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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ARNOLD DAVIS, on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

GUAM, GUAM ELECTION COMMISSION,
ALICE M. TAJERON, MARTHA C. RUTH,
JOSEPH F. MESA, JOHNNY P. TAITANO,
JOSHUA F. TENORIO, DONALD I.
WEAKLEY, and LEONARDO M. RAPADAS,

Defendants.

CIVIL CASE NO. 11-00035

**REPORT AND RECOMMENDATION
RE MOTION TO DISMISS**

This matter comes before the court for a Report and Recommendation on the motion to dismiss Plaintiff’s complaint. The Attorney General of Guam on behalf of himself and all the other named defendants filed the motion to dismiss.

On November 22, 2011, Plaintiff, Arnold Davis, filed a complaint in this court. Therein, he sought to enjoin Guam and officials of the government of Guam from all action which would prevent him from registering and voting in Guam’s ‘Political Status Plebiscite’. On December 2, 2011, Defendants, represented by Assistant Attorney General Robert M. Weinberg, filed a motion to dismiss the complaint. Plaintiff filed an opposition to the motion on January 3, 2012. Defendants filed a reply to the opposition on January 10, 2012.

On December 30, 2011, Anne Perez Hattori, represented by Julian Aguon, Esq., filed a motion for leave to file an *Amicus Curiae* brief. On January 7, 2012, Plaintiff filed an opposition to Hattori’s motion.

1 On February 1, 2012, the motion to dismiss was referred by the Chief Judge to the
2 undersigned for a Report and Recommendation.

3 Having reviewed the memoranda in support and in opposition to the motion, as well as
4 the *amicus curiae* brief, the undersigned submits his Report and Recommendation.

5 BACKGROUND

6 On November 22, 2011, Plaintiff filed his complaint herein. In the complaint, he alleges
7 discrimination in the voting process by Guam and the Defendants in violation of Section Two of
8 the Voting Rights Act of 1965. Plaintiff alleges that under Guam law, a ‘Political Status
9 Plebiscite’ is to be held concerning Guam’s future relationship with the United States. Plaintiff, a
10 resident of Guam, states that he applied to vote for the plebiscite but was not permitted to do so
11 because he did not meet the definition of “Native Inhabitant of Guam.” Under Guam law, only
12 Native Inhabitants of Guam are permitted to vote in the Political Status Plebiscite. The plebiscite
13 would ask native inhabitants which of the three political status options they preferred. The three
14 choices are Independence, Free Association with the United States, and Statehood.

15 Plaintiff states three causes of action. In his first cause of action, he alleges that by
16 limiting the right to vote in the Political Status Plebiscite to Native Inhabitants of Guam, the
17 purpose and effect of the act was to exclude him and most non-Chamorros from voting therein,
18 thereby resulting in a denial or abridgment of the rights of citizens of the United States to vote on
19 account of race, color, or national origin, a violation of Section 2 of the Voting Rights Act of
20 1965. In his second cause of action, Plaintiff alleges that Defendants are preventing him from
21 registering to vote in the Political Status Plebiscite because he is not a native inhabitant of Guam.
22 Thus, Defendants are engaged in discrimination on the basis of race, color, and/or national origin
23 in violation of various laws of the United States. Plaintiff’s third cause of action alleges that he is
24 being discriminated in relation to his fundamental right to vote in the plebiscite in violation of the
25 Organic Act of Guam, the U.S. Constitution and other laws of the United States for the reason that
26 he is not a native inhabitant of Guam.

27 Plaintiff seeks relief enjoining Defendants from preventing Plaintiff and those similarly
28 situated from registering for and voting in the Political Status Plebiscite; enjoining the Defendants

1 from using the Guam Decolonization Registry in determining who is eligible to vote in the
2 plebiscite; enjoining enforcement of the criminal law provisions of the Act that make it a crime to
3 register or allow a person to vote in the plebiscite who is not a Native Inhabitant of Guam; and a
4 declaration that Defendants' conduct has been and would be, if continued, a violation of law.

5 On December 2, 2011, the Attorney General of Guam, Leonardo M. Rapadas, a named
6 Defendant, on behalf of himself and all named defendants, moved to dismiss the complaint on the
7 ground that it failed to present a case or controversy.

8 On December 30, 2011, Anne Perez Hattori, filed a Motion for Leave to file a brief, as
9 *Amicus Curiae*, in support of Defendant's Motion to Dismiss.

10 On January 3, 2012, Plaintiff filed his opposition to Defendant's Motion to Dismiss and on
11 January 7, 2012, he filed an opposition to Hattori's Motion for Leave to file an *Amicus Curiae*
12 brief.

13 On February 11, Defendant's Motion to Dismiss was referred by the Chief Judge to the
14 undersigned for a Report and Recommendation.

