Interest of *Amici Curiae*

Amici are members of the Guam Legislature with a longstanding commitment to promoting territorial self-government. As legislators, *Amici* worked for establishment of the Guam Supreme Court and to assure that it enjoys the authority and autonomy necessary for it to assume its intended role.

Although this appeal arises from the prosecution of a single individual for violation of a local criminal statute, its potential implications for the People and institutions of the United States Territory of Guam are broad. *Amici* are concerned that if the position of Petitioner, the Guam Attorney General, is sustained, Guam's Supreme Court – the establishment of which culminated more than two decades of local political struggle and debate – could be relegated to a subsidiary role in interpreting Guam's fundamental charter, the Organic Act, and protection for the individual rights enjoyed by U.S. citizens residing in Guam (unlike that for citizens living in the 50 States), frozen at the minimum level established in U.S. Supreme Court decisions construing the federal Constitution.

Amici respectfully submit that neither the Organic Act nor this Court's case law sanctions so unfortunate a result – and that consideration of the legal issues presented in light of Guam's distinct historical experience establishes the correctness of the Supreme Court's decision.

RELEVANT BACKGROUND

1. Historical Context. For the four centuries before it was ceded to the U.S. in settlement of the Spanish-American War, the Island of Guam was under Spanish rule. Though that nation's initial colonial presence was minimal, the 1668 arrival of Jesuit missionaries marked a decisive point in Guam's history. The priests were met with armed resistence, and decades of fighting – along with mortality from European disease and flight to neighboring islands – took a drastic toll on Guam's indigenous Chamorro population. *See generally* A. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1990) ("Leibowitz") at 316-17. Moreover, those who remained were forced from the countryside and subjected to compulsory religious conversion – processes that caused irretrievable loss to traditional Chamorro religion and ways of life. *Id.*

From 1898 until 1950 (with the exception of a three-year Japanese occupation during World War II) Guam was ruled by the U.S. Navy, with vast authority wielded by an appointed governor. *See United States v. Seagraves*, 100 F. Supp. 424, 425 (D. Guam 1951) (citing governor's May 30th, 1946 proclamation that "all powers of Government and jurisdiction in Guam * * * and over the inhabitants thereof, and final executive, legislative and judicial responsibility are vested in me * * * and will be

exercised through subordinate commanders by my direction").

Although Guam's naval administrators have been credited with sincere interest in the educational, economic, and (more debatably) political development of the Territory, *see* U.S. Navy, GENERAL REPORT ON GUAM, 1899-1950 (reporting that literacy had increased from close to zero to 84% under naval administration), the U.S. governors hardly broke free of the prevailing cultural prejudices of their day. *See* Leibowitz at 319 (quoting governor's 1904 report that "the natives * * * are like children easily controlled and readily influenced"). Moreover, their policy of eradicating vestiges of Spanish rule often manifest itself in repressive measures aimed at the Catholic faith. Thus, the first governor ordered all Spanish priests to leave Guam, and his successor stripped the clergy of political rights and banned celebration of village saints' days. Leibowitz at 321. These measures "were resisted strongly by the people of Guam, with appeals to Washington" – but "to no avail." *Id.* at 322. Finally, the naval governors, while conducting local elections on a limited scale, adopted an extremely cautious – sometimes overtly hostile – stance toward the aspirations of Guam's people for a greater say in their government. *See Id.* at 331 (attributing to Navy opposition the omission of Guam from 1936 legislation granting

U.S. citizenship to Virgin Islands residents).[1]

2. The Organic Act. Guam's single largest steps toward self-government came in 1949 and 1950, when, responding to the recommendation of a committee appointed by the Secretary of Defense and to the renewed petitions of Guam's people, President Truman ordered a transfer to civilian administration, Exec. Order 10,077, and Congress enacted the Territory's Organic Act, Pub. L. No. 81-630.[2] Among other things, that Act conferred United States citizenship on Guam's residents, *see* 8 U.S.C. § 1107, provided for a locally-elected unicameral legislature, 48 U.S.C. § 1423(a), and established a Bill of Rights, *id.* § 1421b. First among the Bill's sections was its guarantee that:

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[1]The legacy of Japan's occupation of Guam – the lone instance of foreign occupation of an American community since the War of 1812 – is far more unambiguously bitter. The Japanese swiftly established schools to instruct Guam's people in Japanese language and culture and subjected Guamanians, who remained overwhelmingly loyal to the United States, to forced labor, beatings, and public executions. Liberation of Guam also came at a heavy cost: the battle to recapture the Island caused the destruction of Guam's five largest communities, and from the time of recapture until the end of the war one year later, Guam functioned as a U.S. outpost, with land freely confiscated for military use. Leibowitz at 323-25.

