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Honorable Lourdes A. Leon Guerrero

Governor of Guam

IN THE SUPREME COURT OF GUAM

IN RE:

REQUEST OF LOURDES A. LEON
GUERRERO, I MAGA'HÅGAN
GUÅHAN, RELATIVE TO THE
VALIDITY AND
ENFORCEABILITY OF PUBLIC
LAW NO. 20-134.

SUPREME COURT CASE NO.

CRG23-001

**REQUEST FOR
DECLARATORY JUDGMENT
(7 GCA § 4104);
VERIFICATION; EXHIBITS 1-2**

Petitioner Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of
Guam, by and through counsel and pursuant to 7 GCA § 4104, Rules 26 and 27 of
the Guam Rules of Appellate Procedure, and the Organic Act of Guam, as amended,

[COPY]

requests that the court issue declaratory judgment relative to the validity or enforceability of Guam Public Law 20-134 (March 19, 1990), following the U.S. Supreme Court’s issuance of its Opinion in *Dobbs v. Jackson Women’s Health Org.*, 241 S.Ct. 2228 (2022) on June 24, 2022.

I. INTRODUCTION

In 1990, six years prior to the Supreme Court of Guam’s establishment in 1996, the Guam Legislature ostensibly passed Guam Pub. L. 20-134, broadly criminalizing abortion. Today, the Supreme Court of Guam stands as the highest court of Guam, vested with the authority to interpret the meaning of the Organic Act of Guam, the validity of laws enacted by the Guam Legislature, and to develop our island’s common law. The legislation at issue in this case, embraces an important subject not previously addressed by this court – abortion – but resolution of the questions this Petition raises does not require the court to evaluate the substantive moral, ethical, and Constitutional issues associated with abortion.

Rather, the questions involve broader concerns of statutory validity; specifically, (1) whether legislation that was inorganic and unconstitutional at the time of its passage is a legal nullity and therefore invalid, or merely unenforceable at the time, such that a change in the governing caselaw can revive it; (2) whether the Organic Act of Guam, as it existed in 1990, authorized the Guam Legislature to pass an unconstitutional law, or the Guam Legislature acted *ultra vires* in passing

P.L. 20-134; and (3) whether such legislation is valid and enforceable notwithstanding the evolution of the broader statutory scheme in the intervening decades since it was deemed unconstitutional. Resolution of these issues is critical to develop our government's understanding of its duties and limitations, and to provide our people with appropriate notice of their rights, and the conduct Guam law proscribes.

These are significant questions of *local* jurisprudence, regardless of subject matter, and it is important that these questions are addressed in the first instance not by the federal courts, but by the highest court of Guam. *See Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 1985, 170 L. Ed. 2d 837 (2008) (holding that “[a] State’s highest court is unquestionably the ultimate expositor of state law,” and “the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums.”) (internal quotations omitted).

In the seminal 1973 case, *Roe v. Wade*, the United States Supreme Court recognized a Constitutional right of personal privacy that encompassed a woman’s decision whether to terminate a pregnancy, and that regulations limiting such rights may be justified only by a compelling state interest and must be narrowly drawn to express only legitimate state interests. 410 U.S. 113, 122, 93 S. Ct. 705, 711, 35 L. Ed. 2d 147 (1973). In so finding, the Court held:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without

regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id., 410 U.S. at 164. The Court concluded that the Texas abortion statutes “as a unit, must fall.” *Id.* at 166.

On March 19, 1990, Governor Joseph A. Ada purported to sign into law P.L. 20-134, “An Act to Repeal and Reenact §31.20 of Title 9, Guam Code Annotated, to Repeal §§31.21 and 31.22 thereof, to Repeal Subsection 14 of Section 3107 of Title 10, Guam Code Annotated, Relative to Abortions, and to Conduct a Referendum Thereon.” See P.L. 20-134, attached hereto as Exhibit 1. P.L. 20-134 contained a sweeping ban on abortion,¹ setting criminal penalties for (1) persons

¹ Significantly, while Article 1196 of the Texas statutes at issue in *Roe v. Wade* provided that “[n]othing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother,” P.L. 20-134 *excludes* termination of a pregnancy that endangers the life of the mother from the definition of “abortion”:

providing drugs or employing other means to cause an abortion, including doctors; (2) women soliciting and taking a drug with intent to cause an abortion, or submitting to an operation or to the use of other means with intent to cause an abortion; and (3) persons “soliciting” a woman to submit to an abortion. *Id.* P.L. 20-134 purported to repeal the existing statutes governing abortions at the time, which were enacted in 1978 as part of the original Criminal & Correctional Code.

On March 23, 1990, plaintiffs² in *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), aff’d, 962 F.2d 1366 (9th Cir. 1992), as amended (June 8, 1992), filed a complaint in the District Court of Guam (the “District Court case”) alleging that P.L. 20-134 violated the First, Fourth, Fifth,

“Abortion” does not mean the medical intervention in...a pregnancy at any time after the commencement of a pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother...

See, P.L. 20-134:2, Ex. 1 at 1-2.

² Plaintiffs in the District Court case included Maria Doe, a pregnant Guam resident suffering from a chronic health condition; the Guam Society of Obstetricians and Gynecologists; the Guam Nurses Association; Reverend Milton H. Cole, Jr., an Episcopal priest at a church in Agat, Guam; Laura Konwith, a Guam resident and a member of the Jewish faith, which does not believe a fertilized egg is a person; and Edmund Griley, M.D., William Freeman, M.D., and John Dunlop, M.D., physicians licensed in Guam who specialized in the practice of obstetrics and gynecology. Plaintiff Maria Doe was dismissed as a party on order of the court entered June 26, 1990. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427 (D. Guam 1990).

Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983, and seeking a judgment declaring P.L. 20-134 to be in violation of the United States Constitution and the Organic Act, and permanently enjoining its enforcement. Compl., *Guam Soc. of Obstetricians & Gynecologists v. Ada*, District Court of Guam Civil Case No. 90-00013 (March 23, 1990).

On August 23, 1990, the District Court of Guam issued a Decision and Order re Permanent Injunction and Other Motions, granting summary judgment to the plaintiffs and permanently enjoining the enforcement of P.L. 20-134, finding that *Roe v. Wade* applied in Guam. Specifically, the District Court held:

This Court cannot imagine a clearer “signal” from Congress than that, by enacting subsection (u) [of Section 1421b of the Organic Act of Guam] in 1968, it felt an obligation to insure (*sic*) that the people of Guam would enjoy more of the constitutional protections afforded other citizens of the United States. Inarguably, it seems to this Court, the express words of the statute demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam’s Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court. It follows, then, when interpreting subsection (u), that since the decisions of the United States Supreme Court, including *Roe v. Wade*, are the law of the land, they apply with equal force and effect to the Territory of Guam. Having determined that *Roe v. Wade* applies in Guam, the Court finds that Public Law 20-134 is unconstitutional. For the reasons given below, the entire law must fall.

