NO. 23-15602

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

DOUGLAS MOYLAN, in his official capacity as Attorney General of Guam,
Defendant-Appellant

v.

LOURDES LEON GUERRERO, in her official capacity as Governor of Guam, *et al.*,
Defendants-Appellees.

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

GOVERNOR LEON GUERRERO'S REPLY TO APPELLANT'S RESPONSE TO JURISDICTIONAL QUESTION

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I. INTRODUCTION

In his Response to Jurisdictional Question ("Moylan Response"), Appella Douglas B. Moylan, Attorney General of Guam, ("Moylan"), begrudging acknowledges that the Guam Supreme Court, in *In re Leon Guerrero*, 2023 Guam determined that Guam Public Law No. 20-134 has been repealed by implication. *S* Moylan Response (ECF No. 62) at 9 ("The outcome of the parallel Guam Supre Court proceedings means this appeal no longer concerns Public Law 20-134's curr validity.").[1] Contrary to the weight of caselaw, however, Moylan refuses to acc that the decision moots this Appeal. He insists that the Court should proceed w resolving the merits of his Appeal notwithstanding the repeal of P.L. 20-134. claims that *In re Leon Guerrero* constitutes a mere intervening change in law t

[1] Though Moylan previously indicated his intent to challenge the Gua Supreme Court's subject matter jurisdiction to issue its decision in *In re Le Guerrero* in this Court, s*ee* Notice of Resolution (ECF No. 56) at 2, he now appe to have abandoned any further formal challenge. *See generally* Moylan Respon (ECF No. 62). However, his Response continues to call into question the Gua Supreme Court's jurisdiction and further implies that the Guam Supreme Cour exercise of jurisdiction improperly "disrupted" this Appeal. Moylan has not seen to elevate his editorials into a formal challenge, but those editorials evince continued reluctance to accept the Guam Supreme Court's authority to determine t P.L. 20-134 is repealed.

Nonetheless, *In re Leon Guerrero* is now Guam law. Moylan petitioned certiorari to the U.S. Supreme Court — the only court with jurisdiction to overtu the decision — and the Court denied certiorari. As a result, *In re Leon Guerrero* dispositive as to the status of P.L. 20-134 in this Appeal. *Missouri v. Hunter,* 459 U 359, 366–68 (1983) (holding that a federal court interpreting state or territorial statu

serves as another basis to vacate the 1990 injunction pursuant to Rule 60(b). *See* at 11.

In re Leon Guerrero is not mere intervening law to be considered along w *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) in Moylan's FR 60(b) Motion. Rather, the Guam Supreme Court's holding that P.L. 20-134 has be repealed resolves all claims in Plaintiff's Complaint, moots this Appeal, and depriv this Court of Article III jurisdiction. *See McDonald v. Lawson*, 94 F.4th 864, 868 (9 Cir. 2024).

Moylan's arguments urging the Court to resolve the merits of his Rule 60 motion, notwithstanding *In re Leon Guerrero*, should be rejected and this App dismissed as moot.

II. ARGUMENT

A. *In re Leon Guerrero* moots this Appeal, and the Court should decline reach the merits of Moylan's motion for vacatur under Rule 60(b)

Despite having lost in both the Guam Supreme Court and the United Sta Supreme Court, Moylan persists in his attempts to squeeze a victory out of this Cou He begs the Court to ignore the clear jurisdictional implications of *In re Le Guerrero* and the U.S. Supreme Court's denial of certiorari, and proceed w resolving the merits of his Rule 60(b) motion as though neither event occurred. T Court should summarily deny Moylan's request that the Court disregard its ov

