No. 23-15602

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Guam Society of Obstetricians and Gynecologists; *et al.*,
Plaintiffs-Appellees

v.

Guam Attorney General Douglas Moylan,
Defendant-Appellant

v.

Governor of Guam Lourdes Leon Guerrero; *et. al.*,
Defendants-Appellees.

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

Answering Brief of Appellee Lillian Perez-Posadas Administrator of Guam Memorial Hospital

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INTRODUCTION

> "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients."
>
> -*Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

When the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), it overturned almost 50 years of legal precedence on the issue of abortion. The resulting patchwork of state laws, constitutional amendments (both pro- and anti-abortion) and lawsuits have done little to quell the "confusion and disagreement" that the *Dobbs* majority sought to alleviate by overruling *Roe v. Wade*, 410 US 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). More than ever, the issue of abortion is subject to political, moral, and legal debate. In Idaho the "Defense of Life Act" punishes "every person who performs or attempts to perform an abortion" as a felony punishable by a minimum two-year prison sentence.[1] California voters recently enshrined a woman's right to an abortion in their Constitution via public referendum.[2] The need to preserve a woman's right to speak freely with her physician on the issue of abortion is now more important than in the last 50 years.

[1] Idaho Code Annotated § 18-622
[2] California Constitution Article 1, § 1.1

§§ 4 and 5 of Guam Public Law 20-134 (hereinafter referred to interchangeably as "P.L. 20-134" or the "Act") are criminal solicitation provisions designed to target women seeking an abortion and any person who solicits a woman to have an abortion.[3] The law establishes no geographical or jurisdictional restrictions on the target crime of abortion. At no point does either statute specify that the target abortion must occur inside the territory of Guam.

The creation of such uncertainty will inevitably lead to Guam physicians and their patients staying silent in the face of possible criminal sanctions. In a March 21, 1990 memorandum, then Attorney General of Guam Elizabeth-Barrett Anderson opined that §§ 4 and 5 ". . .would prevent a medical professional, or any other person, from recommending to a woman that she seek an abortion in a location other than Guam by making such recommendation a crime." Appellee's SER at 31. The District Court subsequently identified the free speech violation posed by these sections and cited to *Texas v. Johnson, 491 U.S. 397 (1989)*'s as its partial rationale for enjoining them.

Whether §§ 4 and 5 violate free speech rights should have been raised before the Ninth Circuit in 1992 when Appellant Governor Joseph Ada sought reversal of the District Court's injunction of P.L. 20-134, but Appellant did not raise the issue. This

[3] §4 of P.L. 20-134 contains two actionable sections. The first concerns a woman soliciting another to obtain an abortion inducing drug and/or substance. The second clause concerns a woman's submission (whether solicited or not) to an abortion procedure. The distinct nature of both criminal acts is discussed more completely at Section I(A)(1) of this Answer Brief, *below*. For the purpose of clarification, whenever this Brief refers to § 4 of P.L. 20-134, only that section which involves the crime of solicitation shall be invoked, unless otherwise so stated.

cannot have been accident or oversight since Appellant took great pains to argue that the solicitation clauses were not severable from the whole of the law. This Court should recognize that Appellant forfeited his right to appeal this issue when he engaged in a legal strategy, however effective, to force the Ninth Circuit to evaluate the law in its entirety rather than on a piecemeal basis. *Guam Soc. of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992) (hereinafter *Guam II*).[4]

Regardless of what conclusion this Court reaches regarding §§ 1, 2, 3, or 6 of P.L. 20-134, it should find that §§ 4 and 5 continue to be subject to the permanent injunction.

STATEMENT OF THE CASE

In 1990, the Guam Legislature passed Public Law 20-134 with the goal of criminalizing almost all abortions in Guam except in the case of an ectopic pregnancy or where two physicians determine that termination of a pregnancy is necessary to protect the life of the mother. Sections 4 and 5[5] of that law established criminal solicitation penalties for any woman seeking an abortion by any means and any person soliciting a woman to submit to an abortion by any means. The law was enjoined by the US District Court of Guam pursuant to Fed. Rule Civ. P. 60(b). In a footnote, the District Court also held that "Sections 4 and 5 also violate the First Amendment since

[4] Both the 1990 District Court opinion and the 1992 Ninth Circuit opinion are identically captioned. In an effort to avoid confusion, this brief shall refer to the District Court's opinion as *Guam I* and the Ninth Circuit's opinion as *Guam II*.

