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The attached is an amended/corrected amicus brief that was filed on behalf of Anne Perez Hattori. Although we didn't formally coordinate efforts and although Julian makes different points that I do (or maybe because of it), this brief dovetails nicely with what I'll be filing today. Plus, it's a very pleasurable read.
~Rob

Robert M. Weinberg
Assistant Attorney General
Office of the Attorney General
590 S. Marine Corps Drive
Suite 706, ITC Building
Tamuning, Guam 96913
(671) 687-7720 (cell)

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155 Hesler Place, Suite 201, Hagatna, Guam 96910
Tel: (671) 472-3586 Fax: (671) 472-3589
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15199

ARNOLD DAVIS,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v

GUAM, GUAM ELECTION COMMISSION, ALICE M. TAIJERON, MARTH C. RUTH, JOSEPH F. MESA, JOHNNY P. TAITANO, LEONARDO M. RAPADAS,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF AMICUS CURIAE OF
ANNE PEREZ HATTORI
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

JULIAN AGUON, *Esq*.
Law Office of Julian Aguon
GCIC Building, Suite 500H
414 West Soledad Ave.
Hagåtña, GU 96910
Telephone: (671) 477-4826

Counsel for Amicus Curiae
Anne Perez Hattori

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Anne Perez Hattori ("Hattori") is a resident of Guam who satisfies the challenged Guam statutory definition of a "Native Inhabitant of Guam" by virtue of being a lineal descendant of a pre-1950 resident of Guam who gained U.S. citizenship through operation of the Guam Organic Act.[1] Thus, Hattori has a direct and concrete personal interest in whatever outcome, if any, is reached in this case. Agreeing, the U.S. District Court of Guam below granted Hattori's Motion for Leave to File Brief as *Amicus Curiae* in Support of Defendants' Motion to Dismiss. Further, it is Hattori—and not the parties in this case—who raised the issue of ripeness for the first time in the proceedings below. Further still, Hattori, via counsel, participated in oral argument below by leave of court.

Hattori submits this brief in an effort to assist this Court in more fully examining not only the dispositive issue of ripeness in this case, but also the complex constitutional law issues implicated by the same.

INTRODUCTION

This case is a wolf in sheep's clothing. Though deceptively styled as a reverse discrimination case, this lawsuit has nothing to do with preventing

[1] All parties, through their attorneys, have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or her counsel made a monetary contribution to the preparation or submission of this brief.

race discrimination or safeguarding civil rights. This case seeks to deny a multi-racial, multi-ethnic group of people, namely the pre-1950 residents of the U.S. unincorporated territory of Guam and their descendants, from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States. This right has been too long denied. And if the flood of recent migrants to Guam is allowed to vote in the plebiscite, this colonized polity will yet again be denied even this symbolic expression of self-determination by dint of simple vote dilution. Attempting to disguise such an injustice beneath the cloak of civil rights is as shameful as it is transparent.

Plaintiff alleges that the Guam Decolonization Registry Law, codified at 3 GCA §§ 21000–21031, constitutes race-based discrimination violative of the Fourteenth and Fifteenth Amendments of the United States Constitution, the Voting Rights Act, codified at 42 U.S.C. §§ 1973(a)-(p), and the Guam Organic Act of 1950, codified at 48 U.S.C. §1421 *et seq.* Specifically, Plaintiff argues that because the statutory definition of "Native Inhabitants of Guam" will produce a plebiscite electorate predominantly comprised of one racial group, i.e., Chamorros, and thereby disproportionately impact other racial groups, it infringes on his constitutional rights. Plaintiff's claims fail for several reasons.

First, Plaintiff's claims are not ripe for adjudication. No date has been set for the political status plebiscite. Further, the only "injury" that

Plaintiff claims to suffer from, the right to be listed on the decolonization registry, is not grounded in either the Constitution or the Voting Rights Act. Further still, Plaintiff's contention that he has been denied the right to register for the plebiscite is based on a flawed construction of Guam law. The registry is meant only to identify eligible voters; it is not a prerequisite to participating in the plebiscite itself. Moreover, because Plaintiff has alleged nothing more than a purely speculative injury, he has failed to carry his burden of establishing ripeness in this case—a burden this Court requires he carry. *See Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009).