The U.S. Supreme Court and this Court have repeatedly held "a case is mo when the challenged statute is repealed, expires, or is amended to remove t challenged language." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 11 (9th Cir. 2011), *overruled on other grounds* by *Bd. of Trustees of Glazing Health Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019)*; accord Lewis v. Cont'l Ba Corp.*, 494 U.S. 472, 478 (1990); *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Kreme v. Bartley*, 431 U.S. 119, 127–28 (1977)*; Diffenderfer v. Cent. Baptist Church Miami, Fla., Inc.,* 404 U.S. 412, 414–15 (1972); *United States v. Munsingwear, In* 340 U.S. 36, 39–40 (1950).[2] Federal courts only adjudicate actual cases controversies, a requirement that persists through all stages of federal judic proceedings, including appeals. *See McDonald v. Lawson*, 94 F.4th 864, 868 (9th C 2024). "To sustain [appellate] jurisdiction [], it is not enough that a dispute was ve much alive when suit was filed, or when review was obtained in the Court Appeals…The parties must continue to have a personal stake in the outcome of t lawsuit." *Lewis* 494 U.S. 472, 477–78.

This Court has held that courts "should presume that the repeal, amendment, expiration of legislation will render an action challenging the legislation moot, unle

[2] While courts recognize limited exceptions to the general rule that a statutory app moots claims challenging a statute, such exceptions do not apply here. *See, e.g., C*

there is a reasonable expectation that the legislative body will reenact the challeng provision or one similar to it." *Chambers*, 941 F.3d 1199; *see also Cuviello v. City Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) ("The doctrine of mootness, which embedded in Article III's case or controversy requirement, requires that an actu ongoing controversy exist at all stages of federal court proceedings. When subseque events resolve the dispute, such that no live issues remain or the parties lack a lega cognizable interest in the outcome, a case becomes moot.") (citations and quotatio omitted). Even the Fifth Circuit in *Freedom from Religious Foundation, Inc.* *Abbott*, the primary authority Moylan cites in his Response, determined that the acti pending before it was moot upon repeal of the enjoined regulation. 58 F.4th 824, 8 (5th Cir. 2023)

This Court has further determined that an appeal is moot "when a statut repeal or amendment gives a plaintiff everything it hoped to achieve." *Log Cabin*, 6 F.3d at 1166. In *Log Cabin*, the Court considered an appeal from a perman injunction against enforcement of the "Don't Ask, Don't Tell" statute on Fi Amendment grounds. *Id.* Congress repealed the law during the pendency of t appeal. *Id.* Observing that an appellate court determining whether a case has beco moot on appeal must review the judgment "in light of the statute as it now stands, r as it did before the district court," *id.* (citing *Hall v. Beals*, 396 U.S. 361, 363 (1987 the Court determined that there would be no Article III controversy had the plaint

Similarly, the repeal of P.L. 20-134 resolves all claims in this matter. T Second Amended Complaint, which Plaintiffs filed on June 26, 1990, included ni causes of actions, including violations of: (1) the right to privacy; (2) due proce (vagueness); (3) free speech and freedom of association rights; (4) equal protectio (5) religious freedom; (6) freedom from slavery; (7) cruel and unusual punishme (8) rights, privileges and immunities under the Constitution and the Organic Act; a (9) deprivation of liberty without due process. *See* GovSER-099 (Second Amend Complaint). Plaintiffs sought relief including a temporary restraining order a preliminary injunction, class certification, declaratory judgment and permane injunction, and attorney's fees. *See* Supplemental Excerpts of Record of Appel Lourdes Leon Guerrero, Governor of Guam (ECF No. 26) at 93-94. Were the Distr Court action filed today, there would be no Article III controversy, and no law enjoin. The court would have no jurisdiction to consider this matter.

Analyzing the merits of Moylan's Motion to Vacate the Injunction pursuant Rule 60(b), including reviewing the impact *Dobbs* would have had on P.L. 20-1 were the statute still in effect, would require the Court to exercise jurisdiction with live case or controversy. Any decision the Court renders on this issue would constitu an impermissible advisory opinion as to the impact *Dobbs would have had* on P 20-134, a law no longer in effect.

Moylan has ultimately not met his burden to rebut the presumption that *In*

recognized exception applies. Based on the Court's established precedent, this App
should be deemed moot by repeal of P.L. 20-134.