[5] §§ 31.22 & 31.23, respectively.

they attempt to prohibit freedom of speech." *Guam Soc. of Obstetricians and Gynecologists v. Ada*, 776 F.Supp. 1422, 1428 n.9 (D. Guam 1990) (hereinafter *Guam I*)

On appeal to the Ninth Circuit, Appellant Governor Ada chose to both 1) not appeal the District Court's decision enjoining Sections 4 and 5 and 2) argued on appeal that those sections were not severable from the rest of the law.

In 1992, the Ninth Circuit rejected Appellant Gov. Ada's arguments, including on the issue of severability of the solicitation provisions, and upheld the District Court's injunction on the basis that the law violated *Roe v. Wade*, 410 US 113 (1973). The Ninth Circuit did not take up the District Court's determination that the solicitation provisions of the law violated the Free Speech Clause of the First Amendment because Appellant Ada chose not to contest that determination.

Thirty years later, the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022) overturned *Roe* and, for the time being, returned the legality of abortion to the states. On February 1, 2023, Defendant Appellant Douglas Moylan ("Appellant Moylan") filed a motion with the US District Court in Guam to vacate its 1990 permanent injunction.

On March 15, 2023, Appellant Moylan's office received a letter signed by all members of the Board of Trustees and Administrative staff of Guam Memorial Hospital Authority that "It is the position of GMHA that the injunction issued by the District Court of Guam regarding the criminal solicitations provisions of P.L. 20-134 should remain in effect." **Exhibit A**. In her capacity as Administrator of GMHA,

Defendant Appellee Perez-Posadas ("Appellee Posadas") directed GMHA's in-house legal counsel to protect the interests of GMHA's medical staff and narrowly oppose Appellant Moylan's efforts to reinstate the solicitation provisions of P.L. 20-134.

On March 24, 2023, the US District Court of Guam issued its *Order Denying Defendant Attorney General Of Guam's Motion to Vacate Permanent Injunction* finding that Appellant Moylan failed to respond and forfeited his right to contest the Plaintiff's arguments on the issue of whether the law was *void ab initio*. Appellant's ER 2-5. Appellant Moylan appeals that decision to this Court.

JURISDICTION

Appellee Posadas does not dispute Appellant Doug Moylan's Jurisdictional Statement or his conclusion that this court has jurisdiction over this matter.

STATEMENT OF THE ISSUES

1. Whether the Government forfeited its right to contest the District Court's injunction against Sections 4 and 5 of P.L. 20-134 when it failed to appeal those issues before this Court in 1992.

2. If the Court finds that Appellant Moylan did not waive or forfeit his right to appeal the injunction against Sections 4 and 5, do those sections violate the Free Speech Clause of the First Amendment to the United States Constitution?

3. Whether more recent Guam laws mandating certain physician disclosures to patients seeking abortions in Guam render Sections 4 and 5 moot and repealed by implication.

STANDARD OF REVIEW

Appellee Lillian Perez-Posadas agrees with and joins the standard of review described in Appellee Lourdes Leon Guerrero's Answer Brief insofar as it is applicable to the issues presented herein.

SUMMARY OF ARGUMENTS

The criminal solicitation provisions of Public Law 20-134 create unconstitutional intrusions into the doctor-patient relationship by criminalizing and chilling speech. These intrusions that cannot be wished away by merely pointing to a criminal statute that punishes women and their physicians. The First Amendment to the Constitution is a flimsy thing indeed if governments can subvert its protections by first criminalizing an act and then criminalizing speech related to that act. The United States Supreme Court decision in *US v. Williams*, 553 U.S. 285 (2008), when read critically, and within the context of relevant Guam law, does not provide safe harbor for Sections 4 and 5 which are overbroad and should be recognized as such.

Even if this Court finds that Sections 4 and 5 of P.L. 20-134 do not violate the Overbreadth Doctrine, it should nonetheless maintain the District Court's injunction against them. The District Court made clear that its decision to enjoin these sections was based on a determination that the underlying criminal statutes were invalid as against *Roe* and violated free speech protections. This Court acknowledged the same in its *Guam II* opinion and noted that ". . . Guam did not appeal from that ruling." 962 F.2d 1366, 1369 (9th Cir. 1992). In 1992 Appellant Governor Ada forfeited the

government's appeal of the District Court's determination. There is nothing in the *Dobbs* opinion that changes this reality.

Finally, Guam law has moved on from its attempt to criminalize almost all abortions in the early 1990s. In the intervening years, the Guam Legislature has passed laws permitting elective abortions that would be *de facto* illegal under P.L 20-134 and requires that physicians discuss with their pregnant patients seeking an abortion the possible negative consequences of carrying a child to term. P.L. 20-134 makes no such allowances and will have the ultimate effect of chilling speech between a physician and her patient in order to avoid the possibility of running afoul of both the old and new laws. For these reasons, this Court should uphold the District Court's injunction against the solicitation provisions of P.L. 20-134.