Guam Soc. of Obstetricians & Gynecologists v. Ada, *supra* at 1427. On October 16, 1990, the District Court amended its judgment to order in relevant part that

“[S]ections two through five of Public Law 20–134 are hereby declared *unconstitutional and void* under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983.” *Id.* at 1431 (emphasis added).

In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (the “Ninth Circuit case”), the United States Court of Appeals for the Ninth Circuit affirmed the District Court’s judgment permanently enjoining the enforcement of P.L. 20-134, finding that the 1968 Mink Amendment to the Organic Act of Guam, “expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded,” and that P.L. 20-134 was unconstitutional, where it “ma[de] no attempt to comply with *Roe*.” *Id.* at 1370.

Approximately thirty years later, on June 24, 2022, the United States Supreme Court issued its Opinion in *Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade* and finding, among other things, that the right to abortion is not expressly or implicitly protected by the U.S. Constitution, including by the Due Process Clause of the Fourteenth Amendment, upon which *Roe v. Wade* was decided. *Id.* at 2242. Expressly reversing *Roe v. Wade*, the *Dobbs* Court further found that, as the U.S. Constitution does not confer a right to abortion, “the authority to regulate abortion must be returned to the people and their elected representatives.” *Id.* at 2279.

On January 11, 2023, Douglas Moylan, the Attorney General of Guam (“AG”) issued to Gov. Leon Guerrero and other successors to the government officials originally named as defendants in the District Court case, a Notice of Motion to Dissolve Injunction of Guam P.L. 20-134, *Guam Society of Obstetricians and Gynecologists v. Ada*, 776 F. Supp 1422 (D.Guam 1990), *aff’d*, 962 F. 2d 1366; *cert denied sub nom. Ada v. Guam Society of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (“Notice of Motion to Dissolve Injunction”), attached hereto as Exhibit 2.

In his Notice of Motion to Dissolve Injunction, AG Moylan states that pursuant to the *Dobbs* decision, the “[Office of the Attorney General of Guam] is now duty-bound to seek to have the U.S. District Court of Guam vacate (dissolve) the injunction entered against [the Governor’s] predecessors in office in *Guam Society of Obstetricians and Gynecologists v. Ada*...” *Id.* at 1. AG Moylan further states that his office “intend[s] to move to dissolve the injunction upon Guam P.L. No. 20-134 on or by the end of this month.” *Id.* at 2.

Gov. Leon Guerrero petitions the court for declaratory judgment on the validity and enforceability of P.L. 20-134.

The first question presented is whether P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed

by the Ninth Circuit Court of Appeals, is void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade*.

The second question presented for the court's consideration is whether the passage of P.L. 20-134 constitutes an *ultra vires* act, where the Organic Act limits the Legislature's authority to pass laws to subjects of legislation that are not inconsistent with U.S. law applicable to Guam, and, at the time of its passage, P.L. 20-134 was inconsistent with the U.S. Constitution as applicable to Guam.

The final question presented for the court's consideration is, if the court finds that the Organic Act authorized the 20th Guam Legislature to pass P.L. 20-134, and the legislation is not *void ab initio*, whether P.L. 20-134 was impliedly repealed by subsequent legislation the Guam Legislature passed regulating abortion on Guam.

Gov. Leon Guerrero requests that this Court issue declaratory judgment on these questions pursuant to its authority under 7 GCA § 4104.

II. STANDING

1. Gov. Leon Guerrero is the Governor of Guam and has standing to request declaratory judgment pursuant to 7 GCA § 4104.

III. JURISDICTION

2. This court has original jurisdiction over requests from the Governor of Guam seeking declaratory judgment interpreting any federal or local law “and upon

any question affecting the powers and duties of [*I Maga'håga*] and the operation of the Executive Branch[.]” 7 GCA § 4104. *See also* 48 U.S.C.A. § 1424-1(a).

3. Guam law authorizes the Governor of Guam to request that the Supreme Court of Guam directly interpret federal or local law affecting the powers and duties of the Governor of Guam and the operation of the Executive Branch:

I [Maga'hågan] Guåhan, in writing...may request declaratory judgments from the Supreme Court of Guam as to the interpretation of any law, federal or local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of *I [Maga'håga]* and the operation of the Executive Branch...The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments *shall* not be available to private parties. The Supreme Court of Guam *shall*, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented and *shall* render its written judgment thereon.

7 GCA § 4104 (emphasis in original).

4. This court has held:

[T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issues raised must be a matter of great importance; (2) the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay; (3) and the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity & Constitutionality of Pub. L. 26-35, 2002 Guam 1 ¶ 9.

IV. MATTER OF GREAT IMPORTANCE

5. This court has held that a matter of great importance or public interest “signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue’s resolution... the issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of government that requests the opinion.” *In re Request of Governor Gutierrez for a Declaratory Judgment as to Organicity of Guam Pub. Law 22-42, 1996 Guam* 4 ¶ 4.

6. This Petition seeks declaratory judgment regarding specific issues related to validity of P.L. 20-134 in the wake of *Dobbs*.

7. Current Guam law governing abortion was enacted in 1978 as part of the original Criminal & Correctional Code. Title 9 GCA § 31.20 authorizes performance of an abortion (1) within thirteen (13) weeks after commencement of a pregnancy; (2) within twenty-six (26) weeks after the commencement of the pregnancy if the physician has reasonably determined that the child would be born with grave physical or mental defect or that the pregnancy resulted from rape or incest; or (3) at any time after the commencement or pregnancy if the physician reasonable determines that there is a substantial risk that the pregnancy would endanger the life of the mother or gravely impair the physical or mental health of the

mother. *See* 9 GCA § 31.20. Any person performing an abortion in circumstances other than permitted by Section 31.20 shall be guilty of a third degree felony. 9 GCA § 31.21.

8. In contrast, P.L. 20-134 provides that the following acts are subject to criminal penalty:

- a. For a person to provide or administer a drug or employ means to cause an abortion. If the person performing the act is a physician, the person shall be subject to disciplinary action by the Guam Medical Licensure Board in addition to being guilty of a third degree felony;
- b. For a woman to solicit a drug from any person and take the same, or submit to an operation or to the use of any other means, with intent to cause an abortion; and
- c. For a person to solicit a woman to submit to an operation or to the use of any means to cause an abortion.

See Ex. 1 at 2.

9. On August 23, 1990, the District Court of Guam issued a Decision and Order re Permanent Injunction and Other Motions (“8/23/90 D&O”), granting summary judgment to the plaintiffs and permanently enjoining the enforcement of P.L. 20-134, finding that Sections 2, 3, 4, and 5 violated the Due Process Clause of

the Fourteenth Amendment to the United States Constitution,³ and ultimately issuing a judgment declaring that Sections two through five of P.L. 20-134 unconstitutional and void. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427 (D. Guam 1990).

10. In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992), the Ninth Circuit affirmed the District Court's judgment permanently enjoining the enforcement of P.L. 20-134, finding that the 1968 Mink Amendment to the Organic Act of Guam, "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded," and that P.L. 20-134 made no attempt to comply with *Roe* and was unconstitutional. *Id.* at 1370.