[2]The special committee had concluded that "an apology is due the Guamanian people for the long delay [in extending citizenship] and they are also entitled to the Nation's thanks and recognition for their heroic efforts during the recent war. The people are in all respects worthy of being welcomed into the brotherhood of the United States, with all the rights and privileges, and the Nation will be the gainer for it." *See* Hopkins, Tibin & Reyerson, *Report for the Sec'y of the Navy on the Civil Gov't of Guam & American Samoa* (1947).

> No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances

Id. § 1421b(a).

Even as it conferred substantial powers of self-government, however, the Organic Act declared that Guam's status remained that of an "unincorporated" territory, *id.* § 1421a, *i.e.*, one not promised eventual statehood and in which the U.S. Constitution would not apply of its own force. *See generally Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (the most significant of the "*Insular Cases*," establishing the constitutional framework for issues of territorial status).

In 1968, Congress took another "significant step forward in the development of full local self-government in the territory of Guam, and toward the fulfillment of the aspirations of the people of Guam," H.R. Rep. 90-1521, by enacting legislation providing for a locally-elected Governor, *see* 48 U.S.C. § 1422, and adding to the Organic Act's Bill of Rights a section (named for its sponsor, Rep. Patsy Mink), providing that:

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam * * * and shall have the same force and effect there as in the United States or in any State of the United States: * * * the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments * * * *

48 U.S.C. § 1421(b)(u); *see generally* H.R. Rep. 90-1521 (explaining that amendments were made in recognition of Guam's "remarkable economic, political and social progress"); *cf.* Leibowitz at 342 (characterizing Mink Amendment as a "key" provision). Since 1972, Guam has also been represented, by an elected, non-voting Delegate, in the U.S. House of Representatives. *See* 48 U.S.C. § 1711.[3]

3. The Guam Judiciary. Initially, the Organic Act vested judicial power in a federally-appointed District Court and in such local trial courts as the Guam Legislature decided to establish – with appeals heard by an Appellate Division of the District Court (and then this Court). *See Corn v. Guam Coral Co., Inc.*, 318 F.2d 622 (9th Cir. 1963) (discussing 1958 amendment).

In 1974, Guam's Legislature enacted a statute, Guam Pub. L. 12-85, establishing a precursor to the present Territorial Supreme Court. But this Court, in a decision then affirmed by the U.S. Supreme Court, held that measure invalid, as exceeding the authority conferred by Congress. *See Guam v. Olsen*, 540 F.2d 1011

[3]More recent efforts to reconstitute Guam's political relationship with the United States have yet to bear fruit. In a 1982 plebiscite and ensuing run-off, 73% of Guam voters expressed a preference for a commonwealth arrangement. *See, e.g.*, 48 U.S.C. § 1681 (Covenant establishing commonwealth in Political union between United States and Northern Marianas Island); 105th Cong. H.R. 1056. (proposed Guam Commonwealth Act).

(9th Cir. 1976) (*en banc*) (*per curiam*), *aff'd* 431 U.S. 195 (1977).[4]

In 1984, Congress, responding to *Olsen* and other decisions, enacted legislation authorizing the Guam Legislature to create an appellate court. *See* Pub. L. 98-454 § 801 (amending 48 U.S.C. § 1424-1(a)). Proponents of that legislation described it an important step in Guam's progress toward self-government. As then-Judge Anthony M. Kennedy, representing this Circuit's Pacific Islands Committee, explained in congressional testimony supporting the measure: the "concept of a judicial link or participatory tie in Government through the courts is viewed by all of the citizens of [Guam] as being fundamental and of very great importance." *Id.* at 367.

The statute's text expresses that recognition directly, providing:

> The relationship between the courts established by the Constitution or laws of the United States and the local courts of Guam * * * 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 * * * *

48 U.S.C. § 1424-2. *See also id.* (providing for a 15-year period, during which Guam Supreme Court's may be reviewed by this Court, by writ of certiorari, and directing the Circuit Judicial Council to report, at five year intervals, to congressional

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[4]The U.S. Supreme Court's *Olsen* decision emphasized concern that the Guam legislation had extinguished entirely litigants' opportunity to have questions of federal law passed upon by an Article III Court. *See* 431 U.S. at 202-03.

committees concerning "whether [the Guam Court] has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States"); *EIE Guam Corp. v. Supreme Court of Guam*, 191 F.3d 1123 (9th Cir. 1999) (denying certiorari).

In 1993, the Guam Legislature enacted the Frank G. Lujan Memorial Court Reorganization Act, establishing the Supreme Court and conferring its appellate jurisdiction. *See* 7 G.C.A. § 3101, 3107-08; *see also id.* § 3109 (providing for gubernatorial appointment of Justices, with legislative advice and consent); *id.* § 6101 (providing for re-election to Court, after initial 10-year term). The Court held its first session in 1996.

