No. 23-828

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN,
Petitioner,

v.

LOURDES LEON GUERRERO, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Guam

BRIEF FOR GOVERNOR LEON GUERRERO IN OPPOSITION

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RELATED PROCEEDINGS

Governor Leon Guerrero is unaware of any parties to the proceeding other than those identified in the petition. *See* Pet. III. One related case not listed in that section of the petition (but discussed later) is *Guam Society of Obstetricians & Gynecologists* v. *Moylan*, No. 1:90-cv-13 (D. Guam), *appeal pending*, No. 23-15602 (9th Cir.).

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INTRODUCTION

The petition asserts a different claim than the one it describes—and one that petitioner failed to present below. The Guam Supreme Court's exercise of its narrowly tailored statutory authority to issue declaratory judgments under 7 GUAM CODE ANN. § 4104 reflects the Guam Legislature's faithful and decades-old interpretation of Guam's Organic Act. And when, unlike here, it is properly preserved, a challenge to such a declaratory judgment remains subject to this Court's plenary review under 28 U.S.C. § 1257—as was the case the last time this Court reviewed the Guam Supreme Court. *See Limtiaco* v. *Camacho*, 549 U.S. 483 (2007). Petitioner's unpreserved claim that the Guam Legislature exceeded its authority has no implications for the supreme courts of any other U.S. territory—none of which have an analogue to § 4104. And, as *Limtiaco* makes clear, it has no broader implications for this Court's ability to review the Guam Supreme Court or any other territorial tribunal. The petition should therefore be denied.

In trying to capture this Court's attention, the petition spins a colorful tale of a territorial supreme court creating a "new advisory-opinion framework" and using it to frustrate the effects of *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022). Worse, the petition claims that the Guam Supreme Court's decision in this case was "designed to thwart the federal courts' inquiry into whether the federal injunction against [a 1990 abortion] law remained valid." Pet. 3. Barring the issuance of certiorari, the petition concludes, the territorial supreme court's decision "portends a severe limitation of Article III review in a host of critical future contexts." *Id.* at 30.

Despite casting the Guam Supreme Court as the villain, the petition's true target is the Guam Legislature—which, for decades, has authorized Guam's highest court to issue declaratory judgments like the one it issued here. *See* 7 GUAM CODE ANN. § 4104. The real question petitioner invites this Court to resolve is whether § 4104 exceeded the scope of the authority Congress delegated to the Guam Legislature in Guam's Organic Act, under which the local government is empowered to regulate how Guam's local courts exercise "[t]he judicial authority of Guam." 48 U.S.C. § 1424(a)(1).

Once the petition is properly described, the reasons for denying it become clear. First, petitioner never made this argument in the Guam Supreme Court. Thus, before even reaching the question presented, this Court would have to resolve an antecedent jurisdictional question—whether, when this Court's review rests on 28 U.S.C. § 1257 (as it does in this case, *see* Pet. 1), a party's failure to preserve a claim below deprives this Court of jurisdiction to consider it. *See Howell* v. *Mississippi*, 543 U.S. 440, 445–46 (2005) (per curiam). Even if this Court were to conclude that it *could* excuse petitioner's default, the petition offers no argument for why it *should* do so; it doesn't even acknowledge petitioner's failure to present the issue.

Second, even as the petition complains that the Guam Supreme Court's decision frustrates Article III review, it does not actually seek this Court's review of the underlying question of Guam law resolved by the Guam Supreme Court below. Specifically, the petition does not ask this Court to decide whether subsequent enactments by the Guam Legislature have repealed, by implication, a 1990 Guam law. Nor does the petition claim that this Court couldn't review that

question; it just refuses to press it. Far from raising the troubling specter of a territorial court arrogating power in a way that "portends a severe limitation of Article III review in a host of critical future contexts," Pet. 30, the only apparent limitations of Article III review here stem from petitioner's refusal to properly invoke it.

In any event, the authority the Guam Supreme Court exercises under § 4104 is anything but a "new advisory-opinion framework." Over the last 30 years, the Guam Supreme Court has adjudicated roughly a dozen § 4104 actions—including several in which the court found no jurisdiction over (or otherwise declined to determine) one or more of the requested questions. *See, e.g.*, *In re Guam Legislature*, 2014 Guam 24 ¶ 42.

These declaratory judgments are subject to meaningful review by this Court—such as when this Court reversed the Guam Supreme Court on the merits in *Limtiaco*, 549 U.S. at 485–86. As that case demonstrates, nothing prevents parties like petitioner from seeking meaningful Article III review if the Guam Supreme Court, in a case under § 4104 or otherwise, errs. And if the Guam Legislature is dissatisfied with how the Guam Supreme Court has utilized § 4104, it can always modify that provision. (The Legislature already has on three occasions.) The same can be said of Congress, which has amended the Organic Act multiple times since § 4104 was adopted. Rather than express any disapproval of that provision, Congress has only bolstered it—codifying the Guam Supreme Court's holding, in a § 4104 case, that the Organic Act authorized the Guam Legislature to expand its original jurisdiction. *See* 48 U.S.C. § 1424-1(a); *In re Gutierrez*, 2002 Guam 1.

Even if this Court wanted to reach the merits of the question presented, it would not find much to the petition's argument that, when Congress delegated to the Guam courts "the judicial authority of Guam," it thereby limited those non-Article III tribunals to Article III's case-or-controversy requirement. At least a dozen different state supreme courts and other non-Article III federal courts—all of which unquestionably exercise "judicial authority"—have the power to act in cases that would not meet Article III's justiciability minima. Guam's local courts just as unquestionably have (and need) the power to resolve disputes falling outside of Article III—including disputes lacking adverse parties and those non-federal disputes in which the parties are not diverse or the amount in controversy is $75,000 or less.

