IN THE SUPREME COURT OF GUAM

In re: PAT N. DUQUE, PONCIANO E. ELGARICO, ARNOLD E. DAVIS, JR., THOMAS E. SHELDON, and ARMANDO S. DOMINGUEZ,
Petitioners,

v.

SUPERIOR COURT OF GUAM,
Respondent,

CANDELARIA TAITANO RIOS, individually and on behalf of all those similarly situated,

and

FELIX P. CAMACHO, Governor of Guam, **LOURDES PEREZ,** Director of Administration, **ROSITA FEJERAN,** Ass't Treasurer of Guam, **PAULA M. BLAS,** Acting Director of Guam Retirement Fund, and **JOE T. SAN AGUSTIN, DR. WILFRED P. LEON GUERRERO, JAMES J. TAYLOR, Ph.D., KATHERINE T.E. TAITANO, GEORGE SANTOS, ANTHONY C. BLAZ, GERARD A. CRUZ,** in their capacity as members of the Board of Trustees of the Government of Guam Retirement Fund,
Real Parties in Interest.

Supreme Court Case No.: WRP07-001
Superior Court Case No.: SP0206-93

OPINION

Cite as: 2007 Guam 15

Heard on October 26, 2007
Hagåtña, Guam

For Petitioners:
Robert J. O'Connor, *Esq.*
Berman O'Connor & Mann
503 Bank of Guam Bldg.
111 Chalan Santo Papa
Hagåtña, GU 96910

For Respondent Superior Court:
B. Ann Keith, *Esq.*
Staff Attorney
Superior Court of Guam
120 W. O'Brien Dr.
Hagåtña, GU 96910

For Respondent-Real Party in Interest Rios:
Michael F. Phillps., *Esq.*
Phillips & Bordallo, P.C.
410 W. O'Brien Dr. Ste. 102
Hagåtña, GU 96910

For Real Party in Interest Camacho, Perez, Fejeran:
Shannon J. Taitano-Lujan, *Esq.*
Legal Counsel
Office of the Governor
Ricardo J. Bordallo Governor's Complex
Adelup, GU 96918

Eduardo A. Calvo, *Esq.*
Calvo & Clark, LLP
655 S. Marine Dr. Ste. 202
Tamuning, GU 96911

For Real Party in Interest Blas and Retirement Fund:
David W. Dooley, *Esq.*
Dooley, Roberts & Fowler, LLP
865 S. Marine Dr. Ste 201
Tamuning, GU 96911

Alicia A.G. Limtiaco, *Esq.*
Attorney General
Office of the Attorney General
287 W. O'Brien Dr.
Hagåtña, GU 96910

BEFORE: RICHARD H. BENSON, Presiding Justice *Pro Tempore*; MIGUEL S. DEMAPAN, Justice *Pro Tempore*; JOHN A. MANGLONA, Justice *Pro Tempore*.[1]

BENSON, J.:

[1] Petitioners Pat N. Duque, Ponciano E. Elgarico, Arnold E. Davis, Jr., Thomas E. Sheldon, and Armando S. Dominguez (collectively "Petitioners") invoked the original jurisdiction of this court, and sought a writ of prohibition to order Respondent Superior Court of Guam to prevent the trial court judge from presiding over the proceedings in the Superior Court and to reassign the case a new judge, or alternatively to order the issue of the trial court judge's disqualification be assigned to another judge. This court issued an Alternative Writ of Prohibition on October 3, 2007, which, *inter alia*, prohibited the assigned judge from presiding over further proceedings in the case.

[2] We hold that Petitioners have a plain, speedy and adequate remedy in the ordinary course of the law, and accordingly, we discharge the Alternative Writ of Prohibition issued on October 3, 2007.

I.

