UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, ET AL.,	)	
Plaintiffs-Appellees,	)	Case No. 90-16706
v.	)	D.C. Case No. 90-00013
JOSEPH F. ADA, Governor of Guam,	)	
Defendant-Appellant.	)	

On Appeal from the United States District Court
District of Guam

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

I. GUAM'S ABORTION LAW MAY BE ENFORCED ONCE THE UNAPPEALED SOLICITATION PROVISIONS HAVE BEEN SEVERED.

Plaintiffs' first argument on appeal is that the solicitation provisions cannot be severed from the remainder of the law, and thus this Court need not reach the merits of defendant's arguments. Appellees' Br. at 11-13.[1] Without citation of relevant authority,[2] plaintiffs argue that normal severability rules do not apply to laws submitted to public referenda and that Guam would not have enacted its abortion law without the solicitation provisions. Although it is frivolous, we address this argument here because plaintiffs have portrayed it as a dispositive, threshold issue.

Normal severability rules apply to abortion statutes. Webster v. Reproductive Health Services, Inc., 109 S.Ct. 3040, 3053 (1989) (upholding certain provisions of Missouri Abortion Act even though Attorney General did not appeal declaration of unconstitutionality

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[1] In their brief, plaintiffs do not attempt to defend the district court's judgment on the grounds that the Guam abortion law violates the Free Exercise Clause of the First Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, the prohibition of involuntary servitude in the Thirteenth Amendment, the procedural due process component of the Due Process Clause of the Fourteenth Amendment, or the Equal Protection Clause of the Fourteenth Amendment. Although these grounds were raised below, they have not been briefed by appellees on appeal and, therefore, have been waived, notwithstanding the filing of an amicus brief defending the judgment on one of these grounds. See Toussaint v. McCarthy, 801 F.2d 1080, 1106 n.27 (9th Cir. 1986).

[2] The statute in question in Awa v. Guam Memorial Hospital Authority, 726 F.2d 594 (9th Cir. 1984), could not be severed because the legislature had enacted mutually repugnant provisions (mandating binding arbitration and preserving right to jury trial). In Hawaiian Dredging and Const. Corp. v. Guam Airport Authority, 2 Guam Rep. 116 (1980), the court invalidated two statutes that discriminated against nonresident alien workers in the bidding of construction contracts. Since the principal purpose of the laws was to favor citizens and resident aliens in the awarding of those contracts, the court determined that the severability clause in one of the laws could not save a non-discriminatory provision requiring the establishment of apprenticeship and training programs.

as to others).[3] Moreover, "in the construction of statutes there is no essential difference between those enacted by the initiative and referendum and those enacted in the usual way." Anthony v. Veatch, 189 Or. 462, 496-97, 220 P.2d 493, 507-08 (1950). The same severability rules apply to both. Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 332 n.7, 118 Cal. Rptr. 637, 650 n.7, 530 P.2d 605, 618 n.7 (1975). Thus, where appropriate, the unconstitutional portions of laws adopted in an initiative or referendum may be severed from the constitutional ones.[4]

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[3] The Supreme Court has explicitly remanded abortion cases for resolving severability questions, Guste v. Jackson, 429 U.S. 399 (1977), and has implicitly applied severability principles in other cases in which it upheld some provisions while striking down others. See, e.g., Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983). Even in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), the principal authority on which plaintiffs rely in their severability argument, "the Supreme Court did not invalidate the entire [ordinance] . . . even though major sections of that law were held to be unconstitutional." Charles v. Carey, 579 F.Supp. 464, 476 (N.D. Ill. 1983). See also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 758 n.9 (1986) (identifying sections of Pennsylvania Abortion Control Act the constitutionality of which was not before the Court).

Frequently, the courts of appeal have severed unconstitutional language from abortion statutes, allowing what remained to be enforced. See, e.g., Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1023 (1st Cir. 1981); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1200 (6th Cir. 1981), aff'd in part, rev'd in part, 462 U.S. 416 (1983); Zbaraz v. Hartigan, 763 F.2d 1532, 1545 (7th Cir. 1985), aff'd by an equally divided court, 108 S.Ct. 479 (1987); Charles v. Carey, 627 F.2d 772, 778-79 (7th Cir. 1980); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848, 859 n.14 (8th Cir. 1981), supplemented, 664 F.2d 687 (8th Cir. 1981), aff'd in part, rev'd in part, and remanded, 462 U.S. 476 (1983).

[4] See, e.g., Raven v. Deukmejian, 52 Cal.3d 336, 276 Cal. Rptr. 326, 801 P.2d 1077 (1990); People ex rel. Engle v. Kerner, 32 Ill.2d 212, 220-22, 205 N.E.2d 33, 38 (1965); In re Proposal C, 384 Mich. 390, 415, 185 N.W.2d 9, 19 (1971); Buchanan v. Kirkpatrick, 615 S.W.2d 6, 13 n.8 (Mo. 1981); In re Initiative Petition No. 317, 648 P.2d 1207, 1219 (Okla. 1982).

California employs a three-part test to determine whether the constitutional provisions of a law enacted by an initiative should take effect where other provisions have been held unconstitutional: First, the provisions must be mechanically and grammatically severable; second, the provisions must be functionally severable, i.e., they must be capable of independent application; third, it must appear that the constitutional provisions would likely have been adopted if the people had foreseen the partial invalidity of the initiative. Calfarm Ins. Co. v. Deukmejian, 48 Cal.3d 805, 821-22, 258 Cal.Rptr. 161, 170, 771 P.2d 1247, 1255-56 (1989); Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 330-32, 118 Cal.Rptr. 637, 649-50, 530 P.2d 605, 617-18 (1975); People's Advocate, Inc. v. Superior Court, 181 Cal.App.3d 316, 329-34, 226 Cal. Rptr. 640, 650-51 (1986). This test should be applied here because the initiative, referendum and legislative submission provisions of Guam law (3 G.C.A. §17101 et seq.) are based on California law. People v. Ojeda, 758 F.2d 403, 406 (9th Cir. 1985).