11. In *Dobbs v. Jackson Women's Health Org.*, issued on June 24, 2022, the Supreme Court of the United States overturned *Roe v. Wade*, holding that the right to abortion is not expressly or implicitly protected by the U.S. Constitution and

³ Sections 4 and 5 of P.L. 20-134 criminalized (1) a woman's solicitation and taking of a drug or submitting to an operation to cause an abortion, and (2) a person's solicitation of a woman to submit to an abortion, respectively. In the District Court case, the court found that, in addition to P.L. 20-134's violation of the Due Process clause of the Fourteenth Amendment, Sections 4 and 5 violated the First Amendment to the United States Constitution since they attempt to prohibit free speech. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, *supra* at 1429 n.9. The defendants in the District Court case did not appeal this ruling. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992).

that “the authority to regulate abortion must be returned to the people and their elected representatives.” *Dobbs*, 142 S. Ct. at 2279.

12. On January 11, 2023, Douglas Moylan, the Attorney General of Guam issued a Notice of Motion to Dissolve Injunction, notifying Gov. Leon Guerrero and other successor defendants in *Guam Society of Obstetricians and Gynecologists v. Ada* of his intent to move the District Court of Guam for an order dissolving the injunction entered against enforcement of P.L. 20-134 by the end of January, 2023. See Ex. 2 at 2.

13. While dissolution of the permanent injunction imposed by the District Court of Guam and affirmed by the Ninth Circuit against the enforcement of P.L. 20-134 would represent a substantial shift in the law governing abortion on Guam, the issue holds broader implications regarding the continued validity (or lack thereof) of legislation that was unconstitutional at the time of its passage; the limitations on the Guam Legislature’s authority to pass legislation that is contrary to federal law, and the status of such legislation upon passage; and, if valid, the repeal by implication of such legislation based on the subsequent passage of related, conflicting legislation.

14. These questions are critical to the administration of justice on Guam. Their resolution will inform inferior courts, the Guam Legislature, the executive branch agencies charged with enforcement of such legislation regarding their

respective authority relative to such legislation. Further, it will inform the members of the general public regarding abortion laws that are currently in effect.

V. UNDUE DELAY IN NORMAL PROCESS OF LAW

15. The second jurisdictional requirement for Section 4104 review is that the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay. This prong is likewise satisfied.

16. While “[t]he issue of undue delay ... lacks bright line demarcation,” *In re Request of Governor Carl T.C. Gutierrez for a Declaratory Judgment as to the Organicity of Guam Pub. L. 22–42*, 1996 Guam 4 ¶ 7, the court has held that the undue delay standard requires the court to “(1) measure the delay relative to the time that would be consumed by litigating the issue through the normal process of law and (2) determine whether this delay is excessive or inappropriate.” *In re Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan Guahan*, 2017 Guam 14 ¶ 11.

17. While Section 4101 “was intended to provide a fast track for the initiation of cases before the Supreme Court of Guam so that rulings could be obtained on important issues of law without time consuming litigation in the inferior court,” *In re Gutierrez*, 1996 Guam 4 ¶ 8, “the foundational question of whether certain legislation has passed presents a uniquely exigent question that, if not

decided quickly, has potential to impede functions of legislative and executive governance.” *In re Calvo*, 2017 Guam 14 ¶ 13.

18. The Attorney General has stated his intent to move to vacate the injunction imposed on the enforcement of P.L. 20-134 by the District Court of Guam and affirmed by the Ninth Circuit. *See* Notice of Motion to Dissolve Injunction, Ex. 2. The questions of whether P.L. 20-134 is valid though it was unconstitutional at the time of its passage, whether the Guam Legislature had authority to pass it is in the first instance under the Organic Act of Guam, and whether, if valid, P.L. 20-134 was repealed by implication by subsequent legislation therefore present “uniquely exigent question[s] that, if not decided quickly, has potential to impede the functions of legislative and executive governance.” *In re Calvo*, 2017 Guam 14 ¶ 13. If not resolved expediently, the pending questions would cause confusion for the affected agencies and the general public regarding their respective rights and responsibilities.

VI. REQUESTED INTERPRETATION AFFECTING THE GOVERNOR’S POWERS AND DUTIES AND OPERATIONS OF THE EXECUTIVE BRANCH

19. This court has identified two subjects appropriate for section 4104 review: (1) questions that require an interpretation of federal or local law lying within the jurisdiction of Guam or (2) questions that affect the powers and duties of the Governor and the operation of the executive branch.

20. “[T]he question of whether or not legislation has validly passed necessarily impinges on the operation of the executive branch, and the Governor’s powers and duties, because ‘issues involving separation of powers are undoubtedly the type of matter that can be addressed in a request ... under section 4104.’” *In re Calvo*, 2017 Guam 14 ¶ 5 (citing *In re Tax Trust Fund*, 2014 Guam 15 ¶ 15 (internal quotations omitted). “Section 4104 permits expedited review of the non-requesting party’s operations where those operations “impinge” on the operations of another branch of government.” *In re Calvo*, 2017 Guam 14 ¶ 5 (finding that Section 4101 review was appropriate where the ability of the executive branch to issue tax and revenue anticipated notes was “directly depending on first determining whether the legislation [permitting the issue of the notes] has duly passed.”).

21. Where “the Governor is asking the core, fundamental question of whether a bill was validly passed *at all* pursuant to certain statutory language...this interpretive question plainly has ramifications for the Governor’s powers and duties, as well as the operations of the executive branch, including the Governor’s authority to sign any such passed legislation into law, *see* 48 U.S.C.A. § 1423i, and his obligation to faithfully execute the law, *see* 48 U.S.C.A. § 1422.” *In re Calvo*, 2017 Guam 14 ¶ 16 (emphasis in original).

22. Resolution of questions regarding the validity of P.L. 20-134 affects the legislation's enforcement, particularly when considered with the broader statutory scheme regulating abortion on Guam.

23. The Governor seeks declarations on the following questions:

- a. As a matter of Guam law, is P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed by the Ninth Circuit Court of Appeals, void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade*.
- b. Was the passage of P.L. 20-134 an *ultra vires* act, where the Organic Act limited the Legislature's authority to pass laws to subjects of legislation that were not inconsistent with U.S. law applicable to Guam, and, at the time of its passage, P.L. 20-134 was inconsistent with the U.S. Constitution as applicable to Guam; and
- c. As a matter of Guam law, if the court finds that the Organic Act authorized the 20th Guam Legislature to pass P.L. 20-134, and the legislation was not *void ab initio*, was P.L. 20-134 impliedly repealed by subsequent legislation the Guam Legislature passed regulating abortion on Guam.

VII. GOVERNOR LEON GUERRERO'S LEGAL POSITION

24. Gov. Leon Guerrero submits that P.L. 20-134 is void and unenforceable, notwithstanding the change in United States Supreme Court case law interpreting whether abortion is protected by the U.S. Constitution.

