Not Impose an Erroneous "Burden-Shifting" Framework.*

Building on his misreading of *Becerra*, the Attorney General reverse-engineers a narrative to excuse his failure to contest the Providers' arguments before the District Court and shift blame to that court for agreeing with the unrebutted arguments. That narrative goes as follows: (a) Because *Becerra* supposedly compelled the District Court to ignore any legal bases for preserving the injunction that were unaffected by *Dobbs*, the Attorney General was entitled to ignore the Providers' argument that the Ban was void *ab initio* without explanation; and (b) when the District Court agreed with the Providers' unaddressed, unrebutted counterargument, it "built a burden-shifting framework" that was unfair to the Attorney General. AG Br. at 23. Both premises are incorrect.

Premise (a) is wrong, largely for the reasons set forth in Sections I and II.A.1, *supra*. At step one of the *Rufo* analysis, a Rule 60(b)(5) movant must show not just the existence of a change in circumstances but that the change "warrants revision" of the injunction. *Rufo*, 502 U.S. at 393. The Providers' opposition to the Rule 60(b)(5) motion explained at length why the change in law did not warrant lifting the injunction. 2-ER-062–102. The Attorney General was not entitled to ignore those arguments—a decision he never sought to rectify before the District Court and barely

acknowledges here. *See Sabra*, 44 F.4th at 882 (parties who disregard an opponent's counterargument do so at their peril).[9]

Premise (b) is wrong because the Attorney General's extravagant contention that the District Court erected "a heretofore-unknown burden-shifting framework" mischaracterizes the District Court's run-of-the-mill application of familiar principles of motion practice and docket management. AG Br. at 23–24. What this Court has said of appellate practice applies equally to district-court motion practice: "[M]onitoring the arguments raised by one's opponent and responding as necessary in the reply brief is a basic part of vigilant[]" motion practice. *Sabra*, 44 F.4th at 882; *accord Knibbs v. Momphard*, 30 F.4th 200, 229 n.11 (4th Cir. 2022) ("outright failure to join in the adversarial process" results in concession of uncontested points (citation omitted)); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("silence resulting" from failure to file responsive brief "is deafening," compelling the conclusion that non-vigilant party "concede[s]" unrebutted points); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1110 (9th Cir. 2010) (failure to address certain issues results in concession); *Gwaduri v. I.N.S.*, 362 F.3d 1144, 1146

[9] Contrary to the Attorney General's assertion, AG Br. at 23, the District Court did acknowledge the changed legal circumstances, *see* 1-ER-002 n.3. But it also correctly recognized that, standing alone, that is not enough, because the movant must show that those "circumstances *warrant* relief," 1-ER-005 (citing *Rufo*, 502 U.S. at 393 (emphasis added)).

n.3 (9th Cir. 2004) (party failing to file responsive brief "is deemed to have waived his opposition" and "may not now complain on appeal" (citation omitted)).

The District Court applied this settled law in determining that the Attorney General did not contest the Providers' showing that the Ban was void *ab initio*, and that Rule 60(b)(5) relief was thus unwarranted where the underlying statute was a "legal nullity." 1-ER-005. Nor did the District Court simply accept the Providers' argument at face value—it "reviewed the relevant statutes and the legal authority provided by Plaintiffs in their opposition, to which Defendant AG did not respond." *Id*. The court did not "flip[] the burden" in novel ways in so ruling, AG Br. at 23, but employed familiar principles that routinely apply when, as here, a party bears the burden of proof but "fail[s] to contest an argument in its reply brief even after it had been squarely presented in the answering brief," *Sabra*, 44 F.4th at 882. It manifestly did not abuse its discretion in so doing.

B. The Ban Is Void *Ab Initio*, and the Attorney General Waived Arguments to the Contrary.

The District Court was correct that the Attorney General failed to respond to the Providers' void *ab initio* arguments, 1-ER-004–005, and as a result, the Attorney General has waived the ability to raise any objections to those arguments. He should not be permitted, for the first time on appeal, to advance arguments he waived before the District Court. Simply put, the Attorney General's waiver should foreclose consideration of these new arguments. *See Raich v. Gonzales*, 500 F.3d 850, 868–

69 (9th Cir. 2007). Further, this Court should not entertain any new arguments attempting to overcome his waiver that the Attorney General might attempt to raise on reply, which he similarly failed to articulate in his opening brief. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

But even if this Court were to consider the Attorney General's new response, it is plainly insufficient to establish an abuse of discretion below. As the Providers established and the District Court correctly determined, the Ban exceeded the Guam Legislature's authority under the Organic Act when it was passed, and was therefore *ultra vires* and null and void from its inception. That *Dobbs* has since overturned *Roe* does not alter this fact. Because the Ban was void *ab initio*, there is no law in place that could be resurrected by *Dobbs*.

