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IN THE DISTRICT COURT OF GUAM

ARNOLD DAVIS, on behalf of himself and all others similarly situated, Plaintiff, vs. **GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION; et al.**, **Defendants.**	Civil Case No. 11-00035 **DEFENDANTS' RESPONSE TO PLAINTIFF'S *UNTIMELY* OBJECTIONS TO REPORT AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE**

Plaintiff and putative class representative Arnold Davis has filed untimely objections to the magistrate judge's *Report and Recommendation Re: Motion to Dismiss*, Doc. No. 44 (June 14, 2012), recommending dismissal of the complaint on ripeness and standing grounds.[1]

[1] Title 28 U.S.C. § 636(b)(1)(C) provides, "Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court." Mr. Davis' objections were due June 28, 2012. He did not file objections until July 2, 2012, three days late. Nevertheless, "[b]ecause determinations of law by the magistrate judge are reviewed de novo by both the district court and [the court of appeals], 'the failure to object would not, standing alone, ordinarily constitute a waiver of the issue.' " *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007) (quoting *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991)). Accordingly, defendants address his objections as if they were timely filed.

Mr. Davis first complains at page 3 that he had no opportunity to be heard on the issue of ripeness presented by amicus Anne Hattori. That complaint is without merit. In fact, Mr. Davis filed an *Opposition and Reply to Motion for Leave to File Brief for Anne Perez Hattori as Amicus Curiae*, Doc. 23 (Jan. 7, 2012), in which he specifically acknowledged that amicus' motion "contains arguments not raised by the defendant" but Mr. Davis neither addressed the merits of amicus' arguments nor requested additional opportunity to brief them.

Mr. Davis next complains that because defendants did not raise ripeness in their motion to dismiss and were even "unconvinced" of it, that he was caught off guard. "First, 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' Moreover, courts … have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002); also citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

By Plaintiff's Own Admission, the Matter is Not Ripe

After the briefing in this case before the magistrate judge was closed Mr. Davis made admissions against interest that illustrate perfectly why the magistrate judge was correct to recommend dismissal of the complaint on the grounds that the controversy presented is not ripe for judicial review. On May 28, 2012, Mr. Davis published an article in the opinion pages of the

Marianas Variety titled, "Getting Out the Vote," available at http://mvguam.com/outsider-perspective/23855-getting-out-the-vote.html (visited July 13, 2012), attached for the convenience of the court. In it, Mr. Davis practically boasts that this action will never be ripe for review:

> With regard to the actual goal involved – the plebiscite itself, the end of the self-determination rainbow, as it were – near-term optimism has given way to financial and other realities. Hope for a plebiscite as early as 2012 has now faded to 2016 or beyond. Funding isn't the only problem, either. Guam law requires registration of "70% of eligible voters" before a political status plebiscite can occur. Of course nobody knows what that figure actually is, as it changes daily. Senator Pangelinan is responsible for that particular bit of whimsical fluff.
>
> A while ago I compared the growth rate of signatures on the Decolonization Registry to the timeline since the Registry was created. Even with a newly-enacted law that automatically adds everyone who qualifies for a CLTC lease it looks like they have a tough row to hoe. I suspect that most of those automatically registered are blissfully unaware they were signed up by proxy.
>
> I compute a high probability of reaching the 70% level sometime early in the 25th century. Even that may be a bit optimistic however, because it's become apparent that virtually all the eligibles who wished to sign – or were signed up automatically by their friends at the Guam Election Commission – have already done so.
>
> Meanwhile, due at least partly to Guam's standing as the undisputed champion in national birth rate statistics (with Utah a distant second) the number of 'Native Inhabitants' reaching voting age annually exceeds the number signing up to vote. It looks like they're actually losing ground in the struggle to reach that magical 70%.
>
> It's time to regroup, I suppose, or the plebiscite will forever be an alluring mirage out there on the horizon. I believe we can expect a change to eliminate the 70% requirement or reduce it to something like, say, 10%, which is approximately where they stand at the moment. They should probably do it soon, because that number gets smaller every day.

Mr. Davis is complaining to this court that he is not permitted to register for an election that he predicts to the rest of the world "will forever be an alluring mirage out there on the horizon," unless the laws he challenges are amended. By Mr. Davis' own admission, this matter is not and may never be ripe for judicial review. The magistrate judge was correct.