In April 2001, the Circuit Judicial Council's Pacific Islands Committee issued the first of its statutorily-mandated reports.[5] Based on its interviews with members of the Guam Bar and with judges of each of Guam's courts, as well as its independent review of all the Supreme Court's opinions to date, the Committee concluded that the Guam Court already "'has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States,'" *id.* at 7 (quoting statutory language), and recommended that Congress shorten or eliminate the 15-year

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[5] The report is available at: http://www.justice.gov.gu/supreme/Report9thCirJudCouncil.pdf.

transition period. While noting difficulties that the Supreme Court had encountered – the most persistent involving its relationship *vis-a-vis* the Superior Court, respecting certain administrative responsibilities – the report emphasized that the Court has "done a creditable and commendable job, as far as its opinion-writing and law-declaring functions are concerned." *Id.* at 6.

4. The Instant Case. In the decision under review, the Guam Court affirmed dismissal of Respondent's indictment for violating a local narcotics prohibition, *see* 9 G.C.A § 67.89, on the ground that the conduct for which punishment was sought was integrally related to his religious observance. While recognizing both (1) that the U.S. Supreme Court no longer interprets the First Amendment's Free Exercise Clause as requiring religious exemptions from "neutral" laws of "general application," *see* 2000 WL 1299635, at *3 (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)) and (2) that application to Guam of the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb *et seq*., would also support the trial's courts judgment, the Supreme Court grounded its decision on its interpretation of § 1421b(a), the Free Exercise guarantee of the Organic Act's Bill of Rights. *See* 2000 WL 1299635, at *6 ("The approach we take is to construe Guam's Constitution, the Organic Act, and its concomitant protection of the Free Exercise of Religion,

more broadly than the U.S. Supreme Court would the federal counterpart"). The Court further explained:

> The rule which we announce today devolves from the recognition that this court sits as the highest tribunal in this jurisdiction and that Congress intends to allow Guam to develop its own institutions

Id.[6]

Summary of Argument

Affirmance of the Guam Supreme Court's decision is firmly supported by basic statutory interpretation principles, by precedent, and by broader considerations relating to Guam's history and political status within the United States.

At the outset, both the language, structure, and history of the Organic Act and this Court's precedents establish that the substantive content of the Guam Bill of Rights should not be *controlled* by the interpretations given analogous provisions of the federal constitution by the United States Supreme Court. Nothing in the statute – especially not the "same force and effect" language emphasized by the Attorney General, *see* Pet. Br. at 23-25 (citing section (u)) – need be read as imposing a ceiling

[6]Although *Amici* note that the enactment of RFRA renders even more improbable Petitioner's argument in this case – *i.e.*, that *Congress intended* to limit the freedom enjoyed by Guamanians to the narrow protection recognized in the *Smith* decision – we agree with the Supreme Court that the result it reached does not depend on RFRA's being applicable to Guam, nor do we take a position on how RFRA might apply in this or other specific situations.

on the individual liberties enjoyed by Guam's citizens, and ordinary statutory construction rules teach that the rights-conferring language of sections (a) through (t) should be given meaning *independent of* the protection provided by section (u).

In fact, the U.S. Supreme Court has itself long recognized that its decisions giving effect to federal rights are limited by considerations – such as the difficulty of framing rules of nationwide application – that exert no force when the Supreme Court of a State (or Territory) construes a textually similar provision. And State Courts, citing those same institutional differences (along with their own distinctive histories and traditions) increasingly have done what the Guam Court did here: interpreted local law as giving more full protection for individual rights than does the federal Constitution.

Under any circumstances, moreover, a decision of the Guam Supreme Court giving content to the Territory's Bill of Rights should be accorded substantial weight by this Court. Deferential review best comports with precedent, which instructs – for reasons squarely applicable here – that territorial court decisions on matters of local concern should be disturbed only when "manifestly wrong," and with Congress's clearly expressed intent that the decisions of Guam's Supreme Court be reviewed similarly to those of a State court.

ARGUMENT

I. The Guarantees of The Guam Bill of Rights Were Properly Given Independent Construction

Although the Attorney General insists that the "free exercise" language in section 1421b(a) should – or even must – be given a construction identical to the one given the First Amendment by the U.S. Supreme Court in *Smith*, *i.e.*, as imposing no limitation on "general" and "neutral" laws that interfere with (or even punish) religious practice, the text and structure of the Bill of Rights – and standard statutory construction tools – argue forcefully *against* that reading.

