

CRQ24-001

IN THE SUPREME COURT OF GUAM

IN RE: REQUEST OF LOURDES A. LEON GUERRERO, I MAGA'HÅGAN
GUÅHAN, RELATIVE TO THE DUTIES OF THE ATTORNEY GENERAL OF
GUAM TO EXECUTIVE BRANCH AGENCIES

Original Proceeding for Declaratory Judgment
Petition of the Governor of Guam under 7 GCA §4104

**Brief *Amici Curiae* of Consolidated Commission on Utilities, Guam Power
Authority, Guam Waterworks Authority, Guam Memorial Hospital
Authority, and Port Authority of Guam in Support of
Governor Lourdes A. Leon Guerrero**

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INTEREST OF AMICI CURIAE

GPA, GWA,¹ GMHA, and Port Authority (“Autonomous Agencies” or “Amici”) are autonomous instrumentalities of the Government of Guam. *See* 12 GCA §8101 *et seq.* (GPA); 12 GCA §14101 *et seq.* (GWA); 10 GCA §80102 *et seq.* (GMHA); 12 GCA §10101 *et seq.* (Port). The CCU is the governing board for GPA and GWA. 12 GCA §79100 *et seq.* (CCU). Amici are unique because they are subject to various legal and fiscal controls different than line agencies.

Amici frequently enter into high-dollar value contracts. For procurements over \$1 million, GPA and GWA must obtain approval of the CCU. For larger contracts, GPA and GWA also need approval from the Public Utilities Commission (PUC). GMHA must follow its own procurement regulations. The Port requires approval of certain procurements by its Board of Directors and PUC. The anticipated award of a high-dollar contracts triggers the requirements of 5 GCA §5150.

On February 28, 2024, the Amici all received a letter from the Attorney General, substantively identical to the appended as Exhibit 1 to the Governor’s petition, declaring that Moylan was withdrawing from

¹ The CCU is a popularly-elected, nonpartisan body, *see* 5 GCA §§79101, 79102, overseeing GPA and GWA. 5 GCA §79100. The CCU hires the lawyers for GPA and GWA, who can substitute for one another.

representation due to a “possible conflict of interest.”

On February 29, 2024, the Amici each received a letter from the Attorney General, identical to those appended as Exhibit 2 to the Governor’s petition, in which he unilaterally imposed “workaround” for processing documents that require his approval: have the agency sign a waiver of rights or he would indicate “potential conflict, cannot sign.”

On March 28, 2024, the Attorney General “approved” a GPA contract as to form and legality, indicating: “Approved: Not representing ANY public official,” despite 5 GCA §5150’s mandate he act as “legal advisor.” The Attorney General has only approved one GWA contract-review, since the new practice. The review was finally completed 15 months after terminating the SAAG appointments. Amici face inevitable procurement delays.

ARGUMENT

This case involves an Attorney General (“AG”) who sensationalized his office and abandoned the hard work of governing to the detriment of his clients—the government of Guam and its agencies. Democratic governance is, at its core, a shared enterprise—dividing power in a manner intended to ensure a clear departure from the reign of monarchs. *The Federalist Paper* No. 47 (“The accumulation of all powers, legislative, executive, and

judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”).

Attorney General Douglas Moylan (“Moylan”) is apparently unwilling to perform his governing duties as “Chief Legal Officer of the government of Guam,” 48 U.S.C. §1421g(d), while also acting as public prosecutor. This court should enter a declaratory judgment² requiring him to fulfill his Organic Act obligation to provide legal services to the government.

I. The Attorney General’s client is the government, not the “public interest.”

A. The Attorney General’s arguments about the identity of the “client” simply rehash past arguments.

Amici concur in the conclusions in Part V.A. of the Governor’s

² Moylan argues the only remedies for his refusal to do his job are a writ or recall election. *See* AG Br. at 53-59. Amici acknowledge the availability of recall elections. We also acknowledge writs of mandamus, *GIAA v. Moylan II*, 2005 Guam 5 ¶¶64-67, prohibition, *see Guam Police Dep’t v. Super. Ct. (Lujan)*, 2011 Guam 8, and quo warranto, *Terr. Prosecutor v. Super. Ct.*, D.C. Civ. App. 82-0215, 1983 WL 30224 *1 (D. Guam—App. Div., May 26, 1983), are possible remedies to curbing the AG’s misconduct. Like writs, this declaratory judgment action is an “original proceeding,” and the issues involve “the operation of the Executive Branch,” 7 GCA §4104. And while Moylan “withdrew” claiming he needed “the Courts to give us a clear direction,” Gov. Ex.4, he spends a lot of time telling this court it cannot give that direction.

opening brief. Amici wish to emphasize the AG's client under the Organic Act is the government, not an amorphous "public interest."

Moylan's misunderstanding of his role as Attorney General is not new. The questions, here, were raised and settled twenty years ago, the first time Moylan was AG. Moylan has "temporarily withdraw[n]," *see* Gov. Ex.4, from performing *any* legal services for twenty-two government agencies or instrumentalities because of a "possible" or "potential legal conflict" to "reserve [the] right to criminally or civilly investigate and prosecute government officials in their personal or official capacities for any wrongdoings that may be subsequently uncovered...." *See* Gov. Ex.4.

Moylan's all-or-nothing misconduct is a reprise of past improper acts. In *Attorney General v. Pereira*, SP32-03, *Ex Parte* Mot. Rep. Gov't of Guam (Super. Ct. Guam, May 5, 2003), Moylan had "*temporarily* withdrawn" from representing the government in litigation cases. Moylan used this tactic because there was a "pending lawsuit in *GIAA v. AG*" involving ethical issues and he was concerned about "ethical complaints that *may* have recently been filed." *Id.* *4-5, n.2. While Judge Manibusan, in *Pereira*, permitted Moylan to proceed in the dual capacities, the accommodation was short-lived.