Numerous Organic Act provisions reflect that this is, and always has been, Congress's understanding. For example, in those cases in which the Organic Act does not give exclusive jurisdiction to the U.S. District Court of Guam, Guam's local courts "shall have such original and appellate jurisdiction over all causes in Guam as the laws of Guam provide." 48 U.S.C. § 1424-1(d). That would be a strange proviso, indeed, if "all causes in Guam as the laws of Guam provide" actually meant "only Article III cases or controversies."

To instead read "the judicial authority of Guam" in the Organic Act to mean the same thing as "the judicial power of the United States" in Article III would not only create serious gaps in the jurisdiction of Guam's courts going forward; it would subvert Congress's unambiguous "intent to allow Guam to develop its own, independent institutions," *EIE Guam Corp.* v. *Supreme Court of Guam*, 191 F.3d 1123, 1127 (9th Cir. 1999), including an independent territorial

Supreme Court. There is no evidence that Congress intended such a counterintuitive result; and plenty of evidence to the contrary. The petition for a writ of certiorari should therefore be denied.

STATEMENT OF THE CASE

The Guam Supreme Court has long been a fulcrum for both the vertical separation of powers between Congress and the Guam Legislature and the horizontal separation of powers within Guam. The interaction between these two (at times divergent) structural relationships helps to put this case—and § 4104—into proper context.

A. The Evolution of the Guam Supreme Court

Today's Supreme Court of Guam has its roots in this Court's decision in *Guam* v. *Olsen*, 431 U.S. 195 (1977). In that case, a 5-4 majority held that the Guam Legislature lacked the authority to transfer any of the appellate jurisdiction of the U.S. District Court of Guam to a local court of last resort, which the Guam Legislature had purported to establish in 1974. *Id*. at 199–204; *see also id*. at 205 (Marshall, J., dissenting) ("The Court today abolishes the Supreme Court of Guam."). Thus, appeals from Guam's local courts were left within the exclusive purview of the (non-Article III) federal district court.

Congress responded to *Olsen* in 1984. But instead of creating the Guam Supreme Court itself, Congress simply provided the authority *Olsen* held to be lacking—empowering the Guam Legislature to create such a court. Act of Oct. 5, 1984, Pub. L. No. 98-454, § 801, 98 Stat. 1732, 1742 (codified as amended at 48 U.S.C. § 1424-1) ("On or after the effective date of this Act, the legislature of Guam may in its discretion establish an appellate court.").

Thus, when the Legislature exercised that authority and established the Supreme Court of Guam in 1993, *see* Guam Pub. L. No. 21-147, § 2 (Jan. 14, 1993),[1] there was a disparity between the source of the Governor's and the Legislature's authority (the Organic Act) and the Guam Supreme Court's derivative powers. This structure produced a significant imbalance in the horizontal separation of powers within Guam's government. *See, e.g.*, H.R. REP. No. 108-638, at 2 (2004) ("In authorizing the creation of an appellate court for Guam, the Congress left the newly created court subordinate to Guam's other two branches of government.").

Congress put the Guam Supreme Court on equal footing in 2004. *See* Act of Oct. 30, 2004, Pub. L. No. 108-378, § 1, 118 Stat. 2206, 2206. The 2004 act not only gave the Guam Supreme Court Congress's imprimatur, *see id.*, but it vested in that court, as a matter of federal statute, an irreducible minimum of subject-matter jurisdiction and administrative authority—powers and responsibilities that the Guam Legislature could not take away. At the same time, the 2004 act also reaffirmed that, beyond those limits, the Guam Legislature would otherwise retain broad discretion to regulate the Guam local courts, including its Supreme Court. As especially relevant here, for example, Congress reaffirmed that the Guam Supreme Court has "original jurisdiction over proceedings necessary to protect its appellate jurisdiction and supervisory authority and such other original jurisdiction *as the laws of Guam may*

1. Most citations to and discussions of P.L. 21-147 date it to 1992—which is when the Legislature passed it (on December 31). But Governor Ada signed it into law on January 14, 1993.

provide." *Id.*, 118 Stat. at 2207 (codified at 48 U.S.C. § 1424-1(a)(1)) (emphasis added).

The 2004 act thus sought to strike a balance: Giving the Guam Legislature the power to regulate the Guam Supreme Court, but not the power to cripple it—formalizing the Guam Supreme Court's status as a "coequal branch" of the Guam government. H.R. REP. No. 108-638, *supra*, at 2. Further confirming that it intended the Guam Supreme Court to be akin to a state court of last resort, Congress gave this Court direct and immediate oversight over the territorial high court—cutting short the 15-year period of discretionary Ninth Circuit review required by the 1984 act. *See id.* § 2, 118 Stat. at 2208 (codified at 48 U.S.C. § 1424-2).[2] "This arrangement has positioned Guam's supreme court, already a stand-in for a state supreme court, on a path of increasingly parallel footing with its state counterparts." Note, *Developments in the Law—The U.S. Territories: Guam and the Case for Federal Deference*, 130 HARV. L. REV. 1704, 1708 (2017).

B. The History of § 4104

Against that backdrop, the history of § 4104 is more settled than the petition suggests. The Guam Legislature first enacted § 4104 in 1993—as part of the same legislation establishing the post-*Olsen* Guam Supreme Court. Critically, § 4104 authorized the issuance of declaratory judgments[3] in only a small

2. The 1984 act's 15-year clock did not start running until the Guam Supreme Court was established in 1993. *See Limtiaco*, 549 U.S. at 486 (summarizing these developments).

3. The petition repeatedly refers to decisions under § 4104 as "advisory opinions." *E.g.*, Pet. 3–4, 15–18. But the Guam Code does not authorize "advisory opinions"; it authorizes "declaratory

class of disputes: Only the Legislature or the Governor could request them; only with regard to questions "affecting the power and duties" of the Legislature or "the operation of the Executive Branch," respectively; and only "where it is a matter of great public interest and the normal process of law would cause undue delay." Guam Pub. L. No. 21-147, § 2 (codified as amended at 7 GUAM CODE ANN. § 4104).