A. The Guarantees of Sections (a) Through (t) Should Not be Treated As "Mere Surplusage"

First, to read section (a)'s guarantee of religious free exercise as imposing no limitation apart from that imposed under the federal Constitution (and section (u)) defies the cardinal principle that a statute must be construed so that "every clause and word" is given independent effect. *See, e.g.*, *United States v. Smith*, 155 F.3d 1051, 1058 (9th Cir. 1998). If, as Petitioner proposes, the language of section (u) were construed as fusing the *entire* Guam Bill of Rights to the prevailing judicial interpretations of the first nine amendments to the federal Constitution, then most of the other rights-recognizing sections of the Bill, *see* 48 U.S.C. § 1421b(a)-(t), would be reduced to "mere surplusage." *United States v. Mehrmanesh*, 689 F.2d 822, 829

(9th Cir. 1982).

An argument much like Petitioner's here was rejected on that basis in *Guam v. Inglett,* 417 F.2d 123, 125 (9th Cir. 1969), which declined to read section (u) (including its "same force and effect" language) as imposing the Fifth Amendment grand jury indictment requirement on Guam's Courts. To do so, *Inglett* explained, would render meaningless provisions (since repealed) leaving to the Guam Legislature the decision whether to require indictment. *See Id.* (citing former § 1424(b)).

In fact, even in cases where the canon against redundancy was not separately invoked, the provisions of the Bill of Rights have been held subject to independent interpretation. Thus, in *Hammonds by Lizama v. Boonprakong*, 1983 WL 30221, *4 (D. Guam App. Div.1983), the Appellate Division explained that "48 U.S.C. § 1421b(d) embodies the Guam Organic Act's due process guarantees. These guarantees are *modeled upon but distinct from the United States Constitution's*." *Id.* (emphasis added); *Accord Virgin Islands v. Lee*, 775 F.2d 514, 520 (3rd Cir. 1985) (holding interpretation given federal Speech or Debate Clause to be "highly instructive" but "*not dispositive* as to the meaning of the legislative immunity provision for the Virgin Islands").

These decisions are an application of the more general principle that a court

should not uncritically import into one setting the gloss imposed on the same language appearing elsewhere – even if one provision indisputably was modeled on the other. *See Hall v. C&P Tel. Co.*, 793 F.2d 1354, 1355 (D.C. Cir. 1986) (holding that "an Act of Congress that applies exclusively to the District of Columbia but whose substance * * * mirrors that of [a] federal statute that applies to the nation as a whole" was subject to a different, "local" construction by the D.C. Court of Appeals); *Sumitomo Const., Co., Ltd. v. Zhong Ye, Inc.*, 1997 WL 471506 (Guam Terr. 1997) (according interpretations of federal arbitration statute "persuasive," rather than controlling, effect in construing identically-worded Guam law); *see also Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (1994) (identical wording in State Free Exercise Clause did not require State Court "to adopt and apply the *Smith* test to religious exemption cases involving the Alaska Constitution").[7]

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[7]Even if there were merit to the contention that Congress intended that the statutory phrase "free exercise of religion" be given its "constitutional" meaning, ordinary principles of statutory construction would give decisive weight to the *contemporaneous* congressional understanding – *i.e.*, that which prevailed before the abrupt doctrinal u-turn in *Smith*. *See Duncan v. Kahanamoku*, 327 U.S. 304, 316 (1946) (interpreting ambiguous language in Hawaii Organic Act with reference to "development and growth of our governmental institutions *up to the time Congress passed the Organic Act*") (emphasis supplied); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (interpreting 42 U.S.C. § 1981 anti-discrimination rule in light of the "understanding of 'race'" prevailing "when § 1981 became law in the 19th century"); *see also Michigan v. Bullock*, 475 N.W.2d 866, 872 (Mich. 1992) (looking to U.S. Supreme Court interpretation of "cruel and unusual punishments" as of 1963, *i.e.*, the year when parallel Michigan provision was adopted).

Moreover, the text and structure of the Guam Bill of Rights – and the singularity of Guam's historical experience – highlight the unwisdom of giving conclusive effect to the textual overlap between section (a) and the First Amendment. It is a settled principle that individual provisions of the Organic Act – like the individual amendments that comprise the federal Bill of Rights, *see Boyd v. United States,* 116 U.S. 633-34 (1886) – must be read in conjunction with one another, *see Guam ex rel. Guam Econ. Dev. Auth. v. United States*., 179 F.3d 630, 633 (9th Cir. 1999); *cf. Haeuser v. Guam Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996) ("The Organic Act serves the function of a constitution for Guam"), and the context in which the "free exercise" language of section (a) appears differs significantly from that which surrounds the First Amendment.