Legal Discussion

In *John Davis, Jr. v. Commonwealth Election Commission*, Case No. 12-CV-00001, Doc. 44, 2012 WL 2411252 (D. N.M.I. June 26, 2012), Chief Judge Ramona Manglona dismissed without prejudice a legally similar attack on registration and election procedures in the CNMI to those presented by Mr. Davis here in Guam.

> Plaintiff John H. Davis, Jr. ("Davis") asks the Court to permanently enjoin the chairperson and the executive director of the Commonwealth Election Commission ("CEC" or "the Commission") from denying him the right to vote on any initiative to amend or repeal Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI"). Article XII restricts ownership of permanent and long-term interests in real property within the Commonwealth to persons of Northern Marianas descent ("NMD").
>
> In 1999, Article XVIII of the Commonwealth constitution was amended to prohibit non-NMDs who otherwise are qualified voters from voting on initiatives to change Article XII. In 2011, Governor Benigno R. Fitial signed Public Law ("P.L.") 17-40, which directed CEC to maintain a registry of NMDs. The Commission has promulgated rules and regulations to implement P.L. 17-40.
>
> Davis, a non-NMD who is otherwise qualified to vote in the Commonwealth, asserts that by enforcing Article XVIII § 5(c) and P.L. 17-40 to restrict his right to vote, Defendants violate his civil rights as guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution. He claims for injunctive relief under 42 U.S.C. §§ 1971 and 1983, in the form of a declaratory judgment pursuant to 28 U.S.C. § 2201 and 2202 (Declaratory Judgment Act).
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> * * *
>
> As of the April 26 motions hearing in this matter, at least five initiatives regarding Article XII were pending in the Commonwealth legislature. No initiative, however, had yet qualified for the next general election on November 6, 2012, and no special election to vote on an initiative was scheduled. Since the hearing, the parties have not filed any supplemental papers advising that a petition has qualified for the ballot.
>
> It is undisputed that Plaintiff Davis is a U.S. citizen and a resident of the CNMI; that he is eligible to vote pursuant to Article VII of the Commonwealth Constitution and is a registered voter; and that he is not of Northern Marianas

> descent. At the hearing, the parties stipulated that it would be futile for Davis to attempt to register with the Commission for the NMDR.

Davis v.CEC, pp. 1, 2, 7, 8 (footnote and record citations omitted). Here, John Davis' claims and Arnold Davis' claims are for all practical purposes identical.

Chief Judge Manglona looked first at the question in terms of plaintiff's standing to challenge procedures leading to an election that was not "imminent" and then, almost as an afterthought, addressed the "jurisdictional issue closely related to injury in fact," namely ripeness of the controversy overall. As to standing, the court held, "Davis's injury is not actual, because it does not occur until he is denied the right to vote or his ballot is disallowed. It is not imminent, because no petition is on the November ballot. Davis therefore cannot show an injury in fact, and lacks standing." *Davis v. CEC*, page 11. As to ripeness, the court held, "While Davis may find it distressing to contemplate that under Commonwealth law, if an Article XII initiative gets on the ballot he will not be permitted to vote on it, he suffers no hardship until an initiative is 'certainly impending.' " *Id*. (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)).[2]

[2] In point of fact, ripeness and the injury-in-fact component of standing can overlap one another. "The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing and that claims be 'ripe' for adjudication … Standing addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication. The related doctrine of ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiff's purported injury is too speculative and may never occur." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010) (citations omitted). "The standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction. The ripeness question is whether the harm asserted has matured sufficiently to warrant judicial intervention. Both questions bear close affinity to one another." *Immigrant Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 859 (9th Cir. 2002) (quotation marks, editorial brackets and citations omitted). *See also, City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 n. 6 (9th Cir. 2001) (noting that standing "overlaps substantially" with ripeness and that in that case, both were "inextricably linked").

Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), the court analyzed whether John Davis had adequately alleged injury-in-fact.

> The operative question is whether Davis has suffered or is about to suffer an injury in fact. As a duly registered voter, Davis has a legally protected interest in exercising his right to vote. The injury from not being permitted to vote on an Article XII initiative is concrete and particular. Because he is not of Northern Marianas descent, Article XII prohibits him from owning land in fee simple. The outcome of any vote to amend Article XII may affect his potential rights to own real property in the place he has made his home. Davis is injured if he is unlawfully deprived of the ultimate say a citizen has in political affairs: a vote.