This court has been forced—repeatedly—to examine Moylan's

conduct, in his official capacity as AG, including forcing him to perform his official duties to autonomous agencies in *GIAA v. Moylan*, 2005 Guam 5 ¶¶64-67 (“*GIAA v. Moylan II*”)—the very case that instigated the first “temporary withdrawal.” See *In re San Agustin*, WRP23-002 (S.Ct. Guam, Dec. 19, 2023) (referring Moylan to the Office of Regulation Counsel); *People v. Tennesen*, 2011 Guam 2 (“*Tennesen IV*”) (rejecting Moylan’s claims of harm regarding application of ethical rules); *People v. Tennesen*, 2010 Guam 12 (“*Tennesen III*”) (discussing Moylan’s repeated attempts to involve himself in a case where he was conflicted); *People v. Tennesen* 2009 Guam 3 (“*Tennesen II*”) (finding Moylan violated conflict wall and disqualifying entire AG’s Office); *People v. Tennesen*, 2008 Guam 21 (“*Tennesen I*”) (finding Moylan failed to use effective conflict wall); *GIAA v. Moylan*, 2004 Guam 1 ¶2 (“*GIAA v. Moylan I*”) (discussing Moylan’s refusal “to approve a contract for legal services”); see also *In re: Request of Camacho*, 2003 Guam 16 ¶3 (discussing Moylan’s “refusal to sign any contract for the issuance of the bonds” as required by 5 GCA §22601).

Finally, Moylan believes the AG is immune to “ethical restrictions,” and argues the court’s ethics rules cannot be applied to him as AG due to the

“Separation of Powers Doctrine.”³ AG Br. *31-32. This court has squarely rejected this argument. In *Barrett-Anderson v. Camacho*, 2018 Guam 20 ¶24, this court stated: “We begin by rejecting the Attorney General’s request for flexibility under the Guam Rules of Professional Conduct based on her unique position as the Chief Legal Officer of the Government of Guam.” The court acknowledged that ethics rules are not to be “mechanically applied.” *Id.* Yet, the court applied the rules as written to the AG. *Id.* Moylan fails to acknowledge this key holding and settled results. The government agencies are Moylan’s clients—to which he owes ethical obligations.

B. As Chief Legal Officer of the government, the Attorney General is required to fulfill various roles.

The Organic Act specifies the Attorney General is “the Chief Legal Officer of the government of Guam.” 48 U.S.C. §1421g(d)(1). In this position, the AG acts as the *administrator* of the Department of Law, and may delegate matters to deputies and assistants. Title 5 GCA §30101(a) states: “The Office of the Attorney General of the government of Guam shall *be administered* by the Attorney General of Guam...” *Id.* (emphasis added).

³ Moylan also invokes the “checks and balances” doctrine, speaking as if it applies between executive branch officials. The checks and balances doctrine is an *inter-branch* doctrine. *See In re Leon Guerrero*, 2021 Guam 6 ¶68. This court’s power to govern attorney ethics and conduct, 48 U.S.C. §1424-1(a)(7), can be viewed as a check and balance on the Attorney General—an executive branch official.

The AG *may* appoint a Chief Deputy Attorney General or “Second-in-Command,” 5 GCA §30106(b), and *shall* appoint deputies to head each division. 5 GCA §30106(a). Under the statute, he may also appoint other employees, including assistants. 5 GCA §30109(k).

1. The Attorney General has been assigned various statutory and Organic Act duties and his office is divided into Divisions.

The Office of the Attorney General (OAG) is organized into divisions to separate the functions the AG is required to perform under the Organic Act and other laws. The AG’s primary duty is to provide management and administration of these various functions and divisions.

The OAG website confirms the existence of divisions, and their purposes and functions. *See* <https://oagguam.org/divisions/> (accessed May 4, 2024). Presently, it lists eight different divisions.⁴ *Id.* The Department of Law’s divisions include, *inter alia*, the prosecution division, the consumer counsel, the child support division, and other divisions as the AG determines necessary.

The text and history of the divisions confirm their separateness. A “division” is a “separation” or “partition.” *See Cambridge Dictionary*,

⁴ According to recent court findings and staffing patterns, the website appears outdated. *See People v. Sablan*, CF0447-23, Dec. & Order Fact ¶¶9, 28 (Super. Ct. Guam, Apr. 25, 2024); *see* OAG FY2024 2nd Qtr. Staffing Pattern (Apr. 16, 2024).

<https://dictionary.cambridge.org/dictionary/english/division> or partition.

These terms are synonymous with “screen” and “wall.” *See Cambridge Thesaurus*, <https://dictionary.cambridge.org/thesaurus/divider>. The purpose of statutorily requiring divisions is to create separation via an automatic organizational mechanism—*i.e.*, creating dividers, screens, or walls between functions.

Divisions, accountable to the AG, have existed since the Department of Law’s creation. Under the Organic Act, criminal prosecution has always been a separate division, whether or not placed under administration of the AG. 48 U.S.C. §1421g(c) (“The Government of Guam may by law establish an Office of Public Prosecutor and an Office of Public Auditor.”) *Id.*

When the Department of Law was established in 1952, the Legislature created a separate division for criminal prosecution, which the AG administered:

The Department of Law shall have cognizance of all legal matters in which the government of Guam is anywise interested. It shall have cognizance of all matters pertaining to public prosecution. For this purpose, the Island Attorney, deputy Island Attorneys and all employees of the Island Attorney’s office shall form the prosecution division of the Department of Law and are placed under the jurisdiction of the Attorney General.