1. *The Attorney General Waived Arguments Below, and Waived His Ability to Raise Them for the First Time on Appeal.*

The Attorney General has doubly waived any response to the Providers' argument that the Ban was void *ab initio*—first, by failing to respond to the argument in the District Court, and second, by failing in his principal brief to address how he can overcome the presumption against raising new arguments on appeal. "It is well-established that an appellate court will not consider issues that were not properly raised before the district court," as the party has "waive[d] the right to challenge the issue on appeal." *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) (cleaned up) (citation omitted). Although there are narrow exceptions, a party

must still address in their opening brief whether a particular exception might apply to their waived argument, and "whether the particular circumstances of the case overcome [this Court's] presumption against hearing new arguments." *Raich*, 500 F.3d at 868 (internal quotation marks omitted). That's because, just as with arguments not raised in the district court, "on appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith*, 194 F.3d at 1052.

i. The Attorney General waived his arguments concerning the Ban's voidness.

As a threshold matter, contrary to his contentions on appeal, AG Br. at 31–32, the Attorney General did not respond to the Providers' void *ab initio* argument before the District Court. The only instance the Attorney General identifies where he allegedly addressed the Ban's voidness was his response to an earlier-filed abstention motion by the Governor. AG Br. at 31.[10] That response to the Governor's abstention motion was filed *before* the Providers' opposition to the motion to vacate was filed, and it was Providers' brief that advanced the argument that the Ban was void *ab initio*. *Compare* 2-ER-106 (filed Mar. 8, 2023, Dkt. No. 388) *with* 2-ER-062 (filed Mar. 8, 2023, Dkt. No. 391). As a practical matter, the Attorney General could not have addressed arguments in a brief not even on file yet.

[10] In response to the Attorney General's Rule 60(b)(5) motion, the Governor had requested that the District Court abstain from further proceedings in the case to allow the Guam Supreme Court to resolve matters of related local law. 2-ER-216–32.

Far more fundamentally, the Attorney General's abstention opposition did not argue against the Ban's voidness and indeed took no substantive position on that issue. 2-ER-112–13 (Attorney General noting the Guam Supreme Court "infers" that he does not view the Ban as void *ab initio*, but declining to address "[w]hether or not that inference is accurate"). His statements concerned process, not substance. 2-ER-108, 112–13. And those statements (1) were non-responsive to the substantive voidness arguments the Providers raised and that the Attorney General failed to contest, and (2) bear no similarity to the arguments he now raises on appeal. His newly-raised arguments—that the Ban is not void because (1) the Guam Legislature did not know that *Roe* applied to Guam when it passed the Ban since a federal court had not yet explicitly declared as much, and (2) the Court is only now considering the void *ab initio* question, after *Dobbs* overruled *Roe*, AG Br. at 32–39—appear nowhere in any brief filed by the Attorney General before the District Court. Mere "references" to an issue, particularly where they are responsive to a separate substantive matter (here, abstention), are not enough to present it to the district court or preserve it for appeal. *Smith*, 194 F.3d at 1052 n.5; *see also Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) ("[A] mere passing reference . . . is not sufficient to raise that claim before the district court, and does not preserve the claim for our review.").

Moreover, as noted above, when the Attorney General filed a reply in support of his Rule 60(b)(5) motion, it addressed only the Governor's and GMH's oppositions to his motion—not the Providers', even though the Providers' brief was filed weeks earlier, and even though the District Court had clearly instructed that he respond to "all Oppositions" by the same deadline. 2-ER-007; SER-054. And crucially, as the District Court found, nowhere did his reply address why the Ban is not void. 1-ER-004. The Attorney General had every incentive to rebut the Providers' void *ab initio* arguments before the District Court: He was the moving party who bore the burden of proof. And he was undeniably aware of the importance of this argument, as his predecessor in office had issued an Attorney General Opinion that aligned with Providers' void *ab initio* position just eight months prior. Guam Att'y Gen. Op. No. LEG-22-0324 (July 6, 2022) at 3–7. This Court should not consider the Attorney General's "newly minted" arguments, as "[t]he district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal." *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996).

ii. The Attorney General has waived any argument that he can advance new arguments on appeal.

Because the Attorney General did not actually respond to the Providers' void *ab initio* arguments in the District Court, it was incumbent on him to address in his opening brief why he should be permitted to overcome that waiver before this Court

considers his arguments. *See United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987). He did not, and should not be permitted to do so for the first time on reply. *Smith*, 194 F.3d at 1052. Since the Attorney General "failed to raise this claim before the district court and before this court in [his] appeal," any arguments he might seek to advance for the first time in a reply brief are "waived," *Raich*, 500 F.3d at 868–69, under settled principles meant "to prevent sandbagging of appellees," *Novak v. Cap. Mgmt. & Dev. Corp.*, 570 F.3d 305, 316 n.5 (D.C. Cir. 2009) (cleaned up).

The Attorney General was well aware that the District Court determined that his non-response to the void *ab initio* arguments meant he did not contest and/or took no position on those arguments. 1-ER-004. Yet his opening brief makes no attempt to overcome the presumption against deciding waived arguments on appeal, and fails even to address why he should be able to raise arguments he waived before the District Court. Ultimately, "[a] party's unexplained failure to raise an argument that was indisputably available below is perhaps the least 'exceptional' circumstance warranting [this Court's] exercise of this discretion." *G & G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018).