First, read as a whole, Guam's Bill of Rights is most appropriately understood as an effort to identify rights that are fundamental *in light of Guam's history and experience*. Thus, while the Bill includes the familiarly-worded section (a), it also

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But if post-enactment developments *do* have relevance, it surely must be significant that *Congress* has *at no time* embraced the narrow understanding imposed on that phrase in *Smith*. See, *e.g.*, 42 U.S.C. § 2000bb(b).

Indeed, it could be argued that the language of the Mink Amendment, directing that "all laws * * * which are inconsistent with the provisions of this sub-section are *repealed* to the extent of such inconsistency," (emphasis added) means that no statute that would not survive scrutiny under the *1968* understanding of the First Amendment may now be enforced.

includes: (1) provisions that are subtly different from federal analogues, *see* 48 U.S.C. § 1421b(n) ("No discrimination shall be made in Guam against any person on account of race, language, or religion"); (2) protections that are self-evidently broader than their federal counterparts, *see* §1421b(p) ("[n]o public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such"); *compare also id.* § 1421b(r) (guaranteeing education for all children) *with Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("education is not a 'right' granted to individuals by the Constitution"); and (3) provisions that have no federal constitutional analogue at all, *see, e.g.*, 48 § 1421b(k) ("No person shall be imprisoned for debt").[8]

Especially telling are divergences with respect to the subject matter of this case: the relationship between government and religion. Thus, Guam's Bill expressly prohibits "discrimination * * * based on religion," *Id.* § 1421(n)[9] – a

[8]At the same time, the original sections of the Guam Bill *do not* include obvious analogues for the Second Amendment, the Fifth Amendment grand jury indictment guarantee, or the Sixth and Seventh Amendment rights to trial by jury.

[9]Significantly, section (n) links religious discrimination with *language*-based discrimination, which is proscribed in a manner more explicit – and more potent – than by any federal analogue. These provisions, which were enacted in the wake of

limitation only implicit in the U.S. Constitution – and, as quoted above, its restraint on the church/state entanglement, § 1421b(p), is both more specific and more far-reaching than is the federal Establishment Clause. These textual differences, in turn, echo Guam's historical experience, which – as discussed above – includes instances both of religious imposition on government (a hallmark of Spanish rule) *and* of official interference with religious observance (*e.g.*, the Navy's targeting of Catholic practices, on the theory that a weaker Church made Guam's people more governable).

B. The Guam Supreme Court Properly Recognized The "Force and Effect" of The Federal Free Exercise Clause – As Imposing Only A Bottom Limit On Protection of Religious Freedom

Nor is it right, *see* Pet. Br. at 23-26, to read the directive that federal constitutional safeguards be given the "same force and effect" in Guam as meaning that *Smith* (and like decisions) should set an *upper limit* on Guamanian' rights.

First, that argument ignores the context in which the statutory language appears: the manifest intent of the 1968 legislation was to *enlarge* the individual freedoms of those who reside in Guam – not limit them. But just as important, as a matter of "plain language," *Smith* and other U.S. Supreme Court decisions narrowly interpreting the federal Bill of Rights ***do not*** have the "force and effect" of

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the traumatic experience of Japanese occupation, indicate a heightened sensitivity to *cultural* freedom and pluralism.

preempting the field, *i.e.*, ***precluding*** more broad recognition of individual rights in the States and Territories.[10]

To the contrary, it has long been recognized that the Supreme Court's interpretations of federal rights are informed by an understanding that individual jurisdictions may – and regularly do – provide greater protection. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 2 (1995); Brennan, *The Bill of Rights And the States: the Revival of State Constitutions as Guardians of Individual Rights,* 61 N.Y.U. L. Rev. 535 (1986) (the "Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity).

As that Court's opinions forthrightly acknowledge, the U.S. Supreme Court's interpretations of federal constitutional provisions are subject to constraints that do not operate when a State or Territorial Supreme Court construes similar guarantees. First, the U.S. Court's constructions operate as rules of nationwide application – with

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[10]There is a further interpretive embarrassment for Petitioner's "plain language" argument. By its terms, section (u) extends to Guam the *Ninth* Amendment, providing that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" – an odd platform from which to argue for an implied *limitation* on the interpretation of § 1421b(a). *See* H. R. 90-497 (noting "that the [Ninth] amendment is not now part of Guamanian law. If [section (u)] were adopted, it would extend * * * presently unidentified rights which, by subsequent judicial decision, may be identified"); *see also Downes*, 182 U.S. at 282-83 (including among "natural rights" – applicable to Territories even *without* affirmative congressional action – the right "to worship God according to the dictates of one's own conscience").

the inescapable consequence of inhibiting local policy experimentation. *See, e.g.*, *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) (resisting construction that would "pretermit * * * responsible solutions being considered" in State courts); *see generally* Hetherington, *State Economic Regulation & Substantive Due Process of Law*, 53 Nw. U. L. Rev. 226, 250 (1958) ("State courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs").