Id., page 9. Here, the injury-in-fact alleged by John Davis and the injury-in-fact alleged by Arnold Davis diverge.

John Davis' injury-in-fact is tangible because the vote contemplated in the CNMI will affect whether as a non-NMD he will ever be permitted to own property. As discussed previously, *see*, *Motion to Dismiss*, Doc. 17, pp. 11-17 (Dec. 2, 2011); and *Reply to Opp. to Motion to Dismiss*, Doc. 24, pp. 1-4 (Jan. 10, 2012), nothing in the plebiscite currently contemplated in Guam law – designed to ascertain and transmit the *desires* of a select population to Congress, the President, and the United Nations – will alter or affect Arnold Davis' rights in any way.[3] "No matter what it says or how much it says [the report from this plebiscite] is simply a document submitted to Congress that Congress has no obligation to consider, let alone act upon." *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998).

[3] *See* 1 GCA § 2105 ("The general purpose of the Commission on Decolonization shall be to ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America. Once the intent of the Native Inhabitants of Guam is ascertained, the Commission shall promptly transmit that desire to the President and the Congress of the United States of America, and to the Secretary General of the United Nations.").

Mr. Davis insists that the question is not whether a particular *election* will ever be held, but that he is not permitted to *register* for that election (that may never be held and Congress has no obligation to consider).[4] If this non-binding advisory plebiscite was intended to do anything more than ascertain and transmit the desires of "native inhabitants" defendants might tend to agree. But the right to register cannot be viewed in isolation from the purpose it serves and the right from which it is derived, and that is the right to vote.

Not a single case from the "decades of civil rights history and jurisprudence" cited by Mr. Davis at pages 5-8 of his *Objection* involves the application of the Constitution or the Voting Rights Act to a *non-binding advisory plebiscite* in an *unincorporated territory* whose political status remains undetermined. The cases he cites involve registration for elections for public office or self-executing initiatives in states, not advisory plebiscites restricted by design to ascertaining the desires of a historically unique native peoples in unincorporated territories with respect to their preferred future political status.[5]

For purposes of the Voting Rights Act, "vote" includes "*all action necessary to make a vote effective including, but not limited to, registration* or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the

[4] Mr. Davis argues, "A racially discriminatory denial of the right to register is a separate and distinct injury that plaintiff has suffered... [T]he denial of plaintiff's *registration* is the immediate, real, tangible, concrete and illegal harm challenged in the complaint." *Objection*, pp. 4, 5 (emphasis in original). Later he asserts "the language of the statutes invoked by plaintiff in this action … create legal rights [to register independent of the purpose or effect of the election itself] the violation of which automatically creates a case or controversy." *Id.*, at 11.

[5] Mr. Davis has previously argued that it is "unconstitutional for government to solicit and transmit the views of one (and only one) racial group." *Opposition and Reply to Motion to Dismiss*, Doc. 21, page 2, n. 1 (Jan. 3, 2012). Unsurprisingly Mr. Davis cites no authority that would prohibit such a government inquiry, even assuming for the sake of argument that the term "native inhabitant" is race-based, which defendants of course deny.

appropriate totals of votes cast *with respect to candidates for public office and propositions for which votes are received in an election*." 42 U.S.C.A. § 197l(e) (emphasis added). The plebiscite Mr. Davis challenges here does not involve an election "with respect to candidates for public or party office."[6] And it is not a "proposition" because whatever the outcome it "will in no way change the juridical or political status of the plaintiff[] or anyone else." *Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 833-34 (D. P.R. 1967). "Its approval would be nothing more than a

[6] Mr. Davis' *Objection* relies on a hypothetical in Section VI at pp., 14, 15 involving registration for elections for public office ("If, for example, a state announced 'whites only' registration process for an election five years hence – say a U.S. Senate opening or some similar state office with a long term…."). What he does not provide is an example of an advisory plebiscite or referendum where a public office is not at issue, which does not purport to represent the views of the government, or which does not affect a would-be registrant's political status in any way. Mr. Davis' argument in Section V at pp. 13, 14 – that the matter is ripe because "GovGuam has already spent taxpayer funds on the plebiscite" and "the chain of events has already commenced leading to a plebiscite – including registration, expenditure of government funds and plans for a government funded "education" campaigns to support the plebiscite" – is a challenge to the wisdom of the expenditure of public funds, a political question, not an allegation of personal injury-in-fact under the equal protection clause or Voting Rights Act. *See, generally, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-86 (1982) ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."); *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1443-44 (2011) ("This Court has rejected the general proposition that an individual who has paid taxes has a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution.") (quotation marks and citation omitted; emphasis in the original); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) ("[B]ecause state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.") (quotation marks and citations omitted). "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *United States v. Hays*, 515 U.S. 737, 743 (1995).