B. *Munsingwear* does not require vacatur of the 1990 injunction

In the face of overwhelming authority providing that a statute's repeal mo
actions challenging the statute, Moylan strains to reframe his Rule 60(b) motion a
request that does not implicate the merits of the dispute, but rather only involves t
Court's authority to direct disposition of a matter following a finding of mootne
See Moylan Response (ECF No. 62) at 10. Moylan has not, however, explained t
apparent coincidence that the procedural request for vacatur following a finding
mootness would, by his logic, entail the same analysis as the full merits revi
Moylan sought in the District Court and seeks again in this repeal. Moylan's impro
conflation of these distinct types of vacatur to breathe new life into his mooted app
should not be sustained.

As discussed, Moylan's Motion to Vacate seeks a *merits* determination o
which the Court lacks Article III jurisdiction because all claims in the matter we
resolved by the repeal of P.L. 20-134. While Rule 60(b) might have required t
reviewing court to consider whether an intervening change in controlling law warra
modification of an injunction against P.L. 20-134, as discussed, this review is
longer possible because the law has been repealed, and any decision issued on t

Even if the Court accepted Moylan's attempt to reframe his request for Ru 60(b) vacatur as a request for vacatur upon a finding of mootness under *U.S. Banco Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994), he would not be entitl to the relief he seeks. The appellate court practice of vacating a lower cour judgment when a case becomes moot on appeal was established "to prevent judgment, unreviewable because of mootness, from spawning any leg consequences." *Munsingwear,* 340 U.S. at 41. "The procedure clears the path f future litigation of the issues between the parties and eliminates a judgment, revie of which was prevented through happenstance…none is prejudiced by a decisi which in the statutory scheme was only preliminary." *Id.* at 40; *see also Arizonans f Official English v. Arizona*, 520 U.S. 43, 71 (1997) ("Vacatur clears the path for futu relitigation by eliminating a judgment the loser was stopped from opposing on dire review.") (quotation omitted). Courts commonly grant vacatur following a mootne finding based on evaluation of two primary criteria: whether the party seeking vaca caused the mootness, and whether vacatur is in the public interest. *See Bancorp*, 5 U.S. at 26.

However, the *Munsingwear* process, by design, applies to vacate judgmen that could not be reviewed because the matter was mooted while the appeal from th judgment was pending. *See Munsingwear*, 340 U.S. at 41; *Arizona*, 520 U.S. at 7 72. In this matter, if *Munsingwear* in fact applies, it would require vacatur of t

the Court to vacate. This Court *did* in fact review and affirm those portions of t
1990 injunction that were appealed,[3] *see id* at 1370, and the U.S. Supreme Co
subsequently denied cert to review this Court's opinion. *See Ada v. Guam Soc.*
Obstetricians & Gynecologists, 506 U.S. 1011 (1992).

Moylan has failed to cite a single case in which courts have reached back i
prior judgments issued in a case and subsequently reviewed and affirmed on app
under the guise of granting a *Munsingwear* vacatur. Even *Abbott*, on which Moyl
heavily relies, did not allow multiple bites at the same, previously affirmed judgme
but rather ordered vacatur of the judgment the Court could not review because t
matter was mooted on appeal. *See Abbott*, 58 F.4th at 837. *Munsingwear* and
progeny neither urge nor authorize a Court to reopen and re-review a previou
affirmed judgment.

Though Moylan strains to distinguish this matter from *McCorvey v. Hill*, 3
F.3d 846, 848-49 (5th Cir. 2004), the facts and issues of *McCorvey* are nearly identi
to the facts here. Specifically, McCorvey appealed a 2003 district court decisi
denying her Rule 60(b) seeking relief from the judgment of *Roe v. Wade*, 410 U

[3] As the Court noted in *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.
1366, 1369 (9th Cir. 1992), Sections 4 and 5 of P.L. 20-134 were enjoined separat
on First Amendment grounds, which were not appealed. Granting Moylan's requ
for *Munsingwear* vacatur would not only require the Court to conduct a second revi

113 (1973), which declared Texas statutes criminalizing abortion unconstitutional. this pre-*Dobbs* decision, the *McCorvey* court determined that the Texas statutes issue in *Roe* had been repealed by implication by other statutes passed governi abortion in the intervening thirty (30) years since *Roe* was decided. *McCorvey*, 3 F.3d at 849. Having found that the Texas statutes at issue in *Roe* had been repeal the *McCorvey* court held that the plaintiff's Rule 60(b) motion was moot, and declin to reach the merits of the plaintiff's motion for relief from the 30-year old judgme *Id.*