Government Code (“GC”) §7001 (1952).

The Island Attorney—not the AG—was Guam’s first public

prosecutor. GC §7101 (1952) (“The Island Attorney is the public prosecutor....”). Like the AG, the Island Attorney was appointed by the Governor. GC §§7000, 7100 (1952). For over twenty years, the Island Attorney was a separate public official separate office within the Department of Law, intended to keep criminal prosecution separate from civil legal functions. *See* GC §7003 (repealed and reenacted by P.L. 13-117 (Dec. 27, 1975)); *Terr. Prosecutor v. Super. Ct.*, D.C. Civ. App. 82-0215, 1983 WL 30224 (D. Guam—App. Div., May 26, 1983). The Island Attorney was subject only to the *administration* of the AG. GC §7000 (1952) (“The Department of Law...shall be *administered* by the Attorney General of Guam”) (emphasis added).

Similarly, the law creates the Consumer Counsel Division and the Child Support Division as separate offices within the Department of Law, each with its own administrative head, answerable to the AG. GC §7005 (1952); 5 GCA §§30105, 31101, 34103 (“There shall be in the Department [of Law] a Child Support Enforcement Office which shall carry out the provisions of this Chapter.”). In form, these offices have been merged into the OAG as “divisions”—still maintaining a separateness.

For example, the Child Support Division cannot freely share information. Criminal penalties exist for the release of child support files and information to unauthorized individual, including other OAG attorneys:

[R]eports and information...shall be confidential and shall only be made available as necessary to: (a) a duly authorized official of the Attorney General's Office or the Child Support Enforcement Office...Any person who wilfully releases or permits the release of any data and information...not permitted by this Chapter shall be guilty of a misdemeanor.

5 GCA §34103.

Other divisions include the Solicitor Division and the Civil Litigation Division. According to the website:

The Litigation Division *defends government of Guam agencies, officials (in their official capacity) and employees (in their official capacity) in civil litigation....*

See <https://oagguam.org/divisions/> (emphasis added). Further:

The Solicitor Division provides legal representation, counsel and assistance to the government of Guam and its authorized entities. This includes *providing legal advice, answering legal questions posed by government agencies,...*

... it assists the OAG in reviewing contracts as to form and legality and *advising Government of Guam agencies* during all phases of procurement for acquisitions \$500,000 or more.

Id. This publicly-advertised information confirms the AG represents and advises government agencies.

Moylan complains that he has had to create “mini-castles” within the

OAG. Gov. Ex.4, p.2. However, these “mini-castles”—*i.e.*, separate, walled-off divisions—are well-established requirements under Guam law. GC §§7000-7101 (1952); 5 GCA §§30105, 31101 *et seq.*, 34103. The AG must maintain divisions to properly perform the office’s assigned and legally-mandated duties. Moylan protests having to follow the law and the Guam Rules of Professional Conduct by keeping these divisions separate and following procedures designed to prevent the improper release of confidential information. Rather than maintain the divisions, he has practically abolished them and withdrawn from providing civil legal services.

Moylan further ignores that every U.S. jurisdiction assigns to the AG various obligations, including both civil and criminal functions. Each state’s office is organized into separate divisions or units. *See* App’x A. No other AG has ever withdrawn legal services because of the multiplicity of duties. This organizational pattern exists for a reason— to divide functions and protect confidential information, while creating a single legal administrator—an Attorney General.

2. The Attorney General is an attorney for the autonomous agencies, but is not required to *personally* handle every matter.

The statutory and common law powers of the AG create a mandatory

attorney-client relationship between Amici and the AG. This court—through case law and court rule—has already established that autonomous agencies have an attorney-client relationship and privilege with their counsel, whether the AG or in-house. *See* Guam R. Evid. 504(c); *In re A.B. Won Pat Int'l Airport Auth.*, 2019 Guam 6 ¶35 (“One situation in which the government’s business is restricted from broad public access is when the government, or one of its agencies, must seek legal advice.”); *see also* *GIAA v. Moylan II*, 2005 Guam 5 ¶¶63-64.

Autonomous agencies are authorized to hire their own attorneys to provide legal services, particularly given the complexity and specialized nature of the agencies. *See* 12 GCA §8112(a) (GPA); 12 GCA §14109(c) (GWA); 10 GCA §80114(a) (GMHA); 12 GCA §10105(f) (Port). While these attorneys are employed exclusively by the agencies, 5 GCA §30113, they must often work in conjunction with the Attorney General’s Office, *see, e.g.*, 26 GAR §16212 (“The Hospital Legal Counsel, in conjunction with the Attorney General or the designated Assistant, shall serve as legal counsel....”). Nonetheless, an autonomous agency may request the services of the AG for matters assignable to in-house counsel. 5 GCA §30102.

As Chief Legal Officer, the Attorney General has “cognizance of all legal matters...involving the Executive Branch of the government of

Guam.” 5 GCA §30102. For autonomous agencies, in addition to the discretionary use of AG services, 5 GCA §30102, the law commits to the AG several specific functions—including handling some litigation and procurement matters. For example, the law requires the AG to act as legal advisor for procurements of \$500,000 or more. *See* 5 GCA §5150. With respect to GPA, GWA, and GMHA, the law specifies that the AG shall handle their litigation matters unless the AG delegates that responsibility to the agency attorney. *See, e.g.*, 12 GCA §8112(d) (GPA); 12 GCA §14109(a-c) (GWA); 10 GCA §80114(a) (GMHA).