Second, Plaintiff's claim that the Guam Decolonization Registry Law is unconstitutional because it will disproportionately impact certain racial groups fails for the plain reason that the U.S. Supreme Court has consistently held that a showing of disparate impact alone is insufficient to support a constitutional challenge under the Fourteenth and Fifteenth Amendments; a plaintiff must prove that the challenged statute was motivated by race-based animus. *See Washington v. Davis*, 426 U.S. 229, 242 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 66-68 (1980). The Guam statute is not only facially neutral as to race, but it also amply evidences a non-race-based legislative intent. Plaintiff has failed to establish any race-based animus here and so his claims cannot be sustained.

Third, even if the Guam Decolonization Registration Law was deemed to utilize a race-based classification, the statute would still suffer no constitutional infirmity because this Court, together with the Supreme Court, have consistently held that the Constitution enjoys a unique application in unincorporated territories such as Guam, whereby Congress, acting pursuant to its sweeping authority under the Territorial Clause, may engage in patently discriminatory action which would otherwise offend the Constitution. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Att'y Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984); *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992); *People v. Okada*, 694 F.2d 565 (9th Cir. 1982).

Finally, Plaintiff's double misapprehension of the difference between a state and an unincorporated territory on the one hand, and the difference between a state election involving the placement of public officers into a state agency and a political status plebiscite involving a colonized polity's symbolic first step toward decolonization on the other hand, renders his reliance on *Rice v. Cayetano*, 528 U.S. 495 (2000) overreaching. That case does not govern this one, and even if it did, what sealed the impugned statute's fate in that case—namely, race-based animus deducible from pertinent legislative history surrounding its passage—is not present here. Try as he may, Plaintiff cannot credibly contend otherwise.

For these reasons, amicus requests affirmance of the district court's

dismissal.

ARGUMENT

I. PLAINTIFF'S CASE IS NOT RIPE FOR ADJUDICATION

Even taking as true every allegation set forth in the Complaint, Plaintiff fails to show that he has suffered anything more than a purely speculative injury. Hence the instant litigation is premature, and dismissal is appropriate.

To invoke the jurisdiction of the federal courts, a claimant must satisfy the threshold requirement imposed by Article III of the U.S. Constitution by alleging an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). To satisfy this requirement, claimants must show they "[have] sustained or [are] immediately in danger of sustaining some direct injury" as a result of the defendant's conduct, and that the injury or threat of injury is "'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 101-02 (citations omitted). Abstract injury is insufficient. *Id.* at 101.

The policy underlying the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Accordingly, "ripeness is peculiarly a question of timing," *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974), and a federal

court ought not resolve issues involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (citation and internal quotation marks omitted). In other words, in the absence of immediate and certain injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).

Two factors must be considered in determining whether a controversy is ripe for adjudication: the hardship to the parties of withholding court consideration, and whether the issue is fit for judicial consideration. *Abbott Labs.*, 387 U.S. at 149. "The burden of establishing ripeness and standing rests on the party asserting the claim." *Colwell*, 558 F.3d at 1121 (citation omitted). Plaintiff has failed to establish that the instant matter is ripe for adjudication; therefore this case must be dismissed.

Plaintiff cannot establish that he will suffer immediate hardship because his claims are based on contingent future events. "To meet the hardship requirement, a litigant must show that withholding review would result in *direct* and *immediate hardship* . . . ." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (emphases added) (quoting *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v.*

United States, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted).

In this case, Guam law plainly provides that the future plebiscite at issue in this case will only be held "on a date of the General Election at which seventy percent (70%) of eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission." 1 GCA § 2110 (2005). Here, nothing indicates that the criterion of the Guam Election Commission's ("Commission") successful registration of seventy percent (70%) of the eligible voters has been met. Without this threshold criterion being met, there can as yet be no political status plebiscite in which "Native Inhabitants of Guam" may register votes concerning their desired future political relationship with the United States. In other words, the plebiscite at issue here exists solely in an indefinite future and represents exactly the kind of "contingent future event[ ] that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 581; *Texas*, 523 U.S. at 300 (1998). Indeed, there is cause to believe that it "may not occur at all" considering that the Decolonization Registry law was enacted some eleven years ago, and fewer than 5,000 voters have been duly registered by the Commission to date. Furthermore, as a matter of administrative law, it is significant that the Commission has not yet even determined what number is necessary to meet the "seventy percent (70%) of eligible voters" requirement prescribed by the statute. Because the plebiscite at issue is a contingent future event that may not occur as anticipated or at all, this

Court could find itself adjudicating a phantom controversy—a purely academic enterprise. This is precisely the sort of judicial exercise the ripeness doctrine is designed to prevent.

