IN THE SUPREME COURT OF GUAM

IN RE: GRAND JURY SUBPOENA DUCES TECUM DATED JANUARY 30, 2024.	Supreme Court Case No. CVA24-010 Superior Court Case No. SP0025-24
GUAM MEMORIAL HOSPITAL AUTHORITY, for itself and its Custodian of Records, Petitioner-Appellant, vs. **ATTORNEY GENERAL OF GUAM, on behalf of himself, his office, and a Grand Jury,** Respondent-Appellee.	**NOTICE OF ORAL ARGUMENT AND STATUS AND DISQUALIFICATION HEARING**

Please take notice that oral argument for the above-captioned matter will take place on **Wednesday, January 28, 2026, at 10:00 a.m.** in the Justice Monessa G. Lujan Appellate Courtroom. Oral Argument will be heard before the panel of Chief Justice Robert J. Torres, Associate Justice F. Philip Carbullido, and Associate Justice Katherine A. Maraman.

A status and disqualification hearing will be conducted on **Wednesday, December 17, 2025, at 9:00 a.m.,** in the Supreme Court Virtual Courtroom. Any questions regarding the disqualification of any justice, the scheduling of a particular hearing, the duration of arguments, and other administrative matters may be addressed at the hearing.

Dated this 5th day of December, 2025.

/s/
MOANA P. TAIJERON
Deputy Clerk
Supreme Court of Guam

CVA24-010

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IN RE GRAND JURY SUBPOENA *DUCES TECUM* DATED JANUARY 30, 2024.

GUAM MEMORIAL HOSPITAL AUTHORITY,
for itself and its Custodian of Records,

Petitioner-Appellant,

vs.

ATTORNEY GENERAL OF GUAM,
on behalf of himself, his office, and a Grand Jury,

Respondent-Appellee.

On Appeal from the Superior Court of Guam
Superior Court Case No. SP0025-24 – Attorney General Case No. 24-0198
Hon. Arthur R. Barcinas, Presiding

Appellant Guam Memorial Hospital Authority's Opening Brief

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JURISDICTIONAL STATEMENT

The Guam Supreme Court has jurisdiction over appeals from final judgments or orders entered in the Superior Court of Guam. 48 U.S.C. § 1424-1(a)(2); 7 GCA § 3107-3108(b); 7 GCA § 25102(a). An order in a civil action resolving a motion to quash a grand jury subpoena is a final, appealable order. *In re Application of the People*, 2024 Guam 16 ¶ 19. The Decision and Order being appeals is an order resolving a motion to quash a grand jury subpoena. ER-023.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Superior Court clearly erred in denying Guam Memorial Hospital Authority's motion to quash a grand jury subpoena *duces tecum* when the Attorney General publicly admitted an improper purpose, the hospital enjoys sovereign immunity, the Attorney General betrayed the interests of his agency-client, and the grand jury subpoena is facially defective.

STANDARD OF REVIEW

This court reviews a Superior Court ruling on a motion to quash for abuse of discretion. *In re Application of the People*, 2024 Guam 16 ¶ 20. Even under this standard, the trial court's interpretation of the underlying legal principles is subject to de novo review. *Id.*

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STATEMENT OF THE CASE

On or about January 30 or 31, 2024, Guam Memorial Hospital Authority ("Hospital" or "GMHA")—an instrumentality of the Government of Guam—received a subpoena *duces tecum* dated January 30, 2024 to provide a wide-variety of seemingly random documents to a grand jury.

On February 14, 2024, the Hospital moved to quash the subpoena. ER-001. Two days later, on February 16, 2024, the Office of the Attorney General (OAG) filed a motion to direct compliance, seeking to have the court direct GMHA's Custodian of Records "Rosita T. Fejeran" to appear and furnish before the grand jury different documents than those in the January 30, 2024 subpoena, *i.e.*, all documents relating to the contract between GMHA and MedHealth Solutions. ER-64 (Doc. 6). The OAG sought a sanction of $1,000 for each day of non-compliance and an award of reasonable attorneys' fees. *Id.*

The OAG filed its Response to the motion to quash on March 14, 2024. ER-64 (Doc. 9). The Hospital filed its response to the motion to direct on March 15, 2024. ER-65 (Doc. 10).

On March 28, 2024., the Hospital filed its Reply in Support of the Motion to Quash. The OAG did not file a reply in support of its motion to direct. The court heard oral arguments on both motions on May 15, 2024. ER-038-064.

On July 26, 2024, the Superior Court issued a Decision and Order granting

the motion to quash and denying the motion to direct. ER-010-022. The next day, the court issued an Amended Decision and Order denying both motions. ER-023-035. The Hospital timely filed a notice of appeal on August 28, 2024. ER-036.

STATEMENT OF THE FACTS

The facts are undisputed:

In an undated letter to the Office of the Attorney General of Guam, the Guam Medical Association—on behalf of two physicians with no formal affiliation with Guam Memorial Hospital Authority (GMHA)—demanded that the Attorney General investigate GMHA and stated support for "immediate federal receivership." ER-007-009. On January 30 or 31, 2024, the Attorney General of Guam served the Hospital with a grand jury subpoena *duces tecum* on a broad and indiscriminate range of topics covering everything from mold mitigation efforts to daily staffing records of OB-GYNs, conspicuously paralleling the grievances contained in the doctors' letter. ER-003-005. Contemporaneously, Attorney General Douglas B. Moylan *himself* ran to the local media outlets to announce that he was investigating the hospital to determine whether a "federal receivership" was appropriate. ER-064 (Doc. 3 at *5-6). In one such interview, Moylan is quoted as saying:

> If the (governor) and Legislature do not make the hospital safe for patients, and if our investigation proves true that it is unsafe, then we would seek to have a federal receivership imposed, among other possible options.

See Joe Taitano II, *AG: GMH investigated for 'dangerous conditions', receivership could be sought*, Pacific Daily News (Jan. 30, 2024).[1] The Hospital promptly moved to quash.

SUMMARY OF THE ARGUMENT

While grand juries have broad powers, they are not unlimited or boundless. Guam's grand juries are statutorily-created entities with the authority to inquire into felonies and related misdemeanors under local law. Grand juries are not empowered to conduct civil investigations. A prosecutor who misuses a grand jury to conduct a civil investigation engages in the quintessential "fishing expedition" and acts in bad faith.

Attorney General Moylan served the Hospital with a grand jury subpoena *duces tecum* and immediately admitted there was an improper purpose behind it. Moylan went on local broadcast news declaring he was investigating the Hospital to determine whether a federal receivership was appropriate. He also admitted that he was initiating this investigation at the behest of two private doctors who both lack any formal affiliation with the Hospital. A federal receivership, however, lacks both a local and criminal purpose. It is a federal and civil remedy. The

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[1] https://www.guampdn.com/news/ag-gmh-investigated-for-dangerous-conditions-receivership-could-be-sought/article_969fe1da-bf44-11ee-9d0b-9bcb388369fc.html.

subpoena issued to the Hospital exceeds the authority granted to the grand jury.

Moreover, the Superior Court's decision denying the Hospital's motion to quash erroneously discounted the direct admission of a party as merely circumstantial evidence. The lower court also erred in failing to order an evidentiary hearing if it harbored any doubts regarding the authenticity of Moylan's undisputed statements.

Sovereign immunity also shields a state government from a grand jury subpoena. The Superior Court, acting *sua sponte*, erroneously concluded that the "sue or be sued" clause in the Hospital's enabling legislation, standing alone, constituted a complete waiver of sovereign immunity. The lower court's conclusion flies in the face of (1) the strong weight of authority that holds enactment of a sue or be sued clause, in and of itself, does not constitute an effective waiver of sovereign immunity, and (2) the provision of the Hospital's enabling legislation preserving *all immunities* for the Hospital, 10 GCA § 80102. The Hospital is directly accountable to Guam's sovereign under the Organic Act, and this court and the Superior Court have consistently recognized the Hospital's sovereign immunity in prior cases. The Superior Court also reached the conclusion in this case by stepping into the role of advocate on behalf of the Attorney General, after the Attorney General failed to adequately brief the issue of sovereign immunity and to meet its burden to prove jurisdiction.

A grand jury subpoena implicates sovereign immunity because ultimate enforcement lies in the courts' contempt power. A government agency cannot be imprisoned and civil monetary sanctions violate sovereign immunity. A party seeking information from the government must, instead, avail itself of administrative or other remedies.

The Superior Court also erred by failing to address the Hospital's valid claims of privilege. Despite acknowledging the Hospital's claim, the lower court never addressed the arguments before denying the motion to quash. Additionally, the lower court characterized a facial defect in the subpoena as a mere technical error. The error, however, requires the return of the subpoena to a different grand jury than the one that issued it. The subpoena itself violates the secrecy of the grand jury.

Finally, the Hospital raised the Attorney General's disqualifying conflict of interest as grounds for quashal. The lower court refused to meaningfully address the argument, finding it not "material," while still acknowledging that the conflict-of-interest was a live, ongoing dispute. The Attorney General lacks the authority to take a position contrary to that of his agency-clients. Instead of holding Moylan accountable for misconduct that has gotten other state Attorneys General disciplined or disbarred, the Superior Court passed on the issue, leaving Moylan to commit unethical misconduct with impunity. Far from being required to presume

good faith, it is the judiciary's solemn obligation to check Moylan's lawlessness.

ARGUMENT

I. Grand juries in Guam are not empowered to conduct civil investigations.

Grand juries have been a feature of the common law for centuries. *See, e.g.*, R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 Univ. Chi. L. Rev. 613 (1985). The long-established tradition of grand juries is even recognized in the United States Constitution. *See* U.S. Const. amend V. The grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

Even in the federal context, the grand jury's broad power does not allow a government institution to "abuse[] its proper function," *see Branzburg v. Hayes*, 408 U.S. 665, 699-700 (1972). While grand juries are granted substantial latitude, they are still "subject to judicial control and subpoenas to motions to quash." *U.S. v. Dionisio*, 410 U.S. 1, 12 (1973). For its actions to be valid, a grand jury must act "within the legitimate scope of its authority." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300 (1991).

Even within a broad common law background, there is "nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding." *In re April 1956 Term Grand*

Jury, 239 F.2d 263, 271 (7th Cir. 1956). "The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings." *Id.* "If the prosecution were using [criminal procedures to elicit evidence in a civil case], it would be flouting the policy of the law." *United States v. Proctor + Gamble, Co.*, 356 U.S. 677, 683 (1958). "Where the grand jury is used by the government as a cover to obtain records for a civil investigation, the grand jury process is subverted and relief must be granted." *Robert Hawthorne, Inc. v. Dir. of Int'l Rev.*, 406 F.Supp. 1098, 1118 (E.D. Penn. 1975).

Recently, this court adopted a modified common law interpretation of local grand juries. *In re Application of the People*, 2024 Guam 16 ¶ 70. Relying on a historical understanding of grand jury powers, this court took a broad approach to interpreting the grand jury's statutory power "to inquire into felonies and any related misdemeanors triable by the [superior] court." 8 GCA § 50.10.

