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# IN THE DISTRICT COURT OF GUAM

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| **ARNOLD DAVIS**, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>**GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. TENORIO; DONALD I. WEAKLEY**; and **LEONARDO M. RAPADAS**, in his official capacity as Attorney General of Guam,<br><br>**Defendants.** | Civil Case No. 11-00035<br><br>**REPLY TO OPPOSITION**<br><br>**TO**<br><br>**MOTION TO DISMISS** |

## DISCUSSION

There is nothing constitutionally wrong with compiling a registry that identifies qualified voters by race. "Indeed, race-identified registration lists are arguably superior to the alternatives, such as the use of census data, because they make no assumptions about registration rates in particular communities." *United States v. Blaine County, Montana*, 363 F.3d 897, 915 n. 27 (9th Cir. 2004). Therefore, Mr. Davis' complaint of injury-in-fact cannot be merely that he is not

permitted to add his name to a registry of "Native Inhabitants of Guam." His complaint is that he will not be permitted to participate in an advisory plebiscite the purpose of which is "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."[1]

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). Under Guam law, 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 plebiscite Mr. Davis challenges is neither.[2] It is not self-executing, confers no benefit or privilege, and neither proposes nor repeals any laws. It is not an election for a public office, nor does it propose the removal of anyone from public office. Neither the Legislature of Guam nor the United States Congress is bound by it.[3]

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[1] The specific question to be presented at the proposed plebiscite reads in its entirety: "In recognition of your right to self-determination, which of the following political status options *do you favor*? (Mark ONLY ONE): 1. Independence ( ) 2. Free Association with the United States of America ( ) 3. Statehood ( )." 1 GCA § 2110 (emphasis added).

[2] A plebiscite is not defined in Guam law but is otherwise defined as "a vote by which the people of an entire country or district express an opinion for or against a proposal especially on a choice of government or ruler." *Merriam-Webster's Collegiate Dictionary* (11th Ed. 2007). Its meaning is broader than either initiative or referendum.

[3] *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

"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) (editorial brackets and ellipses in original; emphasis added), *approved on other grounds Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006). Under Guam law, "Measure refers to the action proposed or question presented on the initiative, referendum or legislative submission." 3 GCA § 17102(d). The advisory plebiscite at issue here is not a measure because it binds the government of Guam to no further action other than to transmit its results to the President, Congress, and the United Nations.

Amicus curiae Anne Perez Hattori aptly enough describes the plebiscite as a "symbolic expression of self-determination" limited to "pre-Organic Act residents of Guam and their lineal descendants" that would be diluted by the relief Mr. Davis seeks. *Amicus Curiae Brief*, page 1. The Attorney General is not convinced of the argument that this controversy is not ripe merely because the conditions precedent and date of the future plebiscite are uncertain, or because the plaintiff has not been threatened with imminent prosecution under the criminal provisions of the statute. Mr. Davis does not allege that he risks having to commit perjury in order to gain access to the plebiscite. His argument is that it is "unconstitutional for government to solicit and

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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).

transmit the views of one (and only one) racial group." *Opposition*, page 2, n. 1. Notably, Mr. Davis is unable to cite any precedent for such an expansively broad proposition other than a formulaic recitation of cases involving elections for public office or self-executing initiatives, not non-binding or advisory plebiscites restricted by design to determine the desires of a native peoples with respect to their preferred future political status.

Mr. Davis argues, "The existence of state action by GovGuam lends weight and heft to the plebiscite. A transmission of results to Congress by GovGuam likely carries more weight in Washington than a poll by [University of Guam] Professor [Ron] McNinch…A private, lower cost, less constitutionally suspect, alternative exists to accomplish this professed goal, if merely 'ascertaining the wishes of native inhabitants' was truly the singular purpose." *Opposition and Reply to Motion to Dismiss*, page 9, note 5. Mr. Davis cites no authority for his speculation that transmission of the desires of the Native Inhabitants of Guam by the government of Guam "lends weight and heft" or "likely carries more weight in Washington." The Ninth Circuit's decision in *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998), instructs exactly the opposite. "No matter what it says or how much it says, the [plebiscite] is simply a document submitted to Congress that Congress has no obligation to consider, let alone act upon." *Id*., 157 F.3d 1194.[4]

Mr. Davis attempts to distinguish cases from Puerto Rico cited by the Attorney General[5] because they did not involve claims of *race-based* discrimination, although equal protection

[4] As advisable as it may be, the government is under no obligation to pursue "private, lower cost" alternatives to polling a select segment of its citizenry as to their preferences. If it otherwise passes constitutional muster, that is a political question.