To further illustrate the uncertainty about when the plebiscite will be held one need only review the legislative history of 1 GCA § 2110. Guam Public Law 25-106, which created the Guam Decolonization Registry, went into effect on March 24, 2000, and set the date of the plebiscite for July 1, 2000. Guam Pub. L. 25-106:10. Public Law 25-148 changed the date of the political status plebiscite to November 7, 2000, "unless the Guam Election Commission determines that it won't be adequately prepared to hold the Plebiscite on that date, in which case the Guam Election Commission may determine by majority vote of Commission members to hold the Plebiscite on a later date." Guam Pub. L. 25-148:7. Public Law 27-106, which went into effect on September 30, 2004, created the existing requirement for seventy percent (70%) of eligible voters to register before triggering the plebiscite. Guam Pub. L. 27-106:VI:23. Most recently, in April 2011, Bill 31-154 was introduced in the Guam Legislature, which proposed that the plebiscite be held in 2014. Then, on September 19, 2011, Public Law 31-154 went into effect, again without setting a date for the plebiscite. Guam Pub. L. 31-154. Thus, more than eleven years have passed without any real certainty as to when the plebiscite will be held.

For these reasons, this case is not ripe for adjudication and altogether lacks the immediacy that constitutes an indispensable condition of federal

judicial review.

II. THE GUAM DECOLONIZATION REGISTRATION LAW UTILIZES NO RACIAL CLASSIFICATION AND VIOLATES NO FEDERAL CONSTITUTIONAL OR STATUTORY LAW

A. "Native Inhabitants of Guam" Is a Facially Race-Neutral Classification, and Plaintiff Cannot Prove that the Guam Decolonization Registration Law Was Motivated by Race-Based Animus

Plaintiff currently resides in Guam but is not qualified to register his opinion regarding the territory's future political relationship with the United States because he does not come within the statutory definition of "Native Inhabitants of Guam," defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 3 GCA § 21001(e) (2005). This language clearly indicates that the plebiscite seeks to determine the desires of "native inhabitants," not merely Chamorros. On its face, anyone who became a U.S. citizen by operation of the 1950 Organic Act (and descendants of those citizens) qualifies as a "native inhabitant." In other words, the definition does not preclude non-Chamorros from voting in the plebiscite, should one be held. Thus, it is facially neutral as to race. Plaintiff argues here that because the statutory definition of "Native Inhabitants of Guam" works to constitute a plebiscite electorate *largely* comprised of one racial group, i.e. those who identify racially and ethnically as "Chamorros," it is necessarily infirm. *See* Plaintiff-Appellant's Opening

Brief at 1, 4 (Sept. 3, 2013) ("Op. Br.").[2] Plaintiff contends that this classification "cannot survive strict scrutiny because its method of achieving its goal is not narrowly tailored." Op. Br. at 18, 39.

Plaintiff misstates the law of this case. That the challenged statutory scheme may have a disproportionate racial impact is insufficient for a finding of racial discrimination. A statute that is facially neutral as to race receives more than rational basis review *only* where there is proof of a discriminatory purpose. Under *Washington v. Davis*, 426 U.S. 229, 239 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 265 (1977), an ostensibly race-neutral government classification is deemed unconstitutional only if it was enacted with discriminatory intent. *See Arlington Heights*, 429 U.S. at 264-65 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). *Washington v. Davis* is the seminal case articulating this requirement for proof of discriminatory intent. There, applicants for the police force in Washington, D.C., were required to take a test, and statistics revealed that Blacks failed the examination much more often than Whites. *See Davis,* 426 U.S. at 234-35. The Court, however, explained that proof of a discriminatory impact is insufficient, by itself, to show the existence of a

[2] Whether this disparate impact is a statistical reality is uncertain.

racial classification. *Id.* at 239. Justice White, writing for the majority, said the Court never had held that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Id.* The Court explained that discriminatory impact, "[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (citation omitted).