15 On April 6, 2012, the court granted Anne Perez Hattori's motion for leave to file a brief, as
16 *Amicus Curiae*.

17 **Statutory History of the Plebiscite Vote**

18 The current plebiscite law traces its beginnings to P.L. 23-130, which became law on
19 December 30, 1996. Therein, the Guam Legislature established a Chamorro Registry for the
20 purpose of establishing an index of names by the Guam Election Commission for registering
21 Chamorros and recording their names. The Registry was to serve as a tool to educate Chamorros
22 about their status as an indigenous people and their inalienable right to self-determination. A
23 week after the passage of the above referenced law, the Guam Legislature passed P.L. 23-147.
24 This new law created the Commission on Decolonization for the implementation and Exercise of
25 Chamorro Self-Determination ("Commission on Decolonization"). The purpose of the
26 Commission was to ascertain the desires of the Chamorro people of Guam as it pertained to their
27 future political relationship with the United States. The law required the Guam Election
28 Commission to conduct a Political Status Plebiscite at the next Primary Election (September,

1 1998) during which qualified voters would be asked to choose among three political status
2 options. The status options were Independence, Free Association, and Statehood. The results of
3 the plebiscite were to be transmitted to the President and Congress of the United States and the
4 Secretary General of the United Nations.

5 Seeing that no plebiscite vote occurred during the primary election in 1998, the Guam
6 Legislature passed P.L. 25-106¹ to have the plebiscite vote take place on July 1, 2000. The Act
7 more importantly changed those persons entitled to vote during the Political Status Plebiscite from
8 “Chamorros to “Native Inhabitants of Guam”. A native inhabitant was defined as a person who
9 became a citizen by virtue of the 1950 Organic Act of Guam and a descendant of such person.

10 P.L. 25-106 also created a Guam Decolonization Registry. It was a registry separate and
11 apart from the Chamorro registry. The Decolonization Registry was to create a list of qualified
12 voters for the plebiscite. Thus, every person who was a native inhabitant of Guam as defined in
13 the Act was entitled to register with the Decolonization Registry.

14 Four years after passage of the Guam Decolonization Registry and seeing that a plebiscite
15 vote had still not taken place, the Guam Legislature passed P.L. 27-106 on September 30, 2004.
16 This Act provided that the Political Status Plebiscite shall be held on a general election at which
17 seventy percent (70%) of eligible voters have been registered as determined by the Guam Election
18 Commission.

19 DISCUSSION

20 The Attorney General argues that Plaintiff’s complaint be dismissed because it fails to
21 present a justiciable case or controversy. Even if Plaintiff were denied the right to vote in the
22 plebiscite, Plaintiff would not have suffered any justiciable injury because his rights as a United
23 States citizen, a registered voter, and stakeholder in Guam’s future political relationship with the
24 United States remains unaffected². In footnote 1 of his memorandum, he questions whether the
25 plebiscite vote is imminent or within the foreseeable future and further points out that there is no
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27 ¹This Act became law on March 24, 2000.

28 ²See pages seven to eight of Attorney General’s motion.

1 indication “nor any suggestion that the 70% threshold of eligible voters, however calculated, is
2 close to being met”.

3 Anne Hattori in her *amicus curiae* brief suggests that Plaintiff’s complaint should be
4 dismissed based upon the constitutional doctrine of ripeness. She argues that Plaintiff presents no
5 case or controversy before the court because his case is not ripe for review. Wright-Miller-
6 Cooper’s Federal Practice and Procedure discusses the ripeness doctrine as follows:

7 Ripeness doctrine is invoked to determine whether a dispute has yet
8 matured to a point that warrants decision. The determination is rested
9 both on Article III concepts and on discretionary reasons of policy. The
10 central concern is whether the case involves uncertain or contingent
11 future events that may not occur as anticipated, or indeed may not occur
12 at all. One of the famous formulations of ripeness principles is an abstract
13 statement frequently quoted in declaratory judgment cases:
14 The test to be applied * * * is the familiar one *** :Basically the question in
15 each case is whether ...there is a substantial controversy, between the parties
16 having adverse legal interests, of sufficient immediacy and reality to warrant
17 the issuance of a declaratory judgment.
18 §3532, Volume 13B, pages 365-369.

19 The authors state that a more practical formula is that ripeness turns on “the fitness of the
20 issues for judicial decision” and “the hardship to the parties of withholding court consideration”.
21 See *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano*
22 *v. Sanders*, 430 U.S. 99, (1977). The party asserting the claim bears the burden of establishing
23 ripeness. *Colwell v. Dep’t of Health & Human Services*, 558 F. 3d 1112, 1121 (9th Cir.
24 2009)(citing *Reene v. Geary*, 501 U.S. 312, 316 (1991)). Ripeness decisions have generally
25 resolved matters dealing with premature issues.