The functions of the AG may be delegated to other attorneys and do not have to be *personally* performed by the AG. *Public Utility Comm’n Tex. v. Cofer*, 754 S.W.2d 121, 123-24 (Tex. 1988). One historic practice for delegating the AG’s functions is the appointment of Special Assistant Attorneys General (“SAAG”). *See, e.g., Nelson v. Ada*, Civ. No. 87–00071A, 1988 WL 242618 (D. Guam—App. Div., June 8, 1988) (private attorney appearing as SAAG). The SAAG can be “appointed personally by the Attorney General of Guam.” *People v. Lujan*, 1998 Guam 28 ¶4; 5 GCA §5150. Alternatively, the appointment can be “*de facto*.” *Guam Waterworks Auth. v. Badger Meter, Inc.*, Civ. Case No. 20-00032, 2023 WL 4053899 *17 (D. Guam, June 16, 2023). Yet, Moylan “terminated” all SAAG

appointments for agency counsel. *See* John O'Connor, *CCU is attempting to exceed restrictions, says AG Moylan*, Guam Daily Post (Apr. 15, 2023).

II. The Attorney General owes his clients, the autonomous agencies, ethical obligations and must take measures to protect their confidential information.

A. The Attorney General has an obligation to make use of ethical screening to prevent the debacle that he has precipitated in this case.

When the law creates an attorney-client relationship between the OAG and any entity, the AG and all attorneys working on that matter are bound by the ethical rules applicable to all attorneys, including determinations of conflicts of interest and confidentiality. *Barrett-Anderson v. Camacho*, 2018 Guam 20, ¶¶14-20; *People v. Tennessen*, 2009 Guam 3, ¶¶33-50; *Santos v. Camacho*, 2006 WL 581251, *7 (D. Guam, March 10, 2006).

As an attorney for Amici, the AG must act on behalf of his client-agencies. In *Tarantino v. Bd. of Regents, Univ. of Guam*, the Superior Court concluded that the AG owes a duty of loyalty to his client-agencies, particularly those he previously represented. CV1455-00, Dec. & Order *7 (Super. Ct. Guam, Dec. 5, 2000) (Maraman, J.) (adopting *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 157 (1981)). Under *Tarantino* and *Deukmejian*, the Attorney General may not assume a position contrary to the

interests of his client. *Id.* Additionally, GRPC 1.16(b) prohibits a lawyer from “declining or terminating representation” if such action would have a “material adverse effect on the interests of the client.” The rule further requires a withdrawing attorney to “take steps...to protect a client’s interest.” GRPC 1.16(d).

Although Moylan balks at the use of “conflict walls” or “screens,” the definition of ethical screening has been adopted in the Guam Rules of Professional Conduct, Rule 1.0(k): “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” GRPC Rule 1.0(k). A screen is intended to prevent imputation of conflicts-of-interest and protect the clients’ interests. *See* GRPC Rules 1.11(b)(1) & (c), 1.12(c)(1), 1.18(d)(2)(A).

Client confidentiality must be protected. GRPC Rule 1.6. At their core, these issues involve a factual determination of whether attorneys representing adverse interests are able to access or obtain confidential information received from the current, former, or prospective client that

could be significantly harmful to that person in the matter. GRPC Rules 1.8(b), 1.9(c)(1), 1.18(b).

B. The attorney-client privilege protects confidential attorney-client communications from disclosure in judicial and other public proceedings.

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Its “purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “[A]n attorney is not permitted and cannot be compelled to testify as to communications made to him in his professional character by his client, unless the client consents.” *Doyle v. Reeves*, 152 A. 882, 883 (Conn. 1931).

The attorney-client privilege extends to the lawyer’s support staff who assist in communications with clients. 6 GCA §3102(2). It applies to both written and oral communications. *Smith v. Griffiths*, 476 A.2d 22, 25 (Pa. Super. Ct. 1984) (collecting cases). It protects individual and institutional clients, including governmental bodies. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 995 (Ohio 2005).

“Once the attorney client privilege attaches to a communication, the communication retains the protection of the privilege even after the termination of the attorney-client relationship.” *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992). The attorney-client privilege survives the end of the attorney-client relationship, meaning that an attorney can never reveal a client’s confidences without first obtaining the client’s permission. *Swidler & Berlin*, 524 U.S. at 410 (1998) (recognizing the privilege survives the client’s death). Guam Rule of Evidence 504(c) explicitly extends the privilege to “government.” *See* 6 GCA § 3102(2).

C. The ethics rules protect confidential attorney-client communications from disclosure in virtually all cases.

Guam Rule of Professional Conduct 1.6 governs confidential attorney-client communications. Rule 1.6 states, in relevant part, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent....” The commentary to ABA Model Rule of Professional Conduct 1.6 states in part: “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” MRCP 1.6, cmt [2]. This rule applies more broadly than the attorney-client privilege, as it applies to “all information.” MRPC, cmt. [3].

D. Moylan has violated the Rules of Professional Conduct.

1. Moylan’s withdrawal violates his duty of confidentiality.

In his February 28, 2024, Moylan informed the listed agencies that, effective immediately, he was withdrawing from representation due to a potential conflict of interest. *See* Gov. Ex.1 *4. He also indicated that, on documents requiring his signature, he would notate “potential conflict, cannot sign”. *Id.* *5. Without acknowledging his ethical obligations, Moylan also stated the agency should consider any communication between the agency and the Attorney General to be non-privileged and not protected by the attorney-client privilege. *Id.* The February 28 letter was even cc’ed to the Speaker of the Legislature. Gov. Ex.1.

The listed agencies did nothing to trigger Moylan’s withdrawal. In contravention of the ethical rules, the Attorney General withdrew from representation and did not obtain the consent of his clients or make alternate arrangements. Moylan revoked SAAG designations and now revoked his own legal services—imperiling the autonomous agencies.