According to the comments accompanying the 1993 enactment of § 4104, "such a grant of jurisdiction would have solved many serious questions which have arisen, but which have lacked a forum for decision." 7 GUAM CODE ANN. § 4104 cmt. The need for such a provision has likely grown since its enactment. Among other things, Congress has since created the office of the Attorney General of Guam; vested it with authority that necessarily interacts with powers already delegated to the Governor; and authorized the popular election of the Attorney General. One result has been occasional conflict between the Attorney General and the Governor—including the conflict in this case.[4]

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judgments" that, among other things, bind both the Guam courts and those who are parties to such proceedings. *See In re Guerrero*, 2002 Guam 1 ¶ 6. In that respect (and others), the relief authorized by § 4104 represents a narrower departure from Article III's case-or-controversy requirement than the advisory opinions authorized by the laws of at least a dozen states. *See post* at 19–22.

4. Indeed, the Guam Supreme Court recently issued another ruling in a § 4104 proceeding that arose from petitioner's refusal to continue providing legal services of any kind, including representation in court, to dozens of Guam's executive branch agencies. *See In re Leon Guerrero*, No. CRQ24-001 (Guam May 31, 2024) (order). It would have been difficult, if not impossible, to litigate the consequences of all of petitioner's attempted

Since its initial enactment in 1993, the Legislature has revised § 4104 on three different occasions. In 1997, the Legislature added a proviso requiring the Guam Supreme Court to dismiss a § 4104 action if, prior to judgment, the filing party asked it to do so. *See* Guam Pub. L. No. 24-061, § 3 (Sept. 17, 1997). In 2006, the Legislature repealed § 4104 in its entirety. *See* Guam Pub. L. No. 28-146, § 1 (Aug. 15, 2006). But after a rash of difficult separation-of-powers disputes arose for which resolution through ordinary civil litigation proved inadequate, the Legislature soon restored the 1992 language—which is what remains on the books today. *See* Guam Pub. L. No. 29-103, § 2 (July 22, 2008).

The Guam Legislature has not only carefully superintended § 4104; it has availed itself of that provision, as well. Although this suit was initiated by the Governor, the Legislature has initiated four of the reported § 4104 cases. *See In re Legislature*, 2014 Guam 24; *In re Legislature*, 2014 Guam 15; *In re Legislature*, 2001 Guam 3; *In re Legislature*, 1997 Guam 15.

C. One Factual Correction as to Timing

Finally, although it is largely immaterial to the question presented, there is one factual claim in the petition's Statement of the Case that nonetheless warrants correction: Despite several misstatements in the petition, petitioner's formal attempt to lift the federal injunction was instituted only after this § 4104 declaratory judgment action was filed.

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withdrawals through ordinary civil litigation—particularly for agencies not otherwise authorized by law to employ or retain their own counsel.

The § 4104 action was initiated on January 23, 2023, when Governor Leon Guerrero petitioned the Guam Supreme Court to "issue [a] declaratory judgment relative to the validity or enforceability of Guam Public Law 20-134 (March 19, 1990), following the U.S. Supreme Court's issuance of its Opinion in *Dobbs*." *See* Request for Declaratory Judgment, *In re Leon Guerrero*, No. CRQ-23-001 (Guam Jan. 23, 2023), Pet. App. 155.

At the time Governor Leon Guerrero filed this suit, that 1990 Guam law was subject to a permanent injunction entered by the U.S. District Court of Guam in 1992. *Guam Soc'y of Obstetricians & Gynecologists* v. *Ada*, 776 F. Supp. 1422, 1426 (D. Guam), *aff'd*, 962 F.2d 1366 (9th Cir. 1992). But because that case concerned only whether the 1990 Guam law was unconstitutional under *Roe* v. *Wade*, 410 U.S. 113 (1973), the relationship between the 1990 Guam law and subsequent legislation adopted by the Guam Legislature was not part of the earlier decision that petitioner sought to vacate. Seeking a declaratory judgment from the Guam Supreme Court was thus the most expedient way for the Governor to clarify the interaction between the 1990 law, the 1992 injunction, the subsequent Guam legislation, and *Dobbs*—especially because she and petitioner disagreed as to the correct resolution.

It was only after Governor Leon Guerrero filed the § 4104 action that petitioner moved in the district court to vacate the 1992 injunction, *see* Motion to Vacate, *Guam Soc'y of Obstetricians & Gynecologists* v. *Moylan*, No. 1:90-cv-13 (D. Guam Feb. 1, 2023), although petitioner had notified Governor Leon Guerrero that he was planning to seek relief from the 1992 injunction a few days earlier. *See* Pet. App. 188.

The petition is thus simply wrong when it claims that the Rule 60(b) motion came first. Pet. 11–12 (describing the Rule 60(b) motion as "[f]irst," and this case as "[s]econd"); *see also id.* at 27–28 ("The Governor filed this § 4104 action only *after* the Guam Attorney General asked the Guam federal district court to lift its permanent injunction of Public Law 20-134.").[5]

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILED TO CHALLENGE THE VALIDITY OF § 4104 BELOW

Petitioner filed three separate briefs in the Guam Supreme Court in this case—a motion to dismiss; a reply in support of the motion to dismiss; and a brief on the merits. Although petitioner's motion to dismiss (and reply) argued that the Guam Supreme Court lacked jurisdiction under § 4104, he never argued that § 4104 itself is *ultra vires*. Instead, petitioner's argument was that the statutory criteria for a proper § 4104 proceeding were not satisfied. He has not pressed that argument here.