* * *

The Attorney General is a sophisticated litigant. Where "a sophisticated party, represented by able counsel" knows that he must respond to an opponent's

counterargument and "fail[s] to do so without explanation," he is not entitled to have those waived arguments heard on appeal. *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 602 (7th Cir. 2020); *see also United States v. Smith*, 506 F. App'x 600, 602 n.3 (9th Cir. 2013) ("[T]he party who failed to raise arguments in a timely fashion is not a party to whom we feel especially compelled to grant the benefit of the doubt—someone who like a pro se petitioner is bereft of legal guidance and litigation experience. Rather, it is the federal government."). This Court should not reward a party that has twice failed to raise his arguments in a timely way because litigants are not permitted "to opt out of the adversarial system until appeal." *Alioto v. Town of Lisbon*, 651 F.3d 715, 722 (7th Cir. 2011); *see also Handa*, 401 F.3d at 1132 ("Briefly stated, a party cannot treat the district court as a mere ill-placed bunker to be circumvented on his way to this court where he will actually engage his opponents.").

2. *The Attorney General's Arguments Do Not Undermine the Decision Below.*

While this Court should not entertain the Attorney General's waived arguments, they do not affect the outcome in the slightest. Whether the Guam Legislature knew *Roe* applied in Guam at the time it passed the Ban is irrelevant to determining whether it exceeded its authority in doing so, which it did. And the Attorney General's remaining arguments run aground against the unique limits the

Organic Act places on the Guam Legislature's authority. If considered—which they should not be—these arguments fail across the board.

i. *Whether the Legislature knew the Ban violated Roe is irrelevant.*

The Attorney General's first argument that the Guam Legislature would not have "known" that *Roe* applied to Guam at the time it passed the Ban because a federal court had not yet explicitly held as much is both irrelevant and incorrect. AG Br. at 33–34. He offers no reason why such knowledge is legally relevant. And indeed, it is not relevant: If the Legislature had no authority to enact a law because it violates the Organic Act, then it exceeded its power, irrespective of the Legislature's knowledge. *See Baldwin*, 624 F.2d at 934–35.

The Attorney General is correct that an explicit "act of Congress is required to extend constitutional rights to the inhabitants of unincorporated territories," *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002), but the 1968 Mink Amendment to the Organic Act is that act. As this Court observed, one "can scarcely imagine . . . any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments 'have the same force and effect' in Guam as in a state of the United States." *Ada*, 962 F.2d at 1370.

Moreover, while the Legislature's knowledge that its enactment was unlawful is irrelevant, myriad contemporaneous statements show that it was widely assumed that *Roe* applied to Guam, prior to any federal court decision confirming as much,

and that the Ban violated *Roe*. *See* 2-ER-080. Senator Arriola, who introduced the Ban, was advised by her legal counsel "that the Bill as introduced would probably be struck down because . . . a judge would probably find that this bill was not in keeping with *Roe v. Wade*." *Ada*, 776 F. Supp. at 1425 (internal quotation marks omitted). And Guam's then-Attorney General informed the Legislature that the Ban violates *Roe* and would be held unconstitutional. *Id.*

What matters is whether *Roe* applied to Guam when the Ban was enacted. It did. *Ada*, 962 F.2d at 1370. As such, the Ban was plainly "inconsistent with . . . the laws of the United States applicable to Guam," 48 U.S.C. § 1423a, when it was passed, and was therefore inorganic and ultra vires—irrespective of the Legislature's knowledge to that effect—and thus necessarily void *ab initio*.

ii. The Ban was a nullity when passed, so any later change in the law is irrelevant.

The Attorney General's arguments disregard the limits the Organic Act places on the Guam Legislature's authority. Indeed, the Attorney General barely attempts to address or reckon with the Organic Act, and its significance for inorganic enactments, at all.

The power of Guam's Legislature is expressly "constrained by the Organic Act, and the courts must invalidate Guam statutes in derogation of the Organic Act." *Haeuser*, 97 F.3d at 1156; *see also Borja*, 191 F. Supp. at 566; *In re Request of Guerrero*, 2021 Guam 6 ¶ 34 (quoting *Baldwin*, 624 F.2d at 934). The Legislature

"may not enact a law" in violation of the Organic Act, a "limitation on the Legislature's power . . . which prohibits the Legislature from enacting laws that are inconsistent with the provisions of [the Organic Act] and the laws of the United States applicable to Guam." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 36 (internal quotation marks omitted); *see also In re Request of Camacho*, 2004 Guam 10 ¶ 33 (Guam June 11, 2004). This Court and the Guam Supreme Court have held that where the Guam Legislature exceeds its power, the law is "inorganic and void." *In re Guerrero*, 2021 Guam 6 ¶ 55; *see also Baldwin*, 624 F.2d at 934–35.