2. Moylan’s withdrawal and subsequent conduct contravene the attorney-client privilege and confidentiality.

Amici offer an example of how Moylan and OAG have already violated their ethical obligations. On March 7, 2024, during an emergency session of the 37th Guam Legislature, Senator Thomas Fisher asked an OAG

deputy whether an ethical violation was committed when a member of the office copied third-parties, such as an administrative law judge of the PUC and the Speaker of the Legislature, on an email with GPA counsel. *See* <https://www.youtube.com/watch?v=DDuU6ICHMR4>, Time *1:52:55-1:53:34.

Moylan interjected, answering the question himself. He vehemently denied any ethical violation and stated his position that “the client is the government of Guam. The legislature is the embodiment of the government of Guam.” Time *1:53:39-1:53:44. The Attorney General added: “The client is the People of Guam,” Time *1:54:42, which his subordinate then repeated.

About the same time, GPA was conducting a vital emergency procurement which was subject to 5 GCA § 5150. After finally conducting the first review, Moylan released a client communication to the media, who reported on it. *See, e.g.,* John O’Connor, *Temporary power contract sent back, OAG says it needs correction*, Guam Daily Post (Mar. 17, 2024), https://www.postguam.com/news/local/temporary-power-contract-sent-back-oag-says-it-needs-correction/article_2dc7ad7a-e2b0-11ee-8240-9b9a4556d559.html (quoting from AG’s letter to client).

The Attorney General’s transgressions affect all Amici. The AG has harmed Amici by publicizing confidential information about procurements-in-progress and has done so with impunity.

III. The autonomous agencies are responsible for their own fiscal affairs.

A. Autonomous agencies are distinct under Guam law and subject to different fiscal controls than line agencies and separate from the Department of Administration.

The Governor, necessarily, briefed this case broadly as applied to agencies—particularly line agencies. For Amici, the individualized analysis is slightly different due to different fiscal controls.

Amici start with the common ground between line and autonomous agencies. While the AG represents agencies, the agencies and government procurement officers—not the AG—are responsible for the operations of their respective enterprises.

For example, the procurement code commits to the Chief Procurement Officer or the procuring agency the responsibility of procuring goods and services or forming contracts. *See, e.g.*, 5 GCA §5110(b)(1) (“The Chief Procurement Officer shall be uniquely responsible for the supervision and procurement of supplies and services....”); 5 GCA §5121(c) (“The Chief Procurement Officer, or his designee, or a procurement officer of an agency...shall execute all contracts for the government of Guam.”).

Under Guam’s centralized system of procurement, the Chief Procurement Officer, within the General Services Agency, is vested with the duty, responsibility, and authority to “procure or *supervise* the procurement of all supplies and services needed by the Territory.” 5 GCA §§5110, 5113 (emphasis added). Similarly, the Director of Public Works is vested with the duty, responsibility, and authority to “procure or supervise the procurement of all construction needed by the Territory.” 5 GCA §5113. These officers are the “Principal Contracting Officers” for the entire government, in whom procurement authority is centralized. *Id.*; 5 GCA §5120 (“all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction...are hereby transferred to the Policy Office and the Chief Procurement Officer and the Director of Public Works....”).

Title 5 GCA §§5114(a) and 5121 allow departures from the centralization of procurement authority within the government through delegation by GSA’s Chief Procurement Officer.⁵ When procurement power is delegated, the agency becomes a “Purchasing Agency.” 5 GCA §5030(q).

See 5 GCA §§5008, 5127, 5150, 5211, 5214, 5215, 5216, 5219, 5236, 5350, 5425, 5426, 5427, 5707. Thus, the “Director” or “head of the

⁵ There are other statutorily-authorized departures from the centralized procurement authority, 5 GCA §§5116 and 5121(a).

purchasing agency” is this designated as the “Procurement Officer” and becomes the person—the only person—“tasked with the responsibility of purchasing or otherwise procuring goods, services, or construction....” 5 GCA §5141; 5 GCA §§5114, 5125; *see* 5 GCA §§5008, 5127, 5150, 5211, 5214, 5215, 5216, 5219, 5236, 5350, 5425, 5426, 5427, 5707.

While the AG plays a role in the contracting process, he is not responsible for it and is not a party to any contract—the agency is. Amici remain the entities solely responsible for executing their own contracts, either directly or by authority delegated from the Chief Procurement Officer. 5 GCA §5121(c).

B. Autonomous agencies have broader authority to conduct procurements and enter into contracts and are not subject to 5 GCA §22601.

Title 5 GCA §22601 of the Central Accounting Act is identical to, and directly derived from Government Code §6107, which stated: “All contracts shall, after approval of the Attorney General, be submitted to the Governor for his signature. All contracts of whatever nature shall be executed upon the approval of the Governor.” *Id.* Section 6107 was part of Chapter II of the statutes applicable to the “Department of Finance (Administration)” under the code sections applicable to the Treasurer of Guam’s centralized accounting functions. GC, Title VII, Chapter II §§6100 *et seq.*

Its purpose as a fiscal control was—and still is—to ensure that all contracts under which payment is due constitute valid, legal obligations on the General Fund. GC §6108 (1970) (“A copy of every contract under which a payment may be made shall be submitted to the Department of Administration with the account to which such payment pertains.”); 5 GCA §22602; GC §6113 (“Settlement of claims. The Governor is authorized and empowered, subject to legal review by the Attorney General, to discharge by payment from any appropriated, unencumbered and unexpired public funds, any valid liability in tort or in contract....”) (1952); *see also* GC §§6115 (1970) (“Contracts and purchase orders”), 6118(a)(1)–(3) (“Illegal Expenditures”).