In Guam, grand juries are solely created by local statute, and are not tethered to the Constitution. *People v. Felder*, 2012 Guam 8 ¶ 24. As a statutory creation, the grand jury is confined to exercising the powers conferred by statute. *See Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶¶ 17-18. This court has recognized that § 50.10 provides the full scope of common law powers, except as altered by the Guam Legislature. *In re People*, 2024 Guam 16 ¶ 110. GMHA acknowledged in

the lower court that the grand jury typically has "broad power." ER-064 (Doc. 3, Mot. to Quash *4). Yet, this court has acknowledged that § 50.10 grants "narrower" authority than federal counterparts. *In re People*, 2024 Guam 16 ¶ 75.

The U.S. Constitution has placed limitations, however, on grand juries otherwise broad common law powers out of concern for historical governmental abuses dating to before the Magna Carta. *See* Wm. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 158-163 (James Maclehose & Sons 1905). The U.S. Supreme Court has recognized that the limitations placed on the government by the Fifth Amendment may act as an impediment to a prosecutor's preferences, but such limitations are intended to abate the abuses of the Plantagenets, the Tudors, and the Stuarts, *see Ex parte Milligan*, 71 U.S. 2, 71 (1866), and avoid "a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann v. United States*, 350 U.S. 422, 428 (1956); *see also Faretta v. California*, 422 U.S. 806, 821-22 (1975).

a. The Attorney General publicly admitted that the subpoena *duces tecum* was issued for an improper purpose.

Attorney General Moylan publicly admitted to a civil investigatory purpose. Moylan publicly stated that the purpose of his investigation is to determine

whether a federal receivership is appropriate for the Hospital.[2]

In an article dated January 30, 2024, Moylan is quoted as stating:

> If the (governor) and Legislature do not make the hospital safe for patients, and if our investigation proves true that it is unsafe, then we would seek to have a federal receivership imposed, among other possible options.

See Joe Taitano II, *AG: GMH investigated for 'dangerous conditions', receivership could be sought*, Pacific Daily News (Jan. 30, 2024).[3]

The admission is also undeniable because Moylan gave a *video-taped* interview to KUAM acknowledging the investigation over the precise topics listed in the subpoena *duces tecum*. *See* Nestor Licanto, *Attorney General floats idea of potential federal take-over of GMH*, KUAM News (Jan. 31, 2024).[4] While Moylan described his communication with the Hospital as a "letter," the only "letter" the Hospital received was the subpoena *duces tecum*.

Moylan made similar comments to Kandit News. Troy Torres, *Doctors blow*

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[2] It is important to note that even if Moylan asserts that he was communicating a "criminal purpose," his statements would then violate the secrecy of the grand jury. 8 GCA § 50.34(b).

[3] https://www.guampdn.com/news/ag-gmh-investigated-for-dangerous-conditions-receivership-could-be-sought/article_969fe1da-bf44-11ee-9d0b-9bcb388369fc.html (last accessed Feb. 10, 2024).

[4] On KUAM: https://www.kuam.com/story/50401265/attorney-general-floats-idea-of-potential-federal-takeover-of-gmh (last accessed Feb. 10, 2024).

On YouTube: https://www.youtube.com/watch?v=cLrNCg9urRU.

whistle about GMH, AG now investigating possible criminal conduct, Kandit News (Jan. 20, 2024).[5] The Guam Daily Post also reported similar comments with slightly more generality. *See* John O'Connor, *AG's office investigating alleged dangerous conditions at hospital*, Guam Daily Post (Jan. 31, 2024).[6]

Setting the question of Moylan's standing to seek a federal receivership over his own client aside, a federal receivership is a *federal* and *civil* remedy. Fed. R. Civ. P. 67. It lacks any local or criminal component.

The Superior Court dismissed Moylan's statements as mere "circumstantial evidence." ER-030. Yet, Moylan's statements are a direct admission of an improper purpose. The trial court's curt treatment of the issue fails to recognize that (1) the OAG did not challenge the veracity or authenticity of Moylan's statements, and (2) Moylan's statements are admissions of a party opponent and not hearsay. Guam R. Evid. 801(d)(2)(A); *see also People v. Pinaula*, 2023 Guam 2 ¶¶ 84-87 (Carbullido, J., *concurring in part & dissenting in part*) ("[T]he statement was offered against defendant and was defendant's own statement; thus, it was not hearsay.").

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[5] https://kanditnews.com/doctors-blow-whistle-about-gmh-ag-now-investigating-possible-criminal-conduct/ (last accessed Feb. 10, 2024).

[6] https://www.postguam.com/news/local/ags-office-investigating-alleged-dangerous-conditions-at-hospital/article_bbe23804-bf1b-11ee-9a17-2bbce4e743df.html (last accessed Feb. 10, 2024).

There is no stronger "concrete proof" of improper motive than the public and documented admissions of the opposing party. Respectfully to the trial court, if this is not the case for finding the existence of an improper purpose, then there will never be one. This case does not require the court to rely on its "own presumptions" but simply to listen to the Attorney General's own words as proof of his improper use of Guam's grand juries. A grand jury is only empowered to inquire about (1) felonies and related misdemeanors that (2) are triable by the Superior Court of Guam. 8 GCA § 50.10. Grand juries are limited to investigating crimes within the jurisdiction of the local courts. *See, e.g.*, *Petition of McNair*, 187 A. 498, 503 (Penn. 1936) ("Unless specifically authorized by the Legislature, the grand jury has no power to hear any matter that does not lead to criminal prosecution."); *Alt v. State*, 203 S.W. 53, 54 (Tex. Crim. App. 1918) ("The grand jury is only empowered to inquire into violations of criminal laws . . . .").

When the undisputed evidence of Moylan's statements is viewed correctly, these categories of inquiry reveal that no criminal purpose exists behind Moylan's subpoena. They demonstrate that this is a broad, "arbitrary fishing expedition." *R. Enters.*, 498 U.S. at 299; *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1302 (4th Cir. 1987) ("[T]he government appears to be engaging in a paradigmatic 'fishing expedition.'"). "[T]he investigatory power of the grand jury cannot be used out of curiosity or for a blanket inquiry to bring to light supposed

grievances or wrongs for the purpose of criticizing a public officer or department." *Bd. of Trs. of Calaveras Unified Sch. Dist. v. Leach*, 258 Cal.App.2d 281, 288 (1968). The subpoena is both a broad and ambiguous fishing expedition—which also struggles with basic English grammar—and a blanket inquiry of public officials not aimed at specific criminal wrongdoing.

The evidence of the unauthorized "fishing expedition" is exemplified by Moylan's statement that he has "committed" to taking certain actions on behalf of private doctors.[7] The grand jury subpoena conspicuously covers the same topics in an undated letter submitted on behalf of two private doctors to the Attorney General, *see* ER-007-009. This is the precise type of generalized public grievance voiced simply criticize the Hospital; it is not aimed at rooting out criminal conduct.

b. If the Superior Court needed to authenticate the Attorney General's public statements, it committed reversible error by failing to order an evidentiary hearing instead of denying the motion to quash.

Moylan's comments to the press, and the articles reporting them, are self-authenticating. *See* Guam R. Evid. 902(6). But, the lower court referred to the reports as merely "circumstantial." ER-030. If the lower court harbored doubts about the uncontroverted statements, the appropriate procedure to resolve such issues is to hold "an evidentiary hearing if considered necessary by the trial court."

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[7] KUAM Interview with Douglas B. Moylan (Jan. 31, 2024), https://www.youtube.com/watch?v=cLrNCg9urRU at ***Time Stamp 0:20**.

In re Application of the People of Guam, 2024 Guam 17 ¶ 55.

The proper avenue for authentication of documents, statements, or videos is an evidentiary hearing based on "testimony of witness with knowledge." Guam R. Evid. 901(b)(1). And, although authenticity determinations are "context-specific," they can generally be resolved through "in-court testimony." *Jackson v. State*, 188 A.3d 975, 984 (Md. 2018). While the direct admissions from Moylan are more than sufficient to demonstrate improper motives, any uncertainties harbored by the lower court about the "circumstantial" nature of the evidentiary foundation should have been resolved through a testimonial hearing. The failure warrants reversal.

II. Sovereign immunity limits a grand jury's power to subpoena government agencies without an express waiver by the Legislature.

"Sovereign immunity means that a sovereign cannot be sued in its own courts without its consent." *Story-Bernardo v. Gov't of Guam*, 2023 Guam 27 ¶ 12. "Sovereign immunity restrains judicial interference in the executive and legislative branches so that ultimately the people, not the courts, strike the policy balance between immunizing the government's actions and providing a judicial remedy." *Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 409 (Tex. 2020). A grand jury is "an instrumentality of the courts." *People v. Super. Ct (1973 Grand Jury)*, 531 P.2d 761, 766 (Cal. 1975) (in bank) (the grand jury is not "a completely free-wheeling entity, separate and distinct from the judicial branch of government," but is a "judicial body."); *In re Grand Jury Appearance Request of Loigman*, 870 A.2d

249, 254 (N.J. 2005) ("The grand jury is a judicial, investigative body, serving a judicial function; it is an arm of the court, not a law enforcement agency or an alter ego of the prosecutor's office.").

Service of a subpoena on a sovereign entity not a party to a present proceeding is a "suit" triggering sovereign immunity. *Alltec Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1103 (8th Cir. 2012). Sovereign immunity from third-party subpoenas extends to states and their sovereign entities. *Russell v. Jones*, 49 F.4th 507, 518-519 (5th Cir. 2022). Guam enjoys inherent sovereign immunity similar to that of a state. *Marx v. Gov't of Guam*, 866 F.2d 294, 297-98 (9th Cir. 1989); *San Agustin v. Mansapit-Shimizu*, 2020 Guam 25 ¶ 15.[8] The protections of sovereign immunity extend to grand jury subpoenas. *In re Elko Cnty. Grand Jury*, 109 F.3d 554, 556 (9th Cir. 1997).

a. A "sue or be sued" clause—standing alone—does not constitute a valid waiver of sovereign immunity.

The Superior Court *sua sponte* raised and relied on the "sue and be sued" language in the Hospital's enabling legislation, 10 GCA § 80109(i), standing alone, to find that the Guam Legislature waived the Hospital's sovereign

[8] This case was decided without the benefit of adversarial briefing by the Attorney General, *San Agustin,* 2020 Guam 25 ¶ 5, and should be read narrowly for its essential holding that the government can create means for judicial review of final determinations or actions of an agency. *See In re Request of Leon Guerrero*, 2021 Guam 6 ¶¶ 63-72. This power to review, however, also extends to the actions of a grand jury and the Attorney General.

immunity—a conclusion not supported by the law. ER-030-031. A "sue or be sued" clause standing alone is insufficient to waive sovereign immunity—a fact this court has repeatedly recognized when it has extended sovereign immunity to a multitude of agencies whose enabling legislation contains a "sue or be sued" clause. This multitude includes the Hospital. *See infra* Part II.b.

