

IN THE DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

ARNOLD DAVIS,	)	Court of Appeals No. 13-15199
	)	Civil Case No. 11-00035
Plaintiff,	)	Date: 11/15/2012
	)	Time: 1:21 p.m.
vs.	)	
	)	
GUAM, et al.,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF PROCEEDINGS BEFORE  
THE HONORABLE FRANCES TYDINGCO-GATEWOOD,  
Chief Judge

**Plaintiff's Objection to Magistrate Judge's Report and  
Recommendation and Motion to Dismiss**

Proceedings recorded by *electronic recording*, transcript  
produced by computer-aided transcription.

Veronica Flores Reilly, OCR  
District Court of Guam

APPEARANCES

Appearing on behalf of plaintiff:

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Alexandria, VA 22314

Appearing on behalf of defendants:

**OFFICE OF THE ATTORNEY GENERAL**  
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1                   **November 15, 2012; 1:21 p.m.; Hagatna, Guam**

2                   \* \* \*

3                   THE CLERK: Civil case 11-00035, *Davis v. Guam*;  
4 plaintiff's objection to magistrate judge's report and  
5 recommendation, a motion to dismiss.

6                   Counsel, please state your appearances.

7                   MR. ADAMS: Your Honor, Christian Adams appearing  
8 for the plaintiff, Arnold Davis.

9                   THE COURT: Good afternoon, Mr. Adams. And your  
10 client is not present?

11                  MR. ADAMS: No, Your Honor. The client is not  
12 present.

13                  THE COURT: Okay. He waives his appearance?

14                  MR. ADAMS: I don't have a specific reason, but  
15 he is not present.

16                  THE COURT: And then also for the record, your  
17 local counsel is Mr. Park; is that correct?

18                  MR. ADAMS: Yes, it is, Your Honor.

19                  THE COURT: And I understand that he's not able  
20 to be here today.

21                  MR. ADAMS: Your Honor, my understanding is his  
22 mother died.

23                  THE COURT: Right.

24                  MR. ADAMS: And he is unable to be here due to  
25 that.

1 THE COURT: Okay. I wanted to just put that on  
2 the record because local counsel is required to be here unless  
3 excused by the Court, and of course the Court will excuse him  
4 from his presence today. Thank you. Let me hear from  
5 everyone else.

6 Yes, next?

7 MR. WEINBERG: Your Honor, Rob Weinberg and  
8 Shannon Taitano for the defendants, Government of Guam and  
9 Guam Election Commission.

10 THE COURT: Okay. Hafa adai, Mr. Weinberg and  
11 Ms. Taitano.

12 MS. TAITANO: Good afternoon, Your Honor.

13 MR. AGUON: Afternoon, Your Honor.

14 (Inaudible.)

15 THE COURT: Okay. Thank you very much,  
16 Mr. Aguon.

17 And let me just also put on the record before we  
18 begin arguments, couple things: Number one, as you know, the  
19 Court is involved in the pilot program for cameras in the  
20 courtroom, and so it's a national pilot program, so I just  
21 want to make sure that the parties' position is still correct.  
22 The Court cannot proceed with cameras in the courtroom, like  
23 not allow the media to televise civil proceedings unless all  
24 parties agree. As I understand it, Mr. Weinberg, on behalf of  
25 the Government of Guam, you've indicated that you wish to

1 allow cameras in the courtroom.

2 MR. WEINBERG: We have no objection.

3 THE COURT: And Mr. Aguon, on behalf of Ms.  
4 Hattori?

5 MR. AGUON: Yes, we have no objection.

6 THE COURT: And you, Mr. Adams?

7 MR. ADAMS: Your Honor, I received the Court's  
8 order in regards to this while I was in transit here, and I  
9 was unable to reach my client in regard to this issue.  
10 Because of the nature of the case, the high-profile nature of  
11 the case, I don't believe that I could ethically consent  
12 without receiving my client's permission to do so, as he does  
13 have to live here, and would make it even more public.

14 THE COURT: Right.

15 MR. ADAMS: So while I have no particular  
16 aversion to cameras or reporting this, I just don't ethically  
17 believe that I grant consent without -- I attempted to reach  
18 him in the last 24 hours and I have not been able to do so in  
19 regards to this issue.

20 THE COURT: That's odd. Your client is pretty  
21 visible and...

22 MR. ADAMS: Well, he's not on the island.

23 THE COURT: Oh, he's off island. I see. All  
24 right. The Court understands. I just want to make sure  
25 that's placed on the record, because you had indicated in your

1 filings yesterday that by the time of the deadline, you had  
2 not reached your client. All right.

3 MR. ADAMS: Correct.

4 THE COURT: That's fine.

5 We'll hear the motion. Approach the podium, please.  
6 So I've given -- as you know, I've given each party -- well,  
7 I've given the plaintiffs two hours and then the government  
8 and amicus two hours and -- together. Have you all figured  
9 out how you want to divide that?

10 MR. WEINBERG: Yes, Your Honor.

11 THE COURT: And how is that?

12 MR. WEINBERG: Your Honor, I'm going to take the  
13 brunt of the initial argument.

14 THE COURT: Right.

15 MR. WEINBERG: And then I think at a stopping  
16 point, I'm going to invite Mr. Aguon up on the amicus  
17 perspective, and then when he's done, I'll (inaudible.)

18 THE COURT: All right. So we'll give you a  
19 five-minute warning, Gina. Give them a five-minute warning.  
20 Let's stick within the time frames everyone, okay?

21 MR. WEINBERG: Be more than enough.

22 THE COURT: You may proceed, Mr. Adams.

23 MR. ADAMS: Thank you, Your Honor.

24 May it please the Court, Christian Adams for the  
25 plaintiff, Mr. Arnold Davis. Your Honor, our Constitution and

1 laws reject entirely the distribution of political rights  
2 based on blood or ancestry. According to the laws at issue in  
3 this case, every American citizen must be treated with  
4 individual dignity by government and given the same political  
5 voice enjoyed by their neighbor. When governments offend this  
6 fundamental axiom, civil right statutes expressly provide  
7 standing to enter this court and seek a remedy (inaudible) the  
8 constitutional mandate of equality.

9 Granting the defendants' motion to dismiss in this  
10 case would allow a similar state, such as South Carolina, if  
11 you will, to establish the "people we like" registry and  
12 create bloodline qualifications dating back to the 1800s.  
13 This "people we like" list would have no facial racial  
14 qualification, but was well-known and intended to include only  
15 whites. The "people we like" registry serves the purpose of  
16 one day possibly -- possibly -- polling people the government  
17 likes on public issues related to the federal government. The  
18 legislature of South Carolina will take keen notice of the  
19 results of any election, and even though no election is  
20 currently scheduled, registration on the "people we like" list  
21 is encouraged by the government. Granting the defendants'  
22 motion to dismiss would say that an African-American in South  
23 Carolina would have no standing to challenge the state  
24 hypothetical "people we like" list.