[3] The underlying case, *Rios v. Camacho* ("the COLA case"), Superior Court Case No. SP0206-93, is a class action brought in 1993 by Candelaria Taitano Rios ("Rios"), individually and as class representative on behalf of eligible Government of Guam retirees. The COLA case sought mandamus relief for the non-payment of the cost of living allowance ("COLA") provided

[1] On April 19, 2007, Chief Justice F. Philip Carbullido and Associate Justice Robert J. Torres, Jr., filed statements of recusal disclosing the reasons for their recusal. Because all the parties did not waive the disclosed conflict, Chief Justice Carbullido and Justice Torres were recused from the case. On April 23, 2007, Chief Justice Carbullido, citing the Rule of Necessity, appointed the Hon. Richard H. Benson as Presiding Justice *Pro Tempore* in the matter.

by 4 GCA § 8137.1, which was repealed in 1995.[2] Summary judgment was denied on January 19, 1994, and the trial court upheld the validity of section 8137.1 and payment of COLA. *See* Candelaria T. Rios & COLA Class Mem. of P. & A. in Opp'n to Writ of Prohibition ("Rios Mem."), Ex. J (Decision & Order, Jan. 19, 1994). In 2005, the COLA case was assigned to Superior Court Judge Arthur R. Barcinas, who thereafter presided over the trial conducted in 2006. The parties ultimately entered into a stipulated judgment on November 21, 2006. Rios Mem., Ex. A (Stipulation & Order, Nov. 21, 2006); Ex. B (Judgment, Nov. 21, 2006). The Stipulation and Order stated that "all parties waive their rights to appeal or further request reconsideration of previous Court Orders." Rios Mem., Ex. A (Stip, & Order).

[4] On February 12, 2007, Petitioners filed an Objection to Competency of Judge Pursuant to 7 G.C.A. § 6107 in the Superior Court case, seeking to disqualify Judge Barcinas for a conflict of interest because his father is a member of the Plaintiff Class in the class action.[3] At the same time, Petitioners filed a Motion to Intervene in the COLA case pursuant to Rule 24 (a) and (b) of the Guam Rules of Civil Procedure, in order to: 1) set aside the judgment and all orders entered

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[2] Title 4 GCA § 8137.1 was enacted by Guam Public Law 19-19:

> **Section 57.** A new 4 GCA § 8137.1 is added to read:
>
> "**§8137.1. Annual Cost of Living Allowance.** Annually, on the first retirement payday after July 1 of each year, each person entitled to receive a benefit under this Chapter shall receive, in addition to any other adjustment to which such person may be entitled under this Chapter, an annual lump sum cost of living allowance paid out of the General Fund and administered by the Retirement Fund, to be computed by multiplying the entitled benefit times the rate of inflation based on the cost of living index computed annually by the Department of Commerce pursuant to Subsection (f) of §47060 of the Government Code. The base year used in these computations shall be calendar year 1988. The right to this cost of living allowance shall be deemed not to be a vested right of the members of the Retirement Fund. The money necessary to fund this section shall be automatically appropriated from the General Fund on an annual basis as required, unless later amended."

Guam Pub. L. 19-019:57 (Aug. 22, 1988). This provision was repealed in 1995. Guam Pub. L. 23:-045:IV:7 (Oct. 18, 1995).

[3] Petitioners later alleged that Judge Barcinas's mother is also a member of the COLA class. Pet., p. 3 (April. 13, 2007).

by Judge Barcinas, and to disqualify him on the ground of his conflict of interest; and 2) assert, as a cross-claim, a taxpayer action to enjoin payment of funds to COLA class on the terms set forth in the judgment Judge Barcinas entered, and to recover the funds for the Government of Guam. Judge Barcinas denied the Objection to Competency, stating that Petitioners were not parties to the proceeding and thus the objection to competency was "not yet properly before the Court." Petition for Writ of Prohibition ("Petition"), Ex. D (Order, Mar. 19, 2007).

[5] On April 13, 2007, Petitioners filed the instant Petition, requesting this court to issue a writ "to prohibit any further participation by Judge Barcinas in this matter, and to require a new judge be appointed for all further proceedings in the case" or to require "that the issue of Judge Barcinas' disqualification be assigned to another judge before he takes any further action in the case, including hearing and/or ruling upon the Motion to Intervene, now scheduled for hearing on April 20, 2007." Petition, pp. 6-7 (Apr. 13, 2007).