First, the constitutional sections of the Guam abortion law are mechanically and grammatically severable from the unappealed solicitation sections. Second, the substantive offense of abortion is distinct from the inchoate offenses of solicitation and may be separately enforced. Third, if the electorate would have approved the law with the solicitation provisions, it probably would approve the law without them.[5] The stated purpose of the law is "to protect the unborn children of Guam." §1. That purpose can be

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[5] The issue in the referendum is not whether a proposed law should be enacted, but whether an enacted law should be repealed. P.L. 20-134, §7. Saving the constitutional provisions of the law is consistent with a vote not to repeal the law "in its entirety." Of course, when the referendum is ultimately held, the voters will already know that the solicitation provisions cannot be enforced.

achieved without the unappealed solicitation provisions.

"Where part of an initiative or referendum is unconstitutional and other parts are constitutional, the valid proposals should nevertheless be submitted to the voters, if they would have a possible field of operation." Gaines v. City of Orlando, 450 So.2d 1174, 1178 (Fla. App. 1984). The Guam abortion law should be submitted to the voters because once the solicitation provisions have been severed, what remains has a wide field of application.

II. THE RIGHT OF ABORTION DOES NOT APPLY TO THE TERRITORY OF GUAM.

A. Neither the plain language of the 1968 Act nor the legislative history indicate a Congressional intent to apply the right of abortion to Guam.

Plaintiffs argue that "the meaning of the statute [48 U.S.C. §1421b(u)] is plain from its language" and that the statute incorporated the abortion right of Roe v. Wade because it embraces the Due Process Clause of the Fourteenth Amendment. However, the language of the Fourteenth Amendment, when applied to the territories, is not plain and it is unclear which constitutional protections apply.[6] Thus, equal protection has been held to apply to some territories and not to others,[7] and trial by jury is required in some territories but not in others.[8] Although the

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[6] Despite at least three Supreme Court opinions on point, it is unclear whether the Fourteenth Amendment applies to Puerto Rico at all or whether the Fifth Amendment is implicated. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 n.5 (1974).

[7] Rogers v. Larson, 563 F.2d 617 (3rd Cir. 1977) (Equal protection applies to the Virgin Islands); Bunyan v. Camacho, 770 F.2d 773 (9th Cir. 1985) (Equal protection applies to Guam); and Harris v. Rosario, 446 U.S. 652 (1980) (Equal protection does not apply to Puerto Rico).

[8] King v. Andrus, 452 F.Supp. 11 (D.D.C. 1977) (trial by jury required in American Samoa); and Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984) (trial by jury not required in Commonwealth of the Northern Mariana Islands).

District Court, in its opinion, and plaintiffs, in their brief, suggest that the idea of due process not expanding (or contracting) in accord with Stateside precedent is unusual, in fact defendant's position is quite conventional and is consistent with virtually every court that has considered the matter, except for the District Court in this case. Torres v. Puerto Rico, 442 U.S. 465 (1979); King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975).

The Congressional purpose in extending to Guam the second sentence of §1 of the Fourteenth Amendment was to guarantee "Statesiders" fair and equal treatment on Guam, not to expand on the "Bill of Rights" granted under the Organic Act in 1950. Congress and the Administration believed such Statesider protection was prudent given the increased level of self-government granted to Guam in 1968 and the consequent risk that such a Guam government would discriminate against Statesiders.[9] Such a concern was present in every instance in which increased self-government was being granted to a territory. For example, similar language was included in the Puerto Rico Elective Governor Act of 1947 and in

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[9] In arguing the "plain meaning" of §1421b(u), plaintiffs place undue reliance on the language, "same force and effect." That language had its genesis in prior elective governor legislation. See, e.g., Puerto Rico Elective Governor Act of 1947, P.L. 362, 80th Cong., 1st Sess. (Aug. 5, 1947), § 7: "The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State. . . ." Emphasis supplied. The Senate adopted similar language in its original version of the Guam Elective Governor bill in 1967. See Guam-Virgin Islands Elective Governors; Hearings on S. 449 Before the Territories and Insular Affairs Subcomm., Senate Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. 4 (1967): ". . . section 1 of amendment XIV . . . shall have the same force and effect within the unincorporated territory of Guam as in the United States or in any State of the United States." Emphasis supplied. The "same force and effect" language is designed to forestall any dilution of Statesiders' rights, which might have happened in light of Guam's special constitutional status.

1950 when Guam's Organic Act was passed embodying the basic freedoms of the "Bill of Rights." At that time, Guam proposed discriminatory language against Statesiders and withdrew it under Congressional pressure.

> Senator Anderson. May I have your views on just one part of the act here? In the Bill of Rights[10] there is a section (n) which says:
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> > No discrimination shall be made in Guam against any person on account of race, sex, language, or religion, nor shall the equal protection of the laws be denied; Provided, That the legislature of Guam may enact such legislation as may be necessary to protect the lands and business enterprises of persons of Guamanian ancestry, and nothing in this Act shall be construed to deny to the legislature this authority . . . . (emphasis supplied).
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> * * * *
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> Mr. Won Pat. . . . I believe that is just an inadvertence. I am in full accord that that provision should be stricken out of here.[11]

In short, although in 1966 and in 1968 the Administration made light of its concern, the issue was a real one.

