No. 23-828

In the Supreme Court of the United States

DOUGLAS B. MOYLAN,
ATTORNEY GENERAL OF GUAM,
Petitioner,

v.

LOURDES LEON GUERRERO,
GOVERNOR OF GUAM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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August 7, 2024

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REPLY BRIEF

The briefs in opposition confirm this case's certworthiness. Neither one addresses the actual question presented: Whether the "judicial authority," 48 U.S.C. §1424(a)(1), that Congress vested in the Guam Supreme Court authorizes that court to issue advisory opinions. Pet. i. Instead, the principal opposition brief supposes Petitioner's "real question" to be "whether [7 G.C.A.] §4104 exceeded the scope of the authority Congress delegated to the Guam Legislature in Guam's Organic Act." Gov.BIO.2. Little wonder, then, that the Governor doesn't mention the Guam Supreme Court's advisory-opinion holding until page 28 of her 32-page opposition brief; she attacks a straw man. The Guam Legislature, in turn, "rises to defend its rightful authority to provide Guam Supreme Court jurisdiction pursuant to the Organic Act of Guam," and to contend that "Petitioner's challenge to 7 GCA §4104 is best left to the Guam Legislature's discretion." Legis.BIO.2. Those aren't the issues here.

Because both Respondents dodge the actual question presented, neither tries to show how the Guam Supreme Court's advisory opinion constitutes a permissible exercise of federal "judicial authority." 48 U.S.C. §1424(a)(1). Their refusal to acknowledge any bounds on that statutory authority makes this case's importance for the power of non-Article III courts self-evident. This Court should grant the petition.

I. The Governor erroneously frames the Attorney General's claim as a facial challenge to §4104.

According to the Governor, the Attorney General "claim[s] that the Guam Legislature exceeded its

authority" by enacting §4104. Gov.BIO.1. Were that correct, it would make the Attorney General's claim a facial challenge to §4104—a claim that the Guam Supreme Court could *never* properly issue a declaratory judgment under §4104.

But the Governor's framing is wrong. The Attorney General's question presented asks this Court to decide whether a federal statutory term that Congress did not define—"judicial authority," 48 U.S.C. §1424(a)(1)—includes the power to issue advisory opinions. Pet. i. Precedent, history, and practice confirm that the answer is no: When Congress enacted §1424(a)(1), the common, established understanding of "judicial authority" meant only injured parties could obtain judicial relief. *See* Pet.17-25. A federal judicial decision in a case with no injured party constituted an improper advisory opinion. *See id.*

Before the decision below, the Guam Supreme Court agreed. It had concluded that its "jurisdiction is constrained to disputes that are 'appropriate for judicial determination' rather than those that are 'hypothetical,' 'abstract,' or 'academic.'" Pet.App.12 (quoting *Maeda Pac. Corp. v. GMP Haw., Inc.*, 2011 WL 5825988, at *6 (Guam 2011)). It expressly based that conclusion on the "similarity in separation of powers" between the federal system and Guam's Organic Act. Pet.App.12.

The Guam court's whiplash-inducing reversal of that prior position is what prompted the Attorney General's petition. So contra the Governor's argument (at 1-2), here the Attorney General does not challenge §4104's facial validity. Instead, he challenges the opinion below—where, as the Guam Supreme Court itself acknowledges, no party has been injured.

Pet.App.14, 17. Because the Governor's arguments all flow from this false premise, they provide no basis for denying certiorari, as explained below.

II. The question presented is certworthy and the Governor's interpretation is wrong.

The Governor's efforts to dispute the Attorney General's merits arguments beg the question. Where she assumes "[t]he Guam Supreme Court's power to render declaratory judgments in a narrow class of disputes," Gov.BIO.15, the Attorney General asks this Court to review the Guam Supreme Court's claim of power—can that court, consistent with §1424(a)(1), issue declaratory judgments in disputes without an injured party? Pet. i. That is not a dispute about whether declaratory judgments are permissible. After all, the federal Declaratory Judgment Act "authorizes relief which is consonant with the exercise of the judicial function" because it reaches only as far as the "judicial power extends." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). The issue here is whether the "judicial authority" granted in §1424(a)(1) similarly limits the Guam Supreme Court from issuing advisory opinions. The Governor says no. Her reasons do not persuade.