[5] *See*, *Sola v. Sanchez Vilella*, 270 F.Supp. 459, 464 (D.P.R. 1967) ("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."); *Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 833-34 (D.P.R. 1967)

challenges were presented. Regardless, Mr. Davis still fails to articulate factually how his rights as a citizen stakeholder in Guam's future political relationship with the United States are adversely affected by this advisory political status plebiscite.

In *Rice v. Cayetano*, 941 F.Supp. 1529 (D. Haw. 1996), the district court of Hawaii found "the state's limited interest in polling Native Hawaiians on their views regarding sovereignty is rationally related to, *and perhaps even compelling* in light of, the state's unique obligation to Native Hawaiians…." *Id*., 941 F.Supp. 1544 (emphasis added). Mr. Davis relies extensively on the Supreme Court's subsequent decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), and seeks to engraft its holding on a question, as previously noted, that the Supreme Court expressly did not address. A self-executing initiative or election for public office, which provided the factual setting for the equal protection analysis presented in *Rice*, is considerably different from a non-binding or advisory plebiscite, which is what the questions presented here are about. *See again, Rice*, 528 U.S. at 522 ("the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies").

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. Silencing the Native Inhabitants of Guam from being permitted to

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("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."); *New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon*, 779 F.Supp. 646, 654-55 (D.P.R. 1991) ("[t]he plebiscite would not change the political status of the island; such a change would have to be agreed to by the United States Congress... [T]his referendum is simply an expression of public opinion. Its approval would be nothing more than a request that the federal government respect certain rights.").

express their collective *desires* as to what political status option they *favor* in a non-binding plebiscite presents the prospect of a far more invidious injury than what Mr. Davis is presumably trying to prevent.

As broad as the language of the Voting Rights Act is, every one of the cases cited by Mr. Davis involve 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 Attorney General has been unable to locate a single reported 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. And Mr. Davis cites none.[6]

Mr. Davis dismisses the reliance by the district court in *Rice* on *Morton v. Mancari*, 417 U.S. 535 (1974), for the proposition that "while the Native Hawaiians are not now a federally

[6] *Compare* Rose Cruison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 Cal. L. Rev. 801, 804-05 (June 2008) ("Closer examination of the legal construction of political indigeneity in the context of the racial versus political framework of equal protection analysis has largely escaped scholarship. A number of commentators have criticized *Rice* for its doctrinal misapplication of equal protection principles informed by racial equality to claims by Native Hawaiians that were grounded mainly on colonialism and the loss of sovereignty. An analysis deconstructing the process by which the law has produced and perpetuated the political meaning of "indigenous blood," *itself*, and its impact on other indigenous groups, however, has been sorely lacking.") (emphasis in original; footnotes omitted). *Id*., at 837 ("Ultimately, the recognition of racial and political identity within equal protection doctrine illustrates the inherent and unresolved struggle between protecting individuals against race discrimination and promoting the collective right of indigenous peoples' to self-government. While finding solution to this tension is difficult, we could and should explore how the two legally produced mutually exclusive categories of race and political identities intersect and could promote the self-determination of indigenous peoples."). *See also*, Anthony (T.J.) Quan, *"Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 Asian-Pac. L. & Pol'y J. 3 (Winter 2002); and Jon M. Van Dyke, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. Haw. L. Rev. 623 (Summer/Fall 1996).

recognized tribe, they nevertheless have a special relationship with the United States…" *Rice*, 941 F.Supp. 1541-42, another question expressly left open by the Supreme Court. *See Rice*, 528 U.S. at 518-19 ("It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. We can stay far off that difficult terrain, however.") (citing Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95 (1998); Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996)).