> Mrs. Van Cleve. The purpose of this language is to extend to Guam and to the Virgin Islands in the companion bill the two provisions of the Constitution that are referred to loosely as the privileges and immunities clauses . . . . In the case of Puerto Rico the Congress apparently found, so the legislative history would suggest, that the Legislature of Puerto Rico had enacted legislation more beneficial to residents of Puerto Rico than to nonresidents. In order to prevent that happening in the future, the Puerto Rico elected Governor bill[12] contains substantially the language that you see before

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[10] Section 5 of the Organic Act of 1950 as introduced and, as passed, was titled the "Bill of Rights." It protects Guam citizens against action by their government including the right that "No person shall be deprived of life, liberty, or property without due process of law." §5(e), P.L. 630, 64 Stat. 384, Aug. 1, 1950.

[11] U.S. Sen., Civil Government for Guam. Hearings Before Senate Subcomm. of the Comm. on Interior and Insular Affairs on S.185, S.1892, and HR 7273, (81st Cong., 2nd Sess, 1950), pp.46, 51-52.

[12] Cf. §7, P.L. 362, Aug. 5, 1947; 62 Stat. 770.

you in this section.[13]

Two years later, Representative Mink pressed to extend all constitutional provisions to Guam and was met with Administration resistance that such an act would indicate "incorporation" of Guam and, thereby, a promise of Statehood.

> Mrs. Mink. Is it the position of the administration that to extend the protection of the entire Federal Constitution to Guam is inadvisable only for the reason that the administration has not yet determined that statehood is the necessary ultimate course of political growth for the territory of Guam, or are there sections of the Federal Constitution which the administration feels should not now be extended to Guam?
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> Mr. Anderson. I think it is the former rather than the latter.
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> Mrs. Mink. Could we not solve this problem by simply making very certain in the committee report that the extension of the privileges of the Constitution to U.S. citizens in Guam, which they are entitled to have, is not to be interpreted as any step being taken by the administration to alter the status of their form of government as defined under the term "unincorporated territory"? . . . .
>
> Mrs. Van Cleve. [T]here is so much law on the subject of what the act of incorporation means that my guess would be that regardless of what the committee report says...the courts would view it and the people of Guam would correctly view that action as a certain commitment to ultimate statehood . . . .[14]

Reluctantly, Representative Mink retreated.

> Mrs. Mink. . . . I am very disappointed that the administration has not taken this further step to extend the guarantees of the Constitution to the American citizens in Guam. I can appreciate the position of the administration in not wanting to alter the definition of the term "unincorporated territory." . . . .

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[13] House of Rep., Guam--Elective Governor and Legislative Districting. Hearings Before the House Subcomm. on Territorial and Insular Affairs of the Comm. on Interior and Insular Affairs on H.R. 8250, H.R. 8322, H.R. 11775, H.R. 13294, and H.R. 13298. (89th Cong. 2nd Sess., 1966), pp. 96-97.

[14] House of Rep., Guam--Elective Governor. Hearings Before the Subcomm. on Territorial and Insular Affairs of the Comm. on Interior and Insular Affairs, on H.R. 7329 and related bills (90th Cong., 2nd Sess. 1968), pp. 61-62.

> Mr. Burton of Utah. Suppose the gentlelady from Hawaii amended the act before us to provide for the "incorporation" of Guam . . . .
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> Mr. Anderson. . . . The entire purpose of this bill was for an elected Governor. I think . . . if Guam should be another type of a territory, that is a subject of its own.

Id. at 62. In fact, the critical aspect of the individual rights of citizenship was expressly stricken; namely, the first sentence of §1 of the 14th Amendment, which would have established the constitutional right of citizenship. There is no point reiterating here the legislative history of the bill which was presented below and is before this Court. CR 157, pp. 5-19. Suffice to say that it was the Senate version, and the Administration view, that expansion of constitutional protections would be interpreted to convert Guam from an unincorporated to an incorporated territory, not the House Subcommittee version or Representative Mink's desires, which finally prevailed. The law was not intended to grant additional rights to the citizens of Guam.

The Supreme Court requires a clear signal before interpreting a Congressional action as extending a right to the people or to the government of a territory. Guam v. Olson, 431 U.S. 195, 201 (1977). There is no such clear signal here.

B. The right of abortion is not embraced by the limited constitutional guarantees accorded citizens of unincorporated territories under the Insular Cases.

Plaintiffs argue that Roe v. Wade and its progeny held that abortion is a fundamental right. Therefore, plaintiffs argue that under the Insular Cases doctrine this right was automatically extended to the territories regardless of the intended scope of the 1968 legislation. Defendant has challenged whether the "abortion right" can be considered fundamental under recent Supreme Court

precedent. Appellant's Br. at 31-34. But even assuming that that right is "fundamental," it was not embraced by the Insular Cases.

The Insular Cases' language guaranteeing certain natural rights was made in response to the concern of many who feared that territorial expansion without full extension of the Constitution might permit slavery or seizure of property of the local citizens. For example, during the debate immediately following the War of 1898 with respect to the rights of the citizens in the newly acquired territories, former Republican President Benjamin Harrison envisioned extraordinary, untrammeled actions by the Congress if the Constitution were held not to apply in the territories:

> My whole heart has been aflame with indignation against the monstrous proposition that Congress has absolute power in the territories, and that none of the guaranties of personal liberty and civil rights in the Constitution apply there . . . .[15]

It was in response to this type of concern that Justice White in his concurring opinion stated that "there are general prohibitions in the Constitution in favor of the liberty and property of the citizen . . . which are an absolute denial of all authority . . . to do particular acts."[16] Although Justice White's language has been interpreted more broadly, no court has ever suggested that the Insular Cases "general prohibitions" encompassed privacy or abortion. Indeed, courts have expressly addressed the question whether the "general prohibitions" in the territories could be equated with "fundamental" constitutional rights. Both the Supreme Court and the District of Columbia Court of Appeals

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[15] Quoted in Beisner, Twelve Against Empire: The Anti-Imperialists, 1898-1900 (1968), p.193.