Similarly, when giving content to the broadly-phrased guarantees of the federal Bill of Rights, the Supreme Court often looks to the degree of unanimity among the States. *See Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (noting absence of "national consensus" supporting claimed constitutional right); *Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989) (explaining that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures").

The U.S. Supreme Court's interpretations are further restrained by principles of federalism and comity, *see Evans*, 514 U.S. at 30-31 (Ginsburg, J., dissenting) (observing that Court's readiness "to enforce the federal constitutional guarantees" is limited by "reluctan[ce] to intrude too deeply into areas traditionally regulated by the States" and that "[t]his aspect of federalism does not touch or concern state courts

interpreting state law"), and by the Court's recognition that legislative repudiation of its constitutional decisions is "practically impossible." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 397, 407 (1932) (Brandeis, J., dissenting).

Recognition that these constraints are at work at the federal level has supplied a central rationale for *State* decisions giving broad effect to State constitutional guarantees. *See, e.g.*, *People v. Scott*, 593 N.E.2d at 1328, 1348 (N.Y. 1992) (Kaye, J., concurring) (distinguishing between"the role of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions"); *SouthCenter Joint Venture v. National Dem. Policy Comm.*, 780 P.2d 1282, 1306 (Wash. 1989) (Utter, J., concurring) ("Federalism prevents the [U.S.] [C]ourt from adopting a rule which restricts the states from fulfilling their role as experimenters * * * a state-based jurisprudence * * * can craft a doctrine more appropriate to a state's culture, locale, and constitutional language").

That reasoning applies when the Guam Supreme Court interprets the Guam Bill of Rights. Guam decisions interpreting the Bill of Rights affect only the balance between individual liberty and governmental power within the Territory itself – and the absence of a broad consensus *within the fifty States* need not operate to inhibit giving effect *in Guam* to conceptions of individual liberty that have undeniably strong

local roots.[11]

II. The Guam Supreme Court's Interpretation Of Guam's Bill of Rights Merits Deference

Although the Guam Supreme Court's judgment could be affirmed under *any* standard of review, *see Santa Fe R. Co. v. Friday*, 232 U.S. 694, 700 (1914) (sustaining territorial court judgment that was "plainly right"), the decision in this case – limiting application of a local statute in light of a religious freedom guarantee applicable only to Guam – is the sort that should be approached with substantial deference, under any circumstances.

A. This Case Falls Within The Traditional Justification for Deferring To Territorial Supreme Courts

For more than a century, the U.S. Supreme Court's decisions have given substantial weight to the judgments of territorial courts on matters of local concern, declining to overrule them absent "clear," "manifest," or "patent" error, *De Castro v. Board of Comm'rs*, 322 U.S. 451, 454 (1944); *see, e.g.*, *Sweeney v. Lomme*, 89 U.S. 208, 213 (1874); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 339 n.6 (1976); *see also Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (District of

[11]The Guam Court is also popularly accountable in ways that the U.S. Supreme Court plainly is not. *See* 7 G.C.A. § 6101 (establishing limited terms and providing for re-election of Justices by popular vote); *id.* § 3109 (Justices are appointed by Governor, with legislative advice and consent).

Columbia), and this Court has followed the same approach in the overwhelming majority of its decisions, *See King v. Smith*, 250 F. 145, 147 (9th Cir. 1918); *Camacho v. Civil Serv. Comm'n*, 666 F.2d 1257, 1260 (9th Cir. 1982).[12]

The Supreme Court has articulated three principal reasons for this approach. The first is intimately connected with the rationale for sustaining the legality of administering "unincorporated" United States territories in the first place: recognition of their cultural and historical distinctiveness. *See Dorr v. United States*, 195 U.S. 138, 148 (1904) (territories should not be "coerced to accept, in advance of incorporation into the United States, a system of trial unknown to [their residents] and unsuited to their needs"); *cf. Commonwealth of N. Mariana Islands v. Atalig,* 723 F.2d 682, 690 (9th Cir. 1984) ("The *Insular Cases* acknowledged that traditional Anglo-American procedures * * * might be inappropriate in territories having cultures, traditions and institutions different from our own").