With respect to procured contracts, the former 5 GCA §5150, Government Code §6957, entitled “Duties of the Attorney General” contained the requirement that “[t]he Attorney General shall, in addition, *when he approves* contracts, determine not only the correctness of their form, but their legality.” *Id.* (emphasis added). This language still exists in the same form in the current 5 GCA §5150. *See also infra*. When read in conjunction with 5 GCA §22601, it is clear that when the AG approves contracts under these statutes, such approval is for the purposes of determining only form and legality. *GIAA v. Moylan II*, 2005 Guam 5 ¶65.

For line agencies, the AG must approve all contracts under 5 GCA §§22601. However, section 22601 does not apply to Amici's contracts. Amici are authorized to enter into and execute their own contracts. *Id.*, see also 12 GCA §8104(e); 12 GCA §14104(e); 10 GCA §§80109-116 (with certain limitations requiring the Governor's signature); 12 GCA §§10105(a-b), 10109.

Significantly, Amici are exempt from 5 GCA §22601, which governs centralized accounting and fiscal controls. Title 5 GCA §22601 is not found in Guam's procurement law. It is located in Title 5, Chapter 22, General Fiscal Policies and Controls, and it requires AG approval for contracts subject to the *centralized* fiscal controls. For agencies subject to Title 5, Chapter 22, the AG must give "approval" of contracts before obligating funds.⁶ *Id.*

Title 5 GCA §22601 is part of the "Central Accounting Act" administered by the Department of Administration. 5 GCA §§22201-22204. GWA and GPA are explicitly exempt from the Central Accounting Act and

⁶ Notably, section 22601 does *not* state that the AG must "execute" or "sign" any contracts. Section 22601 explicitly requires the *Governor* to sign, approve, and execute contracts, the AG only "approves" the contracts. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.").

5 GCA §22601’s requirements. *See* 5 GCA §22605 (“The provisions of this Act shall not apply to the accounting operations of the Guam Waterworks Authority, the Guam Power Authority...”). Because of this exception, GPA and GWA do not submit contracts for approval under 5 GCA §22601. *But see infra* Part III-A-2 for a discussion of 5 GCA §5150.

The Port and GMHA are not listed in 5 GCA §22605’s exemptions, because a statutory exception for the Port and GMHA was unnecessary. Neither Guam’s commercial Port nor GMHA has ever been subject to the centralized accounting functions of the Department of Administration. From the beginning of Guam’s modern political structure, the Port and GMHA have governed their fiscal controls and policies outside the purview of the Department of Administration.

Government Code §5100 (1952) created a Department of Finance to run the centralized finances of the executive branch, including the functions of the Treasurer of Guam. In 1968, Public Law 9-239 abolished the “Department of Finance” and placed the responsibilities under a “Department of Administration.” GC §5100 (1952); P.L. 9-239 (Aug. 13, 1968); GC §54153 (1970). The Department of Administration was created to “constitute a centralized agency for the transaction of the *internal business* of the government of Guam.” GC §54152 (1970) (emphasis added).

With respect to the Port, GC §5108, also enacted in 1952, created a separate Department of Commerce within the executive branch. The purpose of the Department of Commerce was to promote and encourage “Guam business, industry, and commerce.” GC §47060(a), (b-e) (1970). The “Commercial Port of Guam” was created as “a separate instrumentality” within the Department of Commerce, with its own independent fiscal controls and functions:

For the purpose of securing self-supporting operation of the Commercial Port of Guam, there is hereby established a fund to be known as the ‘Commercial Port of Guam Fund,’ which shall be maintained separate and apart from any other funds of the government of Guam, and independent records and accounts shall be maintained in connection therewith.

GC §14002(a) (1970).

The modern Port is the successor to the Commercial Port of Guam. 12 GCA §10102; GC §14001 (1970) (as amended). The modern Port has all the powers, duties, and authority of the previous Commercial Port, including the ability to earn its own money, contract, and incur and pay its own “debts, liabilities and obligations, capital expenditures, and operating expenses” from its independent funds. GC §14002(c) (1970); 12 GCA §§10105, 10109. The Port is not, and has never been, subject to the Department of Administration’s centralized accounting system, the General Fund’s fiscal constraints, or 5 GCA §22601.

Likewise, GMHA has always been exempt from 5 GCA §22601. Government Code §5103 (1952) created the “Department of Medical Services.” GMHA was established as an entity within the Department of Medical Services. GC §9100 (1952). P.L. 7-101 (Feb. 26, 1964) amended the department’s structure to simply the “Guam Memorial Hospital, the head of which is the Administrator.” GC §5103 (1970). As with the Port, GMHA was created as a financially independent entity with its own separate fund and fiscal controls, outside the governance of the Department of Finance (Administration). GC §§9100–9113 (1952); GC §49010 (added by P.L.14-029:1 (May 27, 1977)). Indeed, GMHA is still fiscally separate, 10 GCA §80116, with its own Chief Financial Officer, 8 GCA §80111. Thus, GMHA is not subject to 5 GCA §22601.

C. The Attorney General does not approve all autonomous agency contracts, but must still “approve” contracts subject to 5 GCA §5150 when requested or required by the agency.

For high-value contracts, Amici are not textually exempted from 5 GCA §5150, which specifies AG responsibilities with respect to anticipated procurements of \$500,000 or more. When triggered, 5 GCA §5150 imposes *duties* upon the *Attorney General*, not the agencies. Three distinct duties are imposed.

First, the AG or designee “shall serve as legal counsel and provide

necessary legal services to the Policy Office and the General Services Agency.” 5 GCA §5150. This is not applicable to Amici and does not appear to be implicated by Moylan’s current withdrawal. Second, when any executive agency, including autonomous agencies, conducts a procurement of \$500,000 or more, the AG or designee “shall act as legal advisor during all phases of the solicitation or procurement process.” *Id.* Third, the AG or designee “shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality.” *Id.* The second and third duty may directly affect the Amici’s procurements.