[16] Downes v. Bidwell, 182 U.S. 244, 294 (1901) (emphasis supplied).

have expressly held otherwise. Torres v. Puerto Rico, 442 U.S. 465 (1979); King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975) (proper rule is to examine the special local circumstances in each territory). See also, Examining Board v. Flores de Otero, 426 U.S. 572, 580 (1976) (look to the "purposes of Congress in enacting [the law], and the circumstances under which the words [State or Territory] were employed").

Appellees and certain amici curiae have suggested that the failure to extend the abortion right would endanger the citizens of Guam and be contrary to territorial policy. This simply is not true. What the territories are seeking is sufficient autonomy and self-determination to decide critical issues for their destiny, which is in accord with federal policy.[17] Local government control and local government action are the means to secure the rights of Guam's citizens. We should note that the challenged law contained a provision for its repeal by popular vote. The referendum, of course, was not held because of the district court's ruling declaring the law unconstitutional.

III. PLAINTIFFS HAVE FAILED TO SHOW THAT THE GUAM ABORTION LAW IS UNCONSTITUTIONAL ON ITS FACE.

To prevail in a facial challenge, plaintiffs must show that "'no set of circumstances exists under which the Act would be valid.'" Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972, 2980-81 (1990) (citing Webster, 109 S.Ct. at 3060, O'Connor, J., concurring). Plaintiffs cannot meet that burden unless they establish both that the Territory's interest in prenatal life is

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[17] Statement of Richard Montoya, Assistant Secretary of the Interior for Territorial and International Affairs, in Federal Policies Regarding the U.S. Insular Areas, Oversight Hearings before the House Committee on Interior and Insular Affairs (99th Cong. 2nd Sess. April 10, 1986), pp. 217, 219.

not compelling throughout pregnancy, and that there is an absolute, fundamental right to choose abortion at some stage of pregnancy, regardless of reason. For the reasons set forth in defendant's opening brief (Br. at 25-35), plaintiffs can establish neither.

To summarize, after Webster, the Supreme Court recognizes that the State has a compelling interest in the protection of unborn human life throughout pregnancy, and that the "abortion right" is, at most, a liberty interest subject to regulation reasonably related to a legitimate governmental purpose. Phrased somewhat differently, there is no generalized right to choose abortion, irrespective of reason. Thus, in some circumstances, the State's interest in the unborn child will outweigh the woman's "right to choose." That is sufficient to sustain the facial constitutionality of the law.[18]

Plaintiffs, however, dispute defendant's characterization of this case as a facial challenge, arguing that it is also an "as-applied" challenge. Br. at 21 n.34.[19] But the record indicates otherwise. Plaintiffs challenged the constitutionality of the Guam

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[18] Salerno, 481 U.S. at 745. Whether the State's interest outweighs the woman's right in every case cannot be decided here because the facts necessary to resolve such issues are "case-specific" and have not been developed in an appropriate as-applied challenge. The facial constitutionality of the law is not affected by the possibility that it may have unconstitutional applications. This is because the Supreme Court has not recognized an overbreadth doctrine outside the limited context of the First Amendment. Id. at 745; Massachusetts v. Oakes, 109 S.Ct. 2633, 2637 (1989); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-801 & nn.12-19 (1984). It is plaintiffs' burden to show that the law can never be constitutionally applied--it is not defendant's burden to prove that it always may be applied.

[19] In their brief, plaintiffs have confused standing to bring this action with their burden of proving that the law cannot be applied constitutionally in any circumstances. In light of the Supreme Court's present abortion jurisprudence, plaintiffs' reliance on pre-Webster opinions (Br. at 21 n.34) is misplaced.

abortion law on its face, not as it applies to any particular woman seeking an abortion for any specific reason. Since the dismissal of Maria Doe as a party-plaintiff, this case has proceeded solely as a facial challenge.[20] Indeed, plaintiffs refer to the prosecution of Janet Benshoof for violation of §5 as "the one instance in which the Act was applied." Br. at 41, n.65 (emphasis supplied).[21]

Citing numerous post-Webster lower federal court decisions (Appellees' Br. at 24 n.41), plaintiffs assert that Roe v. Wade has not been overruled. Defendant, however, has made no such claim. What defendant has shown is that the standard of review for examining abortion statutes has changed,[22] specifically that a

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[20] Although the plaintiff-physicians did not perform abortions while the law was in effect, they failed to identify a single woman who was refused an abortion during that four day period or explain why any such woman sought an abortion. CR 116, Decls. of J. Dunlop, ¶17, W. Freeman, ¶11, and E. Griley, ¶21. This may have been because they seldom ask women why they have abortions. See CR 172 (Dep. of W. Freeman), p. 23, CR 189 (Dep. of E. Griley), pp. 21-23. That the law was in effect for four days before it was challenged did not transform this case into an as-applied challenge where there was no attempt to enforce it against any plaintiff. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 493-95 (1985). Two days after the law went into effect, the Attorney General directed the Chief of Police not to make any arrests for alleged violations of the law without express prior approval of her office. CR 114 (Plaintiffs' Exhibits), Memorandum, March 21, 1990.

[21] Ms. Benshoof, of course, is not a party to this action. She may have agreed to be charged with solicitation in order to provide a "test case" challenging the statute. See CR 207.