25. First, because P.L. 20-134 was held unconstitutional in its entirety at the time of its passage, it is *void ab initio*, and is void forever. “It is an elementary principle of American law that statutes inconsistent with the Constitution are void.” *People v. Aldan*, 2018 Guam 19 ¶ 24 (citing *Marbury v. Madison*, 5 U.S. 137, 180 (1803)); *see also In re Request of Gutierrez*, 2022 Guam 1 ¶ 17 (“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”) (quoting *In re Opinion of the Justices*, 269 Mass. 611, 168 N.E. 536, 538 (1929)); *City of Atlanta v. Gower*, 216 Ga. 368, 372, 116 S.E.2d 738, 742 (1960)(“The time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and, if it is unconstitutional then, it is forever void.”); *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 570 (9th Cir. 1989) (“A law passed in violation of the Constitution is null and void *ab initio*.”).

26. Second, at the time P.L. 20-134 was enacted, the Organic Act of Guam, provided in relevant part that “The legislative power of Guam shall extend to all

subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.” 48 GCA §1423a (August 1, 1950). As this court in *In re Request of Governor Felix P. Camacho*, explained:

[I]t is a “well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act.” H.R.REP. NO. 105-742 (1998), 1998 WL 658802 at *3...The Ninth Circuit Court of Appeals similarly recognizes that Guam’s self-government is “constrained by the Organic Act” and therefore, held that courts must “invalidate Guam statutes in derogation of the Organic Act.” *Haeuser v. Dep’t of Law*, 97 F.3d 1152, 1156 (9th Cir.1996).

2004 Guam 10 ¶ 33 (holding provisions of Public Law 26-169 inorganic and “invalid,” and “striking down” as inorganic Executive Order 2004-07 because “its unconstitutionality is clearly apparent.”). Accordingly, because the Guam Legislature lacked authority to pass a law which violated the United States Constitution as made applicable to Guam through the Organic Act of Guam, as amended, the passage of P.L. 20-134 constitutes an *ultra vires* act and the legislation is invalid on this basis.

27. Finally, if the court finds that P.L. 20-134 is not void, invalid, or otherwise unenforceable, it has been repealed by implication by subsequent laws enacted by the Guam Legislature. “It is a well-settled rule that later statutes repeal by implication earlier irreconcilable statutes.” *People of Territory of Guam v. Quinata*, 1982 WL 30546, at *2 (D. Guam App. Div. 1982), *aff’d*, 704 F.2d 1085

(9th Cir. 1983); *see also Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶16 (“Implied repeals can be found in two instances: (1) where provisions in the two acts are in irreconcilable conflict, or (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.”)(internal quotations omitted).

28. P.L. 20-134 cannot be reconciled with subsequent laws passed by the Guam Legislature that govern abortion on Guam.

29. Title 19 GCA § 4A101 *et seq* prohibits a person from performing an abortion upon a pregnant female under the age of eighteen (18) and not emancipated, unless the person first obtains the written consent of both the pregnant person and one of her parents or a guardian. *See* 19 GCA § 4A102. Section 4A107 of the same chapter further authorizes the Superior Court of Guam to waive the consent requirement for a minor if the court finds, by clear and convincing evidence, that the minor is sufficiently mature or well-informed to decide whether to have an abortion, and to issue an order authorizing the minor to consent to the performance of an abortion without the consent of a parent or guardian. *See* 19 GCA § 4A107. Any person who performs an abortion with knowledge the person upon whom the abortion is to be performed is an unemancipated minor is guilty of a third degree felony. 19 GCA § 4A109(a). Any person not authorized to provide consent for a minor to have an abortion who provides consent is guilty of a third degree felony.

19 GCA § 4A109(c). Any person who coerces a minor to have an abortion is guilty of a misdemeanor. 19 GCA §4A109(d).

30. The Women’s Reproductive Health Information Act of 2012, codified at 10 GCA §3218.1 *et seq*, regulates general consent to abortion. Under Section 3218.1(b), a person provides “voluntary and informed consent” to abortion when (1) at least 24 hours prior to obtaining an abortion, the physician gives the patient specific information regarding the procedure in person, including a description of the method, the associated medical risks of the proposed abortion, the probable gestational age of the unborn child, the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed, the medical risks associated with carrying the pregnancy to term, and any need for anti-Rh immune globulin therapy, risks for declining such therapy, and costs associated therewith; (2) at least 24 hours prior to the abortion, the physician informs the patient in person that medical assistance benefits may be available for prenatal care, childbirth and neonatal care, public assistance may be available to provide medical insurance for the child, public services exist to help facilitate adoption, printed materials to be provided describe this information as well as the unborn child, the father of the unborn child is liable to assist in the support of the child, and the woman is free to withhold or withdraw her consent to the abortion without affecting her future care or treatment and without the loss of local or federal benefits she may be

entitled to, (3) at least 24 hours before the abortion, the physician provides a copy of the printed materials to the woman, and the same is read to her if she is unable to read them on her own, (4) the foregoing information is provided to her individually in a private room, (5) prior to the abortion, the woman certifies on a checklist certification that the information has been provided, (6) the physician receives and signs a copy of the certification prior to the abortion, (7) in the event of a medical emergency, the physician shall certify the nature of the emergency and circumstances that necessitated the waiving of the informed consent requirements, and (8) the physician shall not require payment for providing the foregoing information. 10 GCA § 3218.1. Violation of this section is a misdemeanor. *Id.*

31. The Partial-Birth Abortion Ban Act of 2009, codified at 10 GCA § 91A101 *et seq*, prohibits a person from knowingly performing or attempting to perform a partial-birth abortion, defined as vaginally delivering a living fetus until either the entire fetal head is outside the body of the mother in the case of head-first presentation, or any part of the fetal trunk past the navel is outside of the body of the mother in the case of breach presentation, for the purpose of performing an act the person knows will kill the partially-delivered living fetus, and performing an overt act that kills the partially-delivered living fetus. 10 GCA §§ 91A103 and 91A104. A person who performs a partial-birth abortion shall be guilty of a third degree felony. 10 GCA § 91A106.

32. Title 10 GCA § 3218 requires that individual reports for each abortion are completed by attending physicians and transmitted to the Office of Vital Statistics of the Department of Public Health and Social Services, and that such reports shall be confidential and not contain the name of the mother. 10 GCA §3218. The report is required to include information regarding the mother, including but not limited to, the age, ethnic origin, marital status, number of previous pregnancies, the number of years of education, the number of living children, the number of previous induced abortions, method of contraception at the time of conception, the date of the beginning of her last menstrual period, her medical condition at the time of the abortion, the procedure used, the type of family planning recommended, the type of counseling given, the complications, and the gestational age of the unborn child terminated by the abortion. *Id.* The Office of Vital Statistics shall receive and retain the reports, and publish a statistical report based on the data on an annual basis. *Id.*

33. P.L. 20-134 cannot be harmonized with the body of statutory law governing abortion on Guam, which, along with existing abortion law enacted in 1978, form a comprehensive statutory scheme that cover the subject. Accordingly, P.L. 20-134, to the extent it is not *void ab initio*, invalid, or otherwise unenforceable on other bases, has been impliedly repealed by the enactment of subsequent statutes in this area. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (finding that pre-*Roe* abortion statute was repealed by implication where “comprehensive

regulations governing the availability of abortion for minors, the practices of abortion clinics and state funding for abortions could not be harmonized with provisions purporting to criminalize abortion); *see also Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990) (“[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited. ...A blanket criminal prohibition of abortions and the use of abortifacients is inconsistent with these regulations.”); *State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921) (finding that if subsequent statutes are “repugnant” to an earlier statute, the later statutes will repeal the earlier one because they are “the last legislative declaration upon the subject.”).