A waiver of sovereign immunity must be express and is "strictly construed" in favor of the sovereign. *See Gange v. Gov't of Guam*, 2017 Guam 2 ¶¶ 15, 34. Typically, a waiver of sovereign will be found in only one of two circumstances. First, the legislature can explicitly state "the government of Guam hereby waives immunity from any suit or action," or use substantially similar language. Second, the legislature can create an agency as a private corporation and subject it to the general corporate laws of the jurisdiction. *See Wisc. Dep't of Nat. Res. v. Timber & Wood Prods.*, 2018 WI App 6 ¶ 28; *cf. Gange*, 2017 Guam 2 ¶¶ 22-33 ("Sovereign immunity may not apply where the government is acting in a proprietary rather than governmental function.").

"The strong weight of authority holds that enactment of a sue or be sued clause, in and of itself, does not constitute an effective waiver of sovereign immunity." *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003 ¶ 10; *see also Harrison v. Mass. Bay Transp. Auth.*, 1884CV02939BLS2, 2020 WL 4347511 at *3 (Super. Ct. Mass., June 18, 2020) ("Those rulings would be incorrect if the "sue

and be sued" provision was a global waiver of the [agency]'s sovereign immunity."); *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) ("As we have seen, the words 'sue and be sued,' standing alone, are if anything, unclear and ambiguous."). Indeed, the existence of a "sue and be sued" clause is "only one of the attributes" to be considered in the sovereign immunity analysis. *Mayhugh v. State*, 2015 WI 77 ¶ 23. "Critically, as stated in the related context of State waivers of Eleventh Amendment immunity from suit, the "sue and be sued" language contained in State corporation statutes means "only that the entity has the status and capacity to enter our courts, and does not signify a waiver of sovereign immunity against suit." *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 995 (N.Y. 1995).

When analyzing alleged waivers of immunity based on proprietary function, this court looks to a variety of factors to determine whether activities are governmental or proprietary. *Gange*, 2017 Guam ¶ 26. The analysis looks at the "totality of the circumstances." *Mayhugh*, 2015 WI 77 ¶ 22. No factor is dispositive. *Id.* And no factor can outweigh a different provision in an enabling legislation specifically retaining or conferring immunity on the government agency. *Tooke*, 197 S.W.3d at 340.

This court has even recognized that the mere naming of a government agency in litigation is not sufficient to waive sovereign immunity, absent an

explicit statutory waiver. *See Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 28 ¶ 32. The "sue and be sued" clauses are thus about capacity to enter court, not about whether sovereign immunity has been waived.

A critical look at this court's prior cases demonstrates this to be true. For example, in *Bautista v. Agustin*, 2015 Guam 23, this court analyzed various portions of the Retirement Fund statute, noting the presence or absence of the "sue or be sued" clauses for different retirement plans. The "Defined Benefit Plan" being litigated in that case lacked the "sue or be sued" clause. The court found sovereign immunity had not been waived for that plan. The essential holding of *Bautista* is that in the absence of a "sue or be sued" clause or other explicit waiver of sovereign immunity, the court will not find that there is a waiver. It does not follow from *Bautista*, however, that the presence of a "sue or be sued" clause standing alone constitutes a waiver of sovereign immunity.

This issue ultimately also depends on whether an agency is also created as "an instrumentality of the Executive Branch of the Government of Guam." *Bordallo v. Reyes*, 610 F.Supp. 1128, 1129 (D. Guam 1984). Thus, even if the *dicta* from *Bautista* suggesting that sovereign immunity has been waived for the "Defined Contribution Retirement System" and the "Deferred Compensation Program" is true, the character of these funds is different than the "Defined Benefit Plan." Under defined contribution or deferred compensation programs, the

government holds a private individual's money and acts as an investment manager (a proprietary function). Under a defined benefit program, the government invests its own money and eventually pays a retiree a pension based on a formula (a governmental function). To put it another way, the defined benefit plan is an instrumentality of the government.

Further, the defined benefit plans are each specifically created as a "body corporate," 4 GCA §§ 8202, 8402. The deferred compensation plan specifically sets up "member accounts." 4 GCA § 8305. Thus, the plans which have a "sue or be sued" clause also possess other features of a proprietary function. By contrast, the defined benefits program is set up specifically as a "governmental pension plan." 4 GCA § 8101.2.

This court has explicitly recognized that there is more to the sovereign immunity analysis beyond the inclusion of a "sue or be sued" clause in an agency's enabling legislation. In *AB Won Pat Int'l Airport Auth. v. DFS, LP*, 2023 Guam 7, this court reiterated: "that sovereign immunity is waived 'when the government entity at issue has a sued-and-be-sued clause and has 'cast off the cloak of sovereign and assumed the status of a commercial enterprise.'" *Id.* ¶ 41 (quoting *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 10 & n.2). This court has already acknowledged that the analysis is two-fold: (1) presence of "sue and be sued" clause and (2) assumption of "commercial enterprise" status. *Id.* The lower

court's decision finds a waiver of sovereign immunity based on only step one of this analysis. ER-031.

But even the *Airport* case, 2023 Guam 7, does not establish some sort of unlimited waiver of sovereign immunity. The waiver was limited to GIAA's "contractual dealings" "when it acts as a commercial entity." *Id.* ¶ 41. And the contract in the *Airport* case was ultimately one involving arbitration. "[W]here a valid and enforceable arbitration agreement exists," this court has stated "that sovereign immunity is not implicated or threatened." *See, e.g.*, *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7 ¶ 41. This is relevant, because, outside the arbitration context, this court has extended the protections of sovereign immunity to GIAA, despite the presence of a "sue or be sued" clause in its enabling act. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20 ¶ 60.

The other two leading cases in Guam regarding "sued or be sued" clauses are *Perez v. Guam Hous. & Urban Renewal Auth. (GHURA)*, 2000 Guam 33, and *Guam Econ. Dev. Auth. & Guam Visitors Bureau v. Island Equip. Co.*, 1998 Guam 7. In both cases, this court referenced the "sue or be sued" clause, in part, when finding a waiver of sovereign immunity. *GHURA*, 2000 Guam 33 ¶ 11; *GEDA*, 1998 Guam 7 ¶ 8. Under the *GHURA* case, this reference is ultimately dicta. The essential holding was that GHURA enjoys immunity based on its explicit coverage under the Government Claims Act and the Supreme Court dismissed the case for

lack of jurisdiction. 2000 Guam 33 ¶ 18.

Under the *GEDA/GVB* case, the issue was whether a writ of garnishment could issue against a government agency that owes money to a judgment-debtor. While GEDA and GVB raised the issue of sovereign immunity, that case was poorly framed. When the government owes money to a third-party, this money is no longer part of the "public fisc" if it "merely awaits distribution." *See Buchholz v. Cam*, 430 A.2d 1199, 1200 (Super. Ct. Pa., 1981). In a deposition, GEDA and GVB "admitted a contractual relationship" with the debtor and never "denied owing money to the corporation [debtor]." 1998 Guam 7 ¶ 10. The money in *GEDA/GVB* merely awaited distribution as a payment on the contract. This case may never really have been about sovereign immunity, and confusion was wrought in part by the unclear positions taken by the Office of the Attorney General. *Id.* ¶ 5 n.1. Even the Department of Administration (an agency undoubtedly covered by sovereign immunity) was named and properly served with the Notice of Levy and Attachment. *Id.* The money being sought was not a part of the public funds, nor was there disruption to the operations of the executive branch.

"Indeed, the holding of [*GEDA/GVB v.*] *Island Equipment* was specifically limited to garnishment proceedings." *Wood*, 2000 Guam 18 at *2 n.5. But even if the court believes *GHURA* and *GEDA/GVB* involve sovereign immunity, a careful inspection of the agencies' functions and enabling legislation reveals more to the

analysis. The "sue or be sued" clause alone does not constitute the waiver of sovereign immunity. In addition to the clause, none of the three agencies—GHURA, GEDA, or GVB—have been created as an "instrumentality" or "agency" of the government of Guam. *See Bordallo*, 610 F.Supp. at 1129. They have all been created as general corporations.[9]

GHURA's enabling legislation creates it as a "public body corporate and politic." 12 GCA § 5103(a). The purpose of the agency is to reduce slum and blight conditions both through federal and local governmental programs and *through encouragement of private enterprise to participate in the common task of community improvement.*" 12 GCA § 5101(g) (emphasis added). GHURA is also an entity created by the US Housing Act of 1937 and the Housing Act of 1949. 12 GCA § 5103(a). GHURA is a "local public agency" under the Housing Act of 1949. *Id.* The Housing Act of 1949 permits the programs to be administered either

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[9] Because they are statutory creations, these corporations can be brought back "in limited respects" under the coverage statutes of general applicable to instrumentalities, such as the Sunshine Act. *Guam Radio Servs., Inc. v. Guam Econ. Dev. Auth.*, 2000 Guam 1 ¶ 18. But this only occurs when the Legislature specifically brings a publicly created corporation under the purview of such statute. *Carlson v. Perez*, 2007 Guam 6 ¶ 49 ("[E]ven though GEDCA is not an instrumentality of the government of Guam for purposes of agency law, the Guam Legislature has the power to legislate a merit system for employees of the non-instrumentality corporations that are owned by the people of Guam, such as GEDCA.").

by a state or a local public agency.[10] *See, e.g.*, 42 U.S.C. § 1404a. Guam's choice to not be treated as a state—and to be treated as a local public agency—for these purposes is a further factor weighing in favor of a finding that GHURA lacks sovereign immunity.

GEDA's enabling legislation creates it as a "public, non-profit corporation." 12 GCA § 50101. GEDA is established as a "development company" within the meaning of 15 U.S.C. § 662(6). *See* 12 GCA § 50103(j). The federal definition requires the entity to be "incorporated under State law," and the development company must have the "authority to promote and assist the growth and development of *small-business concerns* in the areas covered by their operations." 15 U.S.C. § 662(6) (emphasis added). Thus, under the federal statutory mandates GEDA was created to fulfill, it *must* be viewed as a general corporation. GEDA also possesses several other indicators of corporate or proprietary power. Apart from a now-expired startup appropriation, 12 GCA § 50115, GEDA largely does not depend on local public funds, *see, e.g.*, Guam Econ. Dev. Auth. *Financial Information & Reports*, https://www.investguam.com/financial-information/.

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[10] While the issue is not fully settled related to the Housing Acts, *see, e.g.*, *United States v. Gov't of Guam*, Civ. Case No. 17-00113, 2019 WL 1867426 (D. Guam, Apr. 25, 2019), Congress may abrogate state sovereign immunity to enforce the 14th Amendment equal protection guarantees. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The presence of this power and the relationship of GHURA to the federal legislation also impacts the analysis.

GEDA also has the power to acquire and dispose of real property. 12 GCA § 50104(f). Under the totality of the circumstances, it would be fair to conclude that GEDA serves a proprietary function and lacks sovereign immunity.

GVB's enabling legislation creates a "public corporation" and further states that it "shall be a non-stock, non-profit membership corporation to be governed in accordance with the applicable general corporation laws of the Territory of Guam." 12 GCA § 9102. Private citizens are also allowed to buy voting shares in GVB. 12 GCA § 9112. GVB also has fiscal authority, and any amounts appropriated as part of the executive budget are considered "grants in aid." 12 GCA § 9113. Thus, the Guam Legislature has clearly established GVB as a general corporation, not an instrumentality of the government of Guam.