25 Now, Your Honor, this case, I would submit, is

1 simpler than it seems and can be decided based on the plain  
2 language of six separate civil rights statutes which make  
3 qualifications to vote or to register a rights inquiry.

4           There are also six cases which I believe control  
5 this case. First, the cases. I'll just mention them very  
6 briefly and then at some point answer any questions you have.

7           The first case is *Havens Realty v. Coleman*, the next  
8 is *Chisom v. Roemer*, *Terry v. Adams*, *Lane v. Wilson* and  
9 *Catholic League v. San Francisco*. And I would submit that  
10 *Rice v. Cayetano* makes it very clear what the Supreme Court of  
11 the United States would do with the facts before us.

12           Now, the defendants have indicated and argued  
13 that the plaintiff lacks concrete injury, that it's  
14 speculative, academic. But, Your Honor, I would submit that  
15 this document is not academic or speculative.

16           THE COURT: Sorry. For the record, what are you  
17 pointing to?

18           MR. ADAMS: What I'm holding -- and I could pass  
19 up -- is the actual form that my client filled out. It's  
20 called the Guam Decolonization Registry Application for  
21 Registration and Certification of Voter Eligibility.

22           THE COURT: Why don't you put it on the -- yeah.  
23 Let me just see it. You can pass it to somebody. You can get  
24 it to Rosa here. All right. Well, show the other parties  
25 first. Do you all know?

1           Rosa, Rosa -- oh, you have extra copies? All right.  
2 Let's mark this as Exhibit 1. Gina, we'll mark this as  
3 Plaintiff's Exhibit 1. Go ahead and while she's -- go ahead.  
4 (Exhibit 1 marked)

5           MR. ADAMS: Your Honor, just to -- we do not have  
6 a parade of exhibits. This is the only one that I want to  
7 show.

8           THE COURT: All right. Go ahead.

9           MR. ADAMS: Your Honor, this denial that you see  
10 is not speculative, isn't academic or theoretical; it is real,  
11 it is concrete. Major Davis went to a government office  
12 seeking to register. He interacted with government officials,  
13 who then, to his face, denied his voter registration  
14 application. The denial was no less speculative, no less  
15 academic for Major Davis than the thousands of ugly denials  
16 which occurred in other registration offices throughout the  
17 south. You will note that the document plainly states  
18 "certification of voter eligibility."

19           Now, I will submit that you can decide this case  
20 based on three different series of standings. And if you  
21 will, there's a timeline (inaudible). The plaintiff makes  
22 three separate alternative ways for you to find this case to  
23 be ripe and to have standing.

24           The first one, beginning at the beginning of the  
25 timeline, is the stigmatization theory. And that relies on

1 *Catholic League*, the Ninth Circuit case. And it says that  
2 when a government announces favorites, when it condemns  
3 others, when it restricts full participation, when it  
4 relegates some to second class citizenship, as the City of San  
5 Francisco did to Catholics, that at that moment -- at that  
6 moment, under the stigmatization theory in *Catholic League*,  
7 this case was ripe and the plaintiff had standing when the  
8 legislature passed this statute.

9           The second theory in which this Court can find  
10 standing and ripeness is the statutory one. *Havens Realty*  
11 controls this case. *Havens*, of course, is a Supreme Court  
12 case, *Havens Realty v. Coleman*, where the Supreme Court said  
13 that "Congress can pass specific statute, the violations --  
14 that confer a right, the violation of which creates an  
15 injury." And that's the second basis this Court can find the  
16 case to be ripe.

17           The third basis to demonstrate that the plaintiff has  
18 suffered a concrete and real injury, I will call the actual  
19 denial theory, the exhibit which we passed up. When the  
20 government actually denies somebody access to the "people we  
21 like" list or, in this case, the decolonization registry,  
22 there is a real, ripe, concrete, imminent and personal injury.

23           THE COURT: Did he -- I'm looking at this  
24 Exhibit 1. Did Mr. Davis -- I'm sorry. You called him Major  
25 Davis. Is that a military title?

1 MR. ADAMS: Yes, Your Honor. He's a retired  
2 officer --

3 THE COURT: Major Davis. All right. So did he  
4 write "void" on this or somebody else wrote that?

5 MR. ADAMS: No, Your Honor. And that's part of  
6 why this exhibit is so powerful, because this is a government  
7 official taking his application to participate in a political  
8 process, denying it and actually writing the word "void"  
9 across it.

10 THE COURT: Didn't the government official have  
11 the obligation to do this under the law?

12 MR. ADAMS: Absolutely. But that simply goes to  
13 the point that the statute under which is being challenged in  
14 this case is the statute under which the official wrote the  
15 word "void." He was following the law, and that's precisely  
16 why this is a ripe and concrete injury, because the statute  
17 that caused him to write the word "void" --

18 THE COURT: So everything else, like filling out  
19 his name and mailing address, he did all that, the ID number.  
20 It was just the word "void" that was written by the government  
21 official? Is that what you're --

22 MR. ADAMS: No. There is two other points on the  
23 exhibit that were written by the government official.  
24 "Officer authorized to take oaths" was also government  
25 official, and you'll notice there's -- that's on the left, and

1 that appears again below: "Officer authorized to take oaths."

2 THE COURT: Okay.

3 MR. ADAMS: So those are the four -- the line  
4 through the application --

5 THE COURT: Right.

6 MR. ADAMS: -- the two officer's signatures and  
7 the word "void" were written by election commission officials.

8 THE COURT: Sorry. Two officers?

9 MR. ADAMS: On the far left, where it says  
10 authorized -- excuse me, "officer authorized to take oaths,"  
11 that's sort of like a notary.

12 THE COURT: Right. So is that just one  
13 signature?

14 MR. ADAMS: Then there's a duplicate one below  
15 it, second instance on the same exact --

16 THE COURT: Oh, I see. I'm sorry. I can see  
17 that now. So it's the same person putting his initials on  
18 there?

19 MR. ADAMS: Exactly. So there's four separate  
20 places where the government official marked this document.  
21 The rest is Mr. Davis's.

22 THE COURT: Okay. I got it. Go ahead.

23 MR. ADAMS: Okay. Your Honor, if I might, I  
24 would like to discuss what I think the easiest way to find  
25 standing and ripeness in this case, and that is the statutory

1 basis, which is the second one under *Havens Realty* that I  
2 mentioned.

3           There are six separate statutes in this case that  
4 deal specifically with qualifications, not with -- not with  
5 ultimate elections, not with -- not with -- not with possible  
6 elections, but actually the qualifications to register to  
7 vote. And the plain language of these statutes weigh in favor  
8 of finding a ripe case. If we might first look at the Organic  
9 Act, Section M. I'm going to briefly scan these so I don't  
10 spend most of my time doing this, but I want to draw your  
11 attention to the word --

12           THE COURT: Let me just ask, are you breaking up  
13 your time for opening argument and then rebuttal argument?  
14 Because you only have two hours total.