Courts have repeatedly reaffirmed the principle that discriminatory impact alone is not sufficient to prove a racial classification. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 292-93, 97 (1987). In that case, statistics clearly showed racial inequality in the imposition of the death penalty. However, the Court ruled that in order for the defendant to demonstrate an equal protection violation, he "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292. Because the defendant relied solely on the statistical study for evidence and could not prove bias on the part of the prosecutor or jury in his case, no equal protection violation existed. *Id.* at 292-93, 297. Moreover, the Court said that to challenge the law authorizing capital punishment, the defendant "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect." *Id.* at 297-98.

The Court has held that showing such a purpose requires a rather high

level of proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (citation omitted).

Finally, the Court specifically indicated in *Davis* that this principle applies to claims of racial discrimination in the context of voting just as in other racial discrimination contexts. *See* 426 U.S. at 240 (approving the conclusion reached in *Wright v. Rockefeller*, 376 U. S. 52 (1964), which upheld a New York congressional apportionment statute against claims of racial gerrymandering because challengers "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines . . . ."); *Bolden*, 446 U.S. at 66-68.

In *City of Mobile, Alabama v. Bolden*, black voters in Mobile, Alabama, challenged that city's method for selecting its governing commission, arguing that the at-large electoral system violated their constitutional rights. 446 U.S. at 65. The plaintiffs relied primarily on the fact that few black commissioners had been elected under the at-large voting system. The Court rejected the voters' reasoning that this showing of

disparate impact was enough to render the voting system unconstitutional. *Id.* at 65-74. In so doing, the Court wrote that such voting laws only "violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Id.* at 66 (citations omitted).[3] For this proposition this Court cited the basic maxim that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," *id.*, and that "[t]he Court explicitly indicated in *Washington v. Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *Id.* at 67. Perhaps to eliminate any remaining doubt about its rejection of disparate impact as the predominant theory in equal protection claims, and specifically those involving voting, the Court went on to declare:

> Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a

[3] In 1982, Congress amended the Voting Rights Act in response to portions of the Court's opinion in *Bolden*. *See* 42 U.S.C. § 1973, as amended, 96 Stat. 134. This enactment did not impact the Court's holdings with regard to either the Fourteenth Amendment equal protection claims or the voters' disparate impact Fifteenth Amendment claims, 446 U.S. at 62. It would seem that *Bolden* still controls in these spheres. *Accord Rogers v. Lodge*, 458 U.S. 613, 617-19 (1982) (upholding the requirement of proof of discriminatory intent in all types of equal protection cases, including those concerning voting).

variety of other contexts involving alleged racial discrimination.

Id. at 67-68 (footnote and citations omitted). This Court should heed this reasoning here, and uphold the Guam Decolonization Registration Law against Plaintiff's disparate impact challenge.

As will be shown, Plaintiff simply cannot prove that the challenged statutory scheme was animated by any racially discriminatory motive.

The Guam Legislature explained at length that the purpose behind the enactment of the Guam Decolonization Registry Law, 3 GCA §§ 21000 - 21031, was to implement the process of decolonization taken up in the first instance by the United States via the 1950 Organic Act, *see* 48 U.S.C. §§ 1421-28 (2005 & Supp. 2007), and earlier, via the 1898 Treaty of Paris. *See* Treaty of Peace, United States-Spain, Dec. 10, 1898, 30 Stat. 1754. In the relevant "Legislative Findings and Intent" section, the Guam Legislature plainly states that its intent was to "permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America." 3 GCA § 21000 (2005). The Legislature further states that "the right has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam." *Id.* The Legislature then pronounces that the native inhabitants of Guam remain

due their inalienable right of self-determination by operation of, among others, the 1898 Treaty of Peace between the United States and Spain, the 1950 Organic Act of Guam, the United States Immigration and Nationality Act, the United Nations Charter and several UN resolutions concerning non-self-governing territories, and the International Covenant on Civil and Political Rights. *Id.*

Illustratively, the Guam Legislature goes on to make specific reference to portions of the legislative history surrounding the passage in the U.S. Congress of the 1950 Organic Act, wherein U.S. representatives stated in no ambiguous terms:

> In addition to its obligation under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self-governing Territory. Under Chapter XI of the Charter of the United Nations, ratified by the Senate June 26, 1945 (59 Stat. at p. 1048), we undertook, with respect to the people of such Territories, to insure political advancement, to develop self-government, and taking 'due account of the political aspirations of the peoples . . . .' to assist them in the progressive development of their free political institutions . . . ."