The question petitioner presents now was never raised below. The only filing to raise even a variation on the question presented was a brief filed by Robert Klitzkie as *amicus curiae*. And even Mr. Klitzkie's brief did not make the argument petitioner advances

5. Nor does the petition explain how the district court, in ruling on petitioner's Rule 60(b) motion, could have resolved the substantive question of Guam law that the Guam Supreme Court answered below. In fact, petitioner has argued the opposite in both the district court and the Ninth Circuit—insisting that they are powerless to consider that issue in resolving his request for Rule 60(b) relief because it was not part of the basis for the original injunction.

here—that the Organic Act *itself* imposes Article III standing requirements on all cases before Guam's local courts. Instead, Klitzkie's brief argued that a 2019 decision by the Guam Supreme Court, *In re A.B. Won Pat International Airport Authority*, 2019 Guam 6, had done so. This distinction is significant. Even though the Guam Supreme Court distinguished its prior ruling in the decision below, Pet. App. 10–17, the court was never presented with, and has never ruled upon, the claim petitioner now advances—that § 4104 is inconsistent with the Organic Act insofar as it authorizes parties lacking an Article III injury in fact to nevertheless seek declaratory judgments.

In Guam's Organic Act, Congress provided that this Court would review decisions by the Guam Supreme Court the same way that it reviews decisions by state courts of last resort. *See* 48 U.S.C. § 1424-2 ("The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to . . . certiorari . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings."). In other words, this Court reviews the Guam Supreme Court as if it were reviewing a decision by a state court under 28 U.S.C. § 1257. *See, e.g.*, *Haeuser* v. *Dep't of Law*, 368 F.3d 1091, 1095–96 (9th Cir. 2004) (looking to this Court's § 1257 jurisprudence to ascertain whether the court of appeals had jurisdiction to grant certiorari under § 1424-2). The petition acknowledges as much. *See* Pet. 1 ("This Court's jurisdiction to review that decision rests on 28 U.S.C. § 1257 and 48 U.S.C. § 1424-2.").

Unlike when this Court's jurisdiction rests on 28 U.S.C. § 1254,[6] when considering appeals under § 1257 and its predecessors, this Court has long and repeatedly held that a party's failure to present its claim to the lower courts deprives this Court of jurisdiction to consider it. *See, e.g.*, *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438–39 (1969); *see also Hemphill* v. *New York*, 595 U.S. 140, 164–66 (2022) (Thomas, J., dissenting).[7] Thus, petitioner's failure to argue to the Guam Supreme Court that § 4104 exceeds the Guam Legislature's authority under the Organic Act deprives this Court of jurisdiction to consider that argument—and, because it is the only question presented, to grant this petition. [8]

"Notwithstanding the long line of cases clearly stating that the presentation requirement is jurisdictional, a handful of exceptions . . . have previously led us to conclude that this is 'an unsettled question.'" *Howell*, 543 U.S. at 445 (quoting *Bankers*

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6. When this Court reviews decisions of lower federal courts, the bar on considering claims that parties failed to preserve below is prudential. *See, e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) (citing *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980)).

7. The *Hemphill* majority did not dispute that the proper-presentation requirement is jurisdictional; it concluded that the petitioner in that case preserved his claim. *See* 595 U.S. at 148–49 & n.2.

8. Petitioner may belatedly seek to frame his challenge as immune to forfeiture insofar as it implicates the Guam Supreme Court's subject-matter jurisdiction. But even if the prudential bar to this Court's consideration of unpreserved claims can yield to jurisdictional objections, *see Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1985) (citing *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)), § 1257's jurisdictional bar cannot.

Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71, 79 (1988) (citations omitted)). Petitioner may also argue in his reply brief that, notwithstanding the plain language of 48 U.S.C. § 1424-2, the contours of the proper-presentation requirement should be more flexible on review of the Guam Supreme Court than on review of a state court.

But whether petitioner's failure to raise this claim below deprives this Court of jurisdiction, or merely militates decisively against this Court's exercise thereof, the result is the same: before it could reach the question presented, this Court would first have to decide whether it has the power to do so. Even if the answer is "yes," the petition never explains why this case should be one of the "very rare exceptions," *Yee*, 503 U.S. at 533, to even prudential limits on this Court's consideration of unpreserved claims.[9] The petition does not even acknowledge petitioner's failure to raise this claim below in the first place—a defect that augurs only further against excusing petitioner's default. Thus, regardless of the answer to the question presented, certiorari should be denied.

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9. Petitioner may argue that the Guam Supreme Court has already resolved the validity of § 4104—so that raising the question presented below would therefore have been futile. Such an argument would be doubly off the mark. First, regardless of whether it is jurisdictional, the proper-presentation rule does not have a "futility" exception. Second, even if it did, *In re Gutierrez*, 2002 Guam 1, resolved a different Organic Act challenge to § 4104. In that case, the claim was that the Organic Act did not allow the Legislature to give the Guam Supreme Court *original* jurisdiction under § 4104. *See id.* ¶ 5. That is, quite obviously, not the same as a claim that the Organic Act imposes Article III justiciability constraints upon all of Guam's local courts in all cases.

II. THE GUAM SUPREME COURT'S ROUTINE EXERCISE OF § 4104 AUTHORITY DOES NOT WARRANT THIS COURT'S REVIEW

Even if this Court were to take up whether it has jurisdiction to consider the question presented, hold that it does, and hold that petitioner's failure to raise this claim below should be excused, the question itself is wholly unworthy of certiorari. The Guam Supreme Court's power to render declaratory judgments in a narrow class of disputes is entirely consistent with the text and purpose of the Organic Act and is an issue of no import outside of Guam—where the Legislature has concluded that it provides a useful and expedient means of resolving disputes over the scope of the local government's powers that might otherwise prove to be intractable.

