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OPINION MEMORANDUM

Ref. LEG-22-0324

TO: **The Honorable Mary Camacho Torres, Senator**
The Honorable Tina Rose Muña Barnes, Vice Speaker
I Mina' Trentai Sais na Liheslaturan Guåhan

FROM: **Attorney General**

SUBJECT: **Legal Opinion Regarding Public Law 20-134 and *Dobbs v. Jackson Women's Health Organization***

The *Dobbs* decision is clear: it is for the Legislature to decide abortion regulation. Not the judiciary. Not the executive branch of government.

The Supreme Court of the United States (SCOTUS) in *Dobbs v. Jackson Women's Health Organization* held that "[t]hrough that democratic process, the people and their representatives may decide to allow or limit abortion." *Dobbs,* 597 U.S. __ (2022), (Kavanaugh, J. concurring). In doing so, SCOTUS overruled *Roe v. Wade* and upended nearly fifty years of precedent that protected reproductive freedom and the right to privacy as guaranteed by the Constitution. *See Roe*, 410 U.S. 113 (1972); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 835 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

In anticipation of SCOTUS overturning *Roe*, some jurisdictions passed "trigger laws," which provided mechanisms to impose abortion regulations once *Roe* was overturned. *See, e.g.*, S.B. 1385, 65th Leg., 2d Reg. Sess. (Idaho 2020); 2019 Tenn. Pub. Ch. 351; ARK. CODE ANN. §§ 5-61-301 thru 5-61-304 (2022). In the wake of *Dobbs*, Guam and other jurisdictions across the country are working to determine the current state of the law regarding abortion and are addressing the question of whether laws that were passed and not enforced because of *Roe* have now gone into effect.[1] It is against this backdrop that you have asked about Public Law 20-134,

[1] *See, e.g.*, *Planned Parenthood v. Attorney General of Michigan*, Case No. 22-000044-MM, Order, May 17, 2022 (lawsuit challenging a 1931 Michigan law criminalizing all abortions except in cases

which the 20th Guam Legislature passed in 1990, criminalizing abortion except under narrow circumstances.

Specifically, you have asked:

1. Given the District Court's ruling that the abortion ban was void and permanently enjoined, does the U.S. Supreme Court's recent decision have any effect?
2. Is the referendum mandate in P.L. 20-134 also required in order for the abortion ban to stand?
3. Given that the original date of the referendum referenced in P.L. 20-134 has since passed, can the referendum take place at the next General Election or must the Legislature amend the law to require a new referendum date?

The short answer is that P.L. 20-134 violated the Constitution and the Organic Act when it was passed and is therefore void *ab initio*.

Background

The 20th Guam Legislature passed Bill No. 848 (COR) in 1990 with the stated purpose "to protect the unborn children of Guam." Bill 848 proscribed and criminalized all abortions in Guam, making it a third degree felony to provide an abortion, a misdemeanor to "solicit" or "submit to" an abortion, and a misdemeanor to solicit any woman to submit to an abortion.[2] The Legislature also included a provision for an "abortion referendum" which provided Guam voters with an opportunity to decide whether this law should remain in effect or be repealed. The specified date for this referendum was the date of the next scheduled island-wide general election, November 6, 1990. Governor Joseph F. Ada signed the bill into law on March 19, 1990.

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where an abortion is necessary to save the pregnant woman's life); *Kaul v. Kapenga*, Case No. 2022-CV-1594, Compl., June 28, 2022 (challenge to Wisconsin laws passed in 1849 and 1858 banning abortions except in cases necessary to save the pregnant woman's life); *Mem. Concerning the Effects of Dobbs v. Jackson Women's Health Organization*, W. Va. Att'y Gen. Op., June 29, 2022 (opining that an 1849 West Virginia statute criminalizing abortion except to save the life of the woman or child is "on the books and enforceable"); *Whole Woman's Health v. Paxton*, Case No. 2022-38397, Compl., June 27, 2022 (challenging a 1925 Texas statute criminalizing most abortions).