Courts treat the Organic Act not as a federal law that may preempt local territorial law, but as the source of and limit upon the Legislature's very authority to pass those laws. *See In re Request of Calvo*, 2017 Guam 14 ¶ 20 (Guam Nov. 29, 2017) ("The Organic Act *itself*, however, is the source of authority for the Legislature to act. It is not parallel federal legislation 'applicable to Guam' that governs the same general issue as local Guam legislation."). Because the "powers of the Government of Guam are necessarily limited by the Organic Act and Congress did not vest the Government of Guam with authority to pass legislation or rules inconsistent therewith," then "if any local laws or rules violate [the Organic Act], the statute or rules are said to be inorganic." *Id*. at ¶ 21.

And importantly, under the Organic Act, inorganic and void enactments that exceed the Legislature's authority are invalid from the point of inception. *See, e.g.*,

In re Request of Gutierrez, 1996 Guam 4 ¶ 5 n.3 (Guam Oct. 24, 1996) ("[R]egardless what significance is given [to] the amendment, it could not cure the deficiency in the [law] which was inorganic at its inception."); *cf. Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 29 (Guam Mar. 10, 2000) (a bill that is "void *ab initio*"—in this case because it had been vetoed—"is dead, and subsequent legislation that purports to ratify the dead bill is 'ineffectual to put life in the corpse'" (quoting *Williams v. Dormany*, 126 So. 117, 121 (Fla. 1930))), *aff'd*, 276 F.3d 539 (9th Cir. 2002). In other words, because of the Organic Act's particular strictures on the bounds of legislative authority, *see Haeuser*, 97 F.3d at 1156, Guam tracks those jurisdictions where an enactment passed in excess of legislative authority is "void *ab initio*" and "as inoperative as though it had never been passed." *In re Huffman*, 408 F.3d 290, 294 (6th Cir. 2005) (quotation marks and citations omitted).

The Attorney General thus misses the mark when he points to *state* jurisdictions that take a different approach to statutes that are passed in excess of legislative authority. *See* AG Br. at 37 (quoting *Close v. Sotheby's*, 909 F.3d 1204, 1210 n.1 (9th Cir. 2018)). For example, "Mississippi has no similar constitutional provision" that renders an unconstitutional statute void *ab initio*. *Olin Mathieson Chem. Corp. v. Gibson's Pharmacy of Vicksburg, Inc.*, 169 So. 2d 779, 783 (Miss. 1964). And no state is subject to a federal statute that so clearly limits the power of the state legislature to extend only to passing laws "not inconsistent with . . . the

[federal] laws of the United States applicable to [the state].” 48 U.S.C. § 1423a. The Attorney General’s references to Mississippi and Arkansas laws are thus inapposite, AG Br. at 37–38, as those states do not impose limitations on their state legislatures comparable to those imposed on the Guam Legislature by the Organic Act.[11]

Thus, the question here is not whether a law passed by a legislature (state or territorial) is unenforceable merely because it is inconsistent with the United States Constitution. The question is instead whether a law passed by the *Guam* Legislature that is “inconsistent with” the laws of United States applicable to *Guam*, and thus in excess of the Guam Legislature’s power as established by the Organic Act, is inorganic and *ultra vires* and thus a legal nullity that cannot be enforced. This Court’s and the Guam Supreme Court’s precedents confirm that question must be answered in the affirmative.[12] *See Baldwin*, 624 F.2d at 934–35; *In re Request of Guerrero*, 2021 Guam 6 ¶ 55.

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[11] The Organic Act’s limit on the Legislature’s authority to pass laws is in stark contrast to authority that is left to the states in our federal system. *Compare People of the Territory of Guam v. Okada*, 694 F.2d 565, 568 (9th Cir. 1982) (“The provisions of the Organic Act thus set the outer limits of the Guam Legislature’s authority.”), *opinion amended on denial of reh’g*, 715 F.2d 1347 (9th Cir. 1983), *with New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”).

[12] The Ban’s solicitation prohibition was also unconstitutional at the time of passage, and thus beyond the power of Guam’s Legislature. Because abortion was a constitutionally protected right—and abortion (prior to viability) could not be

The Attorney General attempts to escape this inevitable conclusion by contending that the "organicity" of the Ban should instead be assessed from a different point in time—not from when the Legislature first passed the law, lacking the power to do so, but (more conveniently for him) from today, post-*Dobbs*, when courts are for "the first time" assessing whether the Ban is void *ab initio*. AG Br. at 34–37. Not so. Whether the Legislature acted *ultra vires* in passing the Ban must be evaluated from the point of enactment because the relevant question is whether the Legislature had the power to pass the Ban *at the time* it did it. *In re Request of Gutierrez*, 1996 Guam 4 ¶ 5 n.3. If it did not, its act was *ultra vires*, and can have no legal effect. *Dobbs*'s subsequent reversal of *Roe*—over three decades after the Legislature passed a law it had no power to pass—does not serve to retroactively revive and sanction that law. It cannot, because the law was a nullity when it was passed, so there is nothing left to spring back into effect. If lower courts may not preemptively overrule precedent, then legislatures certainly cannot. *Cf. Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Of course, this does not mean that Guam is forever controlled by a "zombie-like" *Roe*. AG Br. at 35. To the contrary, the *current* Guam Legislature—which,