request that the federal government respect certain rights." *New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon*, 779 F.Supp. 646, 654-55 (D. P.R. 1991).[7]

The Ninth Circuit's decision in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), cited by Mr. Davis at page 9, actually illustrates why Mr. Davis has failed to allege a personal stake in the outcome sufficient to constitute injury-in-fact. In *Catholic League*, the question presented was "whether Catholics and a Catholic advocacy group in San Francisco may sue the City on account of an official resolution denouncing their church and doctrines of their religion." *Id.*, 624 F.3d 1047. A tenuous majority of the court held they may albeit with reservation. "Had a Protestant in Pasadena brought this suit, he would not have had standing. Catholics in San Francisco, on the other hand, have sufficient interest, so that well-established standing doctrine entitles them to

[7] *Compare*, K.K. DuVivier, *The United States as a Democratic Idea*? *International Lessons in Referendum Democracy*, Temple L.Rev. 821, 841-48 (Fall 2006) ("Referendums may produce positive law, or they may be only advisory, 'a comprehensive opinion poll on a significant issue, with a verdict that can be translated into law or policy as the government or legislature may see fit.' … In contrast to votes that bind in legal terms, some referendums are only advisory or 'consultative.' Advisory referendums are not as common in the United States, and 'some state constitutions disallow ballot questions that have no legal effect.' … An advisory referendum allows a legislature flexibility to predict the outcome of a provision in a manner that reconciles possible conflicts and anticipates constitutional challenges in the courts.") (citations and footnotes omitted). In *Shapiro v. Guerrero*, 1988 WL 242622 (D. Guam App.Div. 1988), the appellate division of the district court dismissed as moot the appeal of a challenge to an election on a proposed Guam Commonwealth Act that had already passed by the time the appeal was heard. One of plaintiff's challenges was that a plebiscite was not provided for in Guam's Organic Act. Although the court did not reach the question it noted the distinction between a non-binding plebiscite intended for purposes of future negotiation and initiatives or referenda which have the effect of amending the law. *See id.*, 1988 WL 242622 *1 ("By definition, Chapter 17 of title 3 G.C.A. is for the purpose of enacting, amending or repealing statutes by initiative and referendum. *Whatever the result of this election, the certified results thereof will not enact, amend or repeal any statute*.") (emphasis added).

litigate whether an anti-Catholic resolution violates the Establishment Clause." *Id.*, 624 F.3d 1048.[8]

Standing analysis in establishment clause cases is *sui generis*, but *Catholic League* is a risky decision for Mr. Davis to cite for a more fundamental reason. Although "psychic" injury-in-fact may be easier to qualify in the standing analysis in first amendment establishment clause cases, what distinguishes *Catholic League* from the case at bar is that the government of Guam is not engaging in speech merely by providing "native inhabitants" a forum from which to solicit and transmit their views. Mr. Davis cannot credibly argue that the plebiscite proposed here, intended to provide a forum in which to solicit and transmit the views of the native inhabitants of Guam, represents official endorsement of those views by the government of Guam.

The question remains whether Mr. Davis "has alleged such a personal stake in the outcome of the controversy as to warrant ... invocation of federal court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks omitted). "To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is

[8] A 6-5 majority agreed that the plaintiffs had standing to raise an establishment law claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), challenging a non-binding resolution of the Board of Supervisors critical of a Vatican directive forbidding the placement of children in need of adoption with same-sex couples, but eight judges concurred in the judgment affirming the district court's dismissal of the complaint. *See* 624 F.3d 1060 ("Although three of us would reverse, a majority of this court concludes that we should affirm, either on standing grounds or on the merits."). Three agreed that plaintiff's establishment law claim failed on the merits, *see*, 624 F.3d 1060 (Silverman, J., concurring) (" the district court correctly dismissed the plaintiffs' lawsuit because duly-elected government officials have the right to speak out in their official capacities on matters of secular concern to their constituents, even if their statements offend the religious feelings of some of their other constituents"); five dissented on the standing question and would not have reached the merits, *see*, 624 F.3d 1062 (Graber, J., dissenting) ("I would not reach the merits of this dispute. Instead, I would hold that we lack jurisdiction over this case because Plaintiffs lack Article III standing.").

concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* Mr. Davis speaks to none of these criteria in any "concrete and particularized" sense.[9]

Mr. Davis' mechanical application of the language of Voting Rights Act to an advisory plebiscite leads to absurd results when applied to the territories in the context of the larger question of what self-determination means, results that Congress could not have been envisioned before the Voting Rights Act was signed into law August 6, 1965, for it would be another three years before Congress would permit United States citizens residing in Guam even to vote for their own governor. *See* Public Law 90-497, § 12(a), September 11, 1968 (82 Stat. 847; 48 U.S.C. 1421a) (Elective Governor Act).[10] When the Voting Rights Act was being considered, the elective franchise rights of United States citizens in unincorporated territories could not have been further from Congress' mind.[11] In view of the fact that citizens in the unincorporated

[9] "The Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient to confer standing. The Court requires that even if a government actor discriminates on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment. Additionally, the Supreme Court recommends that even when a plaintiff has alleged redressable injury sufficient to satisfy the standing requirements of Article III, courts should refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances." *Carroll v. Nakatani*, 342 F.3d 934, 940-41 (9th Cir. 2003) (internal citations and quotation marks omitted). What Mr. Davis seeks here is an advisory opinion about an advisory plebiscite that in his own words "will forever be an alluring mirage out there on the horizon."

[10] For brief histories of the people of Guam's incremental steps toward self-determination and sovereignty, *see generally*, A. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 313-400 (1989); and *In re Request of Governor Felix P. Camacho*, 2004 Guam 10 ¶¶ 19-33.

[11] *Compare, Ngiraingas v. Sanchez*, 495 U.S. 182, 188 (1990) (deciding that Guam was not a "person" within the meaning of 42 U.S.C. § 1983) ("Our review of § 1983's history uncovers no sign that Congress was thinking of Territories when it enacted the statute over a century ago in

territories and in the commonwealths of Puerto Rico and the Northern Mariana Islands still may not vote for president and do not have voting representation in Congress, nothing has changed.[12]

There is a fundamental difference between citizenship unilaterally conferred upon residents of unincorporated territories and citizenship obtained by mutual consent when incorporated territories become states. As applied to persons residing in the original thirteen colonies and the *incorporated* territories that would later join the union in statehood, it can be heard in Thomas Jefferson's *Declaration of Independence*, "Governments are instituted among Men, deriving their just powers from the consent of the governed," and it resounds in Abraham Lincoln's *Gettysburg Address*, "that government of the people, by the people, for the people, shall not perish from the earth." *See also, United States v. Lara*, 541 U.S. 193, 212 (2004) ("The Constitution is based on a theory of original, and continuing, consent of the governed.") (Kennedy, J., concurring in the judgment); and *Nevada v. Hall*, 440 U.S. 410, 426 (1979) ("In this Nation each sovereign governs only with the consent of the governed."). But when uttered by native inhabitants from the unincorporated territories it falls on deaf ears.[13]

1871. The historical background shows with stark clarity that Congress was concerned only with events 'stateside.' ").

[12] *Compare*, Amendment XXIII to the United States Constitution which permits citizens in the District of Columbia to vote for Electors for President and Vice President, proposed by Congress on June 17, 1960, *see* H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 2 (1960), and ratified by the states on March 29, 1961.

[13] " 'The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.' " *Gratz v. Bollinger*, 539 U.S. 244, 301-02 (2003) (quoting *United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836, 876 (5th Cir. 1966) (Wisdom, J.)). The advisory plebiscite at issue here does not even have to be justified on the basis that it is intended to "undo the effects of past discrimination." Its self-evident intent is simply enough to begin to address

When the "native inhabitants" of Guam were made citizens by virtue of Guam's Organic Act in 1950, it was a unilateral act of Congress that made them so.[14] Unlike citizenship established by mutual consent when residents of *incorporated* territories joined the union, or when the islands of the Northern Marianas became a commonwealth, there was no plebiscite evidencing "consent of the governed" to the terms of Guam's Organic Act when those persons residing in Guam in 1950 were simply "made" citizens.[15]

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business left unfinished since 1898 when Spain ceded Guam to the United States pursuant to the Treaty of Paris (30 Stat. 1754), and it is enough that it will not affect Mr. Davis' political rights in the slightest.

