No. 13-15199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

GUAM ELECTION COMMISSION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Territory of Guam

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APPELLEES'ANSWERING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from an order and final judgment entered by the District Court of Guam dismissing a complaint on January 9, 2013. Timely notice of appeal was filed on January 31, 2013.

Federal question jurisdiction was proper in the court below pursuant to 28 U.S.C. § 1331. Appellate jurisdiction to review the final judgment of the District Court of Guam dismissing the complaint is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court of Guam erred when it determined Mr. Davis' claims were not ripe for judicial review.

II. Whether Guam's intended plebiscite – which does not involve an election for public office nor involves a self-executing change in the law – is a vote within the meaning of the voting rights act.

III. Whether Mr. Davis is stigmatized because his views are not being solicited in an advisory plebiscite.

IV. Whether *Rice v. Cayetano* is controlling.

V. Whether Mr. Davis will suffer injury-in-fact if not permitted to register to vote in an advisory plebiscite.

STATEMENT OF THE FACTS

"Native Inhabitants of Guam" are defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam[1] and descendants of those persons." 1 GCA § 2102. The unincorporated territory of Guam has established a "Guam Decolonization Registry" for the "purposes of registering and recording the names of the Native Inhabitants of Guam." 3 GCA § 21001(d).

Arnold Davis is a white, non-Chamorro, male; he is a United States citizen and resident of Guam who has voted in past Guam general elections. Mr. Davis does not meet the statutory definition of "Native Inhabitants of Guam." E.R. 142-43, 146; *Complaint* ¶¶ 1, 7, 20. He seeks declaratory and injunctive relief enjoining a law establishing a "Political Status Plebiscite" in which only "Native Inhabitants of Guam" are eligible to register and vote. That law provides as follows:

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

[1] *See* P.L. No. 81-630, 64 Stat. 384 (1950), codified at 48 U.S.C. § 1421, et seq.

> 1. Independence ( )
> 2. Free Association with the United States of America ( )
> 3. Statehood ( ).
>
> **Persons eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within this Chapter of the Guam Code Annotated**, who are eighteen (18) years of age or older on the date of the 'Political Status Plebiscite' and are registered voters on Guam.
>
> The 'Political Status Plebiscite' mandated in Subsection (a) of this Section shall 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.

P.L. 27-106:VI:23 (Sept. 30, 2004), codified at 1 GCA § 2110 (emphasis added).

There is no indication in the law by what criteria 70% of eligible voters is to be determined, nor any suggestion in the complaint or elsewhere that the 70% threshold of eligible voters, however calculated, is close to being met. The parties agree that the 70% threshold is nowhere close to being met.

Defendants are the members of the Guam Election Commission and the Attorney General of Guam, sued in their official capacities. Mr. Davis alleges that he has attempted to register for the plebiscite but because he is not a "Native Inhabitant of Guam," he has been turned away. E.R. 146; *Complaint* ¶ 21. He contends that because 1 GCA § 2110 limits participation in the political status plebiscite to "Native Inhabitants of Guam," it violates Section 2 of the Voting Rights Act of 1965; his right to equal protection under the 5th, 14th and 15th amendments to the United States

Constitution; and "various provision [sic] of the Organic Act currently codified at [48 U.S.C.] §§ 1421b(m), 1421b(n) and 1421b(u)." E.R. 147-49; *Complaint* ¶¶ 29, 33, 39.[2]

Mr. Davis' complaint begins by misconstruing the plain language and stated intent of the law he challenges. He says,

> **Under Guam law, a plebiscite is to be held concerning Guam's future relationship to the United States**. Only "Native Inhabitants of Guam" will be permitted to vote, and only those meeting the statutory definition of that phrase are currently being registered to vote. Plaintiff and all those similarly situated – those who do not meet the definition of Native Inhabitant of Guam – are precluded from registering to vote. Further, unless this Court enjoins defendants from pursuing their current course of action, **plaintiff and all those similarly situated will not be permitted to vote in this crucial election concerning the future of Guam and, indeed, their own future**.

E.R. 142; *Complaint* ¶ 1 (emphasis in bold added).

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[2] "Guam's 'Bill of Rights' is patterned after, but not identical to, the federal Bill of Rights. For example, in § 1421b there is no equivalent to the Second Amendment, Fifth Amendment grand jury indictment guarantee, or the Sixth and Seventh Amendment rights to a trial by jury. Furthermore, Guam's 'Bill of Rights' contains provisions not found in the federal Bill of Rights. *See*, *e.g.*, § 1421(n) (proscribing discrimination on the basis of race, language, or religion); § 1421b(q) (prohibiting employment of children under the age of fourteen years in any occupation injurious to health); § 1421(r) (requiring compulsory education for all children between the ages of six and sixteen years)." *Guam v. Guerrero*, 290 F.3d 1210, 1214 n. 6 (9th Cir. 2002). In 1968, Congress enacted what is familiarly known as the Mink Amendment, which extended specific constitutional rights to Guam "to the extent that they have not been previously extended" 48 U.S.C. § 1421b(u), including "article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments." *Id.*, 290 F.3d 1214 n. 7.