26 Is the matter before the court one that is premature for decision making, i.e., one that is not
27 ripe for review because the alleged controversy between the parties is not of sufficient immediacy
28 and reality to warrant a decision from the court? For guidance, the court looks at the plebiscite
law that controls the alleged dispute between the parties. It is contained in 3 GCA Chapter 21,
§21110 and provides as follows:

§21110. Plebiscite Date and Voting Ballot. (a) **The Guam Election Commission shall**
conduct a “Political Status Plebiscite”, at which the following question, which shall be
printed in both English and Chamorro, shall be asked of the eligible voters:

1 'In recognition of your right to self determination, which of the following political status
2 options do you favor? (Mark ONLY ONE):

- 3 1. Independence ()
4 2. Free Association with the United States of America ()
5 3. Statehood ()

6 Person eligible to vote shall include those persons designated as Native Inhabitants
7 of Guam, as defined within this Chapter of the Guam Code Annotated, who are eighteen
8 (18) years of age or older **on the date of the 'Political Status Plebiscite'** and are
9 registered voters of Guam.

10 The Political Status Plebiscite mandated in subsection (a) of this Section shall be
11 held on a date of the General Election at which **seventy percent (70%) of eligible voters,**
12 **pursuant to this Chapter, have been registered** as determined by the Guam Election
13 Commission.

14 In her *amicus curiae* brief, Hattori points out that the plebiscite vote will only take place
15 some time in the future on a General Election date when the Guam Election Commission
16 determines that 70% of eligible 'Native Inhabitant of Guam' voters have been registered. The
17 Attorney General points out that there is no indication that **this threshold is close to being met.**
18 More importantly, the Attorney General points out that there is "no indication in the law by what
19 census data or other criteria 70% of eligible voters is to be determined". Hattori echoes the same
20 argument and points out that the Guam Election Commission has not even determined what
21 number is necessary to meet the 70% of eligible voters requirement. Thus, Hattori suggests that
22 the plebiscite election may never take place.

23 When will the plebiscite election take place? At this point in time, it appears that it is an
24 issue that cannot yet be determined. One thing that is certain, however, is that the plebiscite³ will
25 not take place in the 2012 General Election. It will take place when the Guam Election
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27 ³On April 15, 2011, Bill No. 31-154 was introduced in the 31st Guam Legislature which
28 would have required that the plebiscite vote take place during the 2014 primary election.

1 Commission determines that the 70% threshold of native inhabitant voters have been registered.
2 It is interesting to note that in the twelve (12) years since the establishment of the Guam
3 Decolonization Registry, only 5,310 persons have registered as native inhabitants of Guam. This
4 is the number of native inhabitants registered as of May 24, 2012⁴ as reported in the home page of
5 the Guam Election Commission. In contrast, the Commission reports that as of May 23, 2012,
6 there were currently 47,272 registered voters in Guam. Assuming these native inhabitants are also
7 registered voters of Guam, they represent approximately 11.2% of the voting population. As the
8 Defendants and the *amicus curiae* have pointed out in their brief, there is no indication in the law
9 how the 70% criteria is to be determined. But, assuming hypothetically however, that the 70%
10 criteria were to be determined in relation to total registered voters, it may take a further while for
11 the threshold to be met.

12 As noted above, the Guam Decolonization Registry became law on March 24, 2000. In
13 the twelve years that have passed, it has registered only 5,310 Guam native inhabitants. In its
14 original enactment, the plebiscite vote was supposed to have taken place in the primary election in
15 1998. Almost 14 years have passed and still no plebiscite vote has taken place. Clearly, the
16 elements of ripeness are placed at issue herein.

17 Should the court engage in an academic debate to determine whether the aforesaid “Act”
18 unconstitutionally discriminates against Plaintiff’s right to vote in the Political Status Plebiscite
19 when no general election date has been set for the plebiscite? Such an event may not take place at
20 all. Or, it may take place at some time in the future. However, until such a date is set and
21 established by the Guam Election Commission, Plaintiff’s complaint has set forth no case or
22 controversy. It is quite clear that at the present time, Plaintiff is not being denied the right to vote
23 in the ‘Political Status Plebiscite’ for the simple reason that no such plebiscite date is in sight.
24 The plebiscite vote may or may not occur. “A claim is not ripe for adjudication if it rests upon
25 contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas*

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28 ⁴A search of the Guam Election Commission’s web site on June 14, 2012 revealed this
number of registered native inhabitants as of the May 23, 2012.