[6] This court issued an Alternative Writ of Prohibition on October 3, 2007, which commanded the court to:

> [I]mmediately on the receipt of this writ, to prohibit Superior Court Judge Arthur R. Barcinas from presiding over further proceedings in Superior Court Case No. SP0206-93 ("the COLA case"), and to show cause before this court . . . why Judge Barcinas should not be absolutely restrained from any further proceedings in the COLA case, and why the COLA case should not be referred to another judge to decide the disqualification issue and the intervention motion.
>
> The Respondent herein and the Real Parties in Interest, may file and serve a written return on or before Friday, October 12, 2007.
>
> FURTHERMORE, the Petitioners and the Respondent herein, and all parties in interest may file memoranda addressing the following issue: Whether making the writ permanent would be futile because [of] the relief sought by Petitioners herein; specifically, grant of the motion to intervene and objection to competency, may not be available.

Alternative Writ of Prohibition, p. 2 (Oct. 3, 2007). Present at the show cause hearing on October 26, 2007, were Attorney Robert J. O'Conner for Petitioners; Attorney Michael F. Phillips for Rios and the Plaintiff COLA class; and Attorney B. Ann Keith for Respondent Superior Court.

II.

[7] The Supreme Court has "jurisdiction of original proceedings for . . . prohibition" pursuant to 7 GCA § 3107(b) (2005).

III.

[8] Before addressing the merits of the Petition, this court must first examine whether writ relief is appropriate or necessary. *See People v. Super. Ct. (Quint)*, 1997 Guam 7 ¶ 7. We have required "the petitioning party to bear the burden of justifying the issuance of a writ." *Id.* This burden is well established. *See, e.g., DeGeorge v. United States Dist. Ct.*, 219 F.3d 930, 934 (9th Cir. 2000) (stating that the "petitioner has the burden to establish 'that its right to issuance of the writ is clear and indisputable.'") (quoting *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 384 (1953)). Furthermore, we remain cognizant that "[w]hether the issuance of an extraordinary writ is the appropriate remedy lies in the discretion of the court." *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 5.

[9] "The writ of prohibition . . . . arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." 7 GCA § 31301 (2005). Petitioners request this court to either prohibit Judge Barcinas from participating in the case and order the appointment of a new judge, or order that the disqualification issue be assigned to another judge.

[10] A writ of prohibition "may be issued by any court except police or commissioner's courts, to an inferior tribunal . . . in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested." 7 GCA § 31302 (2005).

[11] Clearly, Petitioners have satisfied certain statutory requirements. The Superior Court is an "inferior tribunal" with regard to the Supreme Court. 7 GCA § 3102 (2005) ("The Supreme Court of Guam shall be the highest court of Guam."). Petitioners filed a verified petition in this court on April 13, 2007. In addition, Guam law imposes three requirements to issue a writ of prohibition:

> (1) proceedings without or in excess of a tribunal's jurisdiction; (2) petitioner is without a plain, speedy, and adequate remedy at law; and (3) petitioner is a beneficially interested party. 7 GCA §§ 31301, 31302. Because Guam's statute is derived from the California Code of Civil Procedure, we look to the substantial precedent developed within that state to assist in interpreting parallel Guam provisions.

Laxamana, 2001 Guam 26 ¶ 8 (footnote omitted).

[12] We need only address whether Petitioners have "a plain, speedy, and adequate remedy in the ordinary course of law," because we believe this issue is dispositive. 7 GCA § 31302. We recognize that Petitioners bear the burden of showing there is no such remedy. *See Phelan v. Super. Ct.*, 217 P.2d 951, 953 (Cal. 1950); *see also Agric. Servs., Inc. v. City of Gooding*, 818 P.2d 331, 334 (Idaho Ct. App. 1991) ("The party seeking the writ must prove that no such remedy exists."). Yet, in their October 22, 2007 memorandum, and during the show cause hearing, Petitioners conceded that they could have filed a separate taxpayer action pursuant to 5 GCA § 7103 and sought an injunction against paying out the COLA judgment. Petitioners nonetheless argued that they chose to join an existing suit where the important parties were already involved, and to intervene in the instant litigation rather than institute a new lawsuit.

Because Petitioners have "a plain, speedy, and adequate remedy in the ordinary course of law," the previously issued writ of prohibition must be discharged.