15           MR. ADAMS: Understood. And I'll try to -- Mr.  
16 Weinberg and I briefly talked about how we were going to do  
17 that, and we both -- and correct me if I'm wrong. We both  
18 presumed we would go through the points of our case, sit down,  
19 Mr. Weinberg would speak, and then we presume there would be  
20 more in-depth questions afterwards. So that's what I wanted  
21 to very briefly to -- but we're happy to adjust with whatever  
22 the Court would prefer.

23           THE COURT: All right. Go ahead.

24           MR. ADAMS: Okay. The Organic Acts, 48 U.S.C.  
25 1421(b), subsection M, as in *Mary*, says, "No qualification

1 with respect to property income or political opinion or  
2 any" -- any -- "other matter, apart from citizenship, civil  
3 capacity or residential, shall be imposed on any voter."

4           There are absolutes in this statutory language, which  
5 we submit give rise to a ripe injury. Qualifications were  
6 spoken of, not actual elections.

7           Turning then to subsection N in the same statute.  
8 This is perhaps the easiest basis to find a ripe injury in  
9 this case. It says, plainly, "No discrimination shall be made  
10 in Guam on the basis of race." No discrimination, full stop.  
11 There isn't any sort of equivocation. There doesn't say under  
12 what topic. It simply says "no discrimination." I would  
13 submit this is broader than the Fourteenth Amendment of the  
14 Constitution, that this statutory language is a greater  
15 protection of individual rights than the language of the  
16 Fourteenth Amendment.

17           Lastly, obviously, subsection U codifies the  
18 Fifteenth Amendment. Now, 1971 -- 42 U.S.C. 1971 is the  
19 fourth and fifth areas where this Court can find a ripe injury  
20 and standing. And I want to draw the Court's attention in  
21 1971(a)(2) to the word, once again, the absolute language of  
22 the statute, which says, "All citizens of the United States  
23 who are otherwise qualified by law to vote in any election  
24 shall be entitled" -- entitled -- "and allowed to vote at all  
25 elections without distinct of race."

1           Once again, the language is absolute. Any means any.  
2 All means all. In title relates to qualifications. Qualified  
3 is in the language of the statute. Qualifications relates not  
4 to some speculative election on a future date, but relates to  
5 that visit to the election office Mr. Davis made when he was  
6 denied registration.

7           And lastly -- I'm sorry, sub 2, in 1971(a), sub  
8 2, once again 42 U.S.C. 1971, we see more absolutes. "No  
9 person acting under color of law in determining whether an  
10 individual is qualified under state law or laws to vote in any  
11 election shall apply standard practices different than applied  
12 to other people." I'm paraphrasing that last part.

13           And then lastly -- of course, second to the  
14 Voting Rights Act, which, Your Honor, is -- this Supreme Court  
15 of the United States *Chisom v. Roemer* says "must be given its  
16 widest possible interpretation." And the reason is, is  
17 because of this very issue. The registration laws in southern  
18 states in the '50s and the 1960s played these sorts of games.  
19 They would say, well, this is race neutral, it doesn't have  
20 race on it, but then they would ask how many bubbles are in a  
21 bar of soap. And I would submit, as we do on briefs, that an  
22 African-American in 1959 in Georgia had a greater chance of  
23 getting registered to participate in the political process  
24 than did somebody such as Mr. Davis did here. And so Section  
25 2 of the Voting Rights Act was passed in response to these

1 sorts of games that were being played to restrict people from  
2 participating in the political process.

3 I want to draw the Court's special attention to the  
4 Oklahoma cases. And I say "cases" because there's two. The  
5 first one is Terry -- I'm sorry. The first one is the *Guinn*  
6 case, which I didn't mention in my six most important cases.  
7 *Guinn* was a law that was a grandfather law, was an  
8 ancestry-based qualification that was struck down by the  
9 Supreme Court. What Oklahoma did in response (inaudible),  
10 they said, "well, we're going to open up registration but just  
11 for two weeks, and if you hadn't been registered before,  
12 here's your two weeks to do it. If you're an African-American  
13 in Oklahoma, you have two weeks to get registered, and then  
14 we're closing off voter registration entirely, forever, for  
15 people who are above the age of 18."

16 The Supreme Court confronted the subterfuge in the  
17 *Lane* case, which I did say was one of the important cases, and  
18 it said that even if there is no law to be challenged, even if  
19 it would seem there's no standing, no ripeness, because  
20 there's nothing to be challenged, these sophisticated efforts  
21 of circumventing the Sixteenth Amendment are still abhorrent  
22 and can be addressed in federal court.

23 So I think those are incredibly important cases.

24 Let me briefly mention my stigmatization theory, the  
25 *Catholic League* case. The plaintiff argues that the denial is

1 not speculative under *Catholic League v. The City of San*  
2 *Francisco*. And this is important because the Ninth Circuit  
3 has opined that when a group of citizens are relegated to  
4 second class status by a government, that have standing to  
5 sue.

6 Now, the defendants will tell you that that's an  
7 establishment clause case, but it's bigger than that. It  
8 deals specifically with people who are relegated to second  
9 class status. And contrary to the assertion of defendants, it  
10 is not (inaudible). If somebody is condemned or relegated a  
11 second class status and suffers a concrete injury, such as the  
12 exhibit we handed to you, then you have standing and ripeness.  
13 This isn't theoretical or academic like taxpayer standing in  
14 an establishment clause case. This is entirely different.

15 And I would direct the Court's attention to *Heckler*  
16 *v. Mathews*, a Supreme Court case that made this very clear.  
17 It says, "Our cases make clear, however, that such an injury  
18 (inaudible) basis for standing only to those persons  
19 personally denied equal treatment."

20 So it's spot on. This Court can find standing and  
21 ripeness from the moment the Guam Legislature passed this law  
22 under *Catholic League* and the Supreme Court case of *Heckler v.*  
23 *Mathews*.

24 Let me close this opening, if you will, with sort  
25 of the challenge that this Court faces. The defendants would

1 have you believe that injuries occur only at such time that  
2 the election is announced or is imminent, is the language that  
3 they used. But I would submit that the cases are contrary to  
4 that. I would submit that the statutes are contrary to that.  
5 And if the Court is looking for a beacon to guide on deciding  
6 this philosophical question of when does the injury occur --  
7 because I think that's the hardest part of this case -- I  
8 would submit that the best way to find this guide is the  
9 Supreme Court case, which I will admit we did not brief  
10 because we didn't find it until after the briefs were  
11 submitted in this case. But I think it's spot on, and so,  
12 therefore, I feel it's important to mention, and the case is  
13 *Lorance, L-O-R-A-N-C-E, v. AT&T*. It's 490 U.S. 900.