[2] Public Law 20-134:2 exempted from the definition of abortion "medical intervention" in an ectopic pregnancy or in a pregnancy where two 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." The latter exception would also require subsequent peer review by the Guam Medical Licensure Board.

Less than one week later, a lawsuit challenging the constitutionality of the statute was filed in the United States District Court of Guam. In a decision issued on August 23, 1990, the District Court stated, "[h]aving determined that *Roe v. Wade* applies in Guam . . . P.L. 20-134 is unconstitutional." *Guam Soc. Of Obstetricians and Gynecologists v. Ada*, 776 F. Supp. 1422, 1428 (D. Guam 1990). In granting summary judgment to the plaintiffs, the court held that the statute "violate[d] the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983" and permanently enjoined enforcement and/or execution of any portion of P.L. 20-134.[3] *Id* at 1431.

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court's judgment permanently enjoining the enforcement of P.L. 20-134. *Guam Soc. Of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1374 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992). The Ninth Circuit held that *Roe v. Wade* "applies to Guam as it applies to the states." *Id.* at 1370. However, "[t]he Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception." *Id.* at 1372. That injunction remains in effect today.

Discussion

The questions you raise in the wake of *Dobbs* relate directly to the legal status of Public Law 20-134, which is now in question given that *Roe v. Wade*, the primary reason for the statute's permanent enjoinment, has been overruled and is no longer the law of the land. We therefore examine first the current legal status of P.L. 20-134.

The Guam Supreme Court has recognized that "[t]he Organic Act serves the function of a constitution for Guam." *In re: Request of Lourdes A. Leon Guerrero*, 2021 Guam 6 ¶34 (quoting *Hauser v. Dep't of L., Gov't of Guam*, 97 F.3d 1152, 1156 (9th Cir. 1996)). "In general, it provides for the three branches of government consistent with the constitutional structure of the United States and the powers of each branch flow from, and are limited by the Organic Act." *Id.* (quoting *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980)).

[3] In an amended judgment issued on October 13, 1990, the United States District Court of Guam specified that "sections two through five of Public Law 20-134 are hereby declared unconstitutional and void under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983. Consequently, section seven of Public Law 20-124 is hereby rendered moot." *Guam Soc. Of Obstetricians and Gynecologists v. Ada*, 776 F. Supp. at 1432. Sections two through five are the operative sections of the law prohibiting and criminalizing abortion in Guam. Section seven is the abortion referendum provision.

Congress, through the Organic Act, has limited the Guam Legislature's authority to pass laws. "The powers of the Legislature are derived from 48 U.S.C. § 1423a, which reads in part:

> 'The legislative power of Guam shall extend to all [subjects of local application][4] *not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam*.'

Baldwin, 624 F.2d at 934 (emphasis added). The Legislature thus enjoys a general–but limited–grant of authority to legislate. *Id.* at 934; *see also United States v. Borja*, 191 F. Supp. 563, 566 (D.Guam 1961)(Under § 1423a, "the Guam Legislature's power to legislate is prescribed and limited by the Organic Act, by other acts of Congress and by the provisions of the United States Constitution.").

Both the Ninth Circuit and the Guam Supreme Court have invalidated Guam laws after determining that the Legislature exceeded its section 1423a authority by passing laws inconsistent with the Organic Act.

The Ninth Circuit in *Baldwin*–a separation of powers case–reversed a District Court of Guam decision, holding that a provision of Guam Public Law 14-91 limiting the Governor's power to appoint the Guam Memorial Hospital's Board of Trustees violated the Organic Act because it ran counter to the Governor's section 1421g(a) responsibility to "establish, maintain, and operate public health services in Guam, including hospitals . . . ." *Baldwin*, 624 F.2d at 935. Under the law in question, "[t]he Governor is stripped of all power to have any voice in the policies, management or procedures of the Hospital, despite the mandate of the Organic Act to the contrary. *The Legislature has exceeded its power*." *Id.* at 934-935 (emphasis added). In this instance, the legislature "failed to recognize that the legislative power is limited by Section 1423a to subjects 'not inconsistent with the provisions of this chapter [i.e., the Organic Act]'." *Id.* at 934; *In re Leon Guerrero*, 21 Guam 6 ¶36.