Considering the weight of all this authority, it is clear that a "sue or be sued" clause—standing alone—does not constitute a waiver of sovereign immunity. It merely confers capacity to enter the courts. To find a waiver of sovereign immunity under the common-law dichotomy between government and proprietary functions, the lower court was required to, but did not, consider the "totality of the circumstances." It cannot rely on an isolated, ambiguous statutory clause.

b. Guam Memorial Hospital Authority enjoys sovereign immunity.

Having established that the presence of a "sue or be sued" clause alone is not a waiver of sovereign immunity, this court must look at the totality of the

circumstances related to the Hospital. GMHA is not created as a body politic or corporate. It has been created as a "public corporation *and* autonomous instrumentality" within the government of Guam. 10 GCA § 80102 (emphasis added). Most importantly, the enabling legislation extends governmental immunities to the Hospital. Title 10 GCA § 80102 states: "All the rights, *immunities*, franchises and endowments heretofore granted thereto by Guam are hereby perpetuated unto the said Authority." (emphasis added). So, whatever other 'circumstances' the lower court may have wanted to consider, the Legislature specifically preserved the Hospital's sovereign immunity; and, a "sue or be sued" clause does not overcome that specific grant. *Tooke*, 197 S.W.3d at 340.

The Hospital is not a traditional corporate entity governed by the generally applicable corporate laws. It is primarily a steward of the Governor's plenary Organic Act command and responsibility to "establish, maintain, and operate public-health services in Guam, including hospitals, dispensaries, and quarantine stations." 48 U.S.C. § 1421g(a). The Hospital's direct, constitutional responsibility to the sovereign extends all the way back to the establishment of the Naval government in Guam. *See In re Leon Guerrero*, 2021 Guam 6 ¶¶ 28-33; *Baldwin v. Bordallo*, 624 F.2d 932 (9th Cir. 1980). The Hospital is also not a profit making enterprise, *see Bordallo*, 610 F.Supp. at 1136, but was established to provide "acute, chronic and all other healthcare services . . . for the People of Guam." 10

GCA § 80109(a). The Hospital also cannot be said to be a proprietary function, because it only has the power to "hold and use real property" to fulfill its purposes, 10 GCA § 80109(e), and it lacks the authority to sell or dispose of real property—a key corporate power to raise revenue. The Hospital is not authorized to compete as a proprietor in the free-market. It may establish fees only as a means of recovering "operating and fixed costs" and generating "revenue as is necessary to enable the Hospital to meet its financial obligations, operating expenses and capital improvement needs." 10 GCA § 80109(b)(1).

Additionally, the Hospital is consistently dependent on appropriations from the Legislature to meet the basic operating needs. *See, e.g.*, Guam P.L. 37-125 (Sept. 11, 2024); Guam P.L. 37-43 (Oct. 16, 2023). The fiscal and governmental realities demonstrate that the Hospital is a government-run safety net hospital, aimed at fixing a market failure on the availability of medical services in Guam. The Hospital is not a proprietorship; it is an essential government function.

The lower court's conclusion that GMHA lacks sovereign immunity is also inconsistent with the unbroken line of Guam cases recognizing the Hospital's sovereign immunity. *See Story-Bernardo v. Gov't of Guam*, 2023 Guam 27 ¶¶ 4, 26; *Kittel v. Guam Mem'l Hosp. Auth.*, 2020 Guam 3 ¶ 14; *Newby v. Gov't of Guam*, 2010 Guam 4 ¶ 33; *Moon Yoon v. Guam Mem'l Hosp. Auth. & Gov't of Guam*, Civ. Case No. CV1263-04, Dec. & Order (Super. Ct. Guam, May 25, 2012)

(Barcinas, J., *presiding*) (dismissing for lack of jurisdiction based on sovereign immunity); *Tenorio v. Guam Mem'l Hosp. Auth.*, Civ. Case No. CV0649-11, Order for Further Briefing (Super. Ct. Guam, July 5, 2012) (Lamorena, P.J., *presiding*) (ordering briefs on whether Minimum Wage & Hour Act is independent waiver of GMHA's sovereign immunity).

The sovereign immunity of other agencies who have a "sue or be sued" clause in their enabling legislation has also been recognized by this court. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20 ¶ 60; *Ehlert v. Univ. of Guam*, 2019 Guam 27 ¶ 11; *Wood v. Guam Power Auth.*, 2000 Guam 18 at *1. The lower court's reliance on merely the existence of a "sue or be sued" clause was inappropriate and not supported by law.

c. The Attorney General failed to meet his burden to establish that sovereign immunity has been waived.

In the sovereign immunity context, "the party asserting subject matter jurisdiction has the burden of proving its existence, *i.e.*, that immunity does not bar the suit." *G.B. v. Gov't of Guam*, Civ. Case No. 20-00048, 2022 WL 2793062 at *1 (D. Guam, July 15, 2022). The party invoking judicial process bears the burden of establishing jurisdiction. *Att'y Gen. of Guam v. Gutierrez*, 2011 Guam 10 ¶ 21 ("The AG has the burden of proving that standing exists.").

A waiver of sovereign immunity is proven when a party points to "consent of the legislature evidenced by enacted law." 48 U.S.C. § 1421a; 1 GCA § 405.

The "enacted law" refers to a "statute enacted by the Legislature." *Wood*, 2000 Guam 18 at *3. Legislative waivers must be "unequivocally expressed and are strictly construed." *Gange v. Gov't of Guam*, 2017 Guam 2 ¶ 34.

In this context, it was the responsibility of the Attorney General to point to a statute evidencing a valid waiver of sovereign immunity. He merely raised a circular argument about the Board of Trustees' powers. ER-064 (Doc. 9). The Hospital (to this day) still does not understand what the Attorney General was trying to say in this portion of the response. The Attorney General never raised the "sue or be sued" clause from GMHA's enabling legislation. The trial judge stepped into the role of advocate against the Hospital, raising it *sua sponte*, ER-052-053 (Tr. at 15-16). *See, e.g.*, *People v. Libby*, 2021 Guam 27 ¶ 45 (stating the judge should not "assume the role of either the prosecution or of the defense"). Because of the Attorney General's failure to raise a specific statutory waiver, the lower court should have found that the Attorney General failed to meet his burden and waived any additional arguments in favor of jurisdiction. *See Harper v. Min*, 2021 Guam 11 ¶ 3.

In any event, the Attorney General would not have raised the "sue and be sued" clause as a waiver of sovereign immunity—because he knows it is not one. Even recently, the Attorney General has been advancing sovereign immunity arguments on behalf of other government agencies with a "sue or be sued" clause

in their enabling legislation. *See Gershman, Brickner & Bratton as federal receiver for Guam Solid Waste Auth. v. Guam Waterworks Auth.*, Civ. Case No. CV0593-24, Dec. & Order (Super. Ct. Guam, July 18, 2025) (Barcinas, J., *presiding*).

d. Sovereign immunity bars enforcement of grand jury subpoena, because a government agency cannot be held in contempt.

Sovereign immunity matters because the method of ultimately enforcing a grand jury subpoena is through the court's contempt power. 8 GCA § 75.45(b); *see In re Application of the People*, 2024 Guam 16 ¶¶ 16-19. A government agency cannot be held in contempt because it cannot be sent to prison and civil monetary sanctions against the government violate sovereign immunity. *Barry v. Bowen*, 884 F.2d 442, 443-44 (9th Cir. 1989). As the Eighth Circuit Court of Appeals observed:

> We are able to find no authority that allows us to imply a waiver of federal sovereign immunity for civil compensatory contempt actions either in the statute defining federal courts' contempt powers or in its history. We note further that "in light of the potentially significant effect on the public fisc," we will not lightly imply such a waiver in this situation.

Coleman v. Espy, 986 F.2d 1184, 1192 (8th Cir. 1993). The Attorney General even conceded this point during oral arguments. ER-058-059. During the hearing, Assistant Attorney General Lewis Harley stated:

> MR. HARLEY: Yes, the grand jury is empaneled to inquire about felony and misdemeanors. Agency of the Government can't be sued for a felony or a misdemeanor. There are no laws on Guam's book that says an agency can be indicted. So from a sovereign immunity standpoint, it's

> not going to happen. An agency of any government are not subject to—to being sued. However, this, as it relates to individuals and corporations, that's a different matter, and that's just what this information is—is being sought, is looking towards—

ER-058-059 (Tr. at 21-22). Despite being presented with this admission, the lower court still refused to recognize the Hospital's well-established immunity.

e. The application of sovereign immunity does not create a complete bar to accessing information, but requires the Attorney General to avail himself of the administrative process.

If the court extends sovereign immunity to the Hospital for a grand jury subpoena, it does not mean that the information is completely unavailable. There are established processes for seeking the information.

First, the Attorney General could seek relief through the administrative adjudication law. 5 GCA §§ 9240, 9241. This is the procedure available with the federal government. The APA is the sole means of enforcing a third party subpoena issued to the federal government. *United States E.P.A. v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999). The person seeking the information serves the agency with the subpoena along with a request to comply. The agency is then permitted to consider the subpoena and take a final administrative action, indicating whether it will comply with the subpoena or not. If the agency will not comply, the party issuing the subpoena can file a petition for judicial review. *Id.* This approach is consistent

with this court's recent instruction that "future challenges to grand jury subpoenas *duces tecum* are better addressed as petitions for judicial review." *In re Application of the People*, 2024 Guam 17 ¶¶ 12, 55.

Second, the Attorney General could seek voluntary compliance or cooperation from the government agency. *Guam Mem'l Hosp. Auth. v. Super. Ct.*, 2012 Guam 17 ¶¶ 5, 19. Even in prior disputes over compliance with subpoenas, government agencies—including the Hospital—have voluntarily complied with requests for information while still successfully resisting and avoiding compliance with a subpoena. *See Guam Mem'l Hosp. Auth. v. Super. Ct.*, 2012 Guam 17 ¶¶ 5, 19 (dismissing case as moot after GMHA voluntarily complied with a legislative request for information). This is not to say voluntary compliance will occur in every case, but it is a primary vehicle for obtaining information.

Third, the Attorney General could lobby the Legislature to enact a clear and unambiguous waiver of sovereign immunity for grand jury subpoenas. *Cf. Rapadas v. Benito*, 2011 Guam 28 ¶¶ 20-21 (discussing the impact of a "change in law handed down by a legislature."). "The Guam Legislature is the sole body tasked with defining the scope of the government's immunity, and can broaden or restrict the government's amenability to suit and ultimate liability." *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 24. The Attorney General's attempt to have the court's invade this immunity is a request that the courts act beyond their authority.

Id.; *see also 14 Penn Plaza, LLC v. Puett*, 556 U.S. 247, 270 ("Those parties should not seek to amend the statute by appeal to the Judicial Branch." (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)).

These alternative methods of seeking information are certainly not intended to be a complete list. However, these examples highlight that information can still be obtained even if the doctrine of sovereign immunity is rigorously applied—as it is intended to be.