Id. (quoting S. REP. No. 2109, 81st Cong., 2d Sess. 15 (1950), *reprinted in* 1950 U.S. CODE CONG. & AD. NEWS 2840, 2841). The Legislature further states, "[i]t is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950 and to use this knowledge to further petition Congress and other entities to achieve the stated goals." *Id.* Finally, as if to put to rest any remaining doubt as to its legitimate non-race-based animus, the Legislature announces, "[t]he intent of this Chapter

shall not be construed nor implemented by the government officials effectuating its provisions to be race based, but founded upon the classification of persons as defined by the U.S. Congress in the 1950 Organic Act of Guam." *Id.*

Thus, if and when the time comes, Plaintiff will be not be able to satisfy the high evidentiary bar required of him by *Davis* and its progeny to prove that the Guam Decolonization Registry Law was animated by a racially discriminatory purpose.

B. Even if "Native Inhabitants of Guam" is Deemed a Racial Classification, the Guam Decolonization Registration Law Still Suffers No Constitutional Infirmity Because it Codifies Preexisting Congressional Intent and Congress May Discriminate As it Chooses Under the Territorial Clause

As explained in the preceding section, the Guam Legislature intended only that the challenged decolonization statutory scheme effectuate Congress' intent to permit the native inhabitants of Guam (as that term was itself defined by Congress in the Organic Act) to express by plebiscite their desires regarding their future political relationship with the United States. Thus, Plaintiff's rather blunt use of constitutional race jurisprudence to impute infirmity to the Guam statutes is unavailing. He omits the singular distinction that sets the instant case apart from the several cases he cites: Guam is an unincorporated territory, not a state. This is a distinction with a difference.

Unincorporated territories occupy what might be termed a *sui generis*

space within American constitutional law. Unlike the several states, where the U.S. constitution applies without issue, the latter does not axiomatically apply in the territories. Rather, the U.S. Congress, acting under the Territorial Clause, U.S. CONST. art. IV, § 3, cl. 2, under color of its plenary power, may pick and choose which portions of the Constitution apply in the unincorporated territories, and which do not. And this remains the case even after Congress formally extends U.S. citizenship to the residents of the respective unincorporated territories. *See Balzac*, 258 U.S. at 308-09.

Case law plainly instructs that Congress can do virtually anything it pleases with/in the territories, including act in ways that might otherwise offend the Constitution. *See Att'y Gen. of Guam*, 738 F.2d at 1019 (holding that the denial to U.S. citizens who reside in an unincorporated territory of the right to vote in U.S. presidential elections is not a constitutional violation); *Wabol*, 958 F.2d at 1462 (upholding facially racial land alienation restrictions in the Commonwealth of the Northern Mariana Islands against equal protection challenges); *Balzac*, 258 U.S. at 314 (holding that the Sixth Amendment right to a jury trial is not applicable in Puerto Rico, despite the fact that residents therein are U.S. citizens).

Guam is an unincorporated territory. *See generally People v. Okada*, 694 F.2d 565 (9th Cir. 1982); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985); *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988). As earlier explained, because the statutes challenged here proceed

from Congress's plenary power via the Organic Act, Plaintiff's reliance on non-territorial race cases is misguided. Indeed, none of the race discrimination cases Plaintiff cites address the situation at bar, that is, where the challenged governmental action is that of an unincorporated territory acting within congressionally condoned bounds. Indeed, in the unincorporated territories, Congress is free to engage in what may properly be termed "discrimination" so long as that discrimination is supported by a rational basis. *See, e.g.*, *Califano v. Torres*, 435 U.S. 1, 5 (1978) (upholding Congress' discriminatory treatment of the territories by subjecting the challenged discrimination only to rational basis review); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) ("Congress, which is empowered under the Territory Clause of the Constitution . . . to make all needful Rules and Regulations respecting the Territory . . . belonging to the United States, may treat Puerto Rico differently from States so long as there is a rational basis for its actions.") (internal citation and internal quotation marks omitted).

Because Congress is free to discriminate against the unincorporated territories, it is also free to discriminate in their favor, even where that discrimination would otherwise violate the Constitution. *See Wabol*, 958 F.2d at 1462; *accord King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977); *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) ("Were we to apply sweepingly *Duncan*'s definition of 'fundamental rights' to unincorporated territories, the effect would be

immediately to extend almost the entire Bill of Rights to such territories. This would repudiate the *Insular Cases*."); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) ("[T]he Territory Clause permits exclusions or limitations directed at a territory and coinciding with race or national origin, so long as the restriction rests upon a rational basis.").