The statute decidedly does *not* say that its purpose is to hold a plebiscite "concerning *Guam's* future relationship to the United States," which would necessarily include Mr. Davis. Here is what the statute says:

> 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.

1 GCA § 2105 (emphasis added). Nowhere does the statute suggest that the results of the plebiscite will have the effect, immediate or otherwise, of altering Guam's future political relationship with the United States, only that the *desires* of the "Native Inhabitants of Guam" as defined in § 2102 are to be *ascertained* and *transmitted* to the President, Congress and United Nations.[3]

[3] *See also*, 3 GCA § 21000 ("It is the intent of *I Liheslaturan Guåhan* to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Guam Organic Act to exercise the inalienable right to self-determination of their political relationship with the United States of America. [¶] *I Liheslaturan Guåhan* finds 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."). 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.

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 (last viewed October 3, 2013), in which Mr. Davis predicted the plebiscite will never happen, at least not in his lifetime:

> 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.
>
> * * *
>
> 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 complains that he is not permitted to register for an election that he predicts "will forever be an alluring mirage out there on the horizon," unless the laws he challenges are changed. By his own admission, this matter is not and may never be ripe for judicial review.

SUMMARY OF THE ARGUMENT

Presented to the court below were two questions of law: (1) whether Mr. Davis had alleged injury-in-fact sufficient to confer Article III standing; and (2) whether Mr. Davis' claims were ripe for judicial review. Not only are Mr. Davis' claims not ripe for judicial review, he has failed to allege a judicially redressable injury-in-fact sufficient to satisfy Article III.

The advisory plebiscite that Mr. Davis challenges here does not involve an election for public office, nor does it involve a self-executing modification of existing law; it is a poll. Although it employs the election machinery of the government of Guam, it does not constitute a vote within the meaning of the Constitution or the Voting Rights Act. The Supreme Court's decision in *Rice v. Cayetano*, and this Court's decision in *Arakaki v. Hawaii*, both of which involved elections for statewide public office, not an *advisory* plebiscite, therefore do not control the issues presented. Merely because the election machinery of the government of Guam is to be used to poll a select segment of its population as to its desires does not mean that Mr. Davis has

alleged a constitutionally recognizable injury-in-fact under the Fifteenth Amendment and the Voting Rights Act.

Mr. Davis, who does not meet the definition of "native inhabitant of Guam" (a term originated by Congress) contends he is stigmatized because is not permitted to participate in an advisory plebiscite intended to poll and transmit the desires of a historically distinct and unique *colonized* people to Congress, the President, and the United Nations. Ultimately the relief Mr. Davis seeks is not to vindicate his own constitutional rights but to muzzle whatever voice remains of a people who have yet to have their own say in their own destiny.

STATEMENT OF THE STANDARD OF REVIEW

A district court's order granting a motion to dismiss the complaint is reviewed *de novo*. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009); *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012); *Zadrozny v. Bank of New York Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013).

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, ___ F.3d ____, 2013 WL 4712731 * 3 (9th Cir. 2013) (citing *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)). "Dismissal is proper under Rule 12(b)(6) if it appears beyond doubt that the

non-movant can prove no set of facts to support its claims." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

This Court "can affirm the district court on any basis supported by the record." *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012); *see also, Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011); and *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quotation marks and citation omitted).

ARGUMENT

Ripeness and the injury-in-fact component of standing often 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) (standing "overlaps substantially" with ripeness and, in that case, both were "inextricably linked").

I. THIS CASE IS NOT RIPE FOR JUDICIAL REVIEW.

"To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is 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." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)) (emphasis added). "Ripeness 'requir[es]

us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *Texas v. United States*, 523 U.S. 296, 300-01 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)) (editorial brackets in original).