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subject to outright criminal prohibition—speech soliciting an abortion prior to viability was nothing more than speech soliciting a legal act, falling well within the protections of the First Amendment. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

unlike the Legislature of the early 1990s, was elected by the *current* Guam electorate—could pass a new law today, post-*Dobbs*, regarding abortion. It has not yet done so. The Legislature could also have enacted a trigger ban prior to *Dobbs*, as many states did, to ensure that Guam banned abortion upon a Supreme Court decision overturning *Roe*. *See, e.g.*, Tenn. Code Ann. § 39-15-213 (ban on abortion to take effect upon decision of the United States Supreme Court overruling, in whole or in part, *Roe*); Ark. Code Ann. § 5-61-301 to -304 (same); Ky. Rev. Stat. Ann. § 311.772(2)(a) (same). But it did not do that. And the Attorney General cannot convert the Legislature's void-from-inception Ban to a trigger ban now. Because the Ban violated the Fourteenth Amendment when it was passed, it was void *ab initio*. While the Attorney General has waived any arguments to the contrary, his arguments fail on the merits as well.

C. If This Court Finds an Abuse of Discretion, It Must Remand for Further Consideration, Not Vacate the Injunction in Its Entirety.

As demonstrated above, far from abusing its discretion, the District Court correctly concluded that the Attorney General failed to meet his burden of showing that *Dobbs* warranted revision of the injunction. The decision below should be affirmed on that basis. However, if this Court were to conclude that the District Court abused its discretion in resolving the first prong of the two-part Rule 60(b)(5) inquiry in the Providers' favor, then the appropriate remedy would be to remand to the District Court to address the second prong—whether dissolving the injunction in its

entirety was suitably tailored—in the first instance. The Attorney General's contrary assertion that this Court should itself vacate the injunction misreads the District Court's order, misconstrues the cases he cites, and, in violation of binding Supreme Court precedent, would create and perpetuate constitutional harms. This Court must reject it.

To begin, it is necessary to correct the Attorney General's misreading of the decision below. Contrary to his assertions, AG Br. at 24–25, the District Court's order makes clear that it denied the Attorney General's motion at the first step of the inquiry—whether the asserted change in law warrants modification of the injunction—and did not reach the suitable tailoring prong at all, *compare* 1-ER-004–05 (setting out the standard for a Rule 60(b) motion, including that the proposed modification must be suitably tailored), *with* 1-ER-005 (denying motion based on the Attorney General's failure to establish that modification was warranted). Of course, given the Court's determination that the Attorney General had not carried his burden of proving that modification of the injunction was warranted, there was no need to consider whether the proposed relief was suitably tailored.[13]

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[13] The Attorney General is likewise wrong to suggest that the District Court took the Rule 60(b)(5) prongs out of order (addressing tailoring before considering whether changed circumstances warrant revision). AG Br. at 24–25. The District Court did not rule on tailoring at all.

If this Court disagrees with the District Court's prong-one analysis, however, the proper course is not to vacate the injunction *in toto* as the Attorney General urges, but to remand to the District Court to consider the question of suitable tailoring. As this Court has repeatedly explained, a Rule 60(b) motion "contemplates the exercise of the district court's discretion," and "[r]ather than engag[ing] in a de novo determination," it is "better [for the Court of Appeals] to remand the case to the district court for it to determine whether" the movant has satisfied the requirements of the Rule. *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982). This preferred course flows logically from the fact that "evaluating a Rule 60(b)(5) motion" necessitates "a two-step approach," and in the absence of a decision on one of those steps, this Court "cannot meaningfully review the district court's denial." *Coca-Cola Co. v. M.R.S. Distribs. Inc.*, 224 F. App'x 646, 646–47 (9th Cir. 2007). Thus, if this Court finds an abuse of discretion, it should adhere to its well-established procedure and remand to the District Court to resolve the matters it did not previously address in the first instance. *Id.*[14]

[14] The same holds true for the question whether Guam's Legislature impliedly repealed the Ban. Contrary to the Attorney General's unexplained assertion that it is "unclear" whether the District Court ruled on that issue, AG Br. at 39, the Court did not reach the implied-repeal question, and did not need to, given its void *ab initio* ruling. If this Court does not affirm the decision below, it should "follow the general rule that a federal appellate court does not consider an issue not passed upon below" and remand for the District Court to address repeal-by-implication arguments in the first instance. *Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198, 1209 (9th Cir. 2020) (cleaned up) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.

In asserting that "this Court *itself* must reverse and vacate the 1990 injunction under Rule 60(b)," AG Br. at 20 (emphasis added), the Attorney General asks the Court to depart from what it has described as the "better" course in these circumstances. *See Sparks*, 685 F.2d at 1130. There is no basis to do so.