A. The Governor first suggests that the Guam Supreme Court can issue advisory opinions because "Congress modeled the territory's tribunals on *state* courts, not federal ones." Gov.BIO.17. But lower federal courts act based on statutory power, not models. And the Governor never explains how the blocks of clay she tries to form into state models inform the meaning of "judicial authority" in §1424(a)(1).

Take the Governor's first block of modeling clay—subject-matter jurisdiction. *See* Gov.BIO.16. The Governor claims that Guam's territorial courts must have jurisdiction "*beyond* what the [Guam federal] district court may exercise," *id.*, because 48 U.S.C. §1424-1(d) grants those territorial courts "jurisdiction over all causes in Guam as the laws of Guam provide." According to the Governor, only one limit exists on the Guam Legislature's ability to grant jurisdiction to Guam's courts: "the 'laws of Guam' cannot alter the exclusive or concurrent jurisdiction exercised by the [federal] district court under §1424, but *they are otherwise free* to confer jurisdiction on Guam's local courts." Gov.BIO.16 (emphasis added). Under that reading, the laws of Guam could give Guam courts jurisdiction to veto a new law upon request from a legislator who opposed it but was outvoted. Or they could delete the preconditions in §4104 itself so that any interested—and, now, uninjured—person could get the Guam Supreme Court's thoughts on any subject. What work does §1424(a)(1) do under the Governor's view? None.

The Governor next invokes the Guam Supreme Court's status as an appellate court, and the appointment and tenure rules for "Guam's local judges," to suggest that the Guam Supreme Court resembles a state court. Gov.BIO.16-17. How do those blocks shed light on the meaning of "judicial authority" in §1424(a)(1)? The Governor never says.

B. The Governor's next contentions come closest to explaining her view about what the term "judicial authority" in §1424(a)(1) means. *See* Gov.BIO.17-25. Her argument appears to proceed from these premises: (1) Congress did not import Article III requirements when it used the term "judicial authority" in

§1424(a)(1), (2) the term "judicial" in §1424(a)(1) means "judicial" like a state court, and (3) some state courts issue advisory opinions, so the Guam Supreme Court must be able to issue advisory opinions, too. *See id.* Here too, these premises misconstrue and do not answer the Attorney General's merits arguments.

1. The Governor's myopic focus on Article III misses the forest for the trees. *See id.* at 17-19. The Attorney General asks this Court to interpret the undefined statutory term "judicial authority" in §1424(a)(1). Following this Court's established interpretive method, the petition examines American precedent, tradition, and practice to discern whether the original public meaning of the statutory term "judicial" connotes power to issue advisory opinions to uninjured parties. *See* Pet. 17-23. Without question, Article III and this Court's cases interpreting it constitute critical threads in that fabric. *See id.* Also without question—they're not the only threads. *See id.*

That's why the Governor's claim that "[n]one of the [non-Article III] cases [the petition] cites traced an injury-in-fact requirement to Article III itself" is so puzzling. Gov.BIO.18. The Attorney General's very point is that the term "judicial" in §1424(a)(1) has an established meaning—*in and beyond* the Article III context—that prohibits federal courts from issuing advisory opinions to uninjured parties. If the Governor's contention is right, it only buttresses that point.

2. Taking the Governor's next two premises together, she argues at length about the "at least 12 states" that "authorize their courts of last resort to render non-binding advisory opinions." Gov.BIO.20. The Governor is correct that this shows a "common

practice." *Id.* at 21. She's just wrong about what that common practice is.

Using the Governor's own numbers, a supermajority of States—38 of 50, or 76 percent—do not authorize their courts to issue advisory opinions. And among the 12 that do, eight of them expressly authorize it by constitutional provision. *See* Gov.BIO.20 n.11. This is no surprise; advisory opinions depart so significantly from the established understanding of a proper judicial act that those eight States resorted to state constitutional amendments to eliminate doubt that their judiciaries can act this atypical way.

Of the four remaining States in the Governor's list, supreme courts in two of them "have implied" for themselves "the power to issue" advisory opinions, rather than pointed to positive-law authorization. *Id.* That leaves two States—out of 50—where a state constitution vests its highest court with judicial power and a statute authorizes its highest court to issue advisory opinions. *See id.* at 20 n.10 & 21.