VIII. PRAYER FOR RELIEF

WHEREFORE Petitioner Governor Leon Guerrero respectfully requests the Court issue a Judgment declaring the following:

1. P.L. 20-134, which the District Court of Guam held to be unconstitutional and void at the time of its passage, as affirmed by the Ninth Circuit Court of Appeals, is void forever, such that it cannot be revived following a change in the constitutional doctrine reversing *Roe v. Wade*.

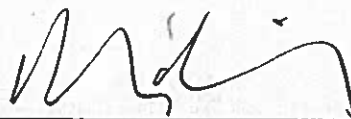
2. The Guam Legislature did not have the authority to pass P.L. 20-134 pursuant to the Organic Act of Guam, and P.L. 20-134 is therefore *void ab initio* and invalid; and

3. To the extent P.L. 20-134 is not void, invalid or otherwise unenforceable, it has been repealed by implication by Guam law passed subsequent to the enactment of P.L. 20-134.

Respectfully submitted this 23rd day of January, 2023.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By:



LESLIE A. TRAVIS
JEFFREY A. MOOTS

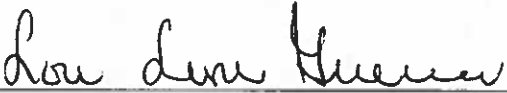
Attorneys for Petitioner
Lourdes A. Leon Guerrero,
Governor of Guam

VERIFICATION

GUAM U.S.A,)
) ss:
Territory of Guam)

The undersigned, deposes and says: That she is the petitioner in the foregoing Request for Declaratory Judgment, that the facts contained therein are true and correct to the best of her knowledge and belief, except as to the matters stated upon information and belief, and as to those matters, she believes them to be true.

Dated this 23rd day of January, 2023.



LOURDES A. LEON GUERRERO

SUBSCRIBED and SWORN to before me on the day and year first above-written.



NOTARY PUBLIC

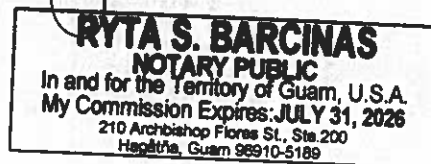
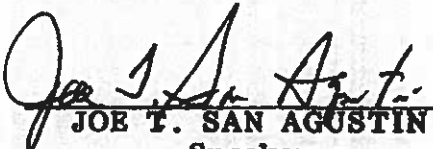


EXHIBIT 1

TWENTIETH GUAM LEGISLATURE
1990 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

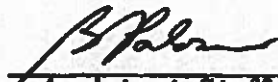
This is to certify that Substitute Bill No. 848 (COR), "AN ACT TO REPEAL AND REENACT §31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§31.21 AND 31.22 THEREOF, TO ADD §31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON," was on the 8th day of March, 1990, duly and regularly passed.


JOE T. SAN AGUSTIN
Speaker

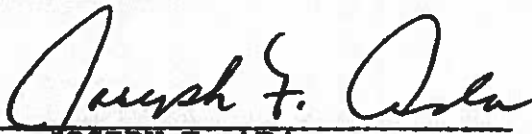
Attested:


PILAR C. LUJAN
Senator and Legislative Secretary

This Act was received by the Governor this 8 day of MAR, 1990,
at 6:22 o'clock P.M.


Assistant Staff Officer
Governor's Office

APPROVED:


JOSEPH F. ADA
Governor of Guam

Date: March 19, 1990

Public Law No. 20-134

**TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session**

**Bill No. 848 (COR)
Substituted by the author**

Introduced by:

**E. P. Arriola
T. S. Nelson**

**AN ACT TO REPEAL AND REENACT §31.20
OF TITLE 9, GUAM CODE ANNOTATED, TO
REPEAL §§31.21 AND 31.22 THEREOF, TO
ADD §31.23 THERETO, TO REPEAL
SUBSECTION 14 OF SECTION 3107 OF TITLE
10, GUAM CODE ANNOTATED, RELATIVE TO
ABORTIONS, AND TO CONDUCT A
REFERENDUM THEREON.**

1 **BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:**

2 **Section 1. Legislative findings. The Legislature finds that for**
3 **purposes of this Act life of every human being begins at conception, and**
4 **that unborn children have protectible interests in life, health, and**
5 **well-being. The purpose of this Act is to protect the unborn children of**
6 **Guam. As used in this declaration of findings the term "unborn children"**
7 **includes any and all unborn offspring of human beings from the moment of**
8 **conception until birth at every stage of biological development.**

9 **Section 2. §31.20 of Title 9, Guam Code Annotated, is repealed and**
10 **reenacted to read:**

11 **"§31.20. Abortion: defined. "Abortion" means the purposeful**
12 **termination of a human pregnancy after implantation of a fertilized**
13 **ovum by any person including the pregnant woman herself with an**
14 **intention other than to produce a live birth or to remove a dead**
15 **unborn fetus. "Abortion" does not mean the medical intervention in**
16 **(i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the**
17 **commencement of pregnancy if two (2) physicians who practice**
18 **independently of each other reasonably determine using all available**
19 **means that there is a substantial risk that continuance of the**
20 **pregnancy would endanger the life of the mother or would gravely**

1 impair the health of the mother, any such termination of pregnancy to
2 be subsequently reviewed by a peer review committee designated by
3 the Guam Medical Licensure Board, and in either case such an
4 operation is performed by a physician licensed to practice medicine in
5 Guam or by a physician practicing medicine in the employ of the
6 government of the United States, in an adequately equipped medical
7 clinic or in a hospital approved or operated by the government of the
8 United States or of Guam."

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

11 "§31.21. Providing or administering drug or employing means to
12 cause an abortion. Every person who provides, supplies, or
13 administers to any woman, or procures any woman to take any
14 medicine, drug, or substance, or uses or employs any instrument or
15 other means whatever, with intent thereby to cause an abortion of
16 such woman as defined in §31.20 of this Title is guilty of a third
17 degree felony. In addition, if such person is a licensed physician,
18 the Guam Medical Licensure Board shall take appropriate disciplinary
19 action."

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

22 "§31.22. Soliciting and taking drug or submitting to an attempt
23 to cause an abortion. Every woman who solicits of any person any
24 medicine, drug, or substance whatever, and takes the same, or who
25 submits to any operation, or to the use of any means whatever with
26 intent thereby to cause an abortion as defined in §31.20 of this Title
27 is guilty of a misdemeanor."