ARGUMENT

I. This Court should follow its holding in *Conant v. Walters*, and find that §§ 4 and 5 of P.L. 20-134 are overbroad and violate the Free Speech Clause of the First Amendment.

A. Analysis of §§ 4 and 5 of P.L. 20-134

§ 4 states: Every woman who solicits of any person any medicine, drug, or substances whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

On its face, this statute is confusing and contains elements of traditional solicitation crimes and a crime that can only be reasonably referred to as *submission to an abortion*. It is difficult to understand how the law seeks to punish the traditionally

inchoate crime of solicitation by requiring that the woman soliciting any medicine, drug, or substance actually "take the same."

The second portion of the statute does not require that a woman engage in solicitation of any other person. All that is required is that she "submit to an operation or to the use of any means whatever with intent thereby to cause an abortion." Submission is the "yielding to the authority or will of another"[6] and an act that does not, intrinsically, involve solicitation of another.

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

This section seeks to criminalize the speech of any person who solicits another to submit to an abortion either by operation or the use of any means whatever. Unlike § 4, there is no scienter element requiring that the solicitous person intend that the woman actually submit to the abortion. As with § 4, there is no requirement that the solicited abortion occur within the boundaries of Guam.

B. Even if the District Court's footnote declaring that §§ 4 and 5 violate free speech is dicta, it is still persuasive.

In *Guam I*, the District Court of Guam enjoined the entirety of P.L. 20-134 as violating the holding in *Roe* because the law failed to "make distinctions based on the stage of the pregnancy and because the law does not recognize, as it must, any of the

[6] Bryan A. Garner, editor in chief. Black's Law Dictionary. St. Paul, MN: Thompson/West, 2006.

other constitutionally-protected interest involved." *Guam I* at 1428 -1429. On appeal, the Ninth Circuit upheld the injunction and, significant to this argument, acknowledged that "[t]he District Court held that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal that ruling. The plaintiffs now argue that the sections are not severable from the remainder of the Act." *Guam II* at 1369. On appeal, Appellant Moylan, in attacking the District Court's refusal to vacate the injunction, disregards the Ninth Circuit's holding by claiming that it's "dicta . . . without analysis." *Appellant Brief* at 26. In doing so, Appellant Moylan ignores both the significance of the U.S. District Court's reliance on the holding in Texas *v. Johnson, 491 U.S. 397 (1989)*, the Ninth Circuit's acknowledgment of the District Court's rationale, and arguments counsel that §§ 4 and 5 of the Act do, in fact, constitute viewpoint discrimination and violate the First Amendment's guarantee of free speech.

Black's Law Dictionary defines "dictum" (of which dicta is the plural form) to mean: "1. A statement of opinion or belief considered authoritative because of the dignity of the person making it. 2. A familiar rule; a maximum."[7] The US Supreme Court has held that dicta is "to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is present for decision." *Arkansas Game and Fish Com'n v. U.S.* 568 U.S. 23, 35 (2012) (citing to: *Cohens v. Virginia*, 6 Wheat

[7] Bryan A. Garner, editor in chief. Black's Law Dictionary. St. Paul, MN: Thompson/West, 2006.

264, 399, 5 L.Ed. 257 (18212)). However, "[d]icta can, of course have persuasive value," *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 764 (11th Cir. 2010), and "persuasive, reasoned dicta may provide a valuable guide to statutory interpretation." *Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21 (1st Cir. 1995).

In this case, the "dicta" created by the District Court in its footnote, and acknowledged by the Ninth Circuit as a holding, should be considered persuasive. The footnote reads:

> Sections 4 and 5 also violate the First Amendment since they attempt to prohibit freedom of speech. If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. These two sections are constitutionally infirm insofar as they would make criminal any discussion between a woman and her doctor concerning the need for, and access to, an abortion. The state has no compelling interest in intruding in this most private area of consultation between a woman and her physician. These sections are also invalid on their face insofar as they purport to prohibit more general speech concerning abortion and its availability.
>
> (citing to *Johnson*, 491 U.S. 397 at 414; *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) *(reversed on other grounds)*; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 760-764 (1992) (*reversed*) (internal citations omitted).[8]

[8] It is important to note that while the holdings in *Massachusetts v. Secretary of Health and Human Services* and *Thornburgh* would have been reversed in light of the *Dobbs* opinion (even if they had not been reversed prior to *Dobbs*) the District Court's analysis remains valid insofar as those cases stood for the legal principle that a person has a general free speech right to discuss with her physician where she may obtain a *legal* abortion. See *Bigelow v. Virginia*, 421 U.S. 809 (1975) holding invalid a Virginia statute that criminalized speech in Virginia that informed Virginia residents on how and where to obtain a legal abortion in the State of New York.