Until the plebiscite he seeks to register for is "actual and imminent," Mr. Davis has no claim. Nevertheless, Mr. Davis insists that not being permitted to register for the plebiscite is the harm that is ripe, despite the fact that he himself does not believe the election will ever be held. Regrettably for Mr. Davis (and even more so for the native inhabitants of Guam), a date when the plebiscite may actually be held remains a constantly moving target.[4] If the history of the statutes Mr. Davis challenges here

[4] *See*, P.L. 23-130 (Dec. 19, 1996) (establishing the Chamorro Registry); P.L. 23-147 (Jan. 15, 1997) (Creating the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination); P.L. 25-106 (Mar. 10, 2000) (Relative to the Creation of the Guam Decolonization Registry for Native Inhabitants of Guam Self-Determination); P.L. 25-146 (Jun. 13, 2000) (Relative to Reforming the Election Laws of Guam and Rescheduling the Political Status Plebiscite); P.L. 25-148 (July 5, 2000) (providing that the political status plebiscite "shall be held on November 7, 2000, *unless* the Guam Election Commission determines that it won't be adequately prepared to hold the Plebiscite on that date"); P.L. 27-106:VI:23 (Sept. 30, 2004) (providing that the " 'Political Status Plebiscite' ... shall 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."); P.L. 29-116 (Nov. 21, 2008) (Relative to meetings of the Commission on Decolonization); P.L. 30-102 (Mar. 12, 2010) (Relative to the Commission on Decolonization); P.L. 31-92 (Sept. 30, 2011) (Relative to the Registration, Education Campaign and Voting Process for the Plebiscite on Political Status for Guam, All in Consultation with the Commission on Decolonization).

demonstrates anything, it is that there is no telling if let alone when the fabled plebiscite will ever be held.[5]

> To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. ——, ——, 130 S.Ct. 2743, 2752, 177 L.Ed.2d 461 (2010); *see also Summers*, *supra*, at 493, 129 S.Ct. 1142; *Defenders of Wildlife*, 504 U.S., at 560–561, 112 S.Ct. 2130. "**Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending**." *Id*., at 565, n. 2, 112 S.Ct. 2130 (internal quotation marks omitted). **Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient**. *Whitmore*, 495 U.S., at 158, 110 S.Ct. 1717 (emphasis added; internal quotation marks omitted).

Clapper v. Amnesty International USA, 568 U.S. ___, ____, 133 S.Ct. 1138, 1147 (2013) (emphasis added; quoting *Whitmore v. Arkansas*, 495 U.S. 149 (1990); additional citations omitted). "A claim is not ripe for adjudication if it rests upon

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[5] This is so because one legislature cannot bind its successors. *See*, *Dorsey v. United States*, 567 U.S. ___, ____, 132 S.Ct. 2321, 2331 (2012) ("statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified"); *see also*, *Lockhart v. United States*, 546 U.S. 142, 147-48 (2005) (Scalia, J., concurring) (citing cases). Until an election date is actually set, there is simply no way to know whether the plebiscite will ever actually occur.

contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (internal quotations omitted).

> Courts must refrain from deciding abstract or hypothetical controversies and from rendering impermissible advisory opinions with respect to such controversies. *See id.* at 96, 88 S.Ct. 1942. **"[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.**" *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (internal quotation marks omitted). An advisory opinion results if the court resolves a question of law that is not presented by the facts of the case. *See, e.g., In re Michaelson*, 511 F.2d 882, 893 (9th Cir.1975) ("[I]t would be constitutionally improper for us to reach this question since the issue lacks the necessary facts to make it concrete.").
>
> Ripeness is a prudential doctrine intended, in part, to prevent judicial review of legal issues outside the limits of Article III cases and controversies.

Earth Island Institute v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2007) (emphasis added) (citing *Flast v. Cohen*, 392 U.S. 83 (1968)), *affirmed in part, rev'd in part on other grounds, Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

The ripeness of an election law claim "depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 301 n.12 (1979). Mr. Davis points to nothing to suggest "an impending or future election."

"In assessing the hardship to the parties of withholding judicial resolution, our inquiry typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (internal quotations omitted). That Mr. Davis is not permitted to register for an advisory plebiscite fraught with a decade-and-a-half-and-counting of uncertainty as to whether or when it will ever be held is not the kind of "direct and immediate dilemma" that merits judicial intervention. *Compare*, *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties. The hardship prong is measured by the immediacy of the threat and the burden imposed on the plaintiffs who would be compelled to act under threat of enforcement of the challenged law. When considering hardship, we may consider the cost to the parties of delaying judicial review.") (citations and internal quotations omitted); and *Colwell v. Department of Health and Human Services*, 558 F.3d 1112, 1128 (9th Cir. 2009) ("Plaintiffs contend that they will suffer hardship if we do not decide their suit in its current posture. Hardship in this context 'does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff.' … Plaintiffs must show that postponing review imposes a hardship on them 'that is immediate, direct, and

significant.' ") (quoting *Natural Res. Def. Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004); and *Municipality of Anchorage v. United States*, 980 F.2d 1320, 326 (9th Cir. 1992)).