Recently, the Guam Supreme Court examined whether section 19605 of the Emergency Health Powers Act impinged upon the Governor's section 1421g(a) Organic Act authority over quarantine. *In re Leon Guerrero*, 2021 Guam 6. The court found section 19605 "inorganic and void," *id.* at ¶55, for violating the separation of powers doctrine, citing to and following the Ninth Circuit's analysis in *Baldwin* that recognized the limitations in the Legislature's authority under section 1423a. *See In re Leon Guerrero* at ¶36. In so holding, the Guam Supreme Court

[4] This is the language of section 1423a when the Legislature passedP.L. 20-134. Congress later revised section 1423a in 1998 to provide: "shall extend to all rightful subjects of legislation" through U.S. Public Law 105-291.

adopted and repeated the Ninth Circuit's unambiguous language in *Baldwin* that "[t]he Legislature has exceeded its power[.]" *Id.*

Under a section 1423a analysis, P.L. 20-134 suffers from the same infirmities as the laws struck down and voided by the Ninth Circuit and the Guam Supreme Court in *Baldwin* and *In re Leon Guerrero,* respectively. In our opinion, the 20th Guam Legislature exceeded its power under section 1423a when it passed P.L. 20-134 that, at its inception, blatantly violated the laws of the United States applicable to Guam at the time, namely *Roe v. Wade*, and the provisions of the Organic Act extending to Guam the constitutional protections that formed the basis of *Roe v. Wade*. *See* 42 U.S.C.A. § 1421b(u).

We recognize that "[a]n analysis of the constitutionality (or organicity) of a local statute 'must begin with the general rule that legislative enactments are presumed to be constitutional.'" *Underwood v. Guam Election Comm'n*, 2006 Guam 17 ⁋ 51 (quoting *In re Request of Governor Gutierrez,* 2002 Guam 1 ¶ 41)(citations omitted). We also recognize that our office has the duty to defend the constitutionality of statutes. *See Raidoo v. Camacho*, U.S. Dist. Ct. Civ. Case No. 21-00009. However, the record is clear in this instance that when P.L. 20-134 was passed in 1990, it was clearly and unequivocally unconstitutional. *See Guam Soc. Of Obstetricians and Gynecologists v. Ada*, 776 F. Supp. 1422, 1428, *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *cert.denied*, 506 U.S. 1011 (1992). During consideration of Bill 848, the Legislature was advised by both the Attorney General of Guam and the legislature's own counsel on the unconstitutionality of the bill. *Ada*, 776 F.Supp at 1425. Then-Attorney General Elizabeth Barrett-Anderson opined that Bill 848 would violate a woman's constitutional right of privacy under *Roe v. Wade* and that the bill would be held unconstitutional. *Id.* Moreover, the legislature's counsel also had advised the primary sponsor that "the bill as introduced would probably be struck down because '[j]udges are bound by Supreme Court decisions because [the decisions are] binding precedent, and that more than likely a judge would probably find that the bill was not in keeping with Roe v. Wade.'" *Id.* We limit our opinion in this case to instances where laws are passed in clear violation of established constitutional rights.