C. *Rice v. Cayetano* is Inapposite, or Alternatively, Distinguishable—And In Any Event, This Court Ought Not Reach This Complex Constitutional Law Question Given That This Case is Not Ripe for Adjudication

Plaintiff invokes *Rice v. Cayetano*, 528 U.S. 495 (2000), to support his untenable assertion that the statutory definition of "Native Inhabitants of Guam" must fail here for the same reason the statutory definition of "Hawaiian" failed there—namely, that because the United States has not formally recognized the "Native Inhabitants of Guam" as an Indian tribe, *Morton v. Mancari*, 417 U.S. 535 (1974), offers no doctrinal cover, and therefore the challenged Guam statutes necessarily utilize a racial, as opposed to political, classification. Momentarily setting aside several other factors distinguishing *Rice* from the present case, Plaintiff's argument effectively ignores more than a century of well-settled jurisprudence, enshrined in the *Insular Cases*[4] and their progeny, which long ago carved

[4] *Delima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). Although the *Insular Cases* are (in)famous for giving judicial sanction to American imperialism at the turn of the twentieth century by withholding from those territories acquired after the

out for unincorporated territories like Guam an exceptionalism entirely independent from that of federal Indian law. Put plainly, *Mancari* need not apply to shield the challenged Guam statutes in the first instance because they arguably are already so shielded by the *Insular Cases* and their progeny. Moreover, this Court already approved this conclusion, if only tacitly, in a series of 1980s decisions concerning the territorial status of

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Spanish-American War all but a few constitutional protections and by denying them the promise of eventual statehood—via the unprecedented doctrine of territorial incorporation—another reading of the *Insular Cases* posits that their more important content is that they authorize territorial de-annexation, i.e. the United States retains the power to de-annex so-called "unincorporated territories" even after said territories have become subject to exclusive U.S. sovereignty, and even after their inhabitants have been made U.S. citizens. *See generally* Christina D. Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (reasoning that the *Insular Cases* effectively smuggled a theory of secession into American constitutional law for unincorporated territories, or territories not bound in permanent union to the rest of the United States). In this one aspect, the *Insular Cases* inversely reflect the right of self-determination as it is understood in international law inasmuch as the latter (1) considers colonialism obsolete, criminal, and contrary to law, and (2) vouchsafes to colonized polities a range of political status options which necessarily includes, indeed highlights, outright independence. *See* Principles Which Should Guide Members in Determining Whether or not an Obligation Exists To Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960); *see also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 74-75 (1995). Though Plaintiff has preemptively narrated the instant lawsuit along very narrow constitutional law lines, the reality is that this case is, constitutionally speaking, much more complex. It involves the United States' international obligations relative to the fundamental right of self-determination as it is understood in international law. Finally, that international law is a part of U.S. law is beyond doubt. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Filártiga v. Peña-Irala*, 630 F.2d 876, 886-87 (2nd Cir. 1980); *Estate of Ferdinand E. Marcos v. Marcos*, 978 F.2d 493, 502 (9th Cir. 1992).

Guam. *See generally Okada*; *Sakamoto*; and *Ngiraingas*.

Plaintiff's reliance on *Rice v. Cayetano* is misguided on additional grounds, including (1) that the state election at issue in that case is not at all similar to the political status plebiscite at issue in this case, and (2) that the problematic date utilized in the Hawaii statute for determining whether or not someone qualified as a "Hawaiian," i.e., 1778, is completely distinguishable to the date utilized in the Guam statute for determining whether someone is a "Native Inhabitant of Guam," i.e., 1950. These points are elaborated below.

At issue in *Rice* was an attempt by a Caucasian resident of Hawaii to vote in a statewide election for trustees of the Office of Hawaiian Affairs ("OHA"), a state agency created to administer programs designed for the benefit of two subclasses of Hawaiian citizenry, namely "Native Hawaiians" and "Hawaiians," the larger latter class being defined as those persons who are descendants of the aboriginal peoples inhabiting the Hawaiian Islands in 1778. *Id.* at 509 (citing Haw. Rev. Stat. §§ 10-2 (1993)). To register to vote for OHA trustees, Rice was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." *Id.* at 510. Rice so attested, and Hawaii denied his application. *Id.* In contrast, at issue here is not a statewide election for public officers of a state agency. Indeed, the international law-guaranteed, congressionally-approved political status plebiscite whereby "Native Inhabitants of Guam" are to take their first

constitutive step toward the decolonization of the American-administered territory of Guam could not be more dissimilar to the state election at issue in *Rice*.