In both *Gonzalez* and *Brown*, the courts found the plaintiffs had standing and the cases were ripe because the plaintiffs' first amendment rights were directly implicated by the challenged election laws. Unlike the plaintiffs in *Gonzalez* and *Brown*, Mr. Davis does not contend he faces a threat of criminal prosecution by not being permitted to register; nor does he allege that his first amendment rights to free speech and free association are in danger of being abridged. Nothing in the law impairs him from exercising his first amendment right to speak out for or against a self-determination plebiscite, to contribute his time and money to efforts to defeat or pass a self-determination plebiscite, or even to sign a petition to put an initiative on the ballot.

Mr. Davis' sole allegation of hardship that he presented to the court below was that he wasn't getting any younger – a poignant truism certainly not lost on the native inhabitants of Guam, but it does not qualify. "As plaintiff[has] alleged no immediate harm, and [his] claims are contingent on future uncertainties, this case is not ripe for review." *Carter v. Virginia State Bd. of Elections*, 2011 WL 665408 * 2 (W.D. Va. 2011).

Mr. Davis contends at page 25 that in enacting the Voting Rights Act Congress conferred a right to challenge registration procedures without regard to whether an election will ever be held. The argument has a surface appeal but it begs the question presented here. For even when Congress has created a cause of action Article III must still be satisfied. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. *See also*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring in part and concurring in judgment) ("The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. [I]t would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.").

Not being permitted to place one's name on a registry for an advisory plebiscite a decade and a half in the making, that has no readily discernible date, and that is contingent on uncertain future events does not satisfy Mr. Davis' burden under Article III. His claims are not ripe. The complaint was properly dismissed.

II. THE ADVISORY NATURE OF THE PLEBISCITE IN QUESTION – WHICH DOES NOT INVOLVE AN ELECTION FOR PUBLIC OFFICE NOR INVOLVES A SELF-EXECUTING CHANGE IN THE LAW – IS NOT A VOTE WITHIN THE MEANING OF THE VOTING RIGHTS ACT.

Mr. Davis insists the question is not whether a particular election will ever be held, but that he is not permitted to *register* (for an election that may never be held) that is his constitutional injury. If this advisory plebiscite was intended to do anything more than ascertain and transmit the desires of "native inhabitants" the government of Guam might agree. To that, Mr. Davis contends that it doesn't matter that this plebiscite is advisory only. The problem with that logic is that the right to register cannot be viewed in isolation from the election it serves.

At page 20 of his brief, quoting *United States v. Dogan*, 314 F.2d 767, 771 (5th Cir. 1963), Mr. Davis argues "the district court's decision conflicts with a long and unbroken line of decisions establishing that the Fifteenth Amendment applies 'not only to the physical act of voting but to the entire voting process,' 'including the matter of registration where registering is required in advance of voting.' " Mr. Davis does not cite a single case that involves the application of the Constitution or the Voting Rights Act to a *non-binding advisory plebiscite* in an *unincorporated territory*. The cases Mr. Davis relies upon, particularly *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002)**,** involve registration for elections for either public office or self-executing initiatives in states, *not* advisory plebiscites restricted by

design to polling the desires of a historically unique colonized peoples in unincorporated territories with respect to *their* preferred future political status.

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 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. § 1971(e) (emphasis added). The plebiscite Mr. Davis challenges here does not involve an election "with respect to candidates for public or party office" as was the case in *Rice*. And it is not a "proposition" because whatever its outcome it is not an official pronouncement or endorsement of a particular position from the government of Guam as was the case in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), discussed within. The plebiscite "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 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).

At page 19 of his brief Mr. Davis says, "The nonbinding status of the plebiscite does not affect this analysis." He tries to argue the same at pages 26 – 29, citing *Smith v. Allwright*, 321 U.S. 649 (1944) which involved primary elections and the right to participate in candidate elections that ultimately led to public office. What Mr. Davis has not done is cite a single case in which the "vote" did not lead to either an election for public office or to a change in existing law by way of initiative or referendum.

Guam's Organic Act provides, "The people of Guam shall have the right of initiative and referendum, to be exercised under conditions and procedures specified in the laws of Guam." 48 U.S.C. § 1422a(a). An initiative is "the power of the voters to propose statutes and to adopt or reject them at the polls." 3 GCA § 17102(a). A referendum is "the power of the voters to initiate action to repeal existing statutes or parts of statutes, except statutes calling for elections or appropriations for usual current expenses of the Territory." 3 GCA § 17102(b). The Organic Act also provides, "Any Governor, Lieutenant Governor, or member of the Legislature of Guam may be removed from office by a referendum election…." 48 U.S.C. § 1422a(b). By these definitions the plebiscite Mr. Davis challenges is neither an initiative nor a referendum.