If the Governor really thinks the public meaning of §1424(a)(1) should turn on "common practice," *id.* at 21, she gives no reason to eschew the settled federal understanding plus the understanding in 46 States for either of the two sets of two-State outliers.

More to the point, the Governor's numbers cannot even bear their own weight. In a supermajority of the States the Governor points to, the authority to issue advisory opinions does not resemble the advisory-opinion power claimed by the Supreme Court of Guam. That court has said its declaratory judgments under §4104 "are binding," *In re Request of Gutierrez*, 2002 WL 187459, at *3 (Guam 2002), and did not carve out the decision below from that rule.

In contrast, courts in nine of the twelve States the Governor cites do not treat their own advisory opinions as traditional exercises of the "judicial power." Gov.BIO.21. *See In re Opinions of the Justices*, 96 So. 487, 489 (Ala. 1923) (The "advisory opinions contemplated are those of the individual Justices, not of the Supreme Court of Alabama in its judicial capacity."); *Opinion of the Justices*, 413 A.2d 1245, 1248 (Del. 1980) (issuing advisory opinions is an "administrative duty" and "are not judicial rulings in any sense"); *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 n.13 (Fla. 1987) ("The opinions expressed in these advisory opinions do not constitute decisions of the Florida Supreme Court and, therefore, are not binding in any future judicial proceedings."); *Opinion of the Justices*, 162 A.3d 188, 198, *as revised* (Me. Sept. 19, 2017) ("Advisory Opinions represent the advice of the individual Justices."); *Opinion of the Justices to the House of Representatives*, 32 N.E.3d 287, 292 (Mass. 2015) ("When presented with a request for an advisory opinion, the Justices do not sit in their usual role, as a court, adjudicating a case or controversy."); *In re Request for Advisory Opinion on Constitutionality of 1979 PA 57*, 281 N.W.2d 322, 324 n.6 (Mich. 1979) (noting that advisory opinions are "not precedentially binding" and "depart[]" from "[t]he Court's traditional role"); *Opinion of the Justices*, 191 A.3d 1245, 1263 (N.H. 2018) (when the Court issues advisory opinions it acts "'not as a court, but as individual constitutional advisors to the legislative or executive branches" and those opinions are not "binding precedent"); *In re Advisory Opinion to the Governor*, 856 A.2d 320, 323 (R.I. 2004) (An advisory opinion "is not an exercise of judicial power, it is not binding and 'it carries no mandate.'"); *In re Elliott*, 446 P.2d 347, 357 (Wash.

1968) (an advisory opinion "is not binding on the court in the future and does not determine the rights of any parties before the court").

That leaves three States from the Governor's list. But in Colorado, the people gave advisory opinions a distinct constitutional status. Colo. Const. art. VI, §3 ("The supreme court shall give its opinion upon important constitutional questions upon solemn occasions when required by the governor, the senate, or the house of representatives; *and all such opinions shall be published* in connection with *the reported decision* of said court.") (emphasis added). So that really leaves just Indiana (where the Indiana Supreme Court has "implied" advisory-opinion power for itself, Gov.BIO.20 n.11) and South Dakota (which grants advisory-opinion power in its state constitution, S.D. Const. art. V, §5) as the Governor's only examples arguably supporting the Guam Supreme Court's approach.

Guam's spot on the globe might make it a geographical outlier from the mainland. Its judicial-authority precedent need not and should not follow suit. The island remains, after all, a federal territory. And the Governor gives no good reason why Indiana's and South Dakota's abnormal approaches to advisory judicial opinions should make §1424(a)(1) a good-for-Guam-only flavor of federal judicial authority. Even in Guam, a dispute without an injury "is political, and not judicial in character." *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923).

III. The question presented is manifestly important.

Denying review or adopting the Governor's argument would have significant ramifications. She never explains whether the power Congress conferred—"judicial authority," 48 U.S.C. §1424(a)(1)—imposes any limit on the Guam Supreme Court. Instead, she posits a congressional intention for the Guam Supreme Court to (kind of) resemble a state court, and claims that means that the Guam Legislature can expand the Guam Supreme Court's reach.