Moylan has attempted to distinguish this matter from *McCorvey* on the ba that the Rule 60(b) motion in that matter was brought by the plaintiff, who was herself subject to the injunction and therefore had suffered no harm and had standing to support her continued participation in the case. *See* Moylan Respo (ECF No. 62) at 13. Moylan argues that, unlike McCorvey, he continues to be subj to the 1990 injunction, and therefore continues to suffer "harm" as a result. Moylan's arguments are unavailing.

McCorvey's finding of mootness was not based on plaintiff's purported lack standing but rather on the repeal of the Texas statutes challenged in the complai *McCorvey*, 385 F.3d at 849. ("…[B]ecause the statutes declared unconstitutional *Roe* have been repealed, McCorvey's 60(b) motion is moot."). The Fifth Circuit not consider vacating the 30-year old U.S. Supreme Court judgment und

did the U.S. Supreme Court when it denied certiorari to review *McCorvey*'s denial the Rule 60(b) motion to vacate *Roe*'s judgment. *Munsingwear* simply does not app in the novel way Moylan asks the Court to apply it.

To the extent that the Court seeks to entertain Moylan's request *Munsingwear* vacatur, such request should be properly tailored to the only judgme the Court will not have had occasion to review due to the matter's mootness – t 2023 judgment. *See Guam Soc. of Obstetricians & Gynecologists v. Guerrero*, C 90-00013, 2023 WL 2631836 (D. Guam Mar. 24, 2023).

If the Court, however, decides to entertain Moylan's novel application *Munsingwear*, Moylan should be required to provide legal support for his argume and Governor Leon Guerrero should be afforded an additional opportunity to respor

C. If necessary, vacatur review of the 1990 injunction should be remanded to the District Court

As discussed, Moylan is not entitled to vacatur of the 1990 injunction under moot Rule 60(b) motion or *Munsingwear*. However, if the Court determines th Moylan's request for vacatur is not moot, and that *In re Leon Guerrero* should considered as additional basis for possible vacatur along with *Dobbs*, the issue shou be remanded to the District Court for review in the first instance.

As Governor Leon Guerrero discussed in her Answering Brief, the district co ordinarily conducts the initial Rule 60(b) inquiry. Answering Brief of Appell

No. 25) at 33. Governor Leon Guerrero urged the Court, if it determined that t
District Court's denial of Moylan's motion to vacate the 1990 injunction based on l
failure to address a dispositive argument in Plaintiffs' opposition does not sufficien
address the merits of Moylan's FRCP 60(b) motion, to order remand to the Distr
Court for further findings. *Id.* The District Court certainly did not have the opportun
to address the new argument Moylan has added to his Rule 60(b) rubric — that *In*
Leon Guerrero supports his motion for Rule 60(b) vacatur. If a new 60(b) review mu
be conducted, the appropriate course is to remand this matter to the District Court
further proceedings. *See Horne v. Flores*, 557 U.S. 433, 471 (2009) (ordering rema
to the District Court for Rule 60(b)(5) analysis); *see also Coca-Cola Co. v. M.R*
Distributors Inc., 224 Fed. Appx. 646, 646–47 (9th Cir. 2007) (remanding where t
District Court failed to provide "reasoned basis for its decision" and the Court cou
not "meaningfully review the district court's denial" of Rule 60(b)(5) motion);
Jones v. Ryan, 733 F.3d 825, 838–39 (9th Cir. 2013) (acknowledging that distr
court ordinarily conducts Rule 60(b) inquiry in the first instance).

Even if this Appeal were not mooted by *In re Leon Guerrero*, it is certainly n
the appropriate forum for Moylan to workshop new ideas in support of his Rule 60(
motion, and the issue should more appropriately be remanded to the District Court
review in the first instance.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal as moot a deny Moylan's request for vacatur of the 1990 injunction.

Respectfully submitted this 10th day of December, 2024 (CHST) (Decembe 9, 2024 (PDT)).

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