A. Congress Intended for the Guam Supreme Court to Function Like a State Court of Last Resort

As noted above, Congress's endorsement of the Guam Supreme Court came in two steps: its 1984 delegation of authority to the Guam Legislature to decide whether to establish such a court, and its 2004 affirmation of the court the Legislature created. The text of both statutes demonstrates that Congress viewed the Guam Supreme Court as akin to a state supreme court, not a lower federal court. The three respects in which this intent is most visible are in the subject-matter jurisdiction contemplated by both statutes; the appellate review Congress provided—by the Ninth Circuit in 1984 and the Supreme Court in 2004; and the provisions relating to the appointment and tenure of judges on Guam's local courts.

Taking subject-matter jurisdiction first, both the 1984 act and the 2004 act contemplate that Guam's lower local courts will (and expressly authorize those courts to) exercise jurisdiction not available to the U.S. District Court of Guam. For instance, under current 48 U.S.C. § 1424-1(d),

> Except as granted to the Supreme Court of Guam or otherwise provided by this chapter or any other Act of Congress, the Superior Court of Guam and all other local courts established by the laws of Guam shall have such original and appellate jurisdiction over all causes in Guam as the laws of Guam provide, except that such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam under section 1424 of this title.

48 U.S.C. § 1424-1(d). In other words, the "laws of Guam" cannot alter the exclusive or concurrent jurisdiction exercised by the district court under § 1424, but they are otherwise free to confer jurisdiction on Guam's local courts *beyond* what the district court may exercise. Indeed, there would be little reason to have local courts on Guam "as the laws of Guam provide" if those courts were confined to the same jurisdiction as the district court.

The provisions governing appellate review of the Guam Supreme Court further evince Congress's view that the territory's courts should be treated as if they were state courts. Although the 1984 act required the Guam Supreme Court's decisions to be reviewed by the Ninth Circuit in the first instance, that was only for a probationary period. Even then, such review was subject to the same deferential rules governing this

Court's supervision of state courts—*not* lower federal courts. *See, e.g.*, *Haeuser*, 368 F.3d at 1095–96; *see also ante* at 7 & n.2 (discussing 48 U.S.C. § 1424-2); *cf.* S. CT. R. 47 (treating Guam's local courts as a "state court" for purposes of this Court's rules).

And again, as is true for state courts, the Organic Act reflects Congress's view that Guam's local judges are not covered by Article III's salary and tenure protections, or even (unlike the district court) Article II's Appointments Clause. Instead, it delegates to the Guam Legislature the complete power to define "[t]he qualifications and duties of the justices and judges of the Supreme Court of Guam, the Superior Court of Guam, and all other local courts established by the laws of Guam." 48 U.S.C. § 1424-1(e). The Guam Legislature, in turn, has provided for the appointment of local justices and judges by the Governor (not the President), subject to the Legislature's approval, for fixed terms. *See* 7 GUAM CODE ANN. §§ 3103, 3109, 5103.

Of course, the inapplicability of Article III, § 1 does not prove the inapplicability of Article III, § 2. But in these and other ways, the text of the Organic Act is unambiguous that, in contemplating the judicial power Guam's local courts would exercise (and who would exercise it), Congress modeled the territory's tribunals on *state* courts, not federal ones.

B. Congress is Not Bound by Article III in Creating and Regulating Non-Article III Courts

It is axiomatic that, when Congress validly exercises its constitutional authority to create non-Article III courts, it is allowed to depart from Article III's constraints. As this Court explained with regard

to territorial courts in *Palmore* v. *United States*, 411 U.S. 389 (1973), "[t]hese courts have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory." *Id.* at 403.

Article III necessarily limits the circumstances in which Congress can *create* non-Article III federal courts. *See, e.g.*, *Stern* v. *Marshall*, 564 U.S. 462 (2011). But this Court has never suggested that, if the non-Article III court was otherwise within Congress's power to create, Article III nevertheless imposes constraints on what that court may do.

In arguing to the contrary, the petition makes much out of its claim that "[o]ther congressionally created courts also required [sic] a showing of injury-in-fact." Pet. 21. That claim is true so far as it goes; it just doesn't go very far. None of the cases it cites traced an injury-in-fact requirement to Article III itself. Instead, some non-Article III federal courts are bound (or have held that they are bound) *by statute* to follow Article III justiciability doctrines; others are not. The Fourth Circuit, for instance, recently held that Article III mootness doctrine does not apply to bankruptcy courts either on its own or through the Bankruptcy Code. *See Kiviti* v. *Bhatt*, 80 F.4th 520, 535 (4th Cir. 2023), *cert. denied*, No. 23-729, 2024 WL 2116280 (U.S. May 13, 2024). As it explained, "we do not ordinarily interpret a jurisdictional statute's constraints to be the same as the Constitution's. In fact, we often go out of our way to create differences and draw distinctions even where—unlike here—the statute uses Article III's precise language." *Id.*

Here, the Organic Act does not use "Article III's precise language." It makes no reference to "cases" or "controversies." And the language on which the petition relies ("the judicial authority of Guam") not only parallels a *different* section of Article III (Section 1, not Section 2), but it isn't even the same language. *See* U.S. CONST. art. III, § 1, cl. 1 (vesting "the judicial *power* of the United States" (emphasis added)).

Thus, although Congress certainly could have required the Guam Supreme Court to abide by Article III's case-or-controversy requirement, it does not follow merely from the fact that Congress *created* the Guam Supreme Court that it thereby imposed such a constraint. As the bankruptcy example underscores, Congress sometimes chooses not to impose Article III justiciability doctrines even on non-Article III courts that exercise limited subject-matter jurisdiction. For non-Article III courts that exercise general subject-matter jurisdiction, such a requirement would make even less sense. *See Am. Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) ("Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.").