The date utilized by the Hawaii statute in *Rice* for determining who qualifies as a "Hawaiian" in order to vote in the OHA trustee election served a qualitatively different purpose than the date utilized by the Guam statute in this case for determining whether or not someone qualifies as a "Native Inhabitant of Guam" in order to participate in a political status plebiscite. There, the relevant date was the year 1778, which marked the year of first contact between the aboriginal peoples of the Hawaiian archipelago and the European/Western world via Captain Cook. For this reason, the Court was able to determine with rather minimal effort that the statutory definition of "Hawaiian" was tantamount to racial discrimination because it singled out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). Thus, the Court concluded that the "very object of the statutory definition in question" was to "treat the early Hawaiians as a distinct people," a legislative purpose it deemed demonstrable race-based animus. *Id.* Oppositely, here the relevant date in the Guam statute is 1950, which, as explained above, is intended only to effectuate the Congress' intent to "permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to

self-determination of their political relationship with the United States of America." 3 GCA § 21000 (2005). Moreover, unlike the legislative history that so troubled the Court in *Rice*, here the relevant statutes contain the above-quoted Legislative Findings and Intent section, which clearly show that the Guam statutes were animated by no racially discriminatory purpose.

Closely tracking the Court's reasoning in *Rice*, the only way the Guam statutes could be considered somewhat akin to the Hawaii statutes would be if the former were to utilize a significantly earlier date, e.g., 1521, or the year of first contact between Guam and the European/Western world via Ferdinand Magellan. Hypothetically, if 1521 were the relevant date, an argument might be advanced that the legislation was animated by a race-based motive inasmuch as a Court would be hard pressed, as it was in *Rice*, to deduce any object other than an impermissible attempt to insulate a racially distinct group. Fortunately here, that is not the case.

In any event, the case at bar implicates questions of profound constitutional dimension and so it is, at this time, particularly ill-suited for adjudication on the merits given that it is not ripe. *Accord Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

CONCLUSION

Plaintiff steadily ignores the settled rule that in order to succeed on his racial discrimination claims, he must first prove that the Guam Decolonization Registration Law was motivated by race-based animus. That Plaintiff cannot prove this is fatal to his case. Moreover, this case implicates a question of profound constitutional dimension: whether an unincorporated territory, acting within congressionally approved parameters, may limit the electorate in a political status plebiscite to members of the colonized polity in order to effectuate the decolonization remedy guaranteed them under domestic and international law. Despite this profundity, Plaintiff does little more in these pleadings than retreat unconvincingly to the orthodox bunker of run-of-the-mill race jurisprudence. Plaintiff not once demonstrates why the cases he cites have any bearing on the constitutional nuances here at issue, namely Congress's sweeping authority to limit the plebiscite electorate to "Native Inhabitants of Guam." Plaintiff misapprehends the nature of the exceptionalism afforded the territories pursuant to the territorial incorporation doctrine, which, despite its doctrinal deficiencies, confers an exceptionalism separate and apart from that of the tribes. Finally, that this case implicates deep constitutional construction only bolsters the position amicus herein advances, i.e., that this case is not ripe for adjudication, and judicial review of the same is improper.

Thus, affirmance is plainly warranted.

DATED: October 2, 2013

Respectfully submitted,

/s/ Julian Aguon

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JULIAN AGUON, *Esq.*
Law Office of Julian Aguon
414 West Soledad Ave.
GCIC Building, Suite 500H
Hagåtña, GU 96910
Telephone: (671) 477-1389

Counsel for Amicus Curiae
Anne Perez Hattori

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DATED: October 2, 2013.

/s/ Julian Aguon

____

JULIAN AGUON, *Esq.*
Law Office of Julian Aguon
414 West Soledad Ave.
GCIC Building, Suite 500H
Hagåtña, GU 96910
Telephone: (671) 477-1389

Counsel for Amicus Curiae
Anne Perez Hattori

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