Certainly, the two cases the Attorney General invokes do not justify such a departure. First, the Attorney General points to *Agostini*. But in that case, the Supreme Court remanded with instructions to vacate its injunction because the Court's opinion had *already* resolved any lingering constitutional questions and eliminated the risk that vacatur would create or perpetuate constitutional harms once the Rule 60(b) motion was granted. 521 U.S. at 237.

Nor does *Becerra* help the Attorney General. First, as the Attorney General concedes, in *Becerra*, this Court did *not* vacate the injunction at issue itself but rather directed the lower court to "modify" the injunction. 978 F.3d at 719. And in any event, the Rule 60(b) motion in *Becerra* concerned only which of two deadlines should govern a federal agency's actions. *See id.* at 710–11. In stark contrast, and as set out more fully below, there is no such straightforward, binary choice here. Rather, vacatur of the injunction in its entirety would produce a host of constitutional harms. In other words, in *Becerra*, this Court's opinion finding that modification under Rule

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2008)). To the extent this Court takes up implied repeal on the merits, however, the Providers adopt the Governor's arguments on the issue. *See* Fed. R. App. P. 28(i).

60(b) was warranted was necessarily *also* a finding that that modification was suitably tailored, as the Court ruled that applying one of the two possible deadlines was legally required, while applying the other was an abuse of discretion. In short, neither *Agostini* nor *Becerra* support the Attorney General's request that this Court vacate the entire injunction—particularly when the Attorney General failed to respond to the Providers' arguments concerning the constitutional harms resulting from vacatur.

And those constitutional harms are numerous, severe, and interrelated. The Supreme Court has explained that, if a party sustains its "burden of establishing that a significant change in circumstances warrants revision," "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383. A principal consideration in determining whether a proposed modification is suitably tailored is whether the modified injunction "conforms to the constitutional floor." *Id.* at 391. It is imperative that "a modification must not create or perpetuate a constitutional violation." *Id.* Indeed, the need to ensure that modification of an injunction "conforms to the constitutional floor," *id.*, undergirds this Court's practice of remanding for further Rule 60(b) proceedings in the district court.

Were this Court to accept the Attorney General's request to vacate the injunction with "no further analysis on remand," AG Br. at 20, the Court would

necessarily "create . . . constitutional violation[s]," directly contradicting *Rufo*. 502 U.S. at 391. Even after *Dobbs*, multiple provisions of the Ban remain unconstitutional or, at a minimum, have unconstitutional applications. The Providers identified these constitutional infirmities in their brief below, but the District Court did not reach them and the Attorney General did not respond to them.

Specifically, as the Providers argued below, Section 5—which criminalizes "solicit[ing] any woman to submit to any operation, or to the use of any means whatever, to cause an abortion," P.L. 20-134 § 5—is overbroad, as it penalizes significant swathes of protected speech. *See United States v. Williams*, 553 U.S. 285, 292–93 (2008); *see also* 2-ER-086–100. Indeed, the amount of protected speech swept up into Section 5's criminal prohibition is enormous:

- Section 5's speech restriction on its face extends to speech about legal abortion wherever it may occur, including *outside of Guam*, in jurisdictions such as Hawai'i, where abortion is legal. Speech soliciting a legal act falls well outside the First Amendment's narrow speech-integral-to-criminal-conduct exception, and is thus fully protected, and binding Supreme Court precedent dictates that Guam cannot, "under the guise of exercising internal police powers," bar speech soliciting an "activity that is legal" in another jurisdiction. *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975).[15]

[15] The Providers' fears are by no means conjectural: during the short time the Ban was in effect, one of the original attorneys in this case, Janet Benshoof, was charged with violating Section 5 for "publicly encourag[ing] women seeking abortions on Guam to have the abortion and travel to Honolulu" simply because she "gave a telephone number which women traveling to Honolulu to have abortions should call" during a public speech. *See* 2-ER-090–91.

- Section 5 also criminalizes speech without requiring any intent on behalf of the speaker to solicit an illegal abortion, in direct violation of the First Amendment. Both this Court and the Supreme Court have unambiguously held that mere knowledge or even anticipation that, following speech, a listener may go on to commit a crime is insufficient for criminal solicitation. *See Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (rejecting government's argument that it could penalize speech by physicians even when "a doctor's 'recommendation' of marijuana may encourage illegal conduct by the patient"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

- Section 5 also captures abstract advocacy in favor of abortion. "[A]bstract advocacy of illegality" is constitutionally distinct from a punishable "proposal to engage in illegal activity." *Williams*, 553 U.S. at 298–99. The former is entitled to constitutional protection while the latter is not. *Id.* A statement as benign as, "If it is the right choice for you, then I encourage you to obtain an abortion" is constitutionally protected abstract advocacy, *id.* at 300, yet this statement would be a criminal violation of Section 5's plain terms.

Moreover, as the Providers argued, even if Section 5 were not invalid on overbreadth grounds, lifting the injunction in its entirety would still not be a suitably tailored remedy, as Section 5 still has the aforementioned unconstitutional applications, rendering vacatur of the entire injunction impermissible under *Rufo*. *See* 2-ER-095–96.