14           And the reason this is so helpful is because time is  
15 the very issue in the case. It's a statute of limitations  
16 case, and it's a statute of limitations case arising in  
17 employment discrimination. And the question is, when does the  
18 injury occur. Because if the injury occurs a long time ago,  
19 at the beginning, if you will, as we contend the injury here  
20 in Guam did, the statute had expired. If the injury occurs  
21 later, as the amicus and defendants contend here, then the  
22 statute has not expired and it's a civil rights case, a racial  
23 discrimination case, like this one is.

24           And so the Supreme Court at 907 lays this out to the  
25 Court in an analysis that I think would be very helpful. And

1 I wonder, when does the discriminatory act occur that creates  
2 the injury. This was an employment discrimination case, the  
3 analytical frame (inaudible), but the Court said, quote, "the  
4 proper focus is upon the time of the discriminatory act, not  
5 on the time the consequences are most painful."

6 The time of the discriminatory act in this case is  
7 when the Guam Legislature enacted a statute to make Mr. Davis  
8 a second class citizen. It became worse when he attempted to  
9 register. But are we here to say that one cannot exercise  
10 their civil rights in a federal court until the time that the  
11 consequences are most painful? The Supreme Court of the  
12 United States disagreed plainly with the position of the  
13 defendants and the amicus on the issue of when did the injury  
14 occur -- now, I will grant you, it's a racial discrimination  
15 case involving employment -- but it provides this Court a  
16 basis in which to say the moment that law relegated somebody  
17 to second class citizenship, an injury occurred.

18 Now I'm perfectly prepared -- I know the Court must  
19 have lots of questions to get into great detail on any of  
20 these remaining issues, but per our discussion with  
21 Mr. Weinberg, I'm going to step down and let him make his  
22 (inaudible). Thank you, Your Honor.

23 THE COURT: Thank you. Mr. Weinberg?

24 (Pause.)

25 MR. ADAMS: We've amended, Your Honor.

1 THE COURT: Okay. Go ahead.

2 MR. ADAMS: You will recall I mentioned there's  
3 three separate layers, if you will, of standing:  
4 Stigmatization, the statutory, and then the actual denial, any  
5 three of which could provide this Court with denial of the  
6 defendants' motion. Given the fact that this Court asked for  
7 a briefing on CNMI case, I would like to address that briefly,  
8 if I might.

9 Now --

10 THE COURT: In that case, the chief judge there  
11 found that the plaintiff lacked standing and the matter was  
12 not ripe for discussion -- or decision and dismissed the case  
13 without prejudice, and said that if there was going to be a  
14 vote, then he could come back in at that point, and it was  
15 probably more likely than not that the judge would say that,  
16 you know, there is now an injury in fact. Right?

17 MR. ADAMS: That's correct.

18 THE COURT: So what's the difference between this  
19 case and that case in the CNMI?

20 MR. ADAMS: The most obvious one is the Organic  
21 Act that's plead here and Section 2 of the Voting Rights  
22 that's plead here. Neither one of those two statutes were at  
23 issue in that case in the CNMI.

24 Now, why is that important? The first reason is that  
25 the Organic Act, as I discussed already, places injury and

1 qualification not at actual conduct of an election. The Court  
2 in the CNMI case was not dealing with the same statutory  
3 framework as we have here. Because of the Organic Act,  
4 subsection M and subsection N.

5 Secondly, the Section 2 wasn't plead. Section 2 of  
6 the Voting Rights Act is specifically directed at  
7 qualification. And the Court in the CNMI cannot -- did not  
8 hear a Section 2 claim.

9 Now, I want to draw attention briefly to the  
10 defendant's response to this. The defendant in their brief  
11 said that the Voting Rights Act was at issue in the CNMI.  
12 That's not entirely -- that's not entirely accurate. 1971 was  
13 pled in the CNMI case. Now, that might have been the first  
14 time I've ever heard 1971 referred to as the Voting Rights  
15 Act. 1971 arises from the 1870 Civil Rights Act, 1957 Civil  
16 Rights Act -- there was a tiny little amendment in 1965, which  
17 apparently to the defendants means that it was done under the  
18 Voting Rights Act. But typically, it's not considered Voting  
19 Rights Act cause of action under 1971. Everyone calls that a  
20 1957 Civil Rights Act cause of action.

21 But the important point is that Section 2 was not  
22 pled. And as a matter of fact, I talked to counsel in the  
23 CNMI who thought she pled the entire Voting Rights Act and did  
24 not. She said to me on the telephone, "You're right. I  
25 didn't plead everything I could have."

1           So there's a gigantic weapon that the CNMI plaintiff  
2 never used that was available to the CNMI plaintiff, and she's  
3 -- this is a complicated area. She just didn't understand  
4 that. But certainly the Organic Act was involved in the CNMI.

5           Now, *Terry v. Adams*. *Terry v. Adams* is the Jaybird  
6 case. It's a Supreme Court case. I think I listed it as one  
7 of my six cases that control this decision. The Jaybird case  
8 involves something even more speculative than the election  
9 here in Guam or the CNMI. *Terry v. Adams* was the Jaybird --  
10 Jaybird was a group of Texas democrats who would get together  
11 and have a convention, and they had no state power. They were  
12 just a private association, and they would pick nominees.  
13 They would -- and they excluded African-Americans. That's the  
14 important point of *Terry v. Adams*.

15           And the Supreme Court found that this practice, even  
16 though there was nothing concrete about it, that there was  
17 nothing that meant anything, that there was just fantasy --  
18 they would pick a nominee. And the Democratic party, of  
19 course, would always follow it, but a non-governmental entity  
20 was picking nominees that had no effect. It was fiction. And  
21 the Supreme Court still said there's an injury in *Terry v.*  
22 *Adams* because public issues are being decided. Public issues  
23 are being decided under the plebiscite statute here in Guam.  
24 Public issues are being decided, quite frankly, in the CNMI,  
25 and that's one of the reasons we argue that the CNMI case was

1 wrongly decided.

2           But this Court does not have to conclude the CNMI  
3 case was wrongly decided. It could find that the CNMI case's  
4 mistake because of Section 2 and the Organic Act here in Guam.  
5 And so it could also rely on *Terry v. Adams* to distinguish it  
6 from the unfortunately named Davis case in Guam.

7           Finally, I would -- on the CNMI issue, I turn the  
8 Court's attention to *U.S. v. Raines*, which we cite in our  
9 brief. It's a district court case in Georgia that eventually  
10 went to the Supreme Court, although the Supreme Court did not  
11 deal with this particular issue. In *U.S. v. Raines*, the Court  
12 said, "Section 1971(a)," which is the same statute in the CNMI  
13 and here, "forbids any distinction in the voting process based  
14 on race or color irrespective of whether such distinction  
15 involves an actual denial of vote."