[22] One court of appeals has noted that Webster appeared to have changed the standard of review of abortion regulations. Planned Parenthood of Minnesota v. State of Minnesota, 910 F.2d 479, 486 (8th Cir. 1990). Plaintiffs' authorities to the contrary are readily distinguishable. Two cases were split decisions striking down Title X regulations, principally on free speech grounds. See Planned Parenthood Federation of America v. Sullivan, 913 F.2d 1492 (10th Cir. 1990); Massachusetts v. Sec. of Health & Human Services, 899 F.2d 53 (1st Cir. 1990) (en banc), petition for cert. pending, 59 U.S.L.W. 3016 (July 17, 1990) (No. 89-1929). Two other cases are on appeal. See Planned Parenthood v. Casey, 744 F.Supp. 1323 (E.D. Pa. 1990), appeal docketed, No. 90-1662 (3rd Cir.); Ragsdale v. Turnock, 734 F.Supp. 1457 (N.D. Ill. 1990), appeals docketed, Nos. 90-1907, 90-1908, 90-2122, 90-2123 (7th Cir.). Two cases did not even involve regulation of abortion. See Arnold v. Bd. of

majority of the justices of the Supreme Court recognizes that the State's interest in prenatal life is compelling throughout pregnancy and that there is no fundamental right to choose abortion, regardless of reason. In a facial challenge, application of that standard requires reversal of the lower court's judgment.

IV. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN IN THEIR FACIAL VAGUENESS CHALLENGE TO THE GUAM ABORTION LAW.

In his opening brief, defendant argued that, to prevail in a facial vagueness challenge, plaintiffs must show that "the law is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982). Appellant's Br. at 35-38. Unable to make that showing, plaintiffs, citing Kolender v. Lawson, 461 U.S. 352 (1983), respond that a statute may be invalidated on its face even when "it could conceivably have . . . some valid application" if it "reaches a substantial amount of constitutionally protected conduct" or if it "imposes criminal liability." Kolender at 358 n.8. Plaintiffs' reliance on Kolender is misplaced.

In Kolender the Supreme Court declared unconstitutional the California "identification statute." As construed by state courts, the statute required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of Terry v. Ohio, 392 U.S. 1 (1968). Kolender, 461 U.S. at 355-57.

Education, 880 F.2d 305 (11th Cir. 1989); In re Air Crash Disaster, 737 F. Supp. 427 (E.D. Mich. 1989), aff'd sub nom. Rademacher v. McDonnell Douglas Corp., 917 F.2d 24 (6th Cir. 1990). A final case, Florida Women's Medical Clinic, Inc. v. Smith, 746 F.Supp. 89 (S.D. Fla. 1990), involved a Rule 60(b)(5) motion.

The statute, according to the Supreme Court, contained "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." 461 U.S. at 358 (emphasis supplied).[23] As a result, the statute vested "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." Id. The Court noted further that the statute had been arbitrarily enforced against Lawson. Id.

In addition to these factors, the Supreme Court indicated that facial vagueness review was appropriate because of the statute's infringement on First Amendment freedoms and the right to free movement, id, neither of which is at stake here.[24] Because such rights were implicated, the Court's facial vagueness analysis became the equivalent of facial overbreadth analysis which does not apply outside the limited context of the First Amendment. United States v. Salerno, 481 U.S. 739, 745 (1987).

In Schwartzmiller v. Gardner, 752 F.2d 1341 (9th Cir. 1984), this Court considered whether Kolender had modified the rules governing facial vagueness challenges. After a thorough analysis of Kolender and the Supreme Court's later opinion in Regan v. Time, Inc., 468 U.S. 461 (1984), where the Court refused to apply facial vagueness review to a statute that arguably infringed first amendment rights, this Court concluded that "Kolender presented a

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[23] See Ferguson v. Estelle, 718 F.2d 730, 734-35 (5th Cir. 1983) (per curiam) (citing Kolender for the proposition that facial review is appropriate "only . . . [when] no standard of conduct is specified at all").

[24] See United States v. Humble, 714 F.Supp. 794, 797 n.1 (E.D. La. 1989) (Kolender "deals only with a First Amendment facial challenge").

unique fact situation and that facial vagueness review may still be appropriate only when 'the enactment is impermissibly vague in all of its applications.'" Schwartzmiller, 752 F.2d at 1348 (citing Flipside, 455 U.S. at 495).

The Guam abortion law is not "impermissibly vague in all of its applications." The law prohibits abortion except when "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 [her] health." §§2, 3. Neither exception applies unless, at a minimum, continuation of the pregnancy poses some identifiable and measurable risk to the woman's life or health. But, as plaintiffs' own evidence indicates, few pregnancies create such risks.

Plaintiffs cited a recent survey which indicates that only a very small percentage of women obtain abortions for any reason relating to their health. CR 116, Decl. of S. Henshaw, ¶3. The experience of plaintiff physicians in their practice on Guam confirms the results of this survey. Dr. Freeman could recall only two or three "medically necessary" abortions he had performed on Guam. CR 172, pp. 17-18, 28-29. When asked to assess the probable impact of the law on his practice, Dr. Freeman answered, without any difficulty, that "[o]f the [women] who come in wanting an abortion, almost all of them would be precluded because they don't have any--it [the pregnancy] does not pose any great effect to their life." Id. at 29. Dr. Dunlop identified only one "medically necessary" abortion that he had performed, and he acknowledged that there were "no other maternal indications" for which he had performed an abortion on Guam. CR 171, pp. 9-10. Dr. Griley

testified that no woman "needs" an abortion, even for psychological or emotional reasons. CR 189, pp. 21-23.[25] When asked to estimate the percentage of his patients who would be precluded from having an abortion because of the law, Dr. Griley stated that it is "very clear" that under the law "none of them can have an abortion," except when their life or health is endangered. Id. at 28.