First, the District Court does not merely express an opinion on the law detached from legal analysis. In *Johnson*, the Supreme Court considered whether a Texas law criminalizing American flag burning violated the First Amendment. Texas argued that the law should stand because it had the effect of criminalizing an act constituting a breach of the peace. *Id.* at 407. That argument was not persuasive. The Court found that the act of burning the flag was an expression of speech that, while offensive to others, was nonetheless protected under the First Amendment. *Id.* at 414.

This cuts directly against Appellant Moylan's argument that the District Court based its decision to enjoin Sections 4 and 5 solely on its determinations that the rest of P.L. 20-134 violated *Roe*. Nothing in *Guam I*'s analysis of Sections 4 and 5 would lead a rationale observer to believe that the District Court first determined that Sections 1, 2, 3, and 6 of P.L. 20-134 were unconstitutional and then worked backwards to get to Sections 4 and 5. As in the *Johnson* analysis, the District Court weighed the government's interest in proscribing speech against the value of the speech as a form of expression.

As in the *Johnson* holding, the District Court found that the government's interest in proscribing the speech was inferior to the free speech liberty interest of the speaker. Just as the statute at issue in *Johnson* criminalized a form of expression, so also do Sections 4 and 5 of the Act. Whether the underlying act being advocated for is supported by a criminal statute is material, but not conclusive. The Government's interest in preventing the solicitation must outweigh the individual's free speech liberty interest. The District Court in *Guam I* held that it does not.

If this Court finds that *Guam I*'s conclusion that §§ 4 and 5 of the Act are not rooted in *Roe v. Wade*'s decriminalization of abortion, but rather rooted in *Texas v. Johnson*'s "bedrock principle" analysis, then this Court must also hold that nothing in the *Dobbs* opinion has caused a reversal of a prior judgment sufficient to fall within the categories of Fed. R. Civ. P. 60(b)(5). Thus Appellant Moylan motion to vacate the injunction insofar as Sections 4 and 5 of P.L. 20-134 must be denied and the injunction sustained.

C. Any solicitation statute must be evaluated within the context of Guam's crime of solicitation at 9 GCA § 13.20.

In a free speech analysis of §§ 4 and 5, it is important to determine the definition, scope, and application of the term "solicit" in both sections. P.L. 20-134 does not define the word solicit, even though it is the *actus reus* of the conduct §§ 4 and 5 seek to penalize. 9 GCA § 13.20 criminalizes the act of solicitation:

> A person is guilty of solicitation to commit a felony when with intent to promote or facilitate its commission he commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

Where P.L. 20-134 does not define "solicit," it is logical that any legal analysis will look to the term as it is defined elsewhere in the criminal code and apply that definition.[9] In Guam, the crime of solicitation includes an act by the solicitor to "encourage" another.

[9] See *People v. Acosta*, 2022 Guam 11, 2022 WL 1795985 at ¶ 40 – 43 (holding that the term "human being" used, but not defined, in the sexual assault chapter should be defined by relying on other sections of the law, including the Guam code's homicide chapter and Guam health statutes)

As stated in this brief's Introduction, Attorney General Barrett-Anderson evaluated the legality of P.L. 20-134 for the benefit of the Guam Chief of Police. Regarding §§ 4 and 5 of the Act, she opined that §§ 4 and 5 ". . .would prevent a medical professional, or any other person, from *recommending* to a woman that she seek an abortion in a location other than Guam by making such recommendation a crime." (emphasis added) Appellee's SER at 31. It is clear that §§ 4 and 5 of the Act criminalize any action that could be reasonably interpreted as encouraging another to solicit or submit to an abortion, without regard to where the speaker encourages the submission.

On its face, any law that criminalizes the dissemination of speech informing citizens of one state that which is legal in another state violates the Supreme Court's holding in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Bigelow*, the Supreme Court considered the criminal prosecution of a newspaper editor. The editor chose to publish an advertisement for a New York abortion clinic that targeted Virginia residents. The advert contained contact information for the clinic, information that abortions in the state of New York were legal, that there was no residency requirement to obtain an abortion in New York, and made an offer to help any Virginia woman seeking an abortion with "all arrangements." *Id.* at 813. The publisher was charged with violation of a Virginia statute establishing a misdemeanor crime for the act of "any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in another manner, encourage[ing] or prompt[ing] the procuring of an abortion. . ." *Id.* at 813-814. The *Bigelow* court rooted its decision in both the Freedom of the Press and

Free Speech Clauses of the First Amendment. The Court held that the "Policy of the First Amendment favors dissemination and opinion, and the guarantees of freedom of speech. . ." preventing ". . . any action of the government by means of which it might prevent such free and general discussion of public matters. . ." *Id.* at 829.