C. State Courts Routinely Exercise Broader "Judicial Authority" Than Article III Courts

Interpreting the "judicial authority of Guam" to limit Guam's local courts to Article III cases and controversies would not only be inconsistent with how Congress has treated other non-Article III courts; it

would be inconsistent with Congress's consistent treatment of Guam's local courts as if they were akin to state courts. After all, the federal Constitution has nothing to say about whether state courts are bound by Article III's case-or-controversy requirement. States may, of course, choose to follow Article III's rules, but they may also create justiciability rules of their own. *See, e.g.*, *U.S. Dep't of Labor* v. *Triplett*, 494 U.S. 715, 721 n.** (1990) ("[S]tate courts are fully entitled to entertain disputes that would not qualify as cases or controversies under Article III."); *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989) ("[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.").

As of July 1, 2024, at least 12 states authorize their courts of last resort to render non-binding advisory opinions—two by statute[10] and ten under the state constitution.[11] *See generally* Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2249–68 (2017) (summarizing states' practices).

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10. *See* ALA. CODE § 12-2-10; 10 DEL. CODE § 141.

11. Eight state constitutions expressly authorize advisory opinions. *See* COLO. CONST. art. VI, § 3; FLA. CONST. art. IV, § 1(c); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II, *as amended by* art. LXXXV; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. LXXIV; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5. Two state supreme courts have implied the power to issue such rulings from the absence of a case-or-controversy requirement. *See Mosley* v. *State*, 908 N.E.2d 599, 603 (Ind. 2009); *To-Ro Trade Shows* v. *Collins*, 27 P.3d 1149, 1155–56 (Wash. 2001).

What is especially instructive about these states' practices is that the courts in 11 of these 12 states are textually limited by their constitutions to exercising "judicial power." *See* ALA. CONST. art. VI, § 139; COLO. CONST. art. VI, § 1; DEL. CONST. art. IV, § 1; FLA. CONST. art. V, § 1; IND. CONST. art. VII, § 1; ME. CONST. art. VI, § 1; MICH. CONST. art. VI, § 1; N.H. CONST. pt. 2, art. LXXII-a; R.I. CONST. art. X, § 1; S.D. CONST. art. V, § 1; WASH. CONST. art. IV, § 1. In other words, it was common practice at the time Congress adopted the Organic Act and amended it in 1984 and 2004, and it remains common practice today, for state constitutions to simultaneously limit state courts to exercising the "judicial power" of that state while authorizing them, even implicitly, to issue advisory opinions.

Even those states that do not allow their courts to issue advisory opinions nonetheless authorize their courts to exercise jurisdiction beyond Article III cases and controversies. To take just one of countless examples, a state-law dispute between non-diverse private parties categorically falls outside of Article III's permitted cases or controversies. *See* U.S. CONST. art. III, § 2, cl. 1. And yet, every single state authorizes its courts to hear such claims—for the prosaic reason that state courts, unlike Article III federal courts, are courts of general subject-matter jurisdiction. *See, e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 367 (2001).

More significantly, states also regularly empower their courts to resolve a range of non-adversarial disputes—from probate and uncontested divorce proceedings to name changes, adoptions, and certain transfers of property. Almost all of these disputes fail to satisfy Article III's case-or-controversy

requirement. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015). And yet, if local courts therefore lacked the power to hear them, it is unclear how they could be effectively resolved.

Thus, there is no textual, structural, or historical reason to believe that, when Congress authorized the Guam Legislature to vest "the judicial authority of Guam" in Guam's local courts, it would have used those words to impose Article III's case-or-controversy requirement on Guam's local courts. To the contrary, just as is the case with state courts, Congress left the outer bounds of Guam's local courts' judicial power for Guam's local government to define. More than that, Congress made express the one constraint it cared about—barring the Guam Legislature from altering either the exclusive or concurrent jurisdiction that the Organic Act confers directly. *See* 48 U.S.C. § 1424-1(d).[12]

In arguing to the contrary, the petition simply ignores the widespread practice of state courts described above. Instead, it devotes pages to the longstanding ban on advisory opinions in *Article III* courts, *see* Pet. 17–22, from which it presumes that

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12. When Congress provided its own support for the Guam Supreme Court in 2004, it was not only well aware of § 4104; at least one of the provisions of the 2004 act appears to have codified the Guam Supreme Court's holding, in *In re Gutierrez*, 2002 Guam 1 ¶ 5, that the Guam Legislature had the power to confer original jurisdiction on the Guam Supreme Court beyond what the pre-2004 Organic Act had expressly authorized. *See* 48 U.S.C. § 1424-1(a)(1). That provision, too, would have been odd in a world in which Congress intended to limit the Guam Supreme Court to Article III cases or controversies.

"Our unbroken tradition confirms that the 'judicial authority' does not include the power to issue advisory opinions on abstract issues of law." *Id.* at 18. And yet, even though Congress intended for Guam's local courts to function like state courts, the petition has nothing to say about the historical practice in those courts—a dozen of which have an "unbroken tradition" that is entirely to the contrary. It simply asserts that the phrase "judicial authority" has an "established meaning," *id.* at 23, by focusing exclusively on what it has meant in Article III federal courts. Given that the "established meaning" on which petitioner relies is actually about (1) a different phrase ("judicial *power*"); (2) in a different section of Article III; and (3) in a different context than the one Congress considered in the Organic Act, that argument fails to persuade.

The petition props up its assertions with a straw man—arguing that, if courts exercising "judicial authority" could issue declaratory judgments in cases that did not satisfy Article III's justiciability rules, those decisions would be unreviewable by this Court on appeal. *See* Pet. 22–23. The logic, apparently, is that Congress could not have intended to give the Guam local courts the ability to decide cases that Article III courts would be unable to review—so "judicial authority" must mean the same thing in both contexts. *See id.* at 23 ("[T]hat judicial authority must impose the same limits on both courts.").