Based on the plaintiff physicians' testimony, it is apparent that almost no abortions are performed on Guam for any identifiable medical reason. There may be a few cases where, because of the woman's medical condition, it is difficult to determine whether continuation of the pregnancy "would endanger [her] life . . . or would gravely impair [her] health." But, in the context of a facial vagueness challenge, this is irrelevant. What is not disputed is that the Guam abortion law clearly applies to virtually all abortions performed on Guam.[26] That is sufficient to sustain its constitutionality in a facial vagueness challenge.

V. THE GUAM ABORTION LAW, WHICH HAS A VALID SECULAR PURPOSE AND DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE SOLELY BECAUSE THE LAW WAS SPONSORED AND SUPPORTED BY PERSONS WHO MAY HAVE BEEN MOTIVATED IN PART BY THEIR RELIGIOUS BELIEFS.

Plaintiffs and certain amici argue that the Guam abortion law violates the Establishment Clause because the law was sponsored and

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[25] "[P]regnancy is not a disease," it is "a normal condition," and if the woman "doesn't suffer from any . . . maternal health danger, . . . she should [not] be at any kind of risk." Id. at 25, 26.

[26] Plaintiffs conceded as much below. CR 154, pp. 23, 40; R.T. at 14. See also CR 116, Decls. of S. Henshaw, ¶3 ("[f]ar fewer than three percent of women are likely to be able to establish endangerment of life or substantial risk of grave impairment of health to the satisfaction of two independent physicians"), and J. Hodgson, ¶3 ("[p]robably fewer than 1% of pregnant women seeking abortions will be able to qualify for a legal abortion on Guam under the Act's extremely narrow exceptions").

supported by persons whose opposition to abortion is based in part on religious belief and because the legislative declaration that human life begins at conception is exclusively religious in nature. Plaintiffs, however, have misunderstood the standards applicable to Establishment Clause challenges. Moreover, their argument, if accepted, would effectively silence the religious community, emasculate the civil rights of religious believers, and forbid legislators from taking into account their personal beliefs in considering legislation that has a valid secular purpose.

To reiterate, the Lemon test requires a statute to have "a secular legislative purpose," but this requirement may be satisfied by a statute "that is motivated in part by a religious purpose." Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985). A statute may be declared unconstitutional for this reason only "if it is entirely motivated by a purported purpose to advance religion." Id. at 56.[27]

The express purpose of the Guam abortion law is "to protect the unborn children of Guam." P.L. 20-134, §1.[28] That purpose, as defendant demonstrated in his opening brief (Br. at 40), is clearly

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[27] Accord Bowen v. Kendrick, 108 S.Ct. 2562, 2570 ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose), 2571 ("religious concerns were not the sole motivation behind the Act") (1988); Lynch v. Donnelly, 465 U.S. 668, 680 (1980) ("[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded [that] there was no question that the statute or activity was motivated wholly by religious considerations").

[28] In light of the scientific and medical evidence that human life begins at conception (Appellant's Br. at 6-8), which many courts have recognized (see Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Appellant), plaintiffs' repeated assertion that the legislative finding is exclusively religious in nature cannot be taken seriously.

secular in nature.[29] Given the legitimacy of that interest, evidence that Senator Arriola and some supporters of the law may have been motivated by their religious beliefs to oppose abortion is constitutionally irrelevant. See Board of Education v. Bergens, 110 S.Ct. 2356, 2371 (1990) ("what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law") (emphasis in original).[30]

The thrust of plaintiffs' argument is that a law that has a valid secular purpose nevertheless may fail the first prong of the Lemon test solely because of the religious and moral beliefs of the legislators and members of the public who supported the law. Not surprisingly, plaintiffs are unable to cite a single authority in support of this novel proposition.[31] In Clayton by Clayton v. Place, 884 F.2d 376 (8th Cir. 1989), the Eighth Circuit rejected

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[29] If the State's interest "in protecting the potentiality of human life," Roe at 162, were not legitimate, it would be difficult to perceive how that interest could support any constitutional regulation of abortion. The Court's recognition of the secular nature of this interest distinguishes this case from Epperson v. Arkansas, 393 U.S. 99 (1968), Stone v. Graham, 449 U.S. 39 (1980), Wallace v. Jaffree, 472 U.S. 38 (1985), Edwards v. Aguillard, 107 S.Ct. 2573 (1987), all of which involved laws that were struck down for lack of a valid secular purpose.

[30] Thus, a legislative declaration that life begins at conception does not violate the Establishment Clause merely because "the legislators who voted to enact it may have been motivated by religious considerations." Webster, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

[31] See Bowen v. Kendrick, 108 S.Ct. 2562, 2573 (1988) ("[n]othing in our previous cases prevents Congress . . . from recognizing the important part that religion or religious organizations may play in resolving certain secular problems"); Jaffree, 472 U.S. at 70 (O'Connor, J., concurring) ("[t]he endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy"); at 109 (Rehnquist, J., dissenting) ("if the purpose prong requires an absence of any intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld") (emphasis in original).

an Establishment Clause challenge to a school district's policy of prohibiting dances in the public schools. After determining that the policy did not violate the Lemon test (id. at 379), the court addressed an argument similar to the one advanced here:

> We . . . find no support for the proposition that a rule, which otherwise conforms with Lemon, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. [Citation]. To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral.
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> * * *
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> We simply do not believe [that] elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling Lemon standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions.

Id. at 380.[32]

Plaintiffs argue further that "the purpose and effect of the Act is to favor one religious doctrine over all others . . . ." Br. at 40. Plaintiffs assert that "by providing that life begins at conception and treating virtually all abortions as murder,[33] the Act embodies the tenets of official Roman Catholic Church doctrine[34] as well as certain fundamentalist Protestant religions,

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[32] See Brief Amicus Curiae of the Christian Legal Society, at 22-34.