Because the 20th Guam Legislature did not have the power to pass P.L. 20-134 in the first place, it is void *ab initio* and has had no legal effect on Guam since its passage.[5]

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[5] *See Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-6 (1955) (striking down a Virgin Islands divorce statute as exceeding the power granted by Congress to the Virgin Islands Legislative Assembly through the Virgin Islands Organic Act to legislate for matters of local application); *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 (1976) (finding statutory restriction on ability of non-residents to engage in private practice of civil engineering was "plainly unconstitutional"; "If the Fourteenth Amendment is applicable, the Equal

Given our determination that the 20th Guam Legislature exceeded its legislative authority under section 1423a and that P.L. 20-134 is therefore void *ab initio*, the U.S. Supreme Court's opinion in *Dobbs* has no bearing on the current or future validity of P.L 20-134.[6] Notwithstanding the permanent injunction imposed by the district court in *Ada* and still in effect, P.L. 20-134 is unable to be enforced in Guam on the alternate ground that it is void *ab initio*.[7]

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Protection Clause *nullifies* the statutory exclusion.") (emphasis added); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional [legislative] act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law."); *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 571 (9th Cir. 1989) ("A law passed in violation of the Constitution is null and void *ab initio*."); *see also People v. Carrera*, 783 N.E.2d 15, 23 (Ill. 2002) ("[A] statute which is facially invalid and thus unconstitutional in its entirety is void *ab initio*."); *cf. K.L.N. Constr. Co. v. Town of Pelham*, 107 A.3d 658, 662 (N.H. 2014) ("When a municipality enacts an ordinance pursuant to a grant of authority by the legislature, the municipality must exercise its power in conformance with the enabling legislation.[ ] If a town enacts an ordinance 'for considerations or purposes not embodied in the enabling act, it will be held invalid … as an ultra vires enactment beyond the scope of the delegated authority.") (internal internal quotations and citations omitted); *Nat'l Rifle Ass'n of America, Inc. v. City of South Miami*, 812 So.2d 504, 505-506 (Fla. Ct. App. 2002) ("[T]he City's ordinance is *ultra vires* because the legislature expressly preempted the entire field of firearm and ammunition regulation by enactment … to the exclusion of all existing and future … municipal ordinances or regulations relating thereto. Any such existing ordinances are hereby declared null and void."); *Board of Trustees of Northern Mariana Islands Retirement Fund v. Ada*, 20 MP 10 ¶¶ 20-28, 2012 WL 3779318 (Aug. 30, 2012).

[6] See *Nevada Power Co. v. Metropolitan Development Co.*, 765 P.2d 1162, 1163-64 (Nev. 1988)("When a statute is held to be unconstitutional, it is null and void *ab initio*; it is of no effect, affords no protection, and confers no rights."); *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 917 (Ky. 2012) ("[A]n unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void *ab initio*."); *Propst v. Bd. of Ed.*, 103 F.Supp. 457 (D.Neb.1951) (holding that an unconstitutional statute is an utter nullity, and it is void from the date of its enactment, making it incapable of creating any rights); *Atlanta v. Gower,* 216 Ga. 368, 116 S.E.2d 738, 742 (1960) ("The time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and if it is unconstitutional then, it is forever void.") (quoting *Jones v. McCaskill,* 112 Ga. 453, 37 S.E. 724, 725 (1900).

[7] For this reason also, the questions regarding the status of the abortion referendum contained in section seven of P.L. 20-134 are moot and need not be addressed.

Conclusion

As the majority in *Dobbs* concluded:

> We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. *We now overrule those decisions and return that authority to the people and their elected representatives*.

Dobbs, 597 U.S. ___ (emphasis added).

It follows that states and territories may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Id.* (quoting *Ferguson*, 372 U. S. at 729–30)(citations omitted). "That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." *Id.* (citations omitted).

Moving forward, difficult moral and policy questions such as the decision of whether to allow or limit abortion must be decided by the Legislature, not the courts. The 1978 abortion law, currently codified at 9 GCA §§ 31.20 thru 31.22, remains on the books and has ostensibly been the operative law governing abortions in Guam since its passage. With *Dobbs*, the door is open for the current legislature, if it so chooses, to forge its own path on the "profound moral question" of abortion for these times that may be different than what your predecessors in previous legislatures chose during their respective times in history. The people of Guam, with confidence, look to our elected policy makers, for our island and our future, to meet this most important of challenges.

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