[13] Our holding is guided by *Murphy v. Bantel*, 91 P. 805 (Cal. Dist. Ct. App. 1907), where a taxpayer requested a writ of prohibition to prevent a county treasurer from paying a bill, despite a court order that such bill be paid. *Id.* at 805. The court recognized that a writ of prohibition would not issue:

> even if it be conceded that the bill is illegal or not authorized by law. *In such case the taxpayer has a remedy by proceeding in the superior court under the process of injunction to restrain the payment.* This remedy is one of frequent occurrence in our courts; but we know of no practice authorizing any court to prohibit the payment of a claim, except by injunction, even although the claim may be illegal.

Id. at 806 (emphasis added). The same remedy exists for Petitioners here. Petitioners may, pursuant to 5 GCA § 7103, institute a taxpayer lawsuit in the Superior Court and request an injunction to prohibit payment of the COLA judgment in that proceeding.

[14] Other jurisdictions, including South Dakota, Idaho and Washington, have enacted laws that define a writ of prohibition with language identical to Guam and California. Furthermore, courts in these states have concluded, like California in *Murphy*, that an injunction presents an alternative remedy that precludes issuance of a writ of prohibition.

[15] For example, South Dakota law similarly "provides that the writ of prohibition may be issued where there is not a plain, speedy, and adequate remedy in the ordinary course of law." *Gilmore v. Sandy*, 209 N.W. 342, 342 (S.D. 1926). In *Gilmore*, a taxpayer brought an action against the district school board "to prevent the issuance of bonds . . . and to prevent the levy of taxes to retire such bonds." *Id.* The South Dakota Supreme Court held that the existence of injunctive relief precluded issuance of a writ of prohibition: "Without considering whether the facts alleged in the complaint would authorize the granting of a writ of prohibition, it is clear that

they would, if proven, authorize injunctive relief, and that such relief would be adequate. *That being the case, the extraordinary writ of prohibition may not be resorted to.*" *Id.* (emphasis added); *see also H & W Contracting, LLC v. City of Watertown*, 633 N.W.2d 167, 176 (S.D. 2001) (citing with approval *Gilmore v. Sandy* for the proposition that prohibition was denied because injunctive relief was available and adequate).

[16] Idaho similarly provides that a writ of prohibition "may be issued by the Supreme court . . . to an inferior tribunal . . . where there is not a plain, speedy and adequate remedy in the ordinary course of law." Idaho Code § 7-402 (West, Westlaw through 2007). In *Agricultural Services, Inc. v. City of Gooding*, 818 P.2d 331 (Idaho Ct. App. 1991), an Idaho appellate court vacated the trial court's issuance of a writ of prohibition that prevented the city from going forward with a construction contract, holding that there was an adequate remedy of seeking a declaratory judgment under Idaho statute, and the party "could have requested the issuance of a preliminary injunction or restraining order." *Id.* at 332.

[17] Finally, Washington law provides for a writ "when that tribunal is acting without or in excess of its jurisdiction and there is no plain, speedy, and adequate remedy in the ordinary course of law." *State ex rel. O'Brien v. Police Ct.*, 128 P.2d 332, 355 (Wash. 1942). In *County of Spokane v. Local 1553, Am. Fed'n of State, County & Muni. Employees*, 888 P.2d 735 (Wash. Ct. App. 1995), the court recognized that the party seeking the writ "ha[d] not shown that injunctive relief would not have been speedy and adequate." *Id.* at 740. Because an alternative remedy existed, it was not an abuse of discretion to deny prohibition. *Id.*

[18] Statutes in South Dakota, Idaho and Washington have identical language to Guam in defining a writ of prohibition, and courts in these states have interpreted a "plain, speedy, and adequate remedy in the ordinary course of the law" as including both legal and equitable

remedies.

> It is required that an applicant for a writ of prohibition must show that he or she has no "plain, speedy and adequate remedy in the ordinary course of law" available to them. If there is another "plain, speedy and adequate" remedy *at law or in equity*, equally available to an applicant, this Court has held it will not issue a writ of prohibition.