Mr. Davis dismisses if not belittles the United States government's *unquestionable* obligations to Guam's "Native Inhabitants" which Congress continues to acknowledge today. *See* Public Law 111-244, 121 Stat. 189 § 1 (Sept. 30, 2010) ("It is the sense of Congress that the Secretary of the Interior may provide technical assistance to the Government of Guam … for public education regarding political status options only if the political status options are consistent with the Constitution of the United States."). Unlike a state already admitted to the union, the federal government indubitably has continuing obligations to the original "native inhabitants" of its unincorporated territories and their descendent that in a strict scrutiny analysis are compelling, and, in this instance, narrowly tailored to a legitimate end. Therefore, Mr. Davis' hypothetical about Alabama having an advisory plebiscite on affirmative action in education that limited voter registration to those persons who were eligible to attend the University of Alabama in 1831 when the school was founded, the assumption being that blacks and other minorities would be ineligible to vote, misses the one critical element presented here. The federal government and state of Alabama do not have the same kind of continuing obligation to a select segment of its population that the federal government has to the native inhabitants of its territories.

But if *Morton v. Mancari* does not apply because "Native Inhabitants of Guam" are not a federally recognized tribe, and if *Rice v. Cayetano* is not precisely on point because no election for public office or self-executing initiative, referendum, or measure is involved with respect to the advisory plebiscite presented here, the question remains: How are Congress and the government of Guam ever going to begin to address the interests of a colonized people whose racial identity coincides with their political identity? The remedy Mr. Davis ultimately seeks is to enjoin both governments from even being permitted to inquire.

"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).[7] If an unincorporated territory such as Guam is not a state, and if its native inhabitants are not a federally recognized tribe, then the appropriate legal analysis lies somewhere between *Morton*; *Rice*; and the *Insular Cases*.[8] This is

[7] Race "is not simply a biological and immutable attribute such as phenotype or skin color. On the contrary, 'race is a socially constructed, human category, not a natural or scientific one.' It is a concept, albeit a powerful one, 'which signifies and symbolizes social conflicts and interests by referring to different types of human bodies.' Indeed, the historical categorization of races in the United States has been arbitrary, fluid, and highly political. Thus, the meaning of race is constructed by social context." Chris K. Iijima, *Swimming from the Island of the Colorblind: Deserting an Ill-Conceived Constitutional Metaphor*, 17 Loy. L.A. Ent. L.J. 583, 593 (1997) (quoting Neil Gotanda, *A Critique of "Our Constitution Is Colorblind*," 44 Stan. L. Rev. 1, 23 (1991); and Michael Omi & Howard Winant, *Racial Formation In The United States*, 55 (1994); additional citations omitted). "Race is 'about a certain set of political and moral rights and obligations' arising from a historical context." *Id.* n. 66 (quoting Angela P. Harris, *Foreward: The Unbearable Lightness of Identity*, 2 Afr.-Am. L. & Pol. Rep. 207, 212 (1995)).

[8] *See*, *e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians."). *See also, id.*, 182 U.S. 286-87 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon

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).[9]

"We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demands it." *Downes v. Bidwell*, 182 U.S. 244, 286-87 (1901). And that is the express intent of this advisory plebiscite: to ascertain and transmit the desires of Guam's native inhabitants to Congress in order that Congress may consider "upon its merits" their preference. "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). 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)). Because the future political status of the native inhabitants of

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principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.").

[9] *See also*, *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) ("Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. § 1421a, the Government of Guam is in essence an instrumentality of the federal government. Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature.") (citation omitted).

Guam is by no means a settled question, the governments of Guam and the United States are morally and legally obligated to solicit their views. The proposed non-binding plebiscite limited to ascertaining and transmitting the desires of the "Native Inhabitants of Guam" is narrowly tailored to that end.

## CONCLUSION

Even if "Native Inhabitants of Guam" were a race-based classification, until such time as the territory of Guam formally enters the union as a state, its native inhabitants are entitled to express their desires in their own advisory plebiscite and to have those desires transmitted to Congress by the government of Guam. As a matter of law, a non-binding plebiscite intended to solicit the views of a colonized people with respect to their political destiny does not offend the Constitution or the Voting Rights Act.

Respectfully submitted,

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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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