The threat that the solicitation clauses of the Act will be used to criminalize those seeking to encourage and inform women on Guam where and how they may obtain a lawful abortion is not an idle one. In 1991, a University of Baltimore Law Review article detailed how P.L. 20-134's solicitation sections were used to suppress the dissemination of information. The article recounts that:

> During a 1990 speech before the Guam Press Club, Janet Benshoof, the director of the American Civil Liberties Union's Reproductive Freedom Project, acknowledged that Guam's law prohibited the solicitation of abortions, but she nonetheless apprised the audience that elective abortions remained legal in the State of Hawaii. Also, she provided a telephone number with which to obtain additional information about the availability of abortion in Hawaii. Ms. Benshoof was subsequently charged with violating the law's solicitation provision.[10]

Per the article, the charges against Ms. Benshoof were dismissed without prejudice, but only after the District Court issued its opinion enjoining P.L. 20-134. *Id.* at 109, fn. 6.

D. Under both *Williams* and *Conant*, the solicitation provisions of P.L. 20-134 violate the Free Speech Clause of the United States Constitution.

[10] William J. Swift, *Prohibiting the Solicitation of Abortion – Viewpoint Discrimination and Other Free Speech Problems: Will Free Speech Guarantees Be a Casualty of the Moral Debate on Abortion*, 21 University of Baltimore Law Review 107, 109 (1991).

This Court should find that the precedent set in its opinion in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) controls. In *Conant*, this Court considered a federal policy that penalized physicians who "recommended" the use of medical marijuana to their patients. A lower court enjoined the government from enforcing the policy and the government appealed. "The fundamental disagreement between the parties concerned the extent to which the federal government could regulate the doctor-patient communications without interfering in First Amendment interests." *Id.* at 634. In finding that the policy infringed on the First Amendment rights of physicians to speak freely with their patients, this Court found that "When the government targets not subject matter but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant." *Id.* at 637.

Directly relevant to the instant case is that the government sought to prevent physicians from extending to their patients advice that obtaining and using medical marijuana (legal at the state level, but illegal the federal level) would be beneficial to their medical treatment. As in *Conant*, there currently exists a patchwork of laws legalizing and criminalizing abortion throughout America. Also, as in *Conant*, P.L. 20-134's solicitation provisions seek to (1) prevent a woman from soliciting advice regarding the ability to obtain medication or other means by which she might be able to obtain an abortion and (2) seek to punish a physician for engaging in speech that can be seen as encouraging or advocating that a woman obtain an abortion.

That P.L. 20-134's solicitation provisions constitute viewpoint discrimination cannot be denied. There are two sides to the solicitation coin. A physician can solicit or encourage a woman to refrain from having a legal abortion and, on the flips side, a physician can solicit and encourage a woman to seek out a legal abortion. If the solicitation happens in a Guam beholden to §§ 4 and 5 of the Act, the solicitation is only criminal if it advocates in favor of abortion. Solicitations of women to refrain from obtaining an abortion, regardless of the legality of the venue, are always legal under P.L. 20-134. This is viewpoint discrimination. See also: *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) (holding that a Las Vegas city ordinance banning solicitation by panhandlers was content-based and did not represent the least restrictive means of achieving the government's goals); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (establishing the principle that the constitutional guarantees of free speech do not permit a state to forbid advocacy of the use of force or violation of the law except where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

Defendant Moylan relies on the opinion in *U.S. v. Williams*, 553 U.S. 285 (2008) arguing two issues: 1) that the opinion in *Williams* establishes a hard and fast rule that all offers to engage in illegal transactions are categorically exclude from First Amendment protection and that "speech or conduct prohibited by Sections 4 and 5 necessarily falls outside the scope of the First Amendment." Appellant Brief at 27. However, *Williams* is inapplicable to the current case.

First, the facts of *Williams* are significantly different than those in the instant case. The law in *Williams* criminalized the solicitation of child pornography. 553 U.S. at 294. Specifically, the statute at issue in *Williams* targeted "the collateral speech that introduces such material into the child-pornography distribution network. . ." *Id.* The *Williams* majority specifically set out that the statute did not criminalize "abstract advocacy, such as the statement 'I believe that child pornography should be legal' or even 'I encourage you to obtain child pornography.' It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer." *Id.* at 300.