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

30 "§31.23. Soliciting to submit to operation, etc., to cause an
31 abortion. Every person who solicits any woman to submit to any
32 operation, or to the use of any means whatever, to cause an abortion
33 as defined in §31.20 of this Title is guilty of a misdemeanor."

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

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

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

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

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

EXHIBIT 2



January 11, 2023

To: Hon. Lourdes Leon Guerrero, Governor of Guam; Governor's Attorney Jeffrey A. Moots, Mr. Arthur U. San Agustin, MHR, Director, Department of Public Health and Social Services; Ms. Lillian Posadas, MN, RN, Administrator and CEO of Guam Memorial Hospital Authority; and Guam Election Commission Members Ms. Alice M. Taijeron, Mr. Gerard "Jerry" C. Crisostomo, Mr. G. Patrick Civile, Mr. Joseph P. Mafnas, Ms. Antonia "Toni" R. Gumataotao, Ms. Carissa E. Pangelinan, and Mr. Benny A. Pinaula

From: Douglas B. Moylan, Attorney General of Guam

Subject: Notice of Motion to Dissolve Injunction on Guam P.L. No. 20-134, *Guam Society of Obstetricians and Gynecologists v. Ada*, 776 F.Supp. 1422 (D.Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992); *cert denied sub nom. Ada v. Guam Society of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992)

Hafa Adai,

In light of the Supreme Court of the United States' recent June 24, 2022 decision in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), which held that there is no right to an abortion in the U.S. Constitution, overruling *Roe v. Wade*, 410 U.S. 113 (1973); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Office is now duty-bound to seek to have the U.S. District Court of Guam vacate (dissolve) the injunction entered against your predecessors in office in *Guam Society of Obstetricians and Gynecologists v. Ada*, Civil Case No. 90-00013 (D. Guam) on August 23, 1990, as amended October 13, 1990.

Under Rule 25(d) of the Federal Rules of Civil Procedure, when a public official leaves office for whatever reason, the current office holder is *automatically* substituted in a lawsuit seeking injunctive or other equitable relief. There are many other jurisdictions throughout the country where similar injunctions against the implementation and enforcement of laws similar to Guam's laws have been successfully vacated, some without opposition from the plaintiffs.

The lawsuit is principally against the Attorney General because the relief it sought was to enjoin enforcement of parts of what were to become changes to Guam's criminal laws in Title 9 of Guam Code Annotated. When the case was first filed the Attorney General was appointed by and served at the pleasure of the Governor, so it may have been at the time appropriate that the Governor and AG be named defendants. Today, unlike back in 1990, the Attorney General of Guam is an

Office of the Attorney General
Douglas B. Moylan · Attorney General of Guam

590 S. Marine Corps. Drive · ITC Bldg., Ste. 901 · Tamuning, Guam 96913 · USA
671-475-3324 · 671-475-4703 (fax) · dbmoylan@oagguam.org · www.oagguam.org
"Guam's Toughest Law Enforcers"

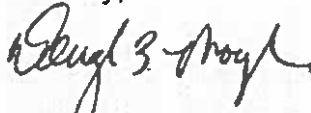
independent and elected office created by Congress. See 48 U.S.C. § 1421g(d)(1) ("[T]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam."); 5 G.C.A. § 30109 ("[T]he Attorney General is the public prosecutor and, by himself, a deputy or assistant, shall: (a) conduct on behalf of the government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in any of the courts of Guam, the District Court of Guam, and any appeals therefrom..."); 5 G.C.A. § 30104 ("[T]he Attorney General shall have cognizance of all matters pertaining to public prosecution, including the prosecution of any public officials."); 5 G.C.A. § 30102 ("[N]otwithstanding any other provision of law, the Attorney General shall have cognizance of all legal matters, excluding the Legislative and Judicial Branches of the government of Guam, involving the Executive Branch of the government of Guam, its agencies, instrumentalities, public corporations, autonomous agencies and the Mayors Council, all hereinafter referred to as 'agency'."); and 5 G.C.A. § 30103 ("[T]he Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary."). Further, it is the responsibility of the Attorney General of Guam to enforce laws passed by the Guam Legislature.

Please find attached a copy of Guam P.L. No. 20-134, and the 1990 injunction.

In addition, regardless of the foregoing, the Attorney General of Guam was a separate party and separately sued in the before mentioned District Court case. We also maintain an ethical duty of candor to the U.S. District Court of Guam to inform the Court of the recent change in the controlling authority by the Supreme Court of the United States, upon which the District Court earlier relied upon. *Supra*.

For the above reasons and possibly others, the injunction is no longer appropriate. We therefore intend to move to dissolve the injunction upon Guam P.L. No. 20-134 on or by the end of this month. Please do not hesitate to contact me, or my Acting Civil Division Deputy Joseph Guthrie, if you have any questions regarding the above matters.

Cordially,



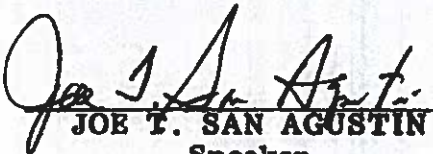
Douglas B. Moylan
Attorney General of Guam

Attachments (13)

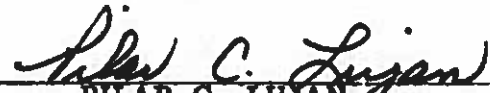
TWENTIETH GUAM LEGISLATURE
1990 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Substitute Bill No. 848 (COR), "AN ACT TO REPEAL AND REENACT §31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§31.21 AND 31.22 THEREOF, TO ADD §31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON," was on the 8th day of March, 1990, duly and regularly passed.


JOE T. SAN AGUSTIN
Speaker

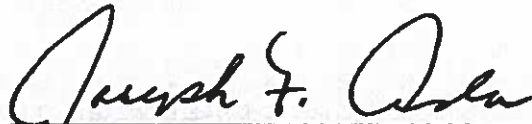
Attested:


PILAR C. LUJAN
Senator and Legislative Secretary

This Act was received by the Governor this 8 day of MAR, 1990,
at 6:22 o'clock P.m.


Assistant Staff Officer
Governor's Office

APPROVED:


JOSEPH F. ADA
Governor of Guam

Date: March 19, 1990

Public Law No. 20-134

**TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session**

**Bill No. 848 (COR)
Substituted by the author**

Introduced by:

**E. P. Arriola
T. S. Nelson**

**AN ACT TO REPEAL AND REENACT §31.20
OF TITLE 9, GUAM CODE ANNOTATED, TO
REPEAL §§31.21 AND 31.22 THEREOF, TO
ADD §31.23 THERETO, TO REPEAL
SUBSECTION 14 OF SECTION 3107 OF TITLE
10, GUAM CODE ANNOTATED, RELATIVE TO
ABORTIONS, AND TO CONDUCT A
REFERENDUM THEREON.**

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. §31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely

1 impair the health of the mother, any such termination of pregnancy to
2 be subsequently reviewed by a peer review committee designated by
3 the Guam Medical Licensure Board, and in either case such an
4 operation is performed by a physician licensed to practice medicine in
5 Guam or by a physician practicing medicine in the employ of the
6 government of the United States, in an adequately equipped medical
7 clinic or in a hospital approved or operated by the government of the
8 United States or of Guam."