1 *v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). A denial of
2 one’s right to register to vote in such an election would be justiciable only if such election was
3 imminent. That the plebiscite vote does not present an imminent controversy is further buttressed
4 by the fact that Plaintiff did not file his complaint until more than 11 years after creation of the
5 Decolonization Registry. More importantly, Plaintiff waited more than 11 years since the
6 plebiscite vote was restricted solely to native inhabitants before filing his complaint even though
7 he has reportedly been living in Guam since 1977⁵. In contrast, he has stated that he is a
8 registered voter in Guam and “has voted in the past in many Guam general elections”.⁶

9 As a final point, the court must address Plaintiff’s request which (1) seeks to enjoin the
10 Attorney General from enforcing the provisions of the plebiscite act which makes it a crime to
11 register or allow a person to register for the plebiscite with the Guam Decolonization Registry
12 who is not a Native Inhabitant of Guam and (2) seeks a determination from the court that
13 Defendants’ conduct has been, and would be if continued, a violation of law.

14 §21009 of 3 GCA, Chapter 21, provides as follows:

15 Any person who willfully causes, procures or allows that person, or
16 any person, to be registered with the Guam Decolonization Registry, while
17 knowing that the person, or other person, is not entitled to register with the
18 Guam Decolonization Registry, shall be guilty of perjury as a misdemeanor.
19 The Guam Decolonization Registry shall have such false affidavit of registration
20 automatically stricken from the Registry.

21 Section 21009 makes it a misdemeanor for anyone who “wilfully causes, procures or
22 allows” any person “to be registered with the Guam Decolonization Registry, while knowing that
23 the person... is not entitled to register” with the Decolonization Registry. Again, the court finds
24 that Plaintiff has presented no case or controversy to invoke judicial review from the court.

25 In the first instance, his complaint does not allege that he has been charged with a
26 misdemeanor for attempting to register with the Decolonization Registry⁷. Thus, he has not been

27 ⁵See page seven, last paragraph of *amicus curiae* brief.

28 ⁶See Paragraph 20 of Plaintiff’s complaint.

⁷Plaintiff applied to register for the plebiscite but was not permitted to do so because he
did not meet the definition of a “Native inhabitant of Guam”. See Paragraph 21 of the complaint.

1 harmed and has suffered no injury therefrom. The Act does not make an attempt to register with
2 the Decolonization Registry and a denial thereof a criminal act.

3 In the second instance, if Plaintiff has not been charged with a misdemeanor offense, for
4 his complaint to be ripe for the court's review, he must show that he is subject to a 'genuine threat
5 of **imminent prosecution**'. See *Wolfson v. Brammer*, 616 F. 3d 1045, (9th Cir.2010), quoting
6 *San Diego Cnty. Gun rights Comm. V. Reno*, 98 F. 3d 1121, 1126 (9th Cir. 1996). In evaluating
7 threats of imminent prosecution, the court considers: (1) whether plaintiff has articulated a
8 concrete plan to violate the law in question; (2) whether prosecuting authorities have
9 communicated a specific warning or threat to initiate proceedings; and (3) whether the past history
10 of past prosecution or enforcement under the challenged statute suggests that prosecution may, in
11 fact, be imminent. Again, in reviewing Plaintiff's complaint, the court finds that his pleadings do
12 not allege the necessary elements. All that Plaintiff has alleged is that he applied to register for
13 the plebiscite but was not permitted to do so because he did not meet the definition of a native
14 inhabitant of Guam.

15 Finally, Plaintiff asks the court to declare Defendants' conduct in attempting to enforce the
16 provisions of the plebiscite vote to be a violation of law. In the absence of a case or controversy,
17 the court will decline to do so.

18 CONCLUSION

19 Based upon the reasons stated herein above, the court recommends that Defendants'
20 motion to dismiss, supported herein by the *Amicus Curiae* brief, be granted for the following
21 reasons:

22 1. Plaintiff's complaint which seeks to enjoin Defendants from preventing him from
23 registering and voting in the 'Political Status Plebiscite' on a general election presents no case or
24 controversy since the matter is not ripe for adjudication. There is no plebiscite vote set in the
25 2012 general election and no plebiscite vote date is in sight. Plaintiff's allegations present no
26 sufficient immediacy and reality to warrant intervention by the court.

27 2. Plaintiff has no standing to bring an action to enjoin the Attorney General from
28 enforcing the provisions of the plebiscite law that makes it a misdemeanor to register or allow

1 anyone to register with the Guam Decolonization Registry if the person were not a Native
2 Inhabitant of Guam. Plaintiff has not alleged that he has been charged with any crime in relation
3 to the Political Status Plebiscite act nor has he shown that he is subject to a genuine threat of
4 imminent prosecution in relation to the said act.

5 Dated this 14th day of June, 2012.



6
7 /s/ Joaquin V.E. Manibusan, Jr.
8 U.S. Magistrate Judge
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11 **NOTICE: THE PARTIES HAVE FOURTEEN (14) DAYS TO FILE OBJECTIONS TO**
12 **THE REPORT AND RECOMMENDATION.**
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