The first distinguishing characteristic between *Williams* and the instant case is that there are no jurisdictions in America where child pornography is legal. The Supreme Court did not have to take up the issue of whether solicitation in one state to obtain legal child pornography in another state would violate free speech protections. Further the opinion specifically exempts speech that "encourages" another to obtain child pornography. 9 GCA § 13.20 is the *only* Guam statute that defines criminal solicitation sets out that person commits a solicitation crime when she "encourages . . . another person to perform. . . an act which constitutes such crime." Illustrative of this risk, Guam police charged Janet Benshoof for providing Guam women with the information and means for obtaining a legal abortion in Hawai'i under the theory that her speech constituted encouragement of another to engage in the illegal act of abortion pursuant to P.L. 20-134. Finally, former Attorney General Barrett-Anderson's memorandum articulated that the solicitation provisions of the statute could be used

for exactly what the *Williams* majority held was impermissible: the encouraging of another to engage in the criminal act.

In conclusion, this Court has more than enough real-world examples to conclude that there is no interpretation of the language of §§ 4 and 5 of the Act that can ensure the facial goals of the statue while also protecting the free speech of Guamanians where that speech treads into advocacy for legally obtaining an abortion. For this reason, this Court should find that §§ 4 and 5 of P.L. 20-134 constitute an impermissible infringement of free speech rights and maintain the injunction insofar as these sections are concerned.

II. This Court should find that Appellant forfeited the right to appeal the District Court's injunction of §§ 4 and 5 when he chose not to raise that issue on appeal in 1992.

When this matter was first appealed to the Ninth Circuit, the Government failed to challenge the District Court's holding that Sections 4 and 5 of the Act violated the First Amendment. *Guam II*, 962 F.2d 1366, 1369 (9th Cir. 1992). "Typically, issues not raised in the initial brief on appeal are deemed abandoned." *U.S. v. Campbell*, 26 F.4th 860, 871 (11th Cir. 2022). Insofar as Section 4 and Section 5 of the Act are concerned, Appellant Moylan's argument that the *Dobbs* opinion allows for his Motion to Vacate via rule 60(b)(5) is reliant upon the presumption that this court's original rationale for enjoining the solicitation provisions was based on *Roe v. Wade* prohibiting the criminalization of abortions.

The Supreme Court's opinion in *U.S. v. Campbell*, 26 F.4th 860 (11th Cir. 2022) states that "Typically issues not raised in the initial brief on appeal are deemed abandoned." *Id.* at 871. The term forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Id.* at 872 (internal citations omitted). Where a party has forfeited its right to appeal an issue by failing to timely raise that issue, a court may, nonetheless, allow the issue to be considered so long as one of the following situations applies:

> (1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party lacked an opportunity to raise the issue at the District Court level; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt, or (5) the issue presents significant questions of general impact or of great concern. . . an issue on an initial brief on direct appeal should be treated as forfeiture of the issue. . . and the court may raise the issue *sua sponte* in extraordinary circumstances. . . after finding that one of our . . . forfeiture exceptions applies. *Id.* at 873.

At the very least, the issue of whether §§ 4 and 5 violate the First Amendment should be considered forfeited by Appellant Moylan as the government did not raise the issue on first appeal. Failure to raise the issue was acknowledged by this Court in its *Guam II* opinion. 962 F.2d at 1369.

Review of the *Campbell* factors allowing for resurrection of a forfeited issue is appropriate. Right away, an analysis disposes of situation Nos. 1, 3, and 5. Each of these situations requires demonstration that refusal to consider the forfeited issue will result in either "a miscarriage of justice," denial of an "interest of substantial justice," or that the issue presents significant questions of general impact/great concern. Each of these

factors is defeated for the simple reason that there is nothing standing in the way of the Guam Legislature passing a similar solicitation statute in the future. Appellant Moylan cannot argue that he holds a significant, justiciable interest in maintaining §§ 4 and 5 of the Act since, in his capacity as Attorney General, his interest is enforcement of valid laws and not merely laws that he believes should be passed.

Regarding issue No. 2, there can be little doubt that Appellant Moylan lacked the opportunity raise the issue at the District Court level. There is nothing in the record, and Appellant Moylan has offered no proof, that the government was unable to argue that the statutes violated free speech considerations at the District Court level. Appellant Moylan's predecessor at the time took up the matter and expressed her opinion both sections violated the first amendment.

Regarding issue No. 3, Appellant Moylan cannot now claim that there are interests of substantial justice at stake when the Government was both aware of the contents of Attorney General Barrett-Anderson's memorandum *and* chose not to contest the District Court's ruling on §§ 4 and 5. From the outset of this case, Defendant Appellants have been aware that there were significant concerns regarding §§ 4 and 5's potential to impinge upon the liberty interests of Guam citizens and Appellants chose to remain silent before the Ninth Circuit.