Cummings v. Mickelson, 495 N.W.2d 493, 495 (S.D. 1993) (citations omitted, emphasis added). Idaho has also concluded that either legal and equitable remedies are sufficient to preclude prohibition. "Our Supreme Court continues to adhere strictly to the principle that the extraordinary writs of prohibition and mandamus are not available where an adequate remedy exists in the ordinary course of law, *either legal or equitable*." *Agric. Servs.*, 818 P.2d at 333-34 (emphasis added). The Washington Supreme Court concluded that its inquiry was whether there was an "absence of a plain, speedy, and adequate remedy *in the ordinary course of legal procedure*." *O'Brien*, 128 P.2d at 335 (emphasis added).

[19] Furthermore, simply because the alternative remedy may be more time consuming or less convenient does not require issuance of prohibition. The Supreme Court of California recognized this in *Agassiz v. Superior Court*, 27 P. 49 (Cal. 1891), when it held: "A remedy does not fail to be speedy and adequate because, by pursuing it through the 'ordinary course of law,' more time would probably be consumed than in the proceeding here sought to be used." *Id.* at 50. The court reaffirmed this holding more than fifty years later, and held: "A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition." *Rescue Army v. Muni. Ct.*, 171 P.2d 8, 12 (Cal. 1946); *see also Mitchell v. Super. Ct.*, 219 P.2d 861, 862 (Cal. Dist. Ct. App. 1950) (rejecting argument that the alternative remedy was inadequate because it "will take time and cost money"). Other jurisdictions with similar

statutory language are in accord. *See, e.g., O'Brien*, 128 P.2d at 336 ("A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship."); *Natatorium Co. v. Erb*, 200 P. 348, 350 (Idaho 1921) ("The adequacy of the remedy by appeal does not depend upon mere delay, expense, or inconvenience.").

[20] The *Agassiz* court further explained the reasons supporting the strict construction of the elements of a writ of prohibition:

> Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress; and it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law.

27 P. at 50 (citation omitted). Here, Petitioners acknowledged that Guam law provides for a taxpayer action under 5 GCA § 7103.[4] Petitioners would be able to seek an injunction in that proceeding. Moreover, if the request for an injunction is denied, Petitioners could then appeal such denial to this court, as an appeal "may be taken . . . [f]rom an order . . . refusing to grant or dissolve an injunction." 7 GCA § 25102(f) (2005); *see also State ex rel. Thatcher v. Dist. Ct.*, 149 P. 178, 179 (Nev. 1915) ("An order refusing to set aside the injunction becomes at once appealable in advance of the trial upon the merits."). Thus, "there is a right to an immediate review by appeal, [and] that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case." *Phelan*, 217 P.2d at 955.

[4] Assuming, *arguendo*, that Petitioners filed such an action, they would not need to prove they were entitled to intervene; they would be parties to the action. Further, the case may likely be brought to another judge, and thus, Petitioners would have precisely what they sought – another judge reviewing Judge Barcinas' competency to hear the COLA case.

Petitioners argued only that the avenue of relief they chose, of intervention and filing the instant writ of mandamus, was instituted for the sake of convenience, rather than that the alternative remedy was inadequate.

IV.

[21] We hold that Petitioners have not met their burden of showing the absence of "a plain, speedy, and adequate remedy in the ordinary course of the law" and therefore, have not satisfied their burden of justifying issuance of the writ. *Quint*, 1997 Guam 7 ¶ 7. We hold that the case is not appropriate for the extraordinary remedy of a writ of prohibition; therefore, the Alternative Writ of Prohibition issued on October 3, 2007, is hereby **DISCHARGED.**

MIGUEL S. DEMAPAN

MIGUEL S. DEMAPAN
Justice *Pro Tempore*

RICHARD H. BENSON

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Presiding Justice *Pro Tempore*

MANGLONA, J., concurring:

[22] I agree with the majority that Petitioners here have failed to show the absence of a plain, speedy, and adequate remedy in the ordinary course of the law. I write in concurrence, however, because the majority opinion may have the unintended effect of encouraging Petitioners to continue their legal efforts. In contrast to the majority's approach, I would have addressed the effect of the *COLA Relief Act*, Guam Public Law 29-18, on the remedies now available to Petitioners.