The term "plebiscite" is not defined in Guam law. In *Shapiro v. Guerrero*, 1988 WL 242622 (D. Guam App.Div. 1988), the appellate division of the district court of Guam dismissed as moot the appeal of a challenge to an election on a proposed Guam

Commonwealth Act. One of plaintiff's challenges was that a plebiscite was not provided for in Guam's Organic Act. The court did not reach that question but it did note the distinction between a non-binding plebiscite intended for purposes of future negotiation on the one hand, and initiatives or referenda which have the effect of amending the law on the other. *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). [6]

[6] *Compare*, K.K. DuVivier, *The United States as a Democratic Idea*? *International Lessons in Referendum Democracy*, Temple L.Rev. 821, 841-48 (Fall 2006) ("Frequently, referendums put forward new legislation, although in some countries they may only nullify rather than create a new law. 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.' … In the United States, citizens have used advisory referendums in the local government arena. For example, in 1983, local voters passed Proposition 0 that asked the City of San Francisco to notify President Reagan that they favored the repeal of bilingual ballot provisions of the Federal Voting Rights Act. In addition, during the late 1970s, advisory referendums directed attention to national environmental and nuclear-freeze issues... 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).

Unlike a popular referendum or initiative intended to amend the law, the plebiscite Mr. Davis challenges here is not self-executing, confers no benefit or privilege, proposes or repeals no laws, does not elect to or remove anyone from office, and does not purport to represent the views of the government of Guam.

> Implicit in both the statutory and the common definitions of the concept of voting is the presence of a choice to be made. One ordinarily votes to pick one candidate or another, or one votes for or against the adoption of an initiated measure. **Thus, applying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term**.

Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988), *approved on other grounds Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006).

That is *not* to say that because the plebiscite is without the legal consequence that Mr. Davis attaches to it that it is meaningless. But the fact that the plebiscite is not self-executing and effects no change in political status, right, benefit or privilege for any individual is fatal to Mr. Davis' claim of injury-in-fact within the meaning of the Fifteenth Amendment and the Voting Rights Act.

As broad as the language of the Voting Rights Act is, every one of the cases cited by Mr. Davis involves elections for public office or self-executing initiatives or referenda intended to change the status quo in some manner, whereas the most that can be said of the plebiscite at issue here is that it invokes the machinery of the state to *poll* a select segment of its citizens as to their *desires*. The government of Guam has been

unable to locate a single decision in which the 15th Amendment or the Voting Rights Act has been applied to an advisory plebiscite intended to poll the desires of the native inhabitants of an unincorporated territory on the continuing question of political status other than the decisions from Puerto Rico, discussed within. And Mr. Davis cites none.

III. MR. DAVIS' ARGUMENT THAT HE IS STIGMATIZED BECAUSE HE IS NOT INCLUDED AND HIS VIEWS ARE NOT BEING SOLICITED IS WITHOUT MERIT.

> 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 quotations omitted); *accord, Drake v. Obama*, 664 F.3d 774, 779 (9th Cir. 2011) ("a litigant's interest cannot be based on the 'generalized interest of all citizens in constitutional governance' ") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); also citing, *United States v. Richardson*, 418 U.S. 166, 173–78 (1974)).

"[Federal courts are] without power to give advisory opinions. It has long been [the Supreme Court's] considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision…." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945) (citations omitted).

At pages 24, 25 of his brief Mr. Davis asserts that he has alleged sufficient injury-in-fact because he is *stigmatized* by not being permitted to register to vote to express his views on political status options for Guam. He cites this Court'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) in support, but what *Catholic League* actually demonstrates is why Mr. Davis has suffered no judicially cognizable injury-in-fact.

The question presented in *Catholic League* 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 (emphasis added). A tenuous 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.[7]

What distinguishes *Catholic League* from the case at bar is that the government of Guam is neither engaging in speech nor endorsing any particular point of view merely by providing "native inhabitants" a forum from which to solicit and transmit *their* views to Congress, the President and the United Nations. Unlike in *Catholic League* there is no government speech to challenge here that arguably causes injury to Mr. Davis because it singles him and a particular group to which he belongs out and subjects him and them to government endorsed opprobrium.

Whatever the results of the "native inhabitants only" plebiscite may be, the statute does not contemplate that the results are intended to represent the position of either the government of Guam or the people of the island as a whole. Because there is

[7] 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 judges 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 judges 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.").

no government speech involved – before, during, or after the plebiscite – *Catholic League* lends no support to Mr. Davis' stigma argument.