III. The Superior Court did not meaningfully address Guam Memorial Hospital Authority's valid claims of privilege.

A trial court commits error when it fails to address an argument raised by a party below. *Bank of Guam v. Reidy*, 2001 Guam 14 ¶ 31. "When a trial court erroneously fails to address an issue raised before it, 'an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself.'" *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶¶ 16, 32. A court is responsible for "fully addressing" the points of law and fact raised by the parties. *Gov't of Guam v. Kim*, 2015 Guam 15 ¶¶ 52, 76.

Most troubling, however, is the subpoena's request for "[a]ny documents regarding concerns and complaints from GMHA employees and patients regarding Mold exposure, safety concerns, pest control, and inadequate infrastructure and resources." Beyond the facial ambiguities of this request, it is an obvious attempt to obtain *patient safety work product*, which is unequivocally privileged from

disclosure under federal law. 42 CFR § 3.204(a). If the Hospital were to comply with the subpoena and disclose the information, it would be subject to heavy fines imposed by the federal government, 42 CFR § 3.404.

The lower court's error on this issue is apparent from its order. The court explicitly acknowledges that the Hospital raised the patient-safety work-product privilege. ER-028 (Dec. & Order *6). However, in the discussion section of the law, the court never addressed the Hospital's assertion of privilege.[11] *See* ER-029-033. It neither stated that the privilege applies or does not apply, nor did the court provide any guidance on how to further raise these claims of privilege.[12] A valid claim of privilege is grounds for not complying with a grand jury subpoena. *In re Sealed Cases*, 121 F.3d 729, 756 (D.C. Cir. 1997) ("The Supreme Court has recognized that 'the longstanding principle that the public has a right to every man's evidence' is limited by valid claims of privilege in grand jury proceedings as elsewhere, even as it held that this principle 'is particularly applicable to grand jury

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[11] The Attorney General's callous disregard for any claims of privilege is on full display in its Motion to Direct Compliance. ER-064 (Doc. 6). The Attorney General sought communications between the Hospital and the Office of the Attorney General and communications between the Hospital and Hospital Legal Counsel. *Id.* This request represents a direct affront to the attorney-client privilege and duty of confidentiality, and it demonstrates the conflict of interest the Attorney General has in prosecuting this matter. *See, e.g.*, *In re Leon Guerrero*, 2024 Guam 18 ¶ 48 n.10.

[12] The principle of 'everyman's evidence' is limited by "constitutional, common-law, or statutory privilege." *Branzburg*, 408 U.S at 688.

proceedings.'" (*quoting Branzburg,* 408 U.S. at 688)). The Superior Court failed to consider the Hospital's claims of privilege. The decision denying the Hospital's motion to quash on this basis should be reversed.

IV. The grand jury subpoena is facially defective, because it compelled attendance to a different grand jury.

In the trial court, the Hospital also pointed out that the subpoena *duces tecum* was facially defective. It is established practice in Guam that different grand juries are empaneled to meet on different days of the week. The grand jury subpoena here was issued by a Tuesday grand jury (January 30, 2024) for appearance before a Thursday grand jury (February 15, 2024). This fact is relevant, because the grand jury subpoena in this matter was signed by the foreman of the Tuesday grand jury.

Worried that this issue may be "endemic to the Judiciary's entire grand jury system," ER-032, the lower court and Attorney General characterized this as a mere technical flaw that can be remedied through "rescheduling," ER-032. However, this component of the ruling fails to appreciate that the objection here is one of fundamental jurisdiction, not rescheduling. One grand jury does not have the power to act for another grand jury. *See, e.g., In re Grand Jury Proceeding*, 971 F.3d 40, 50 (2d Cir. 2020) ("[E]ach new grand jury must issue its own subpoena."); *see Branzburg*, 407 U.S. at 678 (recognizing process of each new grand jury issuing a "new subpoena"). Additionally, other courts "see no great

administrative difficulty in requiring, as a precondition to the use of coercive contempt power, the issuance of a new subpoena for each new grand jury." *In re Grand Jury Proceedings*, 744 F.3d 211, 218 (1st Cir. 2014).

Further, the manner in which this subpoena was issued appears to have violated the secrecy of the grand jury.[13] 8 GCA § 50.34. The statute does not authorize the foreperson of the grand jury to issue or sign a subpoena. A grand jury subpoena may only be signed by the Attorney General[14] or a judge of the Superior

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[13] The Attorney General's motion to direct also contained either another grand jury secrecy violation or an example of ineptitude. The motion to direct asked the court to direct the appearance of "Rosita T. Fejeran." The Hospital does not employ anyone by that name. The Hospital presumes that this "typo," ER-040, actually refers to Rosita Fejeran—the Treasurer of Guam. If this is so, this may represent a violation of the secrecy of another investigation about which Moylan also made inappropriate and unethical comments. *See* Haidee Eugenio Gilbert, *AG's office investigates alleged GovGuam use of Bank of Guam without competitive procurement; Senator says he will file ethics complaint against AG*, Pacific Daily News (Jan. 31, 2024), https://www.guampdn.com/news/ags-office-investigates-alleged-govguam-use-of-bank-of-guam-without-competitive-procurement-senator-says/article_aeff9760-bffe-11ee-bc49-77e589b2acbc.html.

[14] The Hospital also argued that the grand jury subpoena was defective because it was not signed by the Attorney General, only an Assistant Attorney General. This Court resolved this issue in *In re Application of the People*, 2024 Guam 17 ¶¶ 36-42. Given that the Attorney General himself or herself has direct political accountability and the secrecy of grand jury subpoenas is in part premised on prosecutorial accountability, the Hospital does not believe this argument is as "hyper-technical" or "unreasonable" as the court characterized it to be in the opinion. The court should not have addressed this unpreserved argument in that case, and instead allowed the issue to percolate. *See, e.g.*, *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 380 (2024) ("[T]he standing requirement means that the federal courts decide some contested legal questions later rather than sooner, thereby allowing issues to percolate and potentially be resolved by the political

Court, upon request by the grand jury. 8 GCA § 75.45. Yet here, the subpoena was signed by the foreman of the Tuesday grand jury. Thus, with a return date to a different grand jury, the subpoena violates the statute and is facially defective.

V. The Attorney General lacks the authority to proceed in a manner inconsistent with the interests of Guam Memorial Hospital Authority—his agency-client.

The Hospital filed its Motion to Quash on February 14, 2024. ER-001. The Hospital's motion to quash detailed the many ways in which Moylan had already abandoned his agency clients and taken positions adverse to the government he was elected by the People to represent. Unfortunately for the People of Guam, the Hospital's premonition was proven to be all too true only two weeks later.

On February 28, 2024, Attorney General Douglas B. Moylan sent notices to 22 executive branch agencies of the Government of Guam, notifying them that he was "temporarily withdrawing" from representing them because of a potential

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branches in the democratic process."). Given the secrecy violations in this matter, the need for direct accountability in *this* case is at its apex. In the Hospital's considered view, the Guam Legislature was free to require the Attorney General to personally sign grand jury subpoenas. The requirement that a court consider the practicalities and public interest is "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *See People v. Calhoun*, 2014 Guam 26 ¶ 18. Even if the court believed that the Appellant's view of the statute was "impractical," that does not mean the legislature lacked the power to enact it. *Taisipic v. Marion*, 1996 Guam 9 ¶¶ 28-33 ("[C]ourts should not concern themselves with the wisdom of legislation."). Nonetheless, the Hospital respects the court's ultimate resolution of this issue.

conflict of interest between his representation of the agencies and his statutory role as Public Prosecutor." *In Re Request of Leon Guerrero*, 2024 Guam 18 ¶ 2. Despite Moylan's insistence that "the Guam Rules of Professional Conduct may not apply to the Office of the Attorney General the way they apply to private attorneys," *id.* ¶ 3, this court reiterated that "[i]t is well settled that the Attorney General must conform his conduct to that prescribed by the rules of professional ethics," *id.* ¶ 46; *see also In re Guthrie*, ADC04-002 at *12 (Guam Sup. Ct., Oct. 14, 2005) ("Guthrie, as a Deputy Attorney General, has the same duty of confidentiality as any other lawyer.").

In its motion to quash, the Hospital outlined how "the Attorney General has placed himself in a position diametrically opposed to a client he is statutorily required to represent, 5 GCA §§ 30102, 30109; 10 GCA § 80114, creating a clear conflict of interest as defined by Guam Rules of Professional Conduct 1.7, 1.9, 1.10, 1.11, and 1.13." ER-064 (Doc. 3, Mot. at *12). The Hospital further stated: "The Attorney General is either subject to disqualification from his intended investigation of his own client or must 'step aside.'" *See Santos v. Camacho*, 2006 WL 581251 at *7; *see also People v. Tennessen*, 2009 Guam 3 ¶ 2; *Barrett-Anderson v. Camacho*, 2018 Guam 20 ¶¶ 21-28; *see further People v. Lujan*, 1998 Guam 28 ¶¶ 3-4.

Instead of conducting a conflict of interest analysis, the lower court did not

"find [the conflict] material to [its] decision." ER-033. The lower court found the conflict to be merely "a symptom of a much larger issue still in dispute and beyond the scope of these particular motions." ER-033.

But what the lower court essentially writes off as a footnote is actually the central narrative to the story. "The Attorney General is the attorney representing his client." *Santos v. Camacho*, No. Civ. 04-00006, 2006 WL 581251 at *5 (D. Guam, Mar. 10, 2006). He may not take a position adverse to his clients. *Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal.1981). The Attorney General lacks the power and authority to act in contradiction of his client-agency's interests. *See Chun v. Bd. of Trs. of Emps.' Ret. Sys. of State of Haw.*, 87 Hawai'i 152, 177 (1998).

The subpoena issued was also issued at the direction and urging of two private doctors, both of whom have no formal association with the Hospital. ER-007. In Moylan's public statements, he said he has "committed" to taking certain actions on behalf of private doctors.[15] The grand jury subpoena conspicuously covers the same topics in an undated letter submitted on behalf of two private doctors to the Attorney General, *see* ER-007. In this context, it appears that the Attorney General has undertaken *de facto* representation of private citizens whose

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[15] KUAM Interview with Douglas B. Moylan (Jan. 31, 2024), https://www.youtube.com/watch?v=cLrNCg9urRU at ***Time Stamp 0:20**.

interests are opposed to those of his client—the Hospital. *See Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551 (Ga. 2006) ("The State can, as *parens patriae*, maintain an action on behalf of its citizens to seek compensation for sovereign or quasi-sovereign claims, but it may not represent its citizens' private interests."). *Cf.* 5 GCA § 30113 (prohibiting the practice of law outside the government). Moylan's flag-bearing of private interests violates his "duty of undivided loyalty" and turns on its head the requirement that he "must exercise the utmost good faith to protect [the executive agencies'] interests." *In re Leon Guerrero*, 2024 Guam 18 ¶ 46.

Far from being immaterial, Moylan's betrayal of the Hospital's interests is part and parcel to his bad faith and lack of a proper purpose that undermine the presumption of regularity allegedly attached to the subpoena. Moylan's public comments directly violate Guam Rule of Professional Conduct 3.6(a).