Leaving aside that this argument has nothing to do with the text or context of the Organic Act, it also fails to account for an entire line of this Court's jurisprudence—which recognizes the ability of parties to *appeal* to Article III courts in contexts in which their only "injury" stemmed from an adverse lower

court ruling. In *ASARCO*, for instance, this Court held that it sufficed for Article III purposes that the party appealing a lower-court decision have been injured *by that decision*—even if they could not have brought suit in federal court at the outset. *See* 490 U.S. at 618; *see also Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77–78 (1991) (same).

These cases are hardly outliers. In *Camreta* v. *Greene*, 563 U.S. 392 (2011), this Court similarly held that a public official who *prevailed* in a damages suit nevertheless had standing to appeal—even absent a damages award—to challenge the trial court's holding that he had violated the plaintiff's rights. As Justice Kagan explained, the lower-court's ruling "creates law that governs the official's behavior." *Id.* at 708. So too, here. How petitioner enforces Guam's abortion laws—and which ones he enforces—will be directly affected by the Guam Supreme Court's decision in this case. He therefore likely has Article III standing to challenge the ruling even if this case could not have started in an Article III court. The same can be said about the Attorney General of Guam in *Limtiaco*—who successfully invoked this Court's jurisdiction to review (and reverse) the Guam Supreme Court's declaratory judgment in *In re Camacho*, 2003 Guam 16.[13]

Even if the matter were closer, the Guam Legislature would be entitled to deference in its longstanding interpretation of the Organic Act. After

13. The petition thus ends up arguing against itself. If petitioner were correct, then the absence of an injury in fact in the Guam Supreme Court would necessarily preclude one here—depriving petitioner of Article III standing to bring this appeal. Petitioner is, once again, wrong.

all, this Court has long explained that it "accord[s] deference to territorial courts over matters of purely local concern." *Limtiaco*, 549 U.S. at 491–92 (citing *Pernell* v. *Southall Realty*, 416 U.S. 363, 366 (1974)).

If anything, democratically elected territorial legislatures should receive at least as much consideration when exercising the authority Congress delegated to them in an organic act. And unlike the interpretive dispute in *Limtiaco*, in which this Court declined to defer to Guam authorities because the federal government would have to face the "potential consequences of territorial insolvency," *id.*, the Guam Legislature's interpretation of the Organic Act as authorizing the adoption of § 4104 is incapable of producing such mainland ripple effects.

D. Section 4104 Authorizes Resolution of a Narrowly Circumscribed Class of Claims

All of the above goes to why the Guam Legislature did not exceed the Organic Act when it authorized the Guam Supreme Court to issue declaratory judgments under § 4104. The reasonableness of the Guam Legislature's statutory interpretation is reinforced by the *constraints* that apply to § 4104 proceedings—both those imposed by the Legislature and those adopted by the Guam Supreme Court itself, including in this case.

For instance, some of the states that authorize their courts to issue true advisory opinions provide an open-ended grant of authority for requests from the governor or the legislature on *any* important question. An illustrative example comes from the Rhode Island Constitution: "The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either

house of the general assembly." R.I. CONST. art. X, § 3. And although other states limit advisory opinions to "important" or "constitutional" questions, many otherwise authorize the provision of such opinions on any "solemn occasions." *E.g.*, ME. CONST. art. VI, § 3.

The Guam Supreme Court, in contrast, operates under three additional constraints. First, as noted above, the court does not issue non-binding advisory opinions. Instead, its authority is limited to binding, declaratory judgments sought by the Legislature or the Governor—and no other party. Second, the court must specifically determine that the question at issue "is a matter of great public interest and the normal process of law would cause undue delay." 7 GUAM CODE ANN. § 4104. Third, § 4104 limits the court's authority to issuing declaratory judgments respecting questions by the Governor or the Legislature as to their *own* powers—and not as to the powers of each other, or any other government entity. *See Gutierrez*, 2002 Guam 1 ¶ 20 ("The significance of this requirement is that it precludes the Governor from requesting a declaratory judgment on a question that only concerns another branch of the government or that solely impacts subordinate executive officers and agencies."); *id.* ("[T]he Governor is precluded from obtaining review of questions under section 4104 if those questions involve the operation of another branch of government and that operation does not impinge on the Governor's powers and duties as set forth in the Organic Act.").

These constraints may help to explain why, although some version of § 4104 has been in effect for almost 30 years, the Guam Supreme Court has received little more than a dozen requests under that section. Moreover, the Guam Supreme Court

regularly enforces § 4104's limits—either by declining to issue a declaratory judgment at all, or by resolving only some of the questions that the Legislature or the Governor had asked it to answer. *See, e.g.*, *In re Guam Legislature*, 2014 Guam 24 ¶¶ 41–42 (declining the Legislature's request to answer a question about the power of the Guam Election Commission); *In re Gutierrez*, 2002 Guam 1 ¶ 22 (declining the Governor's request to resolve a due process challenge to a Guam law because the law did not implicate the Governor's powers). Indeed, the very first time that § 4104 was invoked, the Guam Supreme Court held that there was no concern that ordinary litigation would cause "undue delay," and thus refused to provide the requested judgment. *See In re Gutierrez*, 1996 Guam 4 ¶ 16.

The relevance of these authorities is twofold: First, the declaratory judgments authorized by § 4104 are, in numerous key respects, narrower than what is permitted in most of the dozen states that allow them. Second, the Guam Supreme Court has been a responsible steward of its authority under § 4104—regularly declining to consider all or part of a request that fails to satisfy the statutory criteria. The petition insists that, if the decision below is left intact, "the Governor or Legislature could always seek a declaratory judgment from the Guam Supreme Court when it thinks that venue will be more favorable than the Guam federal court. And the Guam Supreme Court has every incentive to beat the Guam federal court to a decision." Pet. 29. But the petition's (unsupported) speculation that all three branches of Guam's government would ignore the limits on § 4104 suits and instead use such proceedings in bad faith is belied by 30 years of examples to the contrary.