16           That's a case coming right out of the civil rights  
17 era, speaking to the issue here in this courtroom, that  
18 registration (inaudible) were so pervasive in the American  
19 south that that is the fundamental harm that the entire civil  
20 rights movement sought to cure. It wasn't about who actually  
21 ultimately ended up voting. That came in 1982 in the  
22 amendments of the Voting Rights Act, actual outcomes. But  
23 equal access to the process was what the entire Civil Rights  
24 Act -- civil rights era was about, was the ability to walk in,  
25 like Mr. Davis did, into the election commission, fill out

1 that form, and instead of it being marked "void," it gets  
2 marked "accepted." And that's what this case is all about.

3 So I think that the CNMI case, yes, was wrongly  
4 decided. The Court doesn't have to conclude that here. It  
5 could distinguish the CNMI case and find that this case is  
6 ripe.

7 THE COURT: Well, the thing about the CNMI case  
8 -- and ironically, it has the same last name, Mr. Davis. The  
9 Court found that there was no initiative scheduled for the  
10 next election, just like in our case on Guam. There's no  
11 initiative. There's no vote scheduled on this decolonization  
12 issue, and so that's where the Court really zeroed in on.  
13 It's just almost identical, don't you think?

14 MR. ADAMS: Well, there was no election in the  
15 *Terry v. Adams* case either, the U.S. Supreme Court case.

16 THE COURT: And even more importantly, the vote  
17 that -- I mean, this legislative act is really just advisory.  
18 That's all it is. It's not -- I mean, Congress is not bound  
19 by it.

20 MR. ADAMS: Well, that moves us into a whole  
21 other area. And I would submit, Your Honor, that I think the  
22 only place where this election, this plebiscite, is viewed as  
23 meaningless is in this courtroom and on the defendants'  
24 pleadings.

25 THE COURT: Well, I'm not saying it's

1 meaningless. I'm just saying that it's just really advisory,  
2 advising the Congress that this may be what the people of Guam  
3 or the native inhabitants of Guam, if you will, believe should  
4 happen in terms of the future political status of our island.

5 MR. ADAMS: Well, there's a couple of problems  
6 with the defendants' argument on that point. And let me touch  
7 on a couple of them.

8 First of all, the purpose doesn't matter at this  
9 stage of the proceeding. There is state action involved in  
10 the plebiscite, okay. There's an election being conducted by  
11 government officials that excludes some people from the  
12 political process. That's not advisory. That's a vote.  
13 That's a real concrete process that excludes people on the  
14 basis of race.

15 THE COURT: I don't think that's what I'm saying,  
16 or I don't think that's what the judge said in the CNMI case.  
17 The focus seemed to be that the claim is not ripe for  
18 adjudication if it rests upon contingent future events that  
19 may not occur as anticipated or, indeed, may not occur at all.

20 MR. ADAMS: Well, that's correct. And one of the  
21 -- that's what the Court ruled there.

22 There is a distinction that goes directly at that.  
23 I'm not sure if it's a significant one, but it bears mention,  
24 and that is that the plaintiff in the CNMI case never  
25 attempted to register. Now, they stipulated that he would be

1 denied.

2 THE COURT: Right. So, I mean, yeah -- so, I  
3 mean, it's the same fact scenario. Just like Mr. Davis is  
4 denied here the right to register; so is the defendant in the  
5 CNMI.

6 MR. ADAMS: And I think that when you deal with  
7 the San Francisco case with *Catholic League*, that the actual  
8 denial carries some weight. When you go to a government  
9 office and expect to be treated fairly and you attempt to  
10 register and then you're told by a government official that  
11 you're the wrong -- essentially, as we pled, that you're the  
12 wrong race, that carries some difference between what happened  
13 in the CNMI, when the parties just stipulated.

14 THE COURT: Well, the argument by the government  
15 and the amicus is that this is not race-based.

16 MR. ADAMS: Well, of course, that has no bearing  
17 on the issue before this Court right now, because the  
18 pleadings have to be taken --

19 THE COURT: As true.

20 MR. ADAMS: -- as true.

21 THE COURT: Right.

22 MR. ADAMS: So we're assuming for purposes this  
23 motion that this is a race-based plebiscite.

24 THE COURT: That's true. Go ahead.

25 MR. ADAMS: Okay. The other important

1 difference, I believe, in the CNMI, and more to the point of  
2 the business -- a speculative election, is that everywhere  
3 except inside this courtroom and on the pleadings is this  
4 plebiscite viewed as advisory. As a matter of fact, I would  
5 submit, which I'm happy to do, the deposition testimony of Ed  
6 Alvarez, who is the director of the decolonization commission.  
7 And he admitted in deposition which we conducted in September  
8 that it is the view, or was discussed by the decolonization  
9 commission, that the conduct of this plebiscite would trigger  
10 a constitutional processing. So there's a connection between  
11 the conduct of this advisory plebiscite and ultimate  
12 fundamental question of constitutional process.

13           So I would -- and I'm happy to submit the transcript  
14 if the Court would like to see it. But the larger point is  
15 this: Everywhere except in this courtroom and on the  
16 pleadings is this plebiscite characterized as merely advisory.  
17 It is the oxygen of much of the political discourse on this  
18 island. The actual conduct of this election is more than just  
19 advisory. It will inform the literal language the government  
20 creates and submits to the federal government. It will become  
21 de facto the position of the Government of Guam as it relates  
22 to status. It isn't just advisory. The only place where it's  
23 deemed advisory, again, Your Honor, is on the pleadings and in  
24 this courtroom. Everywhere else, it's given a far greater  
25 (inaudible) inside this case.

1           THE COURT: But really, when you think about the  
2 political status of Guam, what Congress giveth, Congress can  
3 take away, essentially. And isn't that what this is all  
4 about? Congress -- it's really up to Congress if they want to  
5 give Guam a political status that it seeks.

6           MR. ADAMS: And that's not -- and you're right,  
7 but that's not at issue in this case. The only issue in this  
8 case is whether or not everybody should be allowed to  
9 participate. And there are ways to that and still ascertain  
10 the wishes of native inhabitants. But you cannot exclude  
11 people on the basis of race in deciding these public issues,  
12 even if it's an election to determine what Congress ought to  
13 hear the native inhabitants want. You simply cannot exclude  
14 people because they don't have the right bloodline. And  
15 that's what this case is about.

16           And the fact -- nobody can deny credibly that there  
17 is not state action attached to the outcome of this election.  
18 Even if it's de minimus state action -- I'll concede for the  
19 purposes of argument that it's not a whole lot of state  
20 action. It's somebody writing a letter in the governor's  
21 office that says, this is what the results are, this is the  
22 position of the native inhabitants. That's still state  
23 action, even if it's de minimus.

24           And so the constitutional traps are sprung because  
25 they're state action. They can't escape from them. But there

1 is always state action, even if it's small state action, even  
2 if it's advisory state action, even if it's just a letter.  
3 It's state action, period.