A related basis for deference is the unfamiliarity of the Mainland bench and bar

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[12]To the extent that this Court's decisions present a less straight line than those of the Supreme Court, *compare King with Carscadden v. Territory of Alaska*, 105 F.2d 377, 384-85 (9th Cir. 1939) (declining to defer to Alaska Court), that pattern likely reflects both the wider variety of situations with which this Court has been confronted and the difficulty inherent in applying a doctrine grounded on the ambivalent observation that territories are "foreign to the United States in a domestic sense." *Downes*, 244 U.S. at 341; *see id.* at 372 (Harlan, J, dissenting) (likening unincorporated status to "an intermediate state of ambiguous existence").

with these cultural and legal traditions. Thus, in *Diaz v. Gonzalez*, 261 U.S. 102, 107-08 (1923), the Court explained the need for caution when an appellate court is "dealing with the decisions of a Court inheriting * * * a different system from that which prevails here." *Id.* While Mainland judges' "local education may lead us to see subordinations to which we are accustomed," Justice Holmes continued, to a jurist "brought up within [the territorial legal tradition], varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books." *Id.*[13]

Finally, deferential review has long been understood as fostering traditions and institutions of self-government. Just as the Supreme Court's refusal to review State Courts' interpretations of State law, *see Murdock v. City of Memphis*, 87 U.S. 590, 626 (1867), is rooted in respect for their autonomy, the policy of limiting review to instances of "manifest error" has been explained as furthering Congress's intent that the territories develop similar institutions and capacities of self-government. *See* Del Valle, *"Puerto Rico Before the United States Supreme Court,"* 19 Rev. Jur. Univ.

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[13]Before Guam had developed its court system, the U.S. Attorney General concluded that decisions of the naval governor deserved deference for similar reasons. *See* 25 Opp. Atty. Gen. 61 (1903) ("in that distant and little known island, the President could not do otherwise than leave [the governor] a large discretion, and his acts should not be held void strictly on technical reasoning").

Interamer. P. R. 13, 16-17 (1984) (Puerto Rico's "economic, social and cultural development has been intimately associated with its legal development and ability to exercise insular sovereignty over matters of local concern. To the extent that the U.S. Supreme Court has fostered the exercise of these prerogatives it has thereby insured an indicia of self-determination. Its doctrines have provided a means through which the people of Puerto Rico could continue to advance their freedom, further their development, maintain their territorial integrity, and exercise their sovereignty").

These reasons all support deference here. First, to the extent that Guam's Bill of Rights is to be interpreted in light of Territory-specific traditions of liberty, there can be no doubt that the Supreme Court – which is located on-Island, whose Justices are locally appointed, and whose jurisdiction has been determined by the Guam Legislature, is uniquely well-positioned to judge. Moreover, although Guam's status remains that of "unincorporated" territory, Congress has pursued an unmistakable, consistent policy of promoting increased self-government. *See* H.R. Rep. 90-1521 (explaining that additional powers have been extended "commensurate with [Guam's People's] proven capacities and indications of mature judgment"); *cf. Olsen*, 431 U.S. at 206 (Marshall, J., dissenting) (noting that "Congress' sense of the proper way to govern far-distant citizens has changed considerably * * * from the expansionist ethic which prevailed when [Guam was] * * * ceded"), and both Congress and the Guam

Legislature have viewed establishment of a Supreme Court as a real and substantial step in that direction. *See EIE*, 191 F.3d at 1127 (acknowledging"Congress's intent to allow Guam to develop its own, independent institutions"); *see also Olsen*, 540 F.2d at 1012 ("We recognize that Guam's [1974] Court Reorganization Act was drawn to give expression to a strong desire by the territorial legislature for a greater degree of autonomy and self-government").

Indeed, establishment of a local appellate court was the very development that the U.S. Supreme Court treated as triggering deferential review in *Pernell*. *See* 416 U.S. at 367 (inferring from congressional intent that "'the District * * * have a court system comparable to those of the states'" that review should be deferential). In fact, the most salient difference between this case and that one, is that here, the directive to treat the Court like a State Supreme Court was enacted into law, *see* 48 U.S.C. § 1424-2, whereas in *Pernell* it appeared only in legislative history. *See* 416 U.S. at 367 (quoting H.R. Rep. No. 91-907).[14]

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[14]This Court's 1988 decision in *Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988) (*en banc*), holding that decisions of the Appellate Division of the Guam District Court should be reviewed *de novo*, poses no continuing barrier to appropriately deferential review. *Yang*'s reasons for rejecting deference – (1) that the federally-appointed Appellate Division, with only one judge from Guam, had a weak claim to special familiarity with local conditions, 850 F.2d at 510, and (2) that decisions of similar courts in Guam and the Virgin Islands should be reviewed similarly, *id.* (citing *de novo* review in *Saludes v. Ramos*, 744 F.2d 992 (3rd Cir. 1984)) – no longer apply. Since *Yang* was decided, Guam has created a local Supreme Court, for which there

B. Congressional Enactment Does Not Rule Out Deferential Review

In the face of the many compelling reasons for deference, the Attorney General has offered variations on a single theme: that the understanding of the Guam Supreme Court should carry no special weight with this Court – because the Organic Act is "federal law." But that point cannot do the work Petitioner needs it to. First, the long tradition of limited federal review discussed above developed in full awareness of the reality that *all* legal questions that arise from Guam – and other U.S. territories – are "federal," in the sense that, under governing legal principles, local institutions of government are the "creatures" of Congress and their decisions, subject to plenary congressional reconsideration. *See EIE*, 191 F.3d at 1125.