Given all of the above, this Court should find that the right to contest the District Court's holding that §§ 4 and 5 violated the First Amendment was forfeited when

Appellant either chose or neglected to raise the issue on appeal. Thus, the injunction against §§ 4 and 5 should remain in place.

III. If allowed to take effect, §§ 4 and 5 of P.L. 20-134 would create legal framework in which physicians and their patients would face unreasonable criminal risk in connection with discussions surrounding abortion.

A. Since 1990, Guam has passed multiple laws legalizing abortions that P.L. 20-134 would criminalize.

Physicians in Guam are authorized to perform abortions pursuant to the strictures of 9 GCA § 31.20. This statute allows a physician to "[terminate] . . . a human pregnancy with an intention other than to produce a live birth or remove a dead fetus." § 31.20(a). Only a licensed physician is allowed to perform an abortion (§ 31.20(b)(1)) and only in "an adequately equipped medical clinic or in a hospital approved or operated by the United States or this Territory." § 31.20(b)(2). Elective abortions are permitted within 13 weeks of conception. § 31.21(3)(A). No abortion may be performed beyond 13 weeks of pregnancy unless "the child would be born with a grave physical or mental defect," or "the pregnancy resulted from rape or incest." § 31.20(3)(B)(i)-(ii). No abortion may be performed after 26 weeks (§ 31.20(B)) unless "the physician reasonably determines using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother." § 31.20(b)(3)(C).

The definition of "medical emergency" in 10 GCA § 3218.1 cannot be resolved with the definition of what is "not" an abortion under P.L. 20-134. Section 2 defines,

in relevant part, abortion as *not* meaning: ". . .the purposeful termination of a human pregnancy. . ." when that termination constitutes a ". . .medical intervention in commencement of a pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother. . ."

Current law contemplates that a GMHA physician may find cause to advise a patient regarding an abortion procedure. 10 GCA § 3218.1(b) provides that informed consent include a specific list of medically relevant information. The law requires that a physician disclose and discuss this information with her patient, prior to the abortion procedure or administration of an abortion inducing medication. Compliance requires that the physician provide her patient with "medically accurate information. . ." regarding "the immediate and long-term risks associated with the proposed abortion method. . ." and "the medical risks associated with carrying the child to term." *Id.* at § 3218.1(b)(1)(B)(ii) & (b)(1)(E). In a "medical emergency[11]" the statute's extensive informed consent requirements may be waived, § 3218.1(b)(7), but the physician is admonished to ". . . inform the woman, before the abortion if possible, of the medical

[11] 10 GCA § 3218.1(a)(10) Medical emergency means a condition of which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in a substantial or irreversible physical impairment of a major bodily function.

indications supporting the physician's judgment that an immediate abortion or termination of pregnancy is necessary to avert her death or that a twenty-four (24) hour delay would cause substantial and irreversible impairment of a major bodily function." § 3218.1(e).

B. The current legal framework governing abortion in Guam mandates that a physician engage in the types of speech with a patient that P.L. 20-134 would criminalize as solicitation.

If this Court lifts the permanent injunction issued by the District Court, Guam law will be thrown into disarray, confusion, and contradiction in the issue of abortion. 9 GCA § 31.20 allows for elective abortions up to 13 weeks after pregnancy. P.L. 20-134 contains no such provision. 10 GCA § 3218.1(b)(1)(E) mandates that a physician discuss with a woman considering an abortion the "medical risks associated with carrying [a] child to term." P.L. 20-134 will expose a physician to a crime if he is alleged to have encouraged is patient to obtain an abortion where it is legal. The cumulative effect of imposing a law drafted and passed in 1990 overtop a contradictory legal scheme set implemented in the intervening years can only lead to physicians protecting their licenses and livelihoods by refusing to engage in any speech that might be construed by the government as soliciting or encouraging a patient to have an abortion.

CONCLUSION

In 1990, the Guam Legislature crafted a law criminalizing almost all types of abortion in Guam. It criminalized not only the acts of providing or receiving abortions, but also speech that could be construed as soliciting another to either have or cause an

abortion. Physicians are specifically susceptible to the threats these types of laws pose because they are the most likely to encounter women seeking advice on when, where, how, and whether they should obtain an abortion. If physicians are unwilling to completely engage with their patients for fear of running afoul of the law, the doctor-patient relationship which this Court has identified as so crucial to delivery of medical care will break down. It is for this reason, and those articulated above, that this Court should maintain the permanent injunction against the solicitation provisions at §§ 4 and 5 of P.L. 20-134. It is with this sentiment in mind that Appellee Lillian Perez-Posadas, in her capacity as the Administrator of Guam's only public hospital submits this brief.