4           Now, there's much made -- and I respect this  
5 greatly -- about the absence of a voice, about what the  
6 proponents of the plebiscite view the plebiscite is solving.  
7 But I would submit that Mr. Davis has no more right to vote  
8 for president than does Governor Calvo, that they are equally  
9 without political rights on that point. But Mr. Davis does  
10 not come to this case as an anointed special plaintiff with  
11 greater political rights than anybody else on this island. He  
12 can't vote for United States senator either. This is about  
13 treating everybody on the island equally. This isn't about  
14 the balance of power between Guam and the United States. This  
15 Court can decide this case by focusing it on Guam, by focusing  
16 on treating everybody equally, treating your neighbor like the  
17 other neighbor wants to be treated. Okay. This isn't -- this  
18 case will never decide that larger issue, nor should it.

19           But the other thing to realize is that nobody on  
20 the mainland ever had any voice about their citizenship. I  
21 never had a voice about whether I was a United States citizen.  
22 Folks on Guam have greater proximity to that decision than  
23 anybody on the other 48 states, putting aside Alaska and  
24 Hawaii.

25           So I would submit that Mr. Davis finds himself in the

1 exact same situation in regards to his political right as does  
2 everybody else on Guam. This isn't a case of him trying to  
3 silence anybody. It's a case of him trying to be treated  
4 equally.

5 Now, one thing I would mention is, this Court is  
6 sitting as an Article 3 court and not a territorial court, so  
7 the decision this Court makes involving equality and right to  
8 sue and standing in these circumstances is something will be  
9 noticed across the country. I mean, Alabama District Courts  
10 will be just as likely when interpreting the Voting Rights Act  
11 to turn to this case as they would another case.

12 Now, the defendants will say that we cite no  
13 authority that a non-binding plebiscite creates standing or  
14 injury. And I'll concede that. There's no question about  
15 that. But this Court has the opportunity to fill in that gap,  
16 because what happens in the future when other similar  
17 plebiscites pop up; or Alabama case that we cite in the brief;  
18 or worse yet, what if the political balance of power changes  
19 on Guam and suddenly there's statutes being passed that say  
20 Filipinos get the right to decide and Chamorros do not? Or  
21 what if Congress steps up and says, "You know what? We hear  
22 what's going on, on Guam, but we want to take the poll of the  
23 non-Chamorro, you see, and see what they say about the case.  
24 And we're going to exclude everybody else because we want to  
25 see what their opinion is."

1           This is a dangerous road. The Constitution was set  
2 up with the fundamental premise that everybody gets to  
3 participate equally in the political process regardless of  
4 race; that race, which has caused so much bloodshed in this  
5 country, is the one thing that has no place in any political  
6 process. And that's what the plaintiff's position is as it  
7 relates to the broader issues involving relationship between  
8 Guam and the United States. That's not to be decided here.  
9 What's to be decided here is whether race can play a role in  
10 giving one group of people a greater voice than another group  
11 on the island.

12           I want to briefly talk about the Puerto Rico  
13 cases, because the defendants seem to place a great deal of  
14 weight on these cases. There's three main cases. There's  
15 *Barbosa, Sola* and *New Progressive Party*. Those are the three  
16 cases the defendants claim will help this Court determine that  
17 there should not be standing. The most important thing to  
18 realize about these cases is that race discrimination is not  
19 at issue in the case. Nobody was denied the opportunity to  
20 participate in any Puerto Rico plebiscite. So the entire  
21 decision (inaudible) is different. It's not a race  
22 discrimination.

23           Let's take up the *New Progressive Party* case first,  
24 because this is the trickiest of the three. In the *New*  
25 *Progressive Party*, the plaintiffs were challenging the Puerto

1 Rican plebiscite as violating the constitutional guarantee of  
2 a republican form of government. Okay. That was their cause  
3 of action. Republican form of government will be violated  
4 under the plebiscite. Now, the Court ruled there was no  
5 standing to bring this claim because the plebiscite didn't  
6 actually alter the form of government, and the defendants  
7 place a great deal of emphasis on this.

8           Here is the analogy on Guam. Here's where *New*  
9 *Progressive Party* would apply in this case. Let me describe  
10 it. It would be like if Mr. Davis were challenging the three  
11 options in the plebiscite -- remember the three options that  
12 are in the statute -- as violating the congressional  
13 designation of the status quo. In other words, Mr. Davis were  
14 to come into this courtroom and say, "Hey, you're violating  
15 the Organic Act because it's not one of the three options on  
16 the list in the plebiscite." Then *New Progressive Party* would  
17 have some weight on and bearing on this case, because if Mr.  
18 Davis were to make that claim, *New Progressive Party* could  
19 apply and you could rule that, well, there's no standing  
20 because you don't have the authority to challenge the  
21 (inaudible) question. That's where *New Progressive Party*  
22 would apply.

23           But that's the claim that Mr. Davis is making. He's  
24 not saying, "hey, you left off status quo. There should be  
25 four options." That's *New Progressive Party*. What Mr. Davis

1 is saying is, "I get to vote, too, regardless of who my  
2 parents are." Totally different case.

3 *Sola* is easier to distinguish because the plaintiff  
4 (inaudible) live in Puerto Rico. That's an easy standing  
5 question.

6 And *Barbosa* is the last one, which the Court will  
7 tell you in that case, the pleadings were very vague. I think  
8 they described it as a constitutional (inaudible) the Court.  
9 And here's what the wrote said: "It's doubtful the results  
10 would be binding on the Puerto Rican legislature. No one's  
11 race will be altered." What you have in that case is a very  
12 messy precedential foundation, I would submit.

13 But *New Progressive Party* party is probably the most  
14 important one to look at there.

15 Now, there's a number of cases that the  
16 defendants cite which actually, I would submit, help the  
17 plaintiff. I draw your attention to the defendants' treatment  
18 of *Guerrero v. Clinton*. This is on Document 47 on page 6.  
19 Now, the defendants say that this case, *Guerrero v. Clinton* --  
20 they overstate the applicability of this case. They use  
21 brackets to insert the plebiscite into the *Guerrero* case. And  
22 I would submit that there should have at least been a signal  
23 that this was, for example, C or C generally or CF, that this  
24 case does not support the idea that -- that merely advisory  
25 plebiscites give no standing.

1           *Guerrero v. Clinton* was a case involving a  
2 congressional report to Congress by the executive branch on  
3 the status of the islands Hawaii, CNMI and Guam. And the  
4 Court ruled that executive responses to congressional  
5 reporting requirements does not give the Government of Guam  
6 standing to go in and demand that the president of the United  
7 States submit a report. Okay. So there's a couple of cases  
8 like that that I would submit actually help the plaintiff even  
9 though they're cited for the proposition that they help  
10 defendants.

11           THE COURT: Just FYI, my clerk, Gina, here says  
12 your one hour is soon to be up. You have 18 more minutes.