Nor can the fact that the Bill of Rights was enacted by Congress foreclose an interpretive role for the Guam Court. In *Pernell*, the Supreme Court specifically refused to confine its traditional, deferential review to locally-enacted laws, instead holding it applicable to "*Acts of Congress* directed toward the local jurisdiction," 416 U.S. at 367 (emphasis added) – and other decisions similarly instruct that congressional enactment alone does not make a statute a "law of the United States" for all purposes, *see, e.g.*, *American Security & Trust Co. v. Dist. of Columbia*, 224

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is no Virgin Islands analogue, *compare Saludes*, 744 F.2d at 994 (rejecting deference because Virgin Islands has "no separate, insular judicial system").

U.S. 491 (1912). To similar effect is *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543 (1940), a case concerning the power of Puerto Rico's territorial government to effectuate a provision of its Organic Act barring ownership of more than 500 acres of land. Because that part of the Organic Act was one "peculiarly concerned with local policy," *Hermanos* held, it was not "one of 'the laws of the United States'" for jurisdictional purposes. *Cf. Milne v. Hillblom*, 165 F. 3d 733, 737 (9th Cir. 1999) ("not every case which somehow implicates the [Northern Marianas] Covenant is necessarily a case arising under federal law").[15]

Against this background, Petitioner cannot convincingly argue that the Bill of Rights provision should be treated as a garden-variety "federal statute" – rather than one addressing matters of "local concern." First, as the term itself suggests, an organic act, like a Constitution, is a "living document" (indeed, Petitioner, whose substantive argument depends on skipping over the actual intent of the enacting Congress – and instead construing the statute according to a Supreme Court decision issued *four decades later* – is in no position to contend otherwise).

And even among the various components of the Organic Act, the Bill of Rights stands out: unlike other provisions, which might plausibly be described as balancing

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[15] In *Granville Smith v. Granville Smith*, 349 U.S. 1 (1955), the Supreme Court applied the obverse of the proposition, rejecting a liberal divorce law enacted by the Virgin Islands legislature on the ground that its effects were not truly "local").

national against local interests, *see, e.g.*, 48 U.S.C. § 1424k (federal power to designate military and naval reservations); *id.* § 1421q (applicability of certain federal benefits programs), the very purpose of the Bill of Rights is to assure that fundamental conceptions of liberty are given effect within Guam. *See Hermanos,* 309 U.S. at 550 (Organic Act provision at issue was "not designed for the protection of policies having general application throughout the United States"). In fact, even if it is accepted that the Bill, when first drafted, represented *Congress's* best understanding of what was "fundamental" in Guam, there is no reason why the input of Guam's own institutions should now be considered irrelevant to the interpretive task. Indeed, there is every reason why they should play a predominant role.

Nor, finally, is Petitioner right that this case involves matters of more than "local concern," in the relevant sense. By its terms, the Guam Court's decision pertains only to the relationship between Guam's residents and their local government. To the extent the United States has a *national* interest in combating marijuana "importation," *see* Pet. Br. at 19, its enforcement of its own laws *cannot* be affected by the Organic Act, *see, e.g.*, *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985) (right under Puerto Rico Constitution does not impair federal prosecution); *United States v. Perez*, 776 F.2d 797 (9th Cir. 1985) (federal drug laws

apply to Guam).[16]

Finally, while it may be true that the decision in this case is not as readily responded to by local legislation as was that in *EIE*, *see* Pet. Br. at 18-20, that is not an argument for shifting authority *from the Guam Supreme Court to this Court.* To the contrary, an unwelcome decision of this tribunal is no more susceptible to local legislative overruling than is a decision of the Guam Supreme Court – and that Court is, in myriad ways, more responsive and accountable to the People of Guam than this one is or should be.[17]

Conclusion

For the foregoing reasons, the decision of the Guam Supreme Court should be affirmed.

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[16]Of course, any hypothetical application of national law would have to be reconciled with the mandates of RFRA.

[17]Although a decision applying the Organic Act may limit the power of the legislature in a way that other constructions of local law do not, Petitioner is too quick to equate legislative supremacy with self-government. *See Note: Over-Protective Jurisdiction?: a State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948 (1989) (explaining that "adjudication is itself a form of self-government* * * * because the judiciary is best equipped to elaborate a coherent narrative account of the political community's legal norms").

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