The Providers also argued that Sections 3 and 4 violated the Due Process Clause, inasmuch as they prohibit providers located outside of Guam from providing legal abortions to Guam residents and prohibit Guam residents from obtaining abortion care outside of Guam where abortion is legal. 2-ER-096–100; *see Bigelow*, 421 U.S. at 824–25; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73

(1996) (holding that Due Process Clause prohibits one jurisdiction from punishing someone for engaging in out-of-jurisdiction activity that is permitted where it transpires); *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909) (holding that state may not prosecute someone "for doing within the territorial limits of [one state] an act which [another] state had specially authorized him to do").

While there is no need for any court to resolve these issues because the decision below was correct and not an abuse of discretion, to the extent these matters are to be further litigated, this Court should adhere to its usual practice and allow the District Court to address them in the first instance. That is especially necessary here, given that the Attorney General failed to respond to any of the above-described arguments in the District Court[16] and improperly seeks to contest, *inter alia*, the Providers' overbreadth arguments for the first time on appeal. *See Handa*, 401 F.3d at 1132; *see also* Section II.B.1, *supra*.

For the sake of completeness, however, even if the Attorney General's tailoring arguments were not waived (which they plainly are), they are patently insufficient to justify lifting the injunction *in toto*. The Attorney General insists that any speech about abortion can be criminalized on a theory that it is integral to

[16] In his District Court reply brief, the Attorney General spent approximately one page addressing GMH's First Amendment arguments (which did not mirror the Providers'), and did not address the Providers' First Amendment or due process arguments at all. 2-ER-008–10.

criminal conduct. AG Br. at 26–27. But this ignores that that narrow exception applies *only* where the speech is "intended to induce or commence *illegal activities*." *Williams*, 553 U.S. at 298 (emphasis added). In other words, speech about abortion that is legal (*i.e.*, about abortion in Hawai'i) does not fall into the speech-integral-to-criminal-conduct exception, and is thus fully protected.[17] Likewise, the Supreme Court's precedents make clear that, contrary to the Attorney General's claims, AG Br. at 27, the mere fact that the statute "make[s] it a crime to solicit" an abortion does not exempt all speech about even *illegal* abortion from First Amendment protection; rather, where the speaker lacks any intent that their speech solicit an illegal abortion, and where the speech constitutes abstract advocacy in favor of illegal abortion, Section 5's prohibition violates the First Amendment. *See Williams*, 553 U.S. at 298–300; *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

Accordingly, Section 5's overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's" narrowly "legitimate sweep," which includes only speech specifically intended to solicit an illegal abortion in Guam. *Williams*, 553 U.S. at 292–93. Moreover, the Attorney General's (waived) tailoring arguments ignore both (a) that Section 5 has unconstitutional applications and (b) that Sections

[17] As described in Note 15, *supra*, the history of enforcement during the brief period when the Ban was in effect belies the Attorney General's assertion that "any speech or conduct prohibited by sections 4 and 5 necessarily falls outside the scope of the First Amendment." AG Br. at 26–27.

3 and 4 cannot be enforced without violating the Due Process Clause. *See supra* at pp. 51–53.

In sum, this Court should affirm the District Court's determination that the Attorney General failed to establish that modification of the injunction is warranted. But if this Court were to disagree, in light of the myriad constitutional violations that would arise from dissolving the injunction in its entirety, it should remand to the District Court to address tailoring, and any other issue not previously resolved below, in the first instance.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: October 27, 2023

Respectfully submitted,

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STATEMENT OF RELATED CASES

On behalf of Appellees, the undersigned is aware of no related cases currently pending before this Court.

Dated: October 27, 2023

/s/ Meagan Burrows
Meagan Burrows

ADDENDUM

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1. 48 U.S.C. § 1421b(u)

2. 48 U.S.C. § 1423a

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United States Code Annotated
Title 48. Territories and Insular Possessions
Chapter 8A. Guam (Refs & Annos)
Subchapter I. General Provisions

48 U.S.C.A. § 1421b

§ 1421b. Bill of rights

Currentness

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

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

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

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

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

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

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

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

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

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

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(k) No person shall be imprisoned for debt.

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

(Aug. 1, 1950, c. 512, § 5, 64 Stat. 385; Pub.L. 90-497, § 10, Sept. 11, 1968, 82 Stat. 847.)