13           MR. ADAMS: Very good. I will then, therefore,  
14 close on one last important point.

15           THE COURT: Thank you, Gina.

16           MR. ADAMS: *Chisom v. Roemer*. *Chisom v. Roemer*  
17 is one of the six important cases that I believe control this  
18 case, a United States Supreme Court case. The important point  
19 of *Chisom* is that it advised the Courts -- this is the United  
20 States Supreme Court case, and it advised the Courts that when  
21 dealing with Voting Rights Act issues that they could give the  
22 greatest possible scope of protection on the Voting Rights  
23 Act.

24           How does that appear in this court? It appears when  
25 you interpret the words "qualification," "voting

1 prerequisite," "impose," "apply." All of these terms out of  
2 Section 2 have to be interpreted in the broadest possible  
3 sense. And that would favor the plaintiffs in this case  
4 because it means that qualification is a qualification. You  
5 don't even have to scratch. It's the native inhabitant  
6 qualification.

7           Impose or apply takes you back in time to the  
8 enactment of the statute; not even when Mr. Davis walked into  
9 the office, but, yes, you could use it there too. But it  
10 certainly doesn't force us, as the Court warned in the *Lorance*  
11 case, to look at when the consequences are the most painful,  
12 when the actual election is imminent. Section 2 should be  
13 interpreted in the broadest possible way when you look at the  
14 plain language of that statute. And I would submit that that  
15 alone can give you the basis to deny the defendants' motion to  
16 dismiss.

17           I'll reserve the remainder (inaudible).

18           THE COURT: All right. Thank you.

19           MR. ADAMS: Thank you.

20           THE COURT: We're going to take a ten-minute  
21 recess. Then we'll be right back. We'll have the defendants  
22 begin their arguments. So ten minutes, please.

23           THE CLERK: Please rise.

24           (Recess taken.)

25           (Back on the record.)

1 THE CLERK: The District Court of Guam is now in  
2 session.

3 THE COURT: The case of *Arnold Davis v.*  
4 *Government of Guam*. We'll proceed. Mr. Weinberg.

5 MR. WEINBERG: Thank you, Your Honor. May it  
6 please the Court.

7 THE COURT: You may proceed.

8 MR. WEINBERG: Your Honor, I'm going to try and  
9 put an order to this, talk first about ripeness and then  
10 invite Mr. Aguon up to talk about the amicus's point of view,  
11 and then come back perhaps and talk about injury and standing.  
12 Ripeness and standing overlap cases (inaudible). It's  
13 sometimes difficult to know which one we're talking about,  
14 because here we're talking about -- in order for it to be  
15 ripe, the injury has to be eminent. And in order for the  
16 plaintiff to have standing to bring suit here, he has to have  
17 an actual injury, not something hypothetical or projectional.  
18 It has to affect his interests. So sometimes I -- give me an  
19 advance, I may overlap in the theories of it.

20 Let me --

21 THE COURT: Well, they do say -- I don't know  
22 what the case says, inextricably intertwined it.

23 MR. WEINBERG: Yes, Your Honor.

24 Let me just make some points here as to why the case  
25 is not ripe. And I do want to acknowledge upfront that -- I

1 think I may have said this the last time we were here, that  
2 the ripeness question is one I wouldn't say I overlooked; I  
3 would say I almost deliberately avoided, because I was ready  
4 to rock and roll since (inaudible) on the standing question.  
5 I wanted to get to the merits of that question there, and so I  
6 downplayed the significance of it.

7           But seeing Chief Judge Manglona's opinion, it really  
8 made me think a lot more about why this case is not ripe, and  
9 it really made me think about -- as much as I, the litigant,  
10 or the Government of Guam may want to have this question  
11 resolved once and for all so the Government of Guam and the  
12 native inhabitants as they are defined by Guam law can move  
13 forward on the question of self determination -- as much as we  
14 want and like that, we are still constrained by articles, and  
15 we still have limitations. So I'm -- from the bench's point  
16 of view, I have to acknowledge that ripeness is the  
17 preliminary question that we have to look at first.

18           THE COURT: Yes.

19           MR. WEINBERG: First, under one -- Title 1 of the  
20 Guam Code Annotated Section 2110, there is the 70 percent  
21 threshold requirement. We don't know when that threshold will  
22 be met. It's to be determined by Guam Election Commission as  
23 to how that's met. Now, we can theorize as to how it might be  
24 met, but when you look at that statute, it's not really that  
25 clear and it's really -- almost too much subjectivity is put

1 in the hands of the election commission. A little guidance  
2 from the legislature would have been nice as to when that  
3 70 percent threshold would be met. We know -- we think --  
4 don't hold me to this -- that there are approximately 170,000  
5 people living on Guam, and we know from the recent elections  
6 there are 57- to 60,000 registered voters. And we kind of  
7 know from census data that people who have identified  
8 themselves as Pacific Islander or other Chamorro or Guamanian  
9 in the census may be around 30,000. So that might be a  
10 starting point, but we have nothing definitive at this point  
11 by rule, regulation or statute as to how is the 70 percent  
12 numbers going to be satisfied.

13 We also know -- I think it's common knowledge  
14 that the numbers of persons on the native habitants or  
15 decolonization registry is in the 4- to 5,000 range. So even  
16 assuming that we can accept the 30,000 native -- 30,000 people  
17 who self-identify as Chamorro or Guamanian descent, we have 4-  
18 or 5,000 out of 30. That's still a very far way off.

19 THE COURT: Are there -- do you all have the  
20 numbers of those who have been turned away or voided from the  
21 beginning, like Mr. Davis? You have that number?

22 MR. WEINBERG: I did inquire of that. I think  
23 Mr. Davis might be the only person. There might be one other.  
24 I think a Mr. Dotterman was -- and of course this is actually  
25 judicial, but I think that another person did go and did

1 inquire and did ask, but he didn't fill out the form.

2 THE COURT: Okay.

3 MR. WEINBERG: Now, if we look at Section 1, Guam  
4 Code -- I mean Title 1 of GCA Section 2109(b), those were  
5 recently amended. Those provided two parts. One is that UOG  
6 and GCC -- University of Guam and Guam Community College --  
7 would consult and be of service to the decolonization  
8 commission to promote educational campaign efforts. And the  
9 second part of that -- oh, and the second part of that  
10 subsection (b) said that the decolonization commission shall  
11 choose the date in consultation with the Guam Election  
12 Commission and the governor and the legislature. So we have  
13 two parts in Section 2109(b) which have -- are nowhere close  
14 to being satisfied. There's no indication that any education  
15 campaigns (inaudible) have begun, let alone that anyone has  
16 picked a date.

17 Now, these amendments --

18 THE COURT: Well, there's been dates picked for  
19 their plebiscite, but they've just never been successful, as I  
20 understand.