[14] *See*, Robert F. Rogers, *Destiny's Landfall: A History of Guam*, 130 (Honolulu: University of Hawaii Press. 1995) ("The Organic Act functions as a constitution for Guam, but it does not derive its powers from the people of the island. They never voted on it. The U.S. Congress retains plenary power (i.e., full authority) to amend the act or to enact any legislation it wishes for Guam without the consent of the Guamanians, a power that the Congress does not possess when dealing with the citizens of a U.S. state."); Leon Guerrero, Wilfred F. & Salas, John C., "Issues for the United States Pacific Areas: The Case of Guam," *Isla: A Journal of Micronesian Studies*, UOG Press, Vol. 3, No. 1, p. 145 (1995) ("We were granted U.S. citizenship unilaterally by the U.S. Congress in 1950 by the passage of the Organic Act of Guam which designated the island as an 'unincorporated territory' of the United States. The unincorporated status gives the U.S. Congress almost unlimited power over Guam, including the U.S. citizenship status of the people. Presumably, the U.S. Congress can unilaterally terminate our U.S. citizenship."); Ada, Joseph F., "Time for Change," *Isla: A Journal of Micronesian Studies*, UOG Press, Vol. 3, No. 1, p. 135 (1995) ("Our options are three. We can remain a colony. But that we will not do, under any circumstances. Or, we can be fully independent. That is not what we seek at this time, nor does it reflect, we believe, the desires of the federal government. There is only one other alternative: a partnership, a relationship of mutuality, a covenant between us describing our relationship and protected by contractual agreement that neither party will unilaterally change the relationship or impose its will on the other without mutual consent.").

[15] *Compare*, *Consejo de Salud Playa Ponce v. Rullan*, 593 F.Supp.2d 386, 389-90 (D. P.R. 2009) (discussing Congressional oversight of plebiscites held in Alaska and Hawaii before being admitted to the union) ("Thus, as a prerequisite to admission, Congress in both territories held a final plebiscite to determine whether admission to the Union was the will of the populace; in neither case did Congress unilaterally impose statehood as a necessary consequence of incorporation."). *See esp.*, *Commonwealth – Covenant to Establish – Northern Mariana Islands*, S. Rep. 94-596, 1976 U.S.C.C.A.N. 448, 449 (January 27, 1976) ("The essential difference between the Covenant and the usual territorial relationship, as that of Guam, is the provision in

The ultimate relief Mr. Davis seeks is not merely to dilute the vote but to permanently muzzle the native inhabitants of Guam from ever being permitted to express their *desires* as to what political status option they might favor *if* they were given a choice they have never had. Absent the results of the plebiscite being presented as representative of the will of Guam's populace as a whole, something it decidedly does *not* purport to do, Mr. Davis has no personal stake in registering for it other than to dilute it to the point that it is rendered meaningless.[16]

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the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention, as was the case with Puerto Rico, rather than through an organic act of the United States Congress."). *Compare*, *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) ("Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature.") (citing 48 U.S.C. § 1423i).

[16] It is the cruelest of ironies that Mr. Davis employs the Voting Rights Act – intended to protect minorities in the exercise of their right to an effective vote – to condemn to permanent silence a dwindling people who have yet to experience the exercise of the inalienable right of "consent of the governed" exhorted in the *Declaration of Independence*. This is not to say that the Voting Rights Act does not or should not apply in Guam. Indeed, the Elective Governor Act specifically made the Bill of Rights, the second sentence of section 1 of the 14th amendment, and 15th and 19th amendments applicable to Guam. But conspicuous by their absence are the 10th amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people") and the first sentence of section 1 of the 14th amendment ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"), which would have conferred *Constitutional* citizenship rather than *Congressional* citizenship upon the residents of Guam in 1968, *see* Leibowitz, *Defining Status*, *supra* n. 10, at 334, leaving the door open to future uncertainty with respect to the rights of Guam citizens. "The Bill of Rights was not intended to interfere with the performance of our international obligations since 1898 when Spain ceded Guam to the United States pursuant to the Treaty of Paris (30 Stat. 1754). Nor was it intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not to enforce homogeneity." *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990). It is clear enough that Congress was not thinking of the unincorporated territories when it passed the Voting Rights Act in 1965, nor when it was renewed in 1970, 1975, 1982, and 2006. And as applied to the territories *Wabol* makes clear the Bill of Rights, the 14th and 15th amendments, and remedial civil rights legislation such as the Voting Rights Act cannot be read in the vacuum Mr. Davis proposes.