Even faced with this strong evidence of misconduct, the lower court's order essentially permits Moylan to act with impunity. The lower court even expressly acknowledged that the misconduct is "a much larger issue still in dispute." ER-033. Yet, Moylan's unethical comments, behavior, and misconduct remain unchecked by meaningful measures of accountability.

Indeed, other sitting Attorneys General throughout the country have been disciplined and held accountable for their misconduct in office. First, then-sitting

Pennsylvania Attorney General Kathleen Kane was suspended from the practice of law while in office and later disbarred. *Office of Disp. Counsel v. Kane*, No. 2590 Disp. Dkt. No. 3 No. 17 DB 2019 (Mar. 22, 2019) (order disbarring); *Office of Disp. Counsel v. Kane*, No. 2202 Disp. Dkt. No. 3 Bd. File No. C3-15-558 (Sept. 21, 2015) (order suspending). This discipline was imposed primarily because Kane violated the secrecy of the grand jury when she leaked "confidential grand jury information to the press." *Commonwealth v. Kane*, 188 A.3d 1217, 1223 (Super. Ct. Pa. 2018). The stunning similarities between Moylan's and Kane's approach to grand jury secrecy and client loyalty should not be lost on this court.

The Supreme Court of Indiana also suspended then-sitting Attorney General Curtis Hill after he was found to have "committed acts of misdemeanor battery." *Matter of Hill*, 144 N.E.3d 184, 186 (Ind. 2020). Hill was suspended for 30 days with automatic reinstatement for "various forms of nonconsensual and inappropriate touching" against four women. *Id.* The Supreme Court of Indiana also reprimanded the current Attorney General Todd Rokita for making public, televised statements prejudicing an ongoing adjudicative proceeding. *Matter of Rokita*, 219 N.E.3d 733, 733 (Ind. 2023). The West Virginia Supreme Court publicly reprimanded then-sitting Attorney General Darrell McGraw after he voluntarily disclosed information belonging to a government-agency client. *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 859 (W.Va. 1995).

Several other state Attorneys General have been disciplined after leaving office for conduct that occurred while in office. The South Dakota Supreme Court suspended former Attorney General Jason Ravnsborg for 6 months following an accident, while in office, in which he struck and killed a pedestrian with his vehicle. *Matter of Discipline of Ravnsborg*, 2024 S.D. 58 ¶ 1. The First Division of the New York Supreme Court Appellate Division suspended former Attorney General Eric T. Scheiderman for one year for conduct involving verbal and emotional abuse and unwanted physical contact with three women. *Matter of Schneiderman*, 194 A.D.3d 196, 197, 201 (N.Y. App. Div. 2021). The Supreme Court of Ohio suspended former Attorney General Marc Dann for 6 months for soliciting improper compensation and filing false financial disclosures while serving as the Ohio Attorney General. *Disciplinary Counsel v. Dann*, 2012-Ohio-5337 ¶ 2.

The important point here is that the misconduct—or conduct "other than in good faith"—of the Attorney General is relevant to the grand jury subpoena. *Branzburg*, 408 U.S. at 707-08. The misconduct and bad faith that occurred here rises to the level of seriousness for attorney discipline and should constitute a sufficient and material showing in order to quash the subpoena *duces tecum*.

The complained-of misconduct by Moylan is also not isolated. The Hospital cited a plethora of examples of how Moylan has abandoned his clients:

- Haidee Eugenio Gilbert, *AG's office investigates alleged GovGuam use of Bank of Guam without competitive procurement; Senator says he will file ethics complaint against AG*, Pacific Daily News (Jan. 31, 2024), https://www.guampdn.com/news/ags-office-investigates-alleged-govguam-use-of-bank-of-guam-without-competitive-procurement-senator-says/article_aeff9760-bffe-11ee-bc49-77e589b2acbc.html.

- Shane Tenorio Healy, *Public Health officials to argue for OAG's disqualification in corruption case*, Guam Daily Post (Jan. 22, 2024), https://www.postguam.com/news/local/public-health-officials-to-argue-for-oags-disqualification-in-corruption-case/article_7d799e52-b662-11ee-8793-cf8556941c32.html.

- *AG seeks clarification about ongoing investigation on road damages*, Pacific Daily News (Dec. 19, 2023), https://www.guampdn.com/news/ag-seeks-clarification-about-ongoing-investigation-on-road-damages/article_281f7cce-9d8a-11ee-8490-c72126051256.html.

- John O'Connor, *OAG investigates roadway damages allegedly caused by GWA*, Marianas Variety (Nov. 28, 2023), https://www.mvariety.com/news/regional_world/oag-investigates-roadway-damages-allegedly-caused-by-gwa/article_106f8510-8d9f-11ee-96c0-c3b4bf1b0388.html.

- Julianne Hernandez, *Issues come up during hearing, delaying lawsuit from moving forward*, KUAM News (Nov. 1, 2023), https://www.kuam.com/story/49927270/issues-come-up-during-hearing-delaying-lawsuit-from-moving-forward.

- Shane Tenorio Healy, Attorney: *AG's office 'culpable co-actor' in alleged conspiracy*, Marianas Variety (Aug. 23, 2023), https://www.mvariety.com/news/attorney-ags-office-culpable-co-actor-in-alleged-conspiracy/article_4f31f100-4602-11ee-bb3d-1322ea121567.html.

- Thomas Benavente, *AG Moylan warns UOG of possible criminal investigation*, Pacific Daily News (July 12, 2023), https://www.guampdn.com/news/ag-moylan-warns-uog-of-possible-criminal-investigation/article_aa03d768-1fb7-11ee-afde-8b56f7852a59.html.

- Nick Delgado, *Seven GovGuam officials indicted in corruption investigations*, KUAM News (July 4, 2023), https://www.kuam.com/story/49149626/seven-govguam-officials-indicted-in-corruption-investigations. (attaching *Release from the Eagle's Nest: Government Corruption Division Prosecutions* (Monday, July 3, 2023).

- John O'Connor, *AG Moylan subpoenas GPA and GWA; Sanchez calls it 'a fishing expedition'*, Guam Daily Post (June 27, 2023), https://www.postguam.com/news/local/ag-moylan-subpoenas-gpa-and-gwa-sanchez-calls-it-a-fishing-expedition/article_ba0fce92-0bd9-11ee-a076-b7d6f2f5406c.html.

- John O'Connor, *Administration Department files motion to quash AG's subpoena*, Guam Daily Post (June 22, 2023), https://www.postguam.com/news/local/administration-department-files-motion-to-quash-ags-subpoena/article_e371da84-0fe7-11ee-b3a2-9bf2b705f33b.html.

- Nestor Licanto, *AG Doug Moylan on post-typhoon price gouging, possible investigation into Guam's utility agencies*, KUAM News (June 9, 2023), https://www.kuam.com/story/49057917/ag-doug-moylan-on-posttyphoon-price-gouging-possible-investigation-into-guams-utility-agencies.

And even since this court rejected Moylan's public and unethical withdrawal, the Attorney General has continued to take positions contrary to those of his clients:

- Joe Taitano II, *AG: Spending on new hospital illegal, funds could be 'clawed back' from vendors*, Pacific Daily News (Mar. 4, 2025), https://www.guampdn.com/news/ag-spending-on-new-hospital-illegal-funds-could-be-clawed-back-from-vendors/article_5a5875cc-f7fe-11ef-9fe7-dba81a19f04e.html.

- John O'Connor, *Moylan: GHURA violated law*, Guam Daily Post (Feb. 11, 2025), https://www.postguam.com/news/local/moylan-ghura-violated-law/article_6ebaaff6-b84a-11ef-a04c-c7f8e3475035.html.

- John O'Connor, *AG: Contractors, government officials 'on notice' regarding medical complex*, Guam Daily Post (Jan. 28, 2025), https://www.postguam.com/news/local/ag-contractors-government-officials-on-notice-regarding-medical-complex/article_ae4e9de0-dc5c-11ef-9a7e-ff007ce19f4b.html.

- *See* Nestor Licanto, *AG objects to DOC's proposed pre-trial releases, saying it's 'opening a Pandora's box'*, Pacific Daily News (Dec. 5, 2024), https://www.guampdn.com/news/ag-objects-to-docs-proposed-pre-trial-releases-saying-its-opening-a-pandoras-box/article_d3c7ed26-b20c-11ef-9427-3b7d7b82fb20.html.

Moylan's position as Attorney General should not be used to elevate him above the professional rules and to excuse his misconduct in public office. Instead, his misconduct should be called out for the "incalculable harm" it has caused "to the public perception of the attorney general's office and those government agencies, departments, and institutions that the attorney general advises and represents." *Dann*, 2012-Ohio-5337 ¶ 23. "When the Executive publicly announces its intent to break the law, and then executes on that promise, it is the Judiciary's duty to check that lawlessness, not expedite it." *McMahon v. New York*, 606 U.S. --, 2025 WL 1922626 (2025) (Sotomayor, J., *dissenting*).

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CONCLUSION

This court should **REVERSE** the Decision and Order of the Superior Court and **DIRECT** that the subpoena *duces tecum* dated January 30, 2024 be **QUASHED**.

Respectfully Submitted: July 31, 2025.

Jordan Lawrence Pauluhn

JORDAN LAWRENCE PAULUHN
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CERTIFICATE OF COMPLIANCE, RULE 16(a)(7)(D)

This brief complies with the type volume limitation of Rule 16(a)(7)(B) because this brief contains 10,644 words, excluding the parts of the brief otherwise exempted by Rule 16(a)(7)(B)(iii).

Dated: July 31, 2025.

Jordan Lawrence Pauluhn

JORDAN LAWRENCE PAULUHN
Hospital Legal Counsel

STATEMENT OF RELATED CASES

Counsel for Appellant Guam Memorial Hospital Authority is not aware of any related cases pending in this court.

Respectfully Submitted: July 31, 2025.

JORDAN LAWRENCE PAULUHN
Hospital Legal Counsel

CERTIFICATE OF SREVICE

The undersigned hereby certifies that he has caused or, within one business day of filing, shall cause the following documents, together with any and all accompanying documents and supporting memoranda relative to the subject filing, to be served upon all parties who have appeared herein, through counsel of record:

1. Appellant Guam Memorial Hospital Authority's Opening Brief

Electronic copies will be delivered through e-filing to the following: Office of the Attorney General of Guam, Assistant Attorney General Stephen Durden and Assistant Attorney General Emily Rees.

The document is e-filed through the Supreme Court JustWare portal

Dated: July 31, 2025.

Jordan Lawrence Pauluhn

JORDAN LAWRENCE PAULUHN
Hospital Legal Counsel

SUPREME COURT CASE NO. CVA24-010
SUPERIOR COURT CASE NO. SP0025-24

IN THE SUPREME COURT OF GUAM

IN RE GRAND JURY SUBPOENA *DUCES TECUM* DATED JANUARY 30, 2024

GUAM MEMORIAL HOSPITAL AUTHORITY
for itself and its Custodian of Records,
Petitioner-Appellant,
vs.
ATTORNEY GENERAL OF GUAM,
on behalf of himself, his office, and a Grand Jury,
Respondent-Appellee.