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

11 "§31.21. Providing or administering drug or employing means to
12 cause an abortion. Every person who provides, supplies, or
13 administers to any woman, or procures any woman to take any
14 medicine, drug, or substance, or uses or employs any instrument or
15 other means whatever, with intent thereby to cause an abortion of
16 such woman as defined in §31.20 of this Title is guilty of a third
17 degree felony. In addition, if such person is a licensed physician,
18 the Guam Medical Licensure Board shall take appropriate disciplinary
19 action."

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

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23 to cause an abortion. Every woman who solicits of any person any
24 medicine, drug, or substance whatever, and takes the same, or who
25 submits to any operation, or to the use of any means whatever with
26 intent thereby to cause an abortion as defined in §31.20 of this Title
27 is guilty of a misdemeanor."

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

30 "§31.23. Soliciting to submit to operation, etc., to cause an
31 abortion. Every person who solicits any woman to submit to any
32 operation, or to the use of any means whatever, to cause an abortion
33 as defined in §31.20 of this Title is guilty of a misdemeanor."

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

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

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

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

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

776 F.Supp. 1422
District Court of Guam.

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

GUAM SOCIETY OF OBSTETRICIANS
AND GYNECOLOGISTS, Guam Nurses
Association, the Reverend Milton H. Cole,
Jr., Laurie Konwith, Edmund A. Griley,
M.D., John Dunlop, M.D., on Behalf of
themselves and all others similarly
situated, and all their women patients,
Plaintiffs,

v.

Joseph F. ADA, in his individual and
official capacities, Dr. Leticia Espaldon,
George B. Palican, Elizabeth
Barrett-Anderson, Gloria B. Nelson,
Thomas J.B. Calvo, Florencio T. Ramirez,
Leonila L.G. Herrero and Michael
Phillips, as the Board of Directors of the
Guam Election Commission, in their
official capacities, together with all others
similarly situated, Defendants.

Civ. No. 90-00013.

Aug. 23, 1990.

Amended Judgement Oct. 13, 1990.

Synopsis

Plaintiffs brought action challenging constitutionality of Guam's abortion statute. The District Court, Munson, J., held that: (1) *Roe v. Wade* applied to territory of Guam, (2) territory of Guam could not "justify" abortion regulation otherwise invalid under *Roe v. Wade* on ground that it embodied Guam's view of when life begins; (3) Guam's abortion statute was unconstitutional, and (4) officials of Territory of Guam would be enjoined in their official capacities from enforcing the statute.

So ordered.

Attorneys and Law Firms

*1423 Anita Arriola, Arriola, Cowan & Bordallo, Agana, Guam, for plaintiffs.

Katherine Maraman, Monessa Lujan, Governor's Office, Agana, Guam, for Governor Ada.

Maria Fitzpatrick, Asst. Atty. Gen., Agana, Guam, for Atty. Gen. Barrett-Anderson.

Patrick Wolff, Agana, Guam, for Dr. Espaldon.

DECISION AND ORDER RE PERMANENT INJUNCTION AND OTHER MOTIONS

MUNSON, District Judge.

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

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

Statement of Undisputed Facts

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

AN ACT TO REPEAL AND REENACT *1424 § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF, TO ADD 31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10. GUAM CODE

ANNOTATED, RELATIVE TO ABORTIONS, AND
TO CONDUCT A REFERENDUM THEREON.

BE IT ENACTED BY THE PEOPLE OF THE
TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

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

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

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

such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

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

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

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

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

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

Section 7. Abortion referendum. (a) There shall be submitted to an island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro: "Shall that public law derived from Bill 848, *1425 Twentieth Guam Legislature (P.L. 20-134), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?"

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

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

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

Guam is a Christian community. That no matter which way you're going to say "this is not religion, this is not so and so." I beg to differ. Mr. Speaker. It's a Christian

community. We decide what we're going to have here on Guam.

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

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

Schempp is a noteworthy primer on First Amendment religious freedom.

Transcript of Legislative Session, March 8, 1990.

Senator Arriola's legal counsel had advised her that the Bill as introduced would probably be struck down because "[j]udges are bound by Supreme Court decisions because [the decisions are] binding precedent, and that more than likely a judge would probably find that this bill was not in keeping with *Roe v. Wade*." Deposition of Attorney June Mair, May 10, 1990, at p. 23.

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

On February 26, 1990, Guam's Attorney General, Elizabeth Barrett Anderson, filed twelve pages of written testimony with the Committee on Judiciary and Criminal Justice. The Attorney General gave as the legal opinion of her office that both bills were "violative of a woman's constitutional right of privacy as enunciated by the United

States Supreme Court in *Roe v. Wade*." The Attorney General noted that a "state cannot interfere with a woman's right of personal privacy to decide to have an abortion whatever the cause of her pregnancy. The state may *regulate* such a decision, but it cannot deprive a woman of such a choice." (Emphasis in original) Because both bills effectively proscribed abortion, the Attorney General gave as her legal opinion that "both bills would be held unconstitutional." Attorney General's Opinion, pp. 1-4.

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

On March 19, 1990, defendant Governor Joseph F. Ada signed the bill into law as Public Law 20-134. In his March 23, 1990, transmittal letter to the Speaker, Governor Ada noted that his "pro-life" stance was *1426 well-known, but that Bill 848 was "even more severe than my views on the subject are." Despite his expressed misgivings about almost every substantive part of the bill, and after, in his own words, prayer and much soul-searching, the Governor

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

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

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

On March 20, 1990, Janet Benshoof, in a luncheon speech before the Guam Press Club, after acknowledging that Guam's new law prohibited the "soliciting" of abortions, "informed" the audience that abortions could be obtained in Hawaii and gave a telephone number in that state for further information. She was promptly arrested under the solicitation provisions of the new law. (These charges

subsequently were dismissed, but without prejudice.)

On March 23, 1990, plaintiffs filed this lawsuit, challenging the constitutionality of the Act. Plaintiffs alleged that the law violates the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. The Court issued a temporary restraining order the same day. After a hearing on March 26, 1990, the temporary restraining order was continued in force until further order of the Court.

Decision

Summary Judgment and Permanent Injunction

After the emotionalism and stridency of the opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade*² the law in the Territory of Guam? Because the Court finds that it is, plaintiffs' motion for summary judgment is GRANTED and, for the reasons stated hereinbelow, defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon³ are permanently enjoined from enforcing any of the provisions of Public Law 20-134.

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

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

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

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

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

(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 *1427 thirteenth amendment; the second sentence of section 1 of the fourteenth amendment⁵; and the fifteenth and nineteenth amendments.