The Arguments Presented in Defendants' Motion to Dismiss Should Now be Addressed.

"[T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C). Should the court find that Mr. Davis' complaint is ripe for judicial review the merits of defendants' original motion to dismiss still must be addressed.

CONCLUSION

Mr. Davis does not believe the plebiscite he asks to be permitted to register for will ever happen, not unless the law creating it is amended. His claims are not ripe. Even if the plebiscite in its current form were to occur in his lifetime, Mr. Davis has alleged no injury-in-fact because the results of the plebiscite are advisory only, do not purport to represent the views of the island as a whole, and will not affect his political rights in any way. Even if "Native Inhabitants of Guam" were a race-based classification, and it is not, until such time as the territory of Guam formally enters the union, a non-binding plebiscite intended to solicit and transmit the views of the remnants of a colonized people does not offend the Constitution or the Voting Rights Act.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the forgoing electronically with the Clerk of Court via the CM/ECF System to the following:

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Office of the Attorney General

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Getting out the vote

MONDAY, 28 MAY 2012 03:30AM BY DAVE DAVIS HITS: 472

THE self-determination/political status fervor so much in the news last year appears to have fizzled to some extent. The promise to see the process through to consummation in a plebiscite was, after all, a solid plank in the Governor's election campaign.

It launched in September 2011 with a convening of the "Commission on Decolonization for the Implementation and Exercise of Chamorro Self Determination", the first in more than a decade, chaired by the Governor and loyally attended by the usual suspects. The Commission was originally promised generous funding and initially seemed capable of actually achieving something unlike its predecessor, the Guam Commission on Self Determination, which spent more than $12 million over as many years with no measurable result. Sub-committees were formed and grandiose plans put in motion to educate the public.

Within no more than two months, the original funding promises had gone the way of campaign promises since time immemorial and the Commission was broke. Anticipated funding from the Department of Interior was nowhere to be found. Ways to raise money to carry out the agenda became a central issue at every meeting. One suggestion was to ask for public donations. Right. Don't hold your breath.

A whole new problem surfaced in November with the filing of a voter discrimination lawsuit in the Guam District Court. The Guam Attorney General picked up the gauntlet and gamely entered the fray on GovGuam's behalf. After an initial spate of motions and counter-motions the issue sort of sank out of public view. Ditto for the Decolonization Commission. It may be meeting and discussing the grand plan, but there's been little or no media mention of its activities for months now.

With regard to the actual goal involved -- the plebiscite itself, the end of the self-determination rainbow, as it were -- near-term optimism has given way to financial and other realities. Hope for a plebiscite as early as 2012 has now faded to 2016 or beyond. Funding isn't the only problem, either. Guam law requires registration of "70% of eligible voters" before a political status plebiscite can occur. Of course nobody knows what that figure actually is, as it changes daily. Senator Pangelinan is responsible for that particular bit of whimsical fluff.

A while ago I compared the growth rate of signatures on the Decolonization Registry to the timeline since the Registry was created. Even with a newly-enacted law that automatically adds everyone who qualifies for a CLTC lease it looks like they have a tough row to hoe. I suspect that most of those automatically registered are blissfully unaware they were signed up by proxy.

I compute a high probability of reaching the 70% level sometime early in the 25th century. Even that may be a bit optimistic however, because it's become apparent that virtually all the eligibles who wished to sign – or were signed up automatically by their friends at the Guam Election Commission -- have already done so.

Meanwhile, due at least partly to Guam's standing as the undisputed champion in national birth rate statistics (with Utah a distant second) the number of 'Native Inhabitants' reaching voting age annually exceeds the number signing up to vote. It looks like they're actually losing ground in the struggle to reach that magical 70%.

It's time to regroup, I suppose, or the plebiscite will forever be an alluring mirage out there on the horizon. I believe we can expect a change to eliminate the 70% requirement or reduce it to something like, say, 10%, which is approximately where they stand at the moment. They should probably do it soon, because that number gets smaller every day.