IV. RICE v. CAYETANO IS NOT CONTROLLING.

Mr. Davis seeks to engraft the Supreme Court's "ancestry can be a proxy for race" catchphrase from *Rice v. Cayetano*, 528 U.S. 495 (2000) onto a question that the Supreme Court expressly did not consider in that case, namely the constitutionality of a non-binding referendum restricted to persons of Hawaiian descent. The right to register for and vote in an election for statewide public office, the question considered in *Rice*, is a different question entirely from the right to participate in an advisory plebiscite intended to poll a select segment of society on a particular subject.

In *Rice* the district court was confronted with 14th and 15th amendment challenges to a statute pertaining to "Hawaiian Sovereignty," the stated purpose of which was "to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." *Rice v. Cayetano*, 941 F.Supp. 1529, 1534-35 (D. Haw. 1996). The court upheld Hawaii's authority to conduct a referendum for the purpose of "polling Native Hawaiians *on their views* regarding sovereignty." That ruling should not be confused

with the Supreme Court's "ancestry can be a proxy for race" decision invalidating restrictions on the right to vote in statewide elections for trustees of Office of Hawaiian Affairs, limiting the right to participate in those elections to Hawaiians and native Hawaiians. That is the mistake Mr. Davis makes.

The Supreme Court's decision in *Rice* addressed the constitutionality of limitations on access to *statewide elections for public office*, but did not address the question here, namely the constitutionality of limitations on access to participation in *an advisory plebiscite*.[8] There is a critical distinction between a referendum or plebiscite designed to do nothing more than *poll* and transmit the desires of a select group of citizens and an election for specific offices that wield the authority of the state.

If *Rice* is distinguishable because no election for public office or self-executing initiative, referendum, or measure is involved, the question remains: How are Congress and the government of Guam ever going to address the interests of a colonized people

[8] *See*, *Rice*, 528 U.S. 510 ("Rice contested his exclusion from voting in elections for OHA trustees *and from voting in a special election relating to native Hawaiian sovereignty* which was held in August 1996. After the District Court rejected the latter challenge, *see Rice v. Cayetano*, 941 F.Supp. 1529 (1996) (*a decision not before us*), the parties moved for summary judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.") (emphasis added).

whose racial identity happens to coincide with their political identity? The remedy Mr. Davis ultimately seeks is to enjoin both governments from even asking.

"Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). If an unincorporated territory such as Guam is not a state, then the appropriate legal analysis lies somewhere between *Rice* and the *Insular Cases*.[9] This is because the people of Guam are forever being reminded that "Guam remains an unincorporated territory of the United States, 48 U.S.C. § 1421a, subject to the plenary power of Congress." *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002). "The Bill of Rights was not intended to interfere with the performance of our international obligations. 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) (citation omitted).

[9] *See De Lima 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); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). *See also*, *Boumediene v. Bush*, 553 U.S. 723, 756 (2008); and *Consejo de Salud Playa de Ponce v. Rullan*, 586 F.Supp.2d 22 (D.Puerto Rico 2008).

Whatever may be said with respect to states that have already entered the union, as applied to the territories, the Constitution and the Voting Rights Act cannot be construed to "force the assimilation of [its native inhabitants] into the society at large." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992) (citing *In re Heff*, 197 U.S. 488, 499 (1905)). The purpose of limiting the proposed advisory plebiscite to polling only the "Native Inhabitants of Guam" is constitutionally compelling because the *Insular Cases* say it is.[10]

V. EVEN IF GUAM'S ADVISORY PLEBISCITE WERE RACE-BASED, AND EVEN IF THE PLEBISCITE WERE TO BE HELD TOMORROW, MR. DAVIS WILL SUFFER NO INJURY-IN-FACT

Forty-six years ago, the district court of Puerto Rico considered a constitutional challenge to an act of the Puerto Rico Legislature related to its future political status wherein "[a] majority vote … in favor of either American Statehood or Independence would authorize the Legislature of Puerto Rico to petition the Congress of the United States for permission to convert the legal status of Puerto Rico to either Statehood or

[10] At pages 40, 41 of his brief, Mr. Davis posits a straw man argument the government of Guam has never made in order to knock it down. Citing *Cipriano v. City of Houma*, 395 U.S. 701 (1969), Mr. Davis asserts, "No court has ever determined that a voter can be more or less interested in an election because of race." The government of Guam has never said that Mr. Davis is not interested, only that he has no injury if he is not permitted to register to vote in this particular plebiscite.