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Notes of Decisions (14)

48 U.S.C.A. § 1421b, 48 USCA § 1421b
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United States Code Annotated
Title 48. Territories and Insular Possessions
Chapter 8A. Guam (Refs & Annos)
Subchapter III. The Legislature

48 U.S.C.A. § 1423a

§ 1423a. Power of legislature; limitation on indebtedness of Guam; bond issues; guarantees for purchase by Federal Financing Bank of Guam Power Authority bonds or other obligations; interest rates; default

Effective: October 27, 1998
Currentness

The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section. All bonds issued by the government of Guam or by its authority shall be exempt, as to principal and interest, from taxation by the Government of the United States or by the government of Guam, or by any State or Territory or any political subdivision thereof, or by the District of Columbia. The Secretary of the Interior (hereafter in this section referred to as "Secretary") is authorized to guarantee for purchase by the Federal Financing Bank bonds or other obligations of the Guam Power Authority maturing on or before December 31, 1978, which shall be issued in order to refinance short-term notes due or existing on June 1, 1976 and other indebtedness not evidenced by bonds or notes in an aggregate amount of not more than $36 million, and such bank, in addition to its other powers, is authorized to purchase, receive or otherwise acquire these same. The interest rate on obligations purchased by the Federal Financing Bank shall be not less than a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities, adjusted to the nearest one-eighth of 1 per centum, plus 1 per centum per annum. The Secretary, with the concurrence of the Secretary of the Treasury, may extend the guarantee provision of the previous sentence until December 31, 1980. The Secretary, upon determining that the Guam Power Authority is unable to refinance on reasonable terms the obligations purchased by the Federal Financing Bank under the fifth sentence of this section by December 31, 1980, may, with the concurrence of the Secretary of the Treasury, guarantee for purchase by the Federal Financing Bank; and such bank is authorized to purchase, obligations of the Guam Power Authority issued to refinance the principal amount of the obligations guaranteed under the fifth sentence of this section. The obligations that refinance such principal amount shall mature not later than December 31, 1990, and shall bear interest at a rate determined in accordance with section 2285 of Title 12. At the request of the Board of Directors of the Guam Power Authority for a second refinancing agreement and conditioned on the approval of the Government of Guam pursuant to the law of Guam, and conditioned on the establishment of an independent rate-making authority by the Government of Guam, the Secretary may guarantee for purchase by the Federal Financing Bank, on or before December 31, 1984, according to an agreement that shall provide for--

(a) substantially equal semiannual installments of principal and interest;

(b) maturity of obligations no later than December 31, 2004;

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(c) authority for the Secretary, should there be a violation of a provision of this legislation, or covenants or stipulations contained in the refinancing document and after giving sixty days notice of such violation to the Guam Power Authority and the Governor of Guam, to dismiss members of the Board of Directors or the general manager of the Guam Power Authority, and (1) appoint in their place members or a general manager who shall serve at the pleasure of the Secretary, or (2) contract for the management of the Guam Power Authority; and

(d) an annual simple interest rate of seven per centum; and

the Federal Financing Bank shall purchase such Guam Power Authority obligations if such Guam Power Authority obligations are issued to refinance the principal amount scheduled to mature on December 31, 1990. Should such second refinancing occur, (1) the independent rate-making authority to be established by the Government of Guam, or in its absence, the Board of Directors of the Guam Power Authority, shall establish rates sufficient to satisfy all financial obligations and future capital investment needs of the Guam Power Authority that shall be consistent with generally accepted rate-making practices of public utilities, and (2) the Government of Guam shall not modify the requirements of such refinancing agreement without agreement of the Secretary. There are authorized to be appropriated to the Secretary of the Interior for payment to the Federal Financing Bank such sums as are necessary to pay (1) the repurchase payment required under the fifth paragraph of the December 31, 1980, note from the Guam Power Authority to the Federal Financing Bank and any subsequent repurchase payments required under the second refinancing agreement, and (2) the interest rate differential between the seven per centum to be paid by the Guam Power Authority and the second refinancing agreement and the interest rate that would otherwise be determined in accordance with the above cited section 2285 of Title 12. Should the Guam Power Authority fail to pay in full any installment of interest or principal when due on the bonds or other obligations guaranteed under this section, the Secretary of the Treasury, upon notice from the Secretary shall deduct and pay to the Federal Financing Bank or the Secretary, according to their respective interests, such unpaid amounts from sums collected and payable pursuant to section 1421h of this title. Notwithstanding any other provision of law, Acts making appropriations may provide for the withholding of any payments from the United States to the government of Guam which may be or may become due pursuant to any law and offset the amount of such withheld payments against any claim the United States may have against the government of Guam or the Guam Power Authority pursuant to this guarantee. For the purpose of this chapter, under section 3713(a) of Title 31 the term "person" includes the government of Guam and the Guam Power Authority. The Secretary may place such stipulations as he deems appropriate on the bonds or other obligations he guarantees.

CREDIT(S)

(Aug. 1, 1950, c. 512, § 11, 64 Stat. 387; Pub.L. 94-395, Sept. 3, 1976, 90 Stat. 1199; Pub.L. 96-205, Title III, § 303, Mar. 12, 1980, 94 Stat. 88; Pub.L. 98-454, Title II, § 203, Oct. 5, 1984, 98 Stat. 1733; Pub.L. 105-291, § 4, Oct. 27, 1998, 112 Stat. 2786.)

Notes of Decisions (10)

48 U.S.C.A. § 1423a, 48 USCA § 1423a
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FOR THE NINTH CIRCUIT

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