[23] The *COLA Relief Act* creates a statutory mandate to implement the settlement agreement, by enacting a new subsection (d) to 5 GCA § 6404 which provides:

> **(d) Certificates Authorized for COLA Settlement.** (1) The Government of Guam shall finally and permanently implement the settlement agreement entered into between the Government of Guam and the COLA Class as ordered by the Judgment in Rios v. Camacho. . . . *I Liheslatura* acknowledges, adopts, and affirms the government's obligation to immediately pay all monies due and ordered by said Judgment and the Stipulation and Order of November 21, 2006.

Guam Pub. L. 29-18:2 (Sept. 24, 2007). The *COLA Relief Act* incorporates by reference the Superior Court judgment in *Rios v. Camacho*, Superior Court Case No. SP206-93, and the settlement therein is now statutory law. The Legislature has expressed in very clear terms its intention to implement the COLA settlement agreement, stating that "[t]he government of Guam is obligated to pay each member of the successful class of COLA Awardees in Rios v. Camacho, Superior Court Case No. SP206-93." Guam Pub. L. 29-18:1 (Sept. 24, 2007). Unless Petitioners can point out a constitutional or organic deficiency on the face of the agreement itself, this Court cannot now disturb that agreement. Indeed, even if Petitioners were successful in vacating the lower court judgment and obtaining a smaller one, they would still have to convince the legislature to agree to the smaller judgment by repealing 5 GCA § 6404(d).

[24] That the source of section 6404(d) is a potentially flawed judgment of the Superior Court is of no consequence now that the settlement is implemented by statute. Even if Judge Barcinas' parents had penned the settlement themselves, that would not, of itself, void the legitimate act of the legislature in agreeing to pay it. Generally, the judiciary does not insert itself into the legislative process and question the source of a given law. *Stilp v. Commonwealth*, 905 A.2d 918, 952 (Pa. 2006) ("When a challenge is forwarded concerning the process by which legislation is enacted, rather than the substance of the legislation, concerns of comity and separation of powers between the branches necessarily arise. . . . [T]his Court takes seriously its responsibility as a coordinate and equal branch of government, while showing a measure of appropriate deference to the legislative branch when it comes to matters affecting the mechanics of bills and the legislative process."). Instead, our power lies only in review of the final product, that is, the public laws duly enacted by our legislature. *See Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). Because the legislature has broad powers to appropriate funds for the payment of the government's obligations under the Organic Act, section 6404(d) will remain law even if the underlying judgment is eventually vacated. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 38 ("[P]ursuant to the Organic Acts, the Legislature has plenary or absolute power over appropriations[.]" (quotations omitted)).

[25] Furthermore, I believe that other legislative enactments underscore the legislature's intent to implement the COLA settlement agreement. In Public Law 28-151, the legislature authorized the Governor of Guam to use certain executive branch accounts "for the purpose of making payments for the Cost of Living Adjustment to government of Guam retirees as set forth in *Rios v. Camacho, et al.*, Superior Court Case No. SP206-93 . . . ." Guam Pub. L. 28-151:1 (Oct. 31, 2006). Recently, despite the Governor's veto, the legislature passed by override vote Public Law

29-04, which states that "the Government of Guam, pursuant to Rios v. Camacho, Superior Court Case No. SP206-93, relative to Cost of Living Allowances, owes the prevailing parties a judgment . . . . Therefore, *I Liheslatura* will honor the government's commitment to pay COLA awards by assigning the Ten Million Dollars ($10,000,000) promissory note from the GTA sale proceeds for immediate partial payment to the COLA class." Guam Pub. L. 29-04:1 (Sept. 6, 2007).

[26] I would suggest that Petitioners are battling windmills in attempting to repeal statutes by vacating a lower court judgment. The proper method of repealing the statutes at issue here is not by instituting further litigation, but rather, by seeking legislative relief. Because I agree with the majority's position, and because I believe Petitioners cannot obtain the remedy they seek from the judiciary, I concur.

JOHN A. MANGLONA

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Justice *Pro Tempore*