Modern 5 GCA §5150 originated from Bill No. 220-30 (LS), which was enacted to address problems arising from non-standard deviations from Guam’s centralized procurement system. The law was intended to provide “for greater scrutiny in the preparation of bid documents and in the awarding of bids for major purchases and contracts for services” and allowed the AG to “act as legal advisor” in procurements over \$500,000 in an effort to provide a measure of uniformity. P.L. 30-72. The statute defines the AG’s role only as a legal advisor.

Even after 5 GCA §5150 was amended to allow the AG to be “legal advisor,” the Purchasing Agency, not the AG, still “supervises” and controls the procurement. *See supra.* The AG’s own Phase Review Form confirms

that “[p]ursuant to 5 GCA §5150 the AAG functions as an advisor and not an administrator. The Purchasing Agency remains solely responsible for administering the procurement in compliance with the law.” AG Procurement Form 016, Phase Review Form (Aug. 8, 2012).⁷

Additionally, section 5150’s requirements are not absolute. Title 5 GCA §5004(b) states: “Nothing in this Chapter or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.” *Id.*

For example, if a federal funding source requires the Autonomous Agencies, or any agency, conduct a procurement within a specified time or under certain conditions, Guam’s procurement laws and regulations, *including* 5 GCA §5150, cannot operate to prevent Amici from complying with those federal requirements, *see also* 5 GCA §5501.

Amici ask this court to find Moylan abandoned his Organic Act role. He should be ordered to perform the AG’s section 5150 duties or, preferably—because he has already breached client confidences—delegate

⁷ Further demonstrating the existence of an attorney-client relationship, this form is marked “Confidential” and “Privileged Attorney-Client Communication.” *See* <http://oagguam.org/procurement-forms/> (last accessed May 5, 2024).

that authority to the agencies' counsels through a SAAG or other delegation.

In either scenario, he must act consistent with his ethical obligations.

IV. Autonomous agencies may hire their own counsel if the Attorney General withdraws or is disqualified.

Contrary to his assertions that he seeks to represent the agencies, Moylan *in fact* sent letters to his clients withdrawing from the representation. When the AG *withdraws* or is *disqualified* from a matter, there is a well-established procedure for filling the gap. As Supreme Court and Superior Court cases make clear, the Governor may appoint replacement counsel or autonomous agency counsel to provide the legal services abandoned by the AG.

It has long been held that the appointment of a special prosecutor is an executive function, which may not be delegated to a different branch of government. *People v. Camacho*, 1 Guam R. 501, 504-05, 511 (1975) (finding the judiciary violates separation of powers by appointing a special prosecutor). In *Camacho*, the court elaborated that the supervision and appointment power generally resides with the Governor. *Id.*

In *People v. Lujan*, 1998 Guam 28 ¶7 n.1, this court refused to disqualify a special prosecutor appointed for appeal, who was “employed by the Governor.” While the method of appointing a special prosecutor was not dispositive in the court’s decision, it recognized Guam’s historic practice of

the Governor appointing or employing special counsel upon the AG's disqualification. This discussion was consistent with the view of the Appellate Division of the District Court that the AG was under the Governor's "general supervision and control of all departments." *Santos v. Calvo*, D.C. Civ. No. 80-0223A, 1982 WL 30790 (D. Guam—App. Div., Aug. 11, 1982). In *Santos v. Calvo*, the appellate division concluded that the Governor could pay a severance package for a former Attorney General because the Governor has "the authority to administer funds" and to make "specific staffing and resource allocation decisions." *Id.* *5-6.

While the Organic Act was amended since the events giving rise to *Lujan* and *Santos v. Calvo* to provide for an elected AG, *see* P.L. 105-291 (Oct. 27, 1998) (codified at 48 U.S.C. §1421g(d)), the Governor still possesses general supervisory authority over the office, including the appointment of replacement counsel.

In *People v. Moylan*, the defendant, who was concurrently serving as the elected AG, moved to dismiss a criminal complaint and disqualify special prosecutors, arguing the Governor lacked the authority to appoint a special prosecutor. CM0864-03, Dec. & Order *2 (Super. Ct. Guam, Nov. 16, 2004) (Maraman, J.). The Superior Court denied the motion, concluding that the Governor has "inherent authority" to appoint a special prosecutor

“when there is a clear conflict of interest in the Attorney General’s Office.”

Id. *11. This conclusion was based on the Organic Act’s delegation of authority to the Governor to temporarily appoint the AG when a vacancy occurs. *Id.* *10-11.

Subsequently, in *Santos v. Camacho*, the District Court, reviewing a tax matter, concluded that the Governor was entitled to appoint “independent counsel” in lieu of the Attorney General. No. Civ.04-00006, 2006 WL 581251 *7 (D. Guam, Mar. 10 ,2006). The AG represented the Governor for a portion of the litigation, only to later take an “adverse position” in the same case. *Id.* The court observed that “[t]he Attorney General should have faithfully represented the Governor,” instead of creating a conflict warranting dismissal of the AG from the case. *Id.* (“[O]rdinarily, the Attorney General and Governor will share a unified position.”).