[33] Abortion is a third degree felony punishable by imprisonment for a period not to exceed five years (or three years for a first offense). 9 G.C.A. §§80.30(c), 80.31(c). Probation may be imposed in lieu of imprisonment. Murder is a first degree felony punishable by a mandatory sentence of life imprisonment. Id., §§16.30, 16.40. For purposes of the criminal homicide statute, "human being" means "a person who has been born and is alive." Id., §16.10(a).

[34] This argument is flatly contradicted by plaintiffs' assertions elsewhere that the Catholic Church has never made an authoritative pronouncement on the morality of abortion and has never taught that human life begins at conception. CR 116

and rejects any opposing religious or non-religious views." Id. What plaintiffs fail to recognize, however, is that any abortion law is inevitably going to coincide with some, but not other, religious beliefs.[35] However, that congruence does not violate the Establishment Clause. See Harris v. McRae, 448 U.S. 297, 319-20 (1980); Bowen v. Kendrick, 108 S.Ct. 2562, 2571 n.8, 2581 (1988).[36]

To adopt plaintiffs' Establishment Clause argument, this Court would have to ignore the Supreme Court's decision in Harris. That opinion compels rejection of plaintiffs' argument.

VI. SECTION 3 OF THE ABORTION LAW DOES NOT REACH PROTECTED SPEECH.

In an effort to avoid the facial challenge rule, plaintiffs have belatedly discovered a "free speech" issue lurking in the language of §3 of the law. Appellants' Br. at 40-46. Plaintiffs claim that the word "procures," as used in §3, "would criminalize speech between a woman and her doctor about the availability of, need for, and access to abortion," and "would also prohibit more general speech advising women of and advocating the right to choose

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(Declarations), Decl. of D. Maguire, ¶¶ 2, 8-12.

[35] See Brief Amicus Curiae of the Christian Legal Society in Support of Appellant, at 9-21; Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 n.4 ("[t]he simple, and perhaps unfortunate, fact of the matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others") (White, J., dissenting).

[36] In refusing to rule on the constitutionality of the legislative findings in the preamble to the Missouri abortion law in question in Webster, the Supreme Court implicitly rejected Justice Stevens' argument that "the absence of any secular purpose for the legislative declarations . . . makes the relevant portions of the preamble invalid under the Establishment Clause . . . ." Webster, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). Plaintiffs' attempt to distinguish Webster on the ground that the preamble had no legal effect is unavailing as the legislative findings in the Guam abortion law (which were based on the Missouri law) also have no operative effect.

abortion" in violation of the Free Speech Clause. Id. at 40-41.

Plaintiffs, however, have waived this argument by not raising it below. Although this Court may affirm an order granting summary judgment on any ground that finds support in the record, "the ground must have been adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue." Box v. A & P Tea Co., 772 F.2d 1372, 1376 (7th Cir. 1985). Accord Southern Natural Gas Co. v. Pontchartrain Materials, Inc., 711 F.2d 1251, 1257 n.7 (5th Cir. 1983) ("[w]e may . . . affirm the district court's decision on any ground urged below"). Nowhere in their voluminous pleadings did plaintiffs argue that §3 violates the Free Speech Clause. Plaintiffs' First Amendment argument focused exclusively on the solicitation provisions of the law (§§4, 5). CR 154, ¶¶45-47; CR 120 at 70-82; CR 199 at 45-48.[37] But even assuming that plaintiffs' attack on §3 has not been waived, it should be rejected.

The word "procures" appears in a section of the law which makes it illegal to "provide," "supply" or "administer" to any woman any medicine, drug or substance, or to "use" or "employ" any instrument or other means whatever, with the intent thereby "to cause an abortion." §3. All of the terms used in §3 refer to conduct, not speech. Under the rule noscitur a sociis (i.e., associated words have a like meaning), the term "procures" should be construed to mean conduct. Sutherland Stat. Const. §47.16 (4th Ed). This construction is consistent with the legislative intent

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[37] In their reply brief, plaintiffs stated: "Numerous declarants have testified that the solicitation provisions chill the exercise of their free speech rights . . . ." CR 199 at 45. Emphasis supplied. And in oral argument, plaintiffs' counsel said, "Plaintiffs' First Amendment challenge centers on the solicitation provisions of the Act, ..." R.T. at 27. Emphasis supplied.

to separate the inchoate offenses of solicitation, which do have a speech component, from the substantive offense, which does not.

The word "procures" does not encompass speech--it connotes action and means "to cause, acquire, gain, get, obtain, bring about [or] cause to be done," Ford v. City of Caldwell, 79 Idaho 499, 507, 321 P.2d 589, 593 (1958), and has been so interpreted when used in an abortion statute. See Rosenbarger v. State, 154 Ind. 425, 427, 56 N.E. 914, 915 (1900). One definition given in Webster's Third New International Dictionary is "to cause to happen or be done: bring about." Black's Law Dictionary (5th ed) provides a similar definition, "to cause a thing to be done."

Section 3 was derived, in part, from former §274 of the Guam Penal Code which, in turn, was based on former §274 of the California Penal Code,[38] which proscribed acts, not words. People v. Root, 246 Cal.App.2d 600, 604, 55 Cal. Rptr. 89, 92 (1966). Section 3 should be similarly construed, particularly if this Court believes that a broader interpretation of the word "procures" could reach protected speech. "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 493 (1983) (opinion of Powell, J.), cited in Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972, 2980 (1990). Section 3 does not infringe upon free speech.

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[38] "Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." Calif. Pen. Code §274 (West 1955). Cf. Guam Pen. Code §274 (1970) ("necessary to preserve her life or health"). Most of the Guam codes have been derived from California law. See Foreword, Guam Civil & Penal Codes (1953) at iii.