On Appeal from the Superior Court of Guam
Superior Court Case No. SP0025-24
Hon. Arthur R. Barcinas

RESPONDENT - APPELLEE'S BRIEF

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Statement of Jurisdiction

Pursuant to Guam Rule of Appellate Procedure 13(b), Respondent-Appellee the People of Guam ("the People") do not contest Petitioner-Appellant Guam Memorial Hospital Authority's ("GMHA") jurisdictional statement.

Questions Presented

1. Whether the Superior Court abused its discretion in denying GMHA's motion to quash a grand jury subpoena *duces tecum* where GMHA failed to overcome its heavy evidentiary burden that a subpoena is presumed to be reasonable unless the movant demonstrates that the subpoena does "not [have a] reasonable possibility" to "produce information relevant to the general subject of the grand jury's investigation," which investigation this honorable court has determined even includes the mere desire to "satisfy itself that no crime occurred." *In re People*, 2024 Guam 16 ¶¶ 77, 91 citing to *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).
2. Whether the doctrine of sovereign immunity applies to a government agency such that the government agency is empowered to ignore a grand

jury subpoena and refuse to cooperate with an investigation involving potential criminal wrongdoing.

Statement of the Case

Pursuant to Guam Rule of Appellate Procedure 13(b), the People do not contest GMHA's jurisdictional statement as to the facts and dates of the underlying proceedings. The People do contest GMHA's mischaracterization regarding the grand jury subpoena, the underlying proceeding and the media articles presented as evidence.[1]

The subpoena sought seven discrete types of documents: (1) "industrial hygiene reports on GMHA Mold inspection"; (2) "Employment records and the daily availability of OB Gyn doctors at GMHA"; (3) "Employment documents, resume, education, and supporting documents of GMH administrator/CEO"; (4) "Recent procurement contracts, emails, records and other documents regarding GMHA's HVAC units, supplies and participating Vendors"; (5) "Procurement contracts, emails, records and other documents regarding the lacking medications, medical supplies and equipment, including 'Troponon' for heart attack patients"; (6) "Any documents regarding concerns and complaints from GMHA employees and patients regarding Mold exposure, safety concerns, pest control and inadequate

[1] GMHA also mischaracterizes the motion to direct compliance, however, as that motion is not at issue in this appeal, it is not addressed.

infrastructure and resources"; and (7) "All environmental studies and reports regarding Mold at GMHA". ER 4 (Grand jury subpoena, January 30, 2024); ER 23-24 (July 29, 2024 Order).

On the basis of the evidence and argument presented before it, the Superior Court properly denied the Motion to Quash, holding that GMHA "is simply unable to meet that heavy burden of proof," referring to the GMHA's burden to "overcome the presumption of propriety" and to prove "there is no reasonable possibility the subpoenaed materials will produce information relevant to the grand jury's investigation." ER 29-30, Order.

Summary of Argument

The outcome of Petitioner-Appellant Guam Memorial Hospital Authority's ("GMHA")'s appeal is controlled by this court's decisions *In re People*, 2024 Guam 16 ¶ 89 (Guam Dec. 31, 2024) and *In re People*, 2024 Guam 17 ¶ 55 (Guam Dec. 31, 2024). Accordingly, GMHA should have withdrawn its appeal. The Superior Court's evidentiary findings are entitled to substantial deference and Guam's grand jury statutes do not allow the restrictions that GMHA seeks to impose upon them. Similarly, sovereign immunity has never allowed a state or territorial agency to interfere with a criminal grand jury investigation.

The grand jury is entitled by law to investigate whether or not Guam's laws have been broken. This right can be based "merely on the suspicion that the law is

being violated, or even because it wants assurance that it is not." *In re People*, 2024 Guam 16 ¶ 77 (citations omitted). The Superior Court rightly determined that the Attorney General and grand jury have a duty to investigate even the potential or suspicion of criminal wrongdoing, which was more than supported by the record.

Similarly, a government entity does not have sovereign immunity as to criminal charges because the entity is not subject to criminal charges, and hence is not being sued. In this instance, GMHA has no more right to interfere in a lawful grand jury investigation into potential criminal wrongdoing than any other line or autonomous agency of the Government of Guam. Further, taxpayer funds should not be allowed to be spent for paying salaries to government employees and government attorneys attempting to interfere with a taxpayer funded grand jury subpoena, properly issued. The lower court's decision should properly be affirmed.

Argument

I. Standard of Review

This court recently set forth the relevant standard:

> A trial court's ruling on a motion to quash a subpoena duces tecum is reviewed for an abuse of discretion." *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 91. "[A] court abuses its discretion by basing its decision on an erroneous legal standard or clearly erroneous factual findings, or if, in applying the appropriate legal standards, the court misapprehended the law with respect to the underlying issues in the litigation." *People v. Faisao*, 2018 Guam 26 ¶ 12 (alteration in

original) (quoting *People v. Mallo*, 2008 Guam 23 ¶ 56). Although the overall review is for an abuse of discretion, the trial court's interpretation of the underlying legal principles is subject to *de novo* review. *Sule v. Guam Bd. of Exam'rs for Dentistry*, 2011 Guam 5 ¶ 8. "A finding of fact is clearly erroneous where it is not supported by substantial evidence, and this court is left with a definite and firm conviction that a mistake has been made." *In re Guardianship of Moylan*, 2018 Guam 15 ¶ 6 (quoting *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35 ¶ 41). "[L]ike any other issue of fact," we review for substantial evidence a trial court's finding that a party failed to rebut an evidentiary presumption. *Estate of Auen*, 35 Cal. Rptr. 2d 557, 564 (Ct. App. 1994) ("'It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied.' We review the trial court's finding that appellants failed to rebut the presumption ... under the substantial evidence rule like any other issue of fact." (citation omitted)).

On abuse of discretion review, an appellate court does not review whether an alternative course of action was available, but only whether the trial court's decision was allowable." *People v. Bosi*, 2022 Guam 15 ¶ 66. "The concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; at the same time, a decision outside those limits exceeds or, as it is infelicitously said, 'abuses' allowable discretion." *Id.* (quoting *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987)). This court will not simply "substitute its judgment for that of the trial court." *Id.* ¶ 71 (quoting *People v. Quintanilla*, 2001 Guam 12 ¶ 9).

In re People, 2024 Guam 17 ¶¶ 13-14.

II. The Superior Court Correctly Held the Grand Jury Subpoena Enforceable

Under Guam law, "[a] grand jury subpoena permits the government to obtain documents unless 'there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.'" *In re People*, 2024 Guam 16 ¶ 91 (citations omitted, emphasis added).

As an initial matter, GMHA's appeal admits that it impermissibly asks this court to substitute its judgment for the factual finding made the Superior Court. App. Brief at 12 ("When the undisputed evidence of Moylan's statements is viewed correctly. these categories of inquiry reveal that no criminal purpose exists.") (emphasis added). On appeal, the only question is whether the Superior Court's weighing of the evidence before it was allowable; not whether the Superior Court agreed with GMHA's argument as to what the evidence meant.

> The grand jury's important role has been expressly recognized by the Court:
>
> > The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' Such an investigation may be triggered by

> tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

Branzburg v. Hayes, 408 U.S. 665, 701–02 (1972) (citations omitted). This court has recognized the role of grand juries repeatedly as well. *In re People*, 2024 Guam 16 ¶ 86 ("Guam has specific statutory authority by which grand juries can make formal accusations. Although it may ultimately uncover no crime, a Guam grand jury's investigation can still be justified by the possibility that it might have resulted in criminal charges."); *In re People*, 2024 Guam 17 ¶ 35 ("Guam grand juries have broad investigatory powers to inquire into felonies and related misdemeanors, including issuing subpoenas *duces tecum*.").

The Superior Court held "Upon review, the Court finds that GMHA is simply unable to meet that heavy burden of proof. While the statements of the OAG have been submitted by GMHA as evidence of improper motive, the Court does not find the statements to be the particularized proof that these circumstances warrant, but circumstantial evidence that the Court cannot draw a definitive conclusion from. Given the weight of the grand jury's subpoena power, the Court cannot subvert that power based on its own presumptions but requires concrete proof." ER 30, Order.

There is not dispute that the grand jury in Guam is only empowered to "inquire into felonies and any related misdemeanors." 8 GCA § 50.10(a). However, no identification of specific charges, a specific indictment document or notifying a

witness that they are a "target" of the investigation is required. *In re People*, 2024 Guam 17 ¶ 56 (target warning letters not required); *In re People*, 2024 Guam 16 ¶ 110 ("The trial court correctly concluded that a grand jury need not identify a felony at the outset of its inquiry."). Similarly, "Guam grand juries can inquire into all information that might bear on its investigation until it has identified a felony or has satisfied itself that none has occurred." *In re People*, 2024 Guam 16 ¶ 88.

The subpoena at issue was a narrowly tailored investigation into safety hazards at GMHA; principally toxic mold contamination and the lack of sufficient medications. *See* ER 4 (requests for documents regarding mold and "lacking medications" such as the heart attack medication Troponon). The subpoena comes as no surprise to anyone on Guam. These concerns were raised not just by investigative media or individual patients, but by the Guam Medical Association. ER 7-9. The subpoena "has nothing to do with receivership." ER 49:9. In fact, "As far as the receivership, this subpoena and the motion have really nothing to do with that. These are based on independent investigations that – that took place prior to the subpoenas." ER 49:4-7.

GMHA's appeal and argument fails the maxim that correlation is not causation. The media comments by the Attorney General were not related to the grand jury subpoena. The mere co-existence of an investigation by the Attorney General and a grand jury investigation does not make them one and the same.

GMHA presented no evidence to the contrary, nor did they attempt to call the Attorney General himself to provide testimony. GMHA's failure to provide sufficiently persuasive evidence to the Superior Court to overcome their burden is GMHA's failure. Respectfully, GMHA's sole reliance upon the use of second-hand media accounts also constitute hearsay (whether an exception existed or not), inherently unreliable and unworthy of judicial affirmation.

The actions, or inactions, of individuals employed by GMHA, in failing to prevent mold contamination and failing to ensure the presence of necessary life-saving medications, are clearly within the realm of felonies and related misdemeanors. Of course, as part of the grand jury process, the grand jury documents requested might, or might not lead toward criminal liability of GMHA officials. It also could provide evidence of wrong-doing by suppliers, subcontractors or any other individuals. Specifically, the felonies and related misdemeanors of: (1) Theft (9 GCA § 43.20); (2) Certifying officer liability (4 GCA § 14109); (3) Official misconduct (9 GCA § 49.90); and (4) Unlawful influence (9 GCA § 49.40), relate to this specific subpoena.

For example, if GMHA lacked sufficient Troponon (or another medication or item of medical or hygiene equipment), then the grand jury would be entitled to investigate whether this lack was caused by official misconduct by a GMHA employee failing to do their job by procuring sufficient quantities of the medical; or

theft, whether by deception, bribery or otherwise, of a GMHA employee removing the medications from GMHA or accepting a bribe to steer the ordering of the medications; theft, whether by deception or otherwise, of a contractor or supplier, of the medications; and certifying officer misconduct regarding the procurement of the medication. GMHA's lack of concern for the health of its patients and interference with the grand jury investigation is alarming.