STATEMENT OF RELATED CASES

On behalf of Appellee Lillian Perez-Posadas, the undersigned is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I am the attorney representing Appellee GMHA Administrator Lillian Perez-Posadas, MN, RN.

I certify that I electronically filed and served the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system on October 28, 2023 (PDT).

I further certify that, upon information and belief, all other participants in this case are registered CM/ECF users and that service will be accomplished via the CM/ECF system.

GUAM MEMORIAL HOSPITAL

_____

JEREMIAH B. LUTHER
Legal Counsel *on behalf of*
Defendant Appellee Lillian Perez-Posadas, MN, RN
Administrator Guam Memorial Hospital

EXHIBIT A

GUAM MEMORIAL HOSPITAL AUTHORITY
ATURIDAT ESPETAT MIMURIAT GUAHAN
850 Governor Carlos Camacho Road, Tamuning, Guam 96913
Operator: (671) 647-2330 or 2552 | Fax: (671) 649-5508

March 14, 2023

Douglas B. Moylan
Attorney General
Guam
590 Marine Corps Dr. / Ste 901
Tamuning, Guam 96913

Delivery: *via* In-Person & Electronic mail

Re: *Guam Soc'y of Obstetricians and Gynecologists v. Ada;* Scope of AG's Representation of GMHA

Attorney General Moylan:

On February 1, 2023, the Office of the Attorney General filed Motion to Vacate Permanent Injunction Pursuant to Fed.R.Civ.P. 60(b)(5) and Memorandum in Support in the U.S. District Court of Guam case: *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 90-cv-13. If granted, the Attorney General's motion would have the effect of placing P.L. 20-134 into force and effect. Of great interest to GMHA's administration are Sections 4 and 5 of that law, wherein the solicitation of an abortion is made a criminal offense. At no time prior to February 1, 2023, was GMHA's Administration or Board of Trustees consulted by the Attorney General's Office regarding the state of the law or made aware that the Attorney General intended to file such a motion. As of the issuance of this letter, no representative of the Attorney General's office has discussed any concern that the Board of Trustees, the Administration, or medical staff may have regarding imposition of P.L. 20-134.

It is the position of GMHA that the injunction issued by the District Court of Guam regarding the criminal solicitation provisions of P.L. 20-134 should remain in effect. The broad language of that law threatens criminal sanctions against GMHA physicians, nurses, medical staff, and patients if they engage in free and open conversations regarding abortion. In light of the above, GMHA's administration instructed Mr. Luther to file a brief in opposition to the Motion to Vacate any injunction applicable to Sections 4 and 5 of P.L. 20-134. It is the opinion of the GMHA administration that the currently filed Opposition on behalf of GMHA accurately represents the interests of the hospital, its staff, and patients seeking education and information.

On March 13, 2023, GMHA Administrator Lillian Posadas received a letter signed by Attorney General Chief Deputy Joseph A. Guthrie, wherein he writes: "Finally, we notice that Lillian Posadas has filed an Opposition to our Motion to Lift the Preliminary Injunction. Our interpretation of 10 GCA 8114 would permit Mr. Luther to represent you in this matter."

On March 14, 2023, Mr. Luther was served a letter alleging that he had engaged in an ethical violation and violated 10 GCA § 80114 by appearing on behalf of GMHA in the U.S. District Court and filing a brief on GMHA's behalf. That letter states, unequivocally, that the Attorney General of Guam represents GMHA.

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ADMINISTRATION

This letter is a request that the Office of the Attorney General agree to represent the interests of GMHA and its medical staff by retracting that portion of the Motion to Vacate which seeks to impose criminal sanctions or to allow the hospital to represent its own interests before the U.S. District Court in this matter.

Respectfully,

Theresa Obispo
Chairperson, Board of Trustees
Guam Memorial Hospital Authority

Lillian Perez-Posadas, MN, RN
Hospital Administrator/CEO
Guam Memorial Hospital Authority

Melissa Waibel, RN
Vice-Chairperson, Board of Trustees
Guam Memorial Hospital Authority

Dr. Joleen Aguon, MD
Associate Administrator of Medical Services
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Secretary, Board of Trustees
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

I am the attorney or self-represented party.

This brief contains 6,884 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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Signature JERMIAH LUTHER Digitally signed by JEREMIAH LUTHER DN: cn=JEREMIAH LUTHER, o=GMHA, ou=LEGAL, email=jeremiah.luther@gmha.org, c=US Date: 2023.10.28 18:19:44 +10'00' **Date** 10-27-2023

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