And although the petition complains that the Guam Supreme Court's decision in this case creates a "new advisory-opinion framework," Pet. 3, the only thing that is "new" about the ruling below in comparison to prior § 4104 decisions is a further narrowing condition imposed by the territorial high court. In response to arguments that the Guam Supreme Court *should* impose an Article III-like standing requirement (not that the Organic Act requires it to do so), the court responded by reading an additional requirement into § 4104: "where the Legislature or the Governor has satisfied the jurisdictional requirements of [§ 4104], we will reach the merits of the declaratory action in the absence of an injury in fact if the case presents a purely legal issue in an adversary context that is capable of judicial resolution." Pet. App. 17.

In other words, although the petition repeatedly suggests that the Guam Supreme Court's decisions under § 4104 will be insulated from meaningful Article III review, *see, e.g.*, Pet. 30, the decision to which it is objecting actually makes such review that much *more* likely—by ensuring that, as is true here, there will be a party harmed by an adverse ruling. Under *ASARCO* and its progeny, that party would then have standing to appeal to this Court. Thus, to whatever extent an unappealable § 4104 ruling could have been a concern prior to the Guam Supreme Court's decision in this case, it won't be anymore.

E. Neither the Question Presented nor the Question Actually Decided Below Have Implications Beyond Guam

The petition closes by arguing that "[t]he Guam Supreme Court's reworking of the separation of

powers threatens serious practical consequences for (what was supposed to be) Guam's three coequal branches and for Guam's place within the federal system." Pet. 26–27. But the Guam Supreme Court did not "rework[] . . . the separation of powers"; it abided by them—imposing prudential limits on an express grant of jurisdiction by the Guam Legislature. The broader history surveyed above reinforces that Guam's "three coequal branches" have coexisted with § 4104 for 30 years without the sky falling. And nothing about the decision below (or § 4104, in general) has anything to say about "Guam's place within the federal system"—any more so than the 12 states that authorize their courts to render advisory opinions have a different place in the federal system than the other 38.

Nor is there anything to the petition's claim that the Guam Supreme Court is attempting to usurp the role of the Ninth Circuit in petitioner's pending appeal of the district court's denial of Rule 60(b) relief relating to the 1992 injunction. After all, it continues to be petitioner's position in that proceeding that the local law question resolved by the Guam Supreme Court in this case has no bearing on his entitlement to Rule 60(b) relief—since it is unrelated to the original basis for the injunction.

Insofar as that is correct, it necessarily means that nothing about this case should affect that one. And if that is incorrect, then petitioner should have sought this Court's review of the underlying question of Guam law—since anything this Court says on the

matter would obviously bind the Ninth Circuit and the district court.[14]

As for the other federal territories, the petition claims that "this decision had [sic] broad implications for other territorial courts." Pet. 30. Its support for this claim is an unpublished decision by the predecessor to the Virgin Islands Superior Court (which it miscites as a decision by the V.I. Supreme Court). *See id.* (citing *Donastorg* v. *Virgin Islands*, 45 V.I. 259 (Terr. Ct. 2003)). From this, petitioner extrapolates that "the Virgin Islands court (or other territorial courts) might conclude that Congress's grant of 'judicial' power will not be enforced, and those courts too might expand their jurisdiction beyond what Congress provided." *Id.*

Just as it opened, the petition thus closes by firing at the wrong target. At issue here is a statute enacted by the Guam Legislature and invoked by either the Legislature or the Governor of Guam more than a dozen times in over 30 years in the Guam Supreme Court. Despite that history, no other territorial legislature has adopted a similar proviso—and no territorial court has done it for them. Given that context, it is hard to imagine how a denial of certiorari here would suddenly open those floodgates.

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14. Whatever deference the Guam Legislature or Guam Supreme Court would be entitled to in their interpretation of the Organic Act, the Guam Supreme Court is necessarily entitled to deference—from this Court, the Ninth Circuit, and any other tribunal—in its interpretation of Guam law. *See Gutierrez* v. *Pangelinan*, 276 F.3d 539, 546–47 (9th Cir. 2002); *see also Guam Indus. Servs., Inc.* v. *Zurich Am. Ins. Co.*, 787 F.3d 1001, 1005 (9th Cir. 2015) (following the rule of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), in resolving a question of Guam law).

* * *

If there is a single passage that captures best the petition's underlying theme, it is the description of the decision below as "the exact kind of 'distortion of . . . important but unrelated legal doctrines' this Court sought to end in *Dobbs*." Pet. 3 (quoting *Dobbs*, 597 U.S. at 286). The not-so-subtle insinuation is that the Guam Supreme Court did something novel and sneaky—and it did so *because* this is an abortion case.

To get to that conclusion, the petition has to slapdash the history of § 4104 (which otherwise shows that the decision in this case is not novel). It has to ignore the Guam Supreme Court's many prior applications of § 4104 (which otherwise show the court's steady hand over three decades). It has to misrepresent the timing of this case vis-à-vis petitioner's effort to undo the 1992 injunction (which otherwise shows that the Governor's behavior was by the book). It has to cherry-pick how the phrase "judicial power" (which is *almost* the same phrase as the Organic Act's "judicial authority") has been understood in other U.S. judicial systems (at least a dozen of which allow non-adverse rulings on even broader terms than § 4104). And it has to somehow omit the fact that petitioner never argued below that § 4104 exceeds the Guam Legislature's authority under the Organic Act (which is reason enough to deny the petition). In short, it is not the decision below, but rather the petition that seeks the "distortion of . . . important but unrelated legal doctrines" in an abortion case. Proper application of those doctrines all point to the same conclusion: the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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