Independence as endorsed by the popular vote. If the majority of the voters indicated that they favor Commonwealth status there presumably would follow a continuation and development of the presently existing Commonwealth status." *Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 832 (D.P.R. 1967).

> Of far more fundamental importance on the issue of whether a substantial federal constitutional question is raised by this complaint is the concession that, regardless of the degree to which the plebiscite might bind the Puerto Rican Legislature, it concededly does not bind the Congress of the United States. **As a corollary thereto, the legal status, rights or American citizenship of all the residents of Puerto Rico will remain unchanged despite the plebiscite.**
>
> **Since no one's rights or status will be altered by the holding of the imminent plebiscite, this complaint presents no justiciable controversy cognizable by this court**, much less a substantial Constitutional question cognizable by a three-judge district court.
>
> The thrust of the complaint seems to be that plaintiffs in some undisclosed manner will be deprived of rights secured by the United States Constitution, treaties and laws. **This simply is not and cannot be so. The holding of the plebiscite will in no way change the juridical or political status of the plaintiffs or anyone else in Puerto Rico. Prior to the alteration of the status or rights of any person in Puerto Rico whatever change is later voted by the Puerto Rican Legislature must also be concurred in by the Congress of the United States**. Nothing in Act No. 1, as amended purports to bind the Congress. The most that it purports to do is to afford a vehicle for the expression of the will of the People, which may or may not bind the Commonwealth Legislature.

Barbosa, 293 F.Supp. 833-34 (emphasis added). *See also, Sola v. Sanchez Vilella*, 270 F.Supp. 459, 464 (D.P.R. 1967) (denying motion for three-judge court) ("[Plaintiffs]

fail to show how or in what manner the plebiscite, which is no more than an official poll of the individual desires of the citizens and residents of the Commonwealth of Puerto Rico participating therein as to their future political status, violates Constitutional principles.").

Although there were no claims of race-based discrimination presented in that case, the analysis is the same when considering Mr. Davis' claim of injury here because regardless of the outcome of any future plebiscite held in Guam to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America," 1 GCA § 2105, Mr. Davis' rights as a United States citizen, registered voter, and stakeholder in Guam's future political relationship with the United States remain unaffected by the tabulation and transmission of the native inhabitants' "desires" to the President, Congress, and United Nations.

Twenty-two years ago, the district court of Puerto Rico was confronted with constitutional challenges to a referendum to amend Puerto Rico's constitution.

> In December 1966, the Puerto Rico Legislature enacted a law to hold a plebiscite in July 1967 on the political status of the island. The voters in the referendum were to choose one of the three status alternatives for Puerto Rico: commonwealth, statehood, or independence. The results were to be an authorization to the Puerto Rican legislature to petition Congress for a change in status if either statehood or independence won, or to continue with the development of the existing commonwealth status if that alternative won. A group of plaintiffs sued to enjoin the holding of this referendum on a number of constitutional grounds. *Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 833 (D.P.R.

> 1967).**The Court held that the plebiscite was nothing more than a vehicle for the people of Puerto Rico to express their will**. *Id*. at 833. **The plebiscite would not change the political status of the island; such a change would have to be agreed to by the United States Congress.** Thus, the plebiscite had no effect on any federally protected rights and the court refused to enjoin it. *Id*. at 833–34.
>
> We think this case is similar. The referendum provided for in Act 85 is a first step to amend the Constitution of Puerto Rico and a petition to the Congress and the President of the United States to respect these rights when action on the future status of Puerto Rico is taken. Act 85, Section 3. **Like the plebiscite in 1967, this referendum is simply an expression of public opinion. Its approval would be nothing more than a request that the federal government respect certain rights.**

New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon, 779 F.Supp. 646, 779 F.Supp. 654-55 (D.P.R. 1991) (emphasis added).[11]

[11] *Compare*, *Consejo de Salud Playa de 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 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).

Of course, Guam is "subject to the plenary power of Congress and has no inherent right to govern itself." *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

> Article IV, section 3 of the Constitution gives Congress plenary power over territories of the United States. Guam, as an unincorporated territory, 48 U.S.C. § 1421a (1976), is subject to this plenary power. Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control. Except as Congress may determine, Guam has no inherent right to govern itself.

People of the Territory of Guam v. Okada, 694 F.2d 565, 568 (9th Cir. 1982) (citing *Late Corporation of Latter-Day Saints v. United States*, 136 U.S. 1, 32 (1890); *Agana Bay Development Co. (Hong Kong) v. Supreme Court of Guam*, 529 F.2d 952, 954 (9th Cir.1976); and *First National Bank of Brunswick v. County of Yankton*, 101 U.S. 129, 133 (1880)).[12]

[12] Article IV, § 3, clause 2 of the United States Constitution provides, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." And the "powers vested in Congress by Const., Art. IV, § 3, cl. 2, to govern Territories are broad." *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n. 16 (1976). *See also Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n. 1 (9th Cir. 1988) (quoting A. Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va.J.Int'l L. 21, 62-63 (1975) ("authority of the Guam government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt"), *aff'd* 495 U.S. 182 (1990).