VII. CONGRESS NEVER INTENDED TO SUBJECT TERRITORIAL OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY TO §1983 LIABILITY.

Defendant has argued that Congress never intended to include territorial officials, acting in their official capacity, within the meaning of the word "person," as that term is used in 42 U.S.C. §1983. Plaintiffs respond that although territorial officials may not be "persons" for purposes of retrospective relief, they are persons for purposes of prospective relief, citing Ex parte Young, 209 U.S. 123 (1908), and Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Br. at 47. These authorities are inapposite.

The error of the district court and the plaintiffs is in reading together Will and Ngiraingas v. Sanchez, 110 S.Ct. 1737 (1990). The decisions rest on separate rationales. In Will, the Supreme Court reasoned that Congress in 1871 sought to remedy the failure of States and their officials to protect the civil rights of the recently free slaves by establishing federal control over the States where no control previously existed, that is, by vesting original jurisdiction in the federal courts to redress violations of those rights. 109 S.Ct. at 2309. Having recognized this purpose, the Court then proceeded to examine whether Congress intended to abrogate the immunity of the States under the Eleventh Amendment. The Court decided that there was no such intent. Id. at 2309-10. Finally, Justice White, in a footnote, stated that actions for prospective injunctive relief against State officials acting in their official capacities were nevertheless permissible in light of Ex parte Young. Id. at 2311 n.10.

In Ngiraingas, the Court reasoned differently, finding that Congress in 1874 never saw the need for original federal court jurisdiction to redress civil rights violations in the territories.

110 S.Ct. at 1741. The federal government already exercised extensive control over territorial governments and officials. Unlike State courts, territorial courts under federal control would combat, not entrench, the evil to be remedied. Id. Creating original federal court jurisdiction and subjecting territorial governments to §1983 liability was unnecessary and was not the purpose of the 1874 amendment. Id.[39] Likewise, subjecting a territorial official acting in his official capacity to §1983 liability is unwarranted. Given the Court's reasoning in Ngiraingas, the identity of the defendant and the type of relief sought (prospective or retrospective) are simply irrelevant.

In sum, in Ngiraingas, the Supreme Court found it unnecessary to reach the questions of sovereign immunity or the distinction recognized in Ex parte Young, questions that the Court examined in Will.[40] For these reasons, the district court erred in ruling that the Governor of Guam when acting in his official capacity is a

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[39] See also District of Columbia v. Carter, 409 U.S. 418, 429-30 (1973) (applying rationale to District of Columbia).

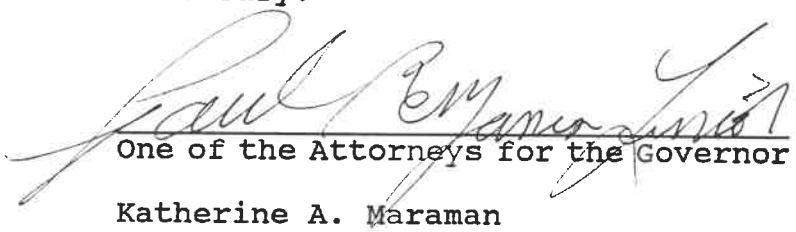
As the Supreme Court has stated, there is no explanation of the purpose of Congress' 1874 addition of "or Territory," to §1983. Ngiraingas, 110 S.Ct. at 1742. One possible reason for the 1874 addition was to subject municipalities in the territories to §1983 liability since they were beyond federal control. Appellant's Br. at 44-45. A more plausible explanation of the addition relates to the codification and revision of the United States Statutes at Large then in progress. The revisers simply may have believed that territories should be included for the sake of uniformity of the Statutes at Large, and an amendment was proposed and passed without Congress actually considering the need for the amendment. In any event, a court should give no more meaning to the amendment than Congress specifically intended.

[40] The distinction between Will and Ngiraingas is all the more apparent considering the Ngiraingas Court's omission of any reference to Will's rationale or footnote 10.

"person" within the meaning of §1983.[41]

CONCLUSION

For the foregoing reasons, Appellant Joseph F. Ada, Governor of Guam, respectfully requests that this Honorable Court reverse the judgment of the district court on §§1-3, 6 and 7 of P.L. 20-134 or, in the alternative, reverse the judgment and remand the cause with directions that the district court apply the appropriate standard of review to the facts as developed, or for further development of the record if this court determines that clarification of the facts is necessary.



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May 3, 1991*

* Counsel gratefully acknowledge the assistance of Mark Wells (J.D. 1990, Chicago-Kent College of Law) in the research of this brief.

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[41] Plaintiffs' suggestion that there are no means of effectively enforcing civil rights in Guam absent §1983 is unfounded. Appellees' Br. at 49, n.77. The Guam district court's original federal question jurisdiction guarantees that the court is an effective forum for the vindication of civil rights. 28 U.S.C. §1331; 48 U.S.C. §1424(b).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 3, 1991, fifteen (15) copies and an original of the Reply Brief of Appellant Joseph F. Ada, Governor of the Territory of Guam, were mailed first class, postage prepaid, to:

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 547
San Francisco, California 94104

I further certify that on May 3, 1991, two copies of the Reply Brief of Appellant were served on Anita Arriola, Law Offices of Arriola, Cowan & Bordallo, P.O. Box X, Agana, Guam 96910, and upon Lynn Paltrow and Simon Heller, American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036, attorneys for Appellees Guam Society of Obstetricians & Gynecologists, et al., by depositing same, properly addressed, first class postage prepaid, in the United States Post Office, Chicago, Illinois.

Dated this 3rd day of May, 1991

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