Further, in *People v. Rippel*, the Superior Court observed that the Organic Act vests the Governor with the appointment power for the entire executive branch. CF382-10, Dec. & Order for *3 (Super. Ct. Guam, Sept. 10, 2010) (Barrett-Anderson, J.). The court recognized the position of Attorney General was now elected, but it was not “co-equal” with the Governor who had general supervision and control over all of the executive branch. *Id.* *2-3. In addressing the request to disqualify a Governor-

appointed special prosecutor, the court observed: “It has been the long standing practice of the Department of Law to request the Governor to make a special appointment of an attorney to execute the statutory duties of the AG, his deputy, or any assistant in cases of conflict of interest.” *Id.* *4. The court elaborated: “[T]he Governor would be required under the Organic Act to make the necessary conflict appointment.” *Id.*

Under this case law, the Governor is entitled to appoint the special counsel to fulfill the functions of the AG in the case of a conflict. Because the autonomous agencies may already hire their own attorneys, the AG’s duties may be exercised by them, *see* 5 GCA §30109(c); *GIAA v. Moylan II*, 2005 Guam 5 ¶64, even if through a *de facto* delegation, *Badger Meter*, 2023 WL 4053899 *17. Where, as here, the AG has withdrawn from all legal representation of Amici, the counsel employed by these agencies are permitted to perform *all* legal services for the agency, upon request of the appointing authority or the Governor. These legal services would be required to fill the gap left by Moylan’s abandonment of his Organic Act duties.

CONCLUSION

Douglas Moylan, as Attorney General, has repeatedly argued that the law and ethical rules do not apply to him. In seeming retaliation for not being exempted from the Rules of Professional Conduct, Moylan has

withdrawn all civil legal services to Amici—and others. Because the law does not tolerate this type of political extortion, this court should issue declaratory relief in favor of Governor Leon Guerrero.

Respectfully submitted this 6th day of May, 2024.

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GRAP 16(a)(7)(B) Certificate of Compliance

This brief complies with the type-volume limitation of Rule 16(a)(7)(B) because this brief contains [6,981] words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Dated: May 6, 2024, Tamuning, Guam.

/s/ Marianne Woloschuk

Marianne Woloschuk

APPENDIX A

List of U.S. jurisdictions Attorney General Office Websites Listing Divisions

Alabama	https://www.alabamaag.gov/divisions/
Alaska	https://law.alaska.gov/department/about.html
American Samoa	https://www.legalaffairs.as.gov/office-of-the-attorney-general
Arizona	https://azdirect.az.gov/attorney-generals-office
Arkansas	https://arkansasag.gov/arkansass-lawyer/
California	https://oag.ca.gov/careers/aboutus/legal
Colorado	https://coag.gov/office-sections/
CNMI	https://www.cnmioag.org/divisions/
Connecticut	https://portal.ct.gov/ag/common/sections
Washington D.C.	https://oag.dc.gov/about-oag/our-structure-and-divisions
Delaware	https://attorneygeneral.delaware.gov/
Florida	https://www.myfloridalegal.com/#about
Georgia	https://law.georgia.gov/about-us/organization-office
Hawaii	https://ag.hawaii.gov/about-us/divisions/
Idaho	https://www.ag.idaho.gov/office-resources/
Illinois	https://www.illinoisattorneygeneral.gov/All-Divisions/
Indiana	https://www.in.gov/attorneygeneral/about-the-office/

Iowa	https://www.iowaattorneygeneral.gov/about-us/divisions
Kansas	https://ag.ks.gov/about-the-office/divisions
Kentucky	https://www.ag.ky.gov/about/Office-Divisions/Pages/
Louisiana	https://www.ag.state.la.us/
Maine	https://www.maine.gov/ag/about/office_organization.html
Maryland	https://www.marylandattorneygeneral.gov/Pages/About.aspx
Massachusetts	https://www.mass.gov/bureaus-at-the-attorney-generals-office
Michigan	https://www.michigan.gov/ag/about/bureaus-and-divisions
Minnesota	https://www.ag.state.mn.us/Office/
Missouri	https://ago.mo.gov/divisions/
Mississippi	https://attorneygenerallynnfitch.com/divisions/
Montana	https://dojmt.gov/agooffice/
Nebraska	https://ago.nebraska.gov/
Nevada	https://ag.nv.gov/About/Office_organization/
New Hampshire	https://www.doj.nh.gov/index.htm
New Jersey	https://www.njoag.gov/about/divisions-and-offices/
New Mexico	https://nm DOJ.gov/about-the-office/
New York	https://ag.ny.gov/about/about-office

North Carolina	https://ncdoj.gov/about-ncdoj/the-attorney-general/
North Dakota	https://attorneygeneral.nd.gov/attorney-generals-office/contact-us/
Ohio	https://www.ohioattorneygeneral.gov/About-AG/Service-Divisions
Oklahoma	https://www.oag.ok.gov/divisions
Oregon	https://www.doj.state.or.us/oregon-department-of-justice/divisions/divisions-overview/
Puerto Rico	https://www.justicia.pr.gov/organigrama/
Pennsylvania	https://www.attorneygeneral.gov/the-office/
Rhode Island	https://riag.ri.gov/about-our-office/divisions-and-units
South Carolina	https://www.scag.gov/inside-the-office/
South Dakota	https://atg.sd.gov/#
Tennessee	https://www.tn.gov/attorneygeneral/about-the-office/divisions.html
Texas	https://www.texasattorneygeneral.gov/divisions
Utah	https://attorneygeneral.utah.gov/about/dept/
Vermont	http://ago.vermont.gov/attorney-generals-office-divisions-and-unit
Virgin Islands	https://usvidoj.com/
Virginia	https://www.oag.state.va.us/our-office/about-the-office
Washington	https://www.atg.wa.gov/office-divisions
West Virginia	https://ago.wv.gov/about/Divisions/Pages/default.aspx

Wisconsin <https://www.doj.state.wi.us/>

Wyoming <https://attorneygeneral.wyo.gov/law-office-division>

Certificate of Service

I hereby certify that on May 6, 2024, I filed the foregoing document with the Supreme Court of Guam by emailing it to efile@guamsupremecourt.com. I certify that the following parties or their counsel of record will be served by email:

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