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

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

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

48 U.S.C. § 1421b(u).

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

Under *Ngiraingas v. Sanchez*, [495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990)], in determining whether Congress extended the privacy/abortion right under the First, Third, Fourth, Fifth, Ninth or Fourteenth Amendments, this court must seek indicia of congressional intent at the time 48 U.S.C. Section 1421b(u) was enacted in 1968. There is, however, no clear signal given from the legislative history of Section 1421b(u) that Congress intended to extend the

privacy/abortion right to Guam. As a matter of law, therefore, the First, Third, Fourth, Fifth and Ninth and Fourteenth Amendments, to the extent that they encompass a privacy/abortion right, do not have the same effect and application that they have in the states. *Roe v. Wade* ... does not apply to Guam and Guam may regulate abortion as in Public Law 20-134.

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

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

Governor Ada's precise argument finds no known precedent in American jurisprudential history. His reliance on *Ngiraingas* to support the "frozen in time" theory of the applicability of certain constitutional rights to the Territory of Guam is erroneous. It is sufficient here to note just one flaw in defendant's reasoning. Section 1983 was enacted by Congress more than a century ago in response to the activities of the Ku Klux Klan. It was not unreasonable in *Ngiraingas*, then, for the Supreme Court to look at § 1983's legislative history to determine if a territory such as Guam was intended to fall within its ambit. However, the Organic Act of Guam is a federal statute concerning *only* Guam. When it was amended in 1968, the amendments applied *only* to Guam. It is inconceivable to the Court that Congress would add subsection (u) to § 1421b and yet simultaneously fix it immutably in time in 1968 so that it would not truly "have the same force and effect" as in the United States, as provided.

This Court cannot imagine a clearer "signal" from Congress than that, by enacting subsection (u) in 1968, it felt an obligation to insure that the people of Guam would enjoy more of the constitutional protections afforded other citizens of the United States. Inarguably, it seems to this Court, the express words of the statute demonstrate that Congress intended that the people *1428 of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court. It follows, then, when interpreting subsection (u), that since the decisions of the United States Supreme Court,

including *Roe v. Wade*, are the law of the land, they apply with equal force and effect to the Territory of Guam. Having determined that *Roe v. Wade* applies in Guam, the Court finds that Public Law 20-134 is unconstitutional. For the reasons given below, the entire law must fall.

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

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

However, as *Roe* noted, the right of personal privacy, in the context of a woman's decision regarding abortion, is not unqualified and must be weighed against important state interests in regulation. *Id.* at 155, 93 S.Ct. at 728. Under *Roe*, Guam may regulate abortions only to serve two compelling interests: The government's paramount interest throughout the pregnancy in the woman's health, *Id.* at 154, 93 S.Ct. at 727, and the government's interest after viability in protecting the potentiality of human life, *Id.*, at 162, 93 S.Ct. at 731. During approximately the first trimester of pregnancy, neither of these interests is deemed "compelling" for purposes of constitutional analysis and the government may not restrict a woman's right to choose an abortion. *Id.* at 164, 93 S.Ct. at 732. During approximately the second trimester, the government may only regulate the abortion procedure in ways that are "reasonably related to maternal health." *Id.* After viability [of the fetus], the government may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 165, 93 S.Ct. at 733. Therefore, any law purporting to regulate abortion must take into account these different interests, and protect both the rights of the individual woman and the interests of the state.

Because Sections 2', 3', 4', and 5 (Title 9 G.C.A. §§ 31.20, 31.21, 31.22, and 31.23, *1429 respectively) of the

Guam law fail to make distinctions based on the stage of the pregnancy, and because the law does not recognize, as it must, any of the other constitutionally-protected interests involved, it violates the Due Process Clause of the Fourteenth Amendment⁸, as it applies to Guam via § 1421b(u).⁹

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

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

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

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

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

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

⁹ Sections 4 and 5 also violate the First Amendment since they attempt to prohibit freedom of speech. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [Citations

omitted]." *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989).

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

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

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

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

42 U.S.C. § 1983 Claims

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

The Supreme Court has held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." *Ngiraingas v. Sanchez*, 495 U.S. 182, 110 S.Ct. 1737, 1743, 109 L.Ed.2d 163 (1990). The Supreme Court has also said, however, that "a state official acting in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state'." (Emphasis added) *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2311, n. 10, 105 L.Ed.2d 45 (1989),

quoting, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985). The theory supporting this view was expressed in *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454, 52 L.Ed. 714 (1908):

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

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official attempting, by the use of the name of the state, *1430 to enforce a legislative enactment which is void because unconstitutional.

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

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

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

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

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

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

¹⁴ The Court does not today, of course, address the issue of attorney fees. The § 1988 provision for an award of attorney fees and costs was enacted to encourage enforcement of civil rights provisions by compensating those who bring meritorious actions. The possibility of an award of fees and costs provides an important inducement for attorneys to undertake the vindication of constitutional rights in unpopular causes. Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray.

Left for future consideration is the effect of the Ninth Circuit's reasoning in its *Ngiraingas* decision that a § 1983-based money judgment against defendants in their official capacities was prohibited because it would have affected the public treasury and, thus, would essentially have been a suit against the Government of Guam itself. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1372 (9th Cir.1988). Likewise here, even though the granting of injunctive relief does not itself affect the public treasury, a request for, and an award of, attorney fees following the injunction would most assuredly affect the public treasury. The Court is cognizant of those cases that treat attorney fees as "ancillary" to the merits of the case and

which are deemed, therefore, not to affect the public treasury. See, e.g., *Kentucky v. Graham*, 473 U.S. at 170, n. 18, 105 S.Ct. at 3107, n. 18; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Edelman v. Jordan*, 415 U.S. 651, 667-668, 94 S.Ct. 1347, 1357-1358, 39 L.Ed.2d 662 (1974); *Maher v. Gagne*, 448 U.S. 122, 131-132, 100 S.Ct. 2570, 2575-2576, 65 L.Ed.2d 653 (1980) and *Gagne v. Maher*, 594 F.2d 336, 341-342 (2nd Cir.1979); *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir.1986); and, *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir.1983).

The remaining issue involves § 1983 injunctive relief against Governor Ada in *1431 his individual capacity. Plaintiffs argue that such relief is available because the Supreme Court noted without objection that portion of the Ninth Circuit's *Ngiraingas* opinion which held that the police officers there still could be sued under § 1983 in their individual capacities, to the extent they were not entitled to immunity. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 3.

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

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

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

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

With this distinction in mind, it is clear that a suit against a government official in his or her personal

capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. (Emphases in the original)

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

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

IT IS SO ORDERED.

AMENDED JUDGMENT

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

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS in their official capacities in accordance with the Decision and Order filed in this matter on August 23, 1990. *1432 Defendant Joseph F. Ada cannot be held liable in his individual capacity under 42 U.S.C. § 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that sections two through five of Public Law 20-134 are hereby declared unconstitutional and void under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983. Consequently, section seven of Public Law 20-134 is hereby rendered moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Joseph F. Ada, Leticia Espaldon, George B. Palican, Elizabeth Barrett-Anderson, Gloria B. Nelson, Thomas J.M. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael F. Phillips, in their official capacities, their officers, agents, assistants, servants, employees, successors and all persons acting in concert or cooperation with them at their

direction or under their control be restrained and enjoined permanently from operating, administering, enforcing or executing all provisions of Public law 20-134.

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

All Citations

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