GMHA "must show that the trial court's determination that Appellant failed to rebut the presumption of reasonability is unsupported by substantial evidence." *In re People*, 2024 Guam 16 ¶ 107. Instead, GMHA has impermissibly attempted "to shift this burden by arguing that the People did not present competent evidence to support the finding that the subpoena was reasonable." *Id.* GMHA instead impermissibly asks this Court to insert its own *de novo* review of GMHA's "evidence." However, the Superior Court followed this Court's rules regarding confirming that a grand jury subpoena is proper. ER 27-30. The People respectfully submit that, by informing the Superior Court regarding the nature of the investigation and denying any involvement with media comments, "What was done here—stating the general subject of the grand jury investigation in the body of a motion and in open court during a hearing—satisfied the *R. Enterprises* procedure." *In re People*, 2024 Guam 16 ¶ 97. Accordingly, the appeal should be denied.

III. No Government of Guam Entity, GMHA or Otherwise, has Immunity, Sovereign or Otherwise, from Complying with a Grand Jury Subpoena

Appellant argues that is entitled to sovereign immunity from the grand jury subpoena, but fails to explain how it could raise such immunity in the first instance. App. Brief at 14-30. As an initial matter, Appellant's argument relies entirely upon *In re Elko Cnty. Grand Jury*, 109 F. 3d 554, 556 (9th Cir. 1997) for that proposition that sovereign immunity applies to grand juries. This is puzzling at best, ingenuous at worst, because it does not apply to the instant matter whatsoever between coordinate government agencies. The *Elko* Court quashed a grand jury subpoena that Elko County attempted to bring against the United States Federal Government. *Id.* Appellant has failed to cite to, and Appellee has been unable to locate, a single case where a state or territorial grand jury subpoena was quashed on the basis of sovereign immunity exercised by a duly authorized agency from the **same** state or territory. Appellant's argument is especially suspect because the *Elko* Court relied upon the *Touhy* doctrine extensively (the administrative process whereby a federal agency will provide a witness or documents subject to subpoena), which Appellant's counsel himself summarized in the hearings below. ER 46:5-20.

Notably, each of the cases relied upon, incorrectly, by Appellant for the basis that a subpoena enforcement action is a "suit." that triggers sovereign immunity deal with subpoenas by private third-parties against a government agency or between

different levels of government entities, whether federal, state, tribal or territorial. None address providing immunity to a territorial agency from a territorial grand jury. *See Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012) (quashing subpoena by private entity against Indian tribe because "a third-party subpoena in private civil litigation is a 'suit' for purposes of the Tribe's common law sovereign immunity."); *Russell v. Jones*, 49 F.4th 507, 518 (5th Cir. 2022) (state judges as state officials are immune from federal court subpoena issued by a private third party due to state sovereign immunity). *See also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, (1993) (unless waived, "neither a State nor agencies acting under its control may "be subject to suit in federal court.'"); *Ex parte Ayers*, 123 U.S. 443, 505, (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."). There is no dispute that a Guam grand jury investigates felonies and related misdemeanors, not civil liability, and that neither the Attorney General nor the Grand Jury are private parties. There is no, as GMHA would lead the court to believe, any "judicial interference," by allowing the People, by their legislative representative (the grand jury system) and electorally determined representative, the Attorney General, from investigating and indicting, if necessary, any individuals on the basis of documents in the custody and control of a government agency. *Univ. of the Incarnate Word v.*

Redus, 602 S.W.3d 398, 409, fn. 67 (Tex. 2020) ("[I]n our system of government, the people are the sovereign.") (citation omitted). Where the legislature has empowered the grand jury to investigate, the People respectfully submit that they should be allowed to proceed and do so. 8 GCA § 50.10(a).

In other words, "Guam's sovereign immunity protects it from suit by individuals," and not from a grand jury investigation. *United States v. Gov't of Guam*, No. CV 17-00113, 2019 WL 1867426, at *3 (D. Guam Apr. 25, 2019). Neither the People of Guam nor the Attorney General's Office which represents them, are "individuals," which are barred from bring suit against Guam in the courts of Guam. To the contrary, the United States Congress expressly acted to create the Attorney General's Office, which has been expressly empowered by the Guam Legislature to issue the grand jury subpoena in question.

More fundamentally, GMHA is an autonomous agency of the Government of Guam. 10 GCA § 80102 (GMHA is "a public corporation **and an autonomous instrumentality** called the Guam Memorial Hospital Authority.") (emphasis added). GMHA's comparisons to other government agencies is not relevant where the legislature clearly decided the issue already. Further, government agencies are not subject to indictment or investigation for felonies or related misdemeanors. *United States v. Price*, 383 U.S. 787, 810 (1966) ("we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to

individuals."); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) ("**Because agencies and entities of the government are not themselves subject to criminal liability**, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.") (emphasis added). Individuals are subject to indictment. Grand juries investigate and subsequently indict individuals. This was discussed at the underlying hearing. ER 58:22-59:4. As explained by the Connecticut Supreme Court, "Sovereign immunity is not applicable in criminal cases, because, at least ordinarily, the charges are not brought 'in effect' against the government." *State v. Velky*, 263 Conn. 602, 612, 821 A.2d 752, 759 (2003). Where the grand jury is not, and cannot, bring charges against GMHA, there is no sovereign "being sued in its own courts without its consent," regardless of whether or not any sovereign immunity GMHA may enjoy has been waived. Alternatively, the People agree with the Superior Court's determination and reasoning that GMHA's sovereign immunity was waived by the legislature. ER 30-31.

The Attorney General respectfully requests that the court strongly and expressly reject GMHA's argument that a Government of Guam agency "may or

may not" turn over records in its possession that would support the conviction of said agency's employee. ER 56:18-23. Government agencies must clearly understand that when they receive a subpoena, that they are legally obligated to produce the documents, whether they are incriminating or exculpatory. Any other holding would give government employees and officials the false notion that they can hide, destroy or delay the release of exculpatory or incriminating evidence in their possession.

Finally, the Court should make clear when, and to what extent taxpayer funds, salaries, attorneys and resources should be allowable to be spent when a grand jury issues criminal subpoenas. Our People should not be funding litigation against themselves, but acting in unison of purpose to enforce duly passed criminal laws and effectuating a grand jury process. Delays created by taxpayer-funded litigation against and within our government to shield potential personal, criminal actions should not be tolerated or allowed.

Accordingly, the appeal should be denied as GMHA does not have any immunity, sovereign or otherwise, to ignore a grand jury subpoena. The lower court's decision should properly be affirmed.

IV. GMHA's Miscellaneous Arguments Against the Grand Jury Subpoena are Equally Meritless

A. No evidentiary hearing was required

GMHA argues that the Superior Court should have held an evidentiary hearing. App. Br. at 13. GMHA's argument is wrong factually and legally, and seeks to create an issue where none exists. Legally, the Superior Court heard argument on, and referred to, the news articles GMHA used as its only evidence that the subpoena was improper. ER 43:1-18; ER 23. Factually, GMHA assumes the Superior Court's use of the word "circumstantial evidence," suggests that the lower court didn't give full consideration to GMHA's evidence. In fact, the order does not disparage GMHA's evidence, but instead clearly states that the news articles failed to meet GMHA's "heavy burden." ER 30. The People did not challenge the admissibility of the news articles because it was confident in the proper purpose and scope of the subpoena, and the grand jury's investigative power. As discussed above, *supra*, media statements by the Attorney General, who was not present at the hearing or involved in the grand jury investigation, do not act to preclude the grand jury's investigation into potential criminal acts. GMHA's evidence regarding media statements was given the weight that the Court felt they were due; and there is no need for an evidentiary hearing where the Court clearly considered the evidence and

found it insufficient to carry GMHA's burden.

B. Privilege is a procedural matter and the Subpoena does not seek privileged material

GMHA argues that the Order must be reversed because it allegedly failed to take into account GMHA's privilege arguments. The subpoena does not seek privileged documents. This issue was discussed at the hearing and the Attorney General's office made clear that no privileged documents were being sought. ER 40:23-25 ("we're just asking for information that – that is not privileged in any way. A lot of it is public information."). To the extent that there are any documents privileged, in part or whole, the proper procedure is for the producing party to produce all responsive non-privilege documents along with a privilege log. The Attorney General's Office can then access the validity of the privilege and file a motion if necessary, where the Superior Court can hold a hearing or review the documents in camera. Accordingly, GMHA's argument is meritless and the lower court's decision properly affirmed.

C. The Grand Jury Subpoena is Valid and Any Error was *De Minimis*

A *de minimis* typo regarding the incorrect date for the return of a subpoena or the inclusion of an incorrect name is not a valid reason to quash the subpoena. The Attorney General's Office explained that this was a typo and that the practice is for a subpoena to be returned to the specific grand jury that issued the subpoena. ER

40:18-20 ("that section should be – should be stricken. That was a typo. She's not even part of GMH."); ER 49:20-21 ("when the request is made, we also request that the return go back to the same – same grand jury."). As the Superior Court correctly ruled, this is a *de minimis* error, and should not be allowed to interfere and delay compliance with an on-going investigation. ER 33.

D. GMHA's Misconduct Allegations Are Not Relevant and Should be Stricken

This Court has already ruled regarding the obligations and duties of the Attorney General's Office vis-à-vis other agencies of the Government of Guam. Appellant's argument is at best a not relevant, and at worse, repeats the evidentiary arguments regarding allegedly improper motives that the Superior Court already determined were factually insufficient to challenge the grand jury subpoena. Either way, they should be stricken and are not relevant to this appeal. Accordingly, the lower court's decision should properly be affirmed.

Conclusion

GMHA should have withdrawn its appeal. The outcome of GMHA's appeal is controlled by this court's decisions *In re People*, 2024 Guam 16 ¶ 89 and *In re People*, 2024 Guam 17 ¶ 55. GMHA merely seeks a proverbial second bite at the apple, and asks this Court to re-weigh the evidence and reach a different result than that reached by the Superior Court. However, the Superior Court's evidentiary

findings are entitled to substantial deference and Guam's grand jury statutes do not allow the restrictions that GMHA seeks to impose upon them. Similarly, sovereign immunity has never allowed a state or territorial agency to interfere with a criminal grand jury investigation. Accordingly, the order denying the motion to quash should be affirmed and the People, finally, allowed to proceed with an unduly delayed investigation.

Respectfully submitted this 16th day of October, 2025.

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 16(a)(7)(B) because this brief contains 4,325 words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Respectfully submitted this 16th day of October, 2025.

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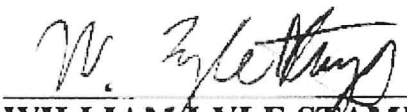

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Certificate of Service

I hereby certify that on this date of October 16, 2025, I caused to be electronically filed the foregoing document with the Supreme Court of Guam by using the Judiciary of Guam's electronic filing system and that the following parties through their counsel of record were thereby served through the Judiciary of Guam's electronic system:

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I declare under penalty of perjury that the foregoing is true and correct.

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