Permitting this slipshod approach to congressional grants of power threatens implications far beyond Guam. For territorial courts, it would mean that the local legislative body can expand the court's authority to be inconsistent with the authority given to it by Congress. And it would leave no reason the legislative body could not also *restrict* the territorial court's authority in a manner inconsistent with the authority given to it by Congress. For non-Article III courts, the Governor's approach means congressional grants of particular kinds of power have no meaningful limit, and they can reach beyond their prescribed role as their local legislatures see fit.

The Governor's arguments also confirm the friction her approach fosters between federal and territorial courts. Though she quibbles with the timing of filings below, she never disputes that she sought an opinion from the Guam Supreme Court to impede federal court proceedings asking to lift a permanent injunction of Guam Public Law 20-134. Gov.BIO.9-11. After all, she petitioned the Guam Supreme Court under §4104 after she received the Attorney General's notice that he planned to seek removal of the

injunction—and expressly urged the Guam Supreme Court that "it is important that these questions are addressed in the first instance not by the federal courts." Pet.App.156, 162-63.[1] And she suggests that the Ninth Circuit might lift the injunction anyway while omitting that Plaintiffs have already argued that the Guam Supreme Court's decision moots the Ninth Circuit appeal. See Gov.BIO.29-30; Appellees' R. 28(j) Letter, *Moylan v. Guam Society of Obstetricians & Gynecologists, et al.*, No. 23-15602, ECF 38 (9th Cir. Nov. 6, 2023). She provides no reason to think this would be the last time a party would be tempted to frustrate federal proceedings because she views the Guam Supreme Court as a more favorable venue. That alone makes this case certworthy even if—contrary to all indications—it affects only Guam. *See Territory of Guam v. Olsen*, 431 U.S. 195 (1977) (reviewing on certiorari whether the Guam Legislature could properly divest the Guam federal district court of appellate jurisdiction under Section 22 of the Organic Act); *Chase Manhattan Bank (Nat'l Ass'n) v. South Acres Dev. Co.*, 434 U.S. 236, 236 (1978) (reviewing on certiorari "whether Congress has

[1] The Petition mistakenly stated that the Governor filed her §4104 petition after the Attorney General filed his Rule 60(b) motion, but that timing discrepancy does not undermine the conclusion that the Governor sought to frustrate federal-court review. *See* Pet.27-28. The Attorney General provided notice of his intent to file the Rule 60(b) motion on January 11, 2023. The Governor filed in the Guam Supreme Court on January 23, 2023, urging that court to act lest the federal courts resolve the issues first. Pet.App. 155, 157. The Attorney General then filed his Rule 60(b) motion on February 1, 2023. Att'y Gen. Mot. to Vacate, *Guam Soc'y of Obstetricians & Gynecologists v. Moylan*, 1:90-cv-13, ECF 356 (D. Guam Feb. 1, 2023), ECF 252.

authorized the District Court of Guam to exercise federal diversity jurisdiction").

IV. The Governor's forfeiture argument is inapposite.

The Governor raises a forfeiture argument that has nothing to do with the question presented. Her forfeiture contention proceeds from the false premise that the Attorney General's "real question" is "whether §4104 exceeded the scope of the authority Congress delegated to the Guam Legislature in Guam's Organic Act." Gov.BIO.2. But that is not the Attorney General's question presented. *See supra* at 1.[2]

The Attorney General's *actual* argument here—that the Supreme Court of Guam lacks judicial authority where no party has suffered an injury-in-fact—was squarely presented and decided below. The Attorney General "join[ed] with" an *amicus* argument "that this [Guam] High Court has no jurisdiction over this matter due to the [Governor's] lack of standing." Pet.App.86. The Governor herself acknowledged below that the Attorney General "join[ed]" that argument. Pet.App.54 & n.2, 55. That the Attorney General could not have predicted the precise basis on which the Supreme Court of Guam would reject his argument—its surprising claim to judicial power to

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[2] The Legislature also misses the relevant question. It contends that if Congress did not want the Guam Legislature to "gran[t] jurisdiction" under §4104, it could "prohibit" the Guam Legislature from doing so. Legis.BIO.10-11. Again, the question presented is not whether the Guam Legislature could enact §4104; it's whether a declaratory judgment issued under §4104 in a case without injured parties constitutes a permissible exercise of the judicial authority granted in §1424(a)(1).

render a binding decision when there is no injured party—does not mean he forfeited his preserved objection.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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