> **Guam remains an unincorporated territory of the United States, 48 U.S.C. § 1421a, subject to the plenary power of Congress.** Congress has the power to legislate directly for Guam or to establish a government for Guam subject to congressional control, and except as Congress may determine, Guam has no inherent right to govern itself.

Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002) (footnote omitted; emphasis added) (citing *Guam v. Okada*, 694 F.2d 565, 568 (9th Cir. 1982); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 147 (1904); and *Pugh v. United States*, 212 F.2d 761, 762-63 (9th Cir. 1954)).

The law Mr. Davis challenges mandates only that the *desires* of the "Native Inhabitants of Guam" are to be *transmitted* to the President, Congress and the United Nations. What Congress does with that transmission, and it may be nothing, is an entirely separate matter. *See*, *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998) ("No matter what it says or how much it says, the report is simply a document submitted to Congress that Congress has no obligation to consider, let alone act upon."). Similarly here, whatever its results, the plebiscite will in no way affect Mr. Davis' rights. Mr. Davis has failed to present a justiciable case or controversy.

It is because of Congress' plenary powers under Article IV that race-based restrictions on the alienation of land that are codified in the United States Code and that would otherwise offend the equal protection clause of the fourteenth amendment have been upheld in the Commonwealth of the Northern Mariana Islands. In *Wabol v.*

Villacrusis, 958 F.2d 1450 (9th Cir. 1990), this Court considered a challenge to the CNMI's presumably race-based restrictions on the acquisition of permanent and long-term interests in Commonwealth lands. Article XII of the CNMI Covenant, codified at section 805 of 48 U.S.C. § 1681, "provides that the sale of a freehold or a leasehold exceeding forty years, including renewal rights, to a person not of Northern Mariana Islands descent, is void *ab initio*." *Wabol*, 958 F.2d 1452.[13]

This Court first questioned whether the restriction on land alienation in the CNMI was necessarily subject to the equal protection clause of United States Constitution and then answered its own question in the negative: "**The Bill of Rights was not intended to interfere with the performance of our international obligations. 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." *Id.*, 958 F.2d 1462 (footnotes and citations omitted). As applied to the territories *Wabol*

[13] A person of Northern Marianas descent is defined as one "who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas decent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth." *Wabol*, 958 F.2d 1452-53.

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 insists upon.

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. 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. *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.").[14] Unlike citizenship established by mutual consent

[14] *See also*, 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."); and *see*, Ada, Joseph F., "Time for Change," *Isla: A Journal of Micronesian Studies*, UOG Press, Vol. 3, No. 1, p. 135

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.

The obvious point is that Guam's native inhabitant's future political status is not set in stone any more now than it was in 1898 when Spain ceded Guam to the United States pursuant to the Treaty of Paris (30 Stat. 1754); in 1950 when Congress passed the Organic Act of Guam and certain persons born in or inhabiting Guam were first made citizens; or in 1968 with the passage of the Mink Amendment. If the United States is to fulfill the "international obligations" that it inherited in 1898, there must be some mechanism to begin to catalog the plurality of views on the subject. That is all that the statute challenged by Mr. Davis does.

(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.").

CONCLUSION

Even if "Native Inhabitants of Guam" were determined to be an intentionally race-based classification, Mr. Davis' claims are not ripe for judicial review because there is no election to be registered to vote in on any foreseeable horizon. And even if Mr. Davis' claims were ripe and the proposed plebiscite was to be held in the foreseeable future, he has suffered no injury because it is not self-executing and does not affect his political or juridical rights in any way. Until such time as the territory of Guam formally enters the union as a state, the "native inhabitants of Guam" are constitutionally authorized to express their *desires* in their own *advisory* plebiscite and to have those desires transmitted to Congress, the President and the United Nations.

The government of Guam respectfully submits that the trial court did not err in dismissing Mr. Davis' complaint. The decision of the court below should be affirmed.

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STATEMENT OF RELATED CASES

Pursuant to 9th Circuit Rule 28-2.6, the undersigned is aware of no cases that are related to this appeal pending before this Court.

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BRIEF FORMAT CERTIFICATION

Pursuant to Fed.R.App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing answering brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 10,015 words as determined by the word-count function of Microsoft Word 2007, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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