21 MR. WEINBERG: That's correct, Your Honor. And I  
22 think in my last filing with the Court, I think I tracked, and  
23 I think the plaintiff has also tracked this. And, in fact,  
24 the plaintiff makes the argument that this has been set and  
25 reset so many times over the last 14 to 16 years that that is

1 the proof that it's imminent. And I respectfully submit that  
2 it's exactly the opposite. The fact that this plebiscite has  
3 been set and reset so many times or enough times over the last  
4 14 to 16 years is proof that we don't know when or if it will  
5 ever be held.

6 Another part about this Section 2019(b) part of the  
7 current Guam Code Annotated is that this was proposed -- this  
8 came out of public law 31-92. Now, if you look at the  
9 legislative history, which I quote in my last filing, we can  
10 see that then-Senator Judith Guthertz proposed an actual  
11 filing -- an actual date for the actual plebiscite, and it was  
12 proposed to be at the next general election (inaudible) the  
13 year 2013. That was when we were going to have a plebiscite,  
14 or that was going to be on the ballot at that time. So we had  
15 a proposal to set an actual date, and it was evidently  
16 defeated in (inaudible), all of which goes to show that we  
17 don't have any election anywhere on the horizon. In fact,  
18 Mr. Davis, the plaintiff here, has said so in his -- in the  
19 Marianas Variety opinion case, where he says it will be 2025  
20 before we see one. And it's pretty clear that he does not  
21 believe that the plebiscite election will ever be held, in  
22 particular that the 70 percent threshold will be met.

23 Now, the plaintiff's arguments here is it doesn't  
24 matter if you're going to have an election or not. The injury  
25 we claim -- this is where I get into injury a little bit --

1 the injury we claim is not being permitted to register at all,  
2 and that makes -- and I'm going to paraphrase it -- paraphrase  
3 that from -- from "I don't get to get on the people who like  
4 me" -- "the 'people we like' registry." Now, I don't think  
5 that's an appropriate or fair, anyway, characterization of  
6 what the registry is about. The registry is -- is -- "The  
7 general purpose of the commission on decolonization shall be  
8 to ascertain the intent of the native inhabitants of Guam as  
9 to their future political relationship with the United States  
10 of America." And that's in Section 2105 of Title 1.

11 Now, notably, that does not say the intent of the  
12 persons currently residing in Guam, nor does it speak for the  
13 Government of Guam. It speaks to the persons identified as  
14 native inhabitants of Guam.

15 And then it goes on to, "Say once the native  
16 inhabitant of Guam is ascertained" -- "once the intent of the  
17 native inhabitants of Guam, the commission shall promptly  
18 transmit that desire" -- decolonization commission shall  
19 transmit it -- "to the president and Congress and the United  
20 Nations, Secretary General of the United Nations."

21 So Mr. Davis's complaint is that he doesn't get to be  
22 included in the transmission of the desires of a select group  
23 of people, an identifiable politically separate group of  
24 people, because he is a current resident.

25 Now, this -- we understand -- and that may be for

1 later if this case were to proceed, that we understand the  
2 argument that ancestry can be -- can be a proxy for race, but  
3 "can be" doesn't mean automatically is. Here we have a group  
4 of people identified as -- that were made citizens as of 1950,  
5 or when the Organic Act was approved by Congress for Guam, and  
6 the question presented is, if you had a choice, you and your  
7 descendants, native inhabitants -- if you had a choice, what  
8 would it be? Because you didn't have a choice 62 years ago,  
9 in 1950, because Congress made that choice for you. There was  
10 no plebiscite then. There was no constitutional convention  
11 then.

12 So the question is very clear. It's simple. The  
13 people and their descendants of 1950 who were here at the time  
14 that the people living here on Guam were made citizens didn't  
15 have a choice. Now we're going ask you, what would it be? An  
16 act we are going to transmit to Congress.

17 Now, as Mr. Davis's counsel said, I think, a little  
18 earlier -- said, "Well, that's the oxygen." And that may very  
19 well be the oxygen that will prompt further debate, but we're  
20 not there yet. That's the problem. We have too much to do.  
21 We have education campaigns, we have to set a date, we have to  
22 meet a threshold. All of these contingencies, these future  
23 contingent events, have to occur before we know if it's ever  
24 going to happen at all.

25 Now, Mr. Davis's counsel says, yes, but the Voting

1 Rights Act says and the Organic Act says that I have a right  
2 to register because it uses the word "vote" and it uses the  
3 right word "election," and the Voting Rights Act says I have a  
4 right to register.

5 Now, the problem with that is -- or the concern here  
6 we have is, register for what? Now, I don't believe that we  
7 looked at the original complaint, that the problem was the  
8 establishment of the registry itself. I cited in one of my  
9 earlier pleadings -- I'm sorry I don't have it in front of me  
10 -- a Ninth Circuit precedent, I think it was, that said --  
11 that said, you know, simply identifying voters by race,  
12 there's nothing wrong with that, nothing that violates the --  
13 identifying people. So establishing a registry of, quote,  
14 native inhabitants of Guam is in and of itself not a violation  
15 of either the Fifteenth Amendment, Fourteenth Amendment or the  
16 voting rights. It's good to know these things. We made need  
17 these later on to have an identifiable -- if, in fact,  
18 ancestry is a proxy for race here.

19 But the Courts have never said that you can't make a  
20 registry of (inaudible). So Mr. Davis's complaint is that he  
21 doesn't get to register, to get on the registry. The registry  
22 for what, is the question. For the plebiscite. What  
23 plebiscite, is the question. Okay. Well, the plebiscite that  
24 Government of Guam may have. When? We keep coming back to  
25 that question, and that's why I think Chief Judge Manglona's

1 opinion is really -- I had to read it a number of times  
2 because, again, when I read it the first time, I wanted to get  
3 right past it and get into the -- let's get to the injury and  
4 that part, the advisory part of this -- of the plebiscite.

5 But I had to look at -- and she makes a really good  
6 point -- couple of important points. One is that if and when  
7 the Article 12 debate does get put on the ballot, Mr. John  
8 Davis will then -- his claim will be ripe. His claim will be  
9 ripe. And in the meantime -- and this, I think, is a really  
10 important point -- she says that does not prevent him at all  
11 during this time from lobbying for or against Article 12  
12 amendments or anything, or exercising his First Amendment  
13 right to speak out, petition and all that. So they're  
14 (inaudible).

15 So this injury that he claims doesn't become concrete  
16 and particularized until we know it's about to happen,  
17 imminent. I didn't make that word up. The U.S. Supreme Court  
18 said the injury has to be imminent.

19 Now, Mr. Adams anticipated this, and I want to  
20 emphasize, none of the cases that Mr. Adams and Mr. Davis cite  
21 when they're talking about "Voting Rights Act gives me a per  
22 se right to object to any kind registration for any kind of  
23 process." None of those cases involve an advisory nonbinding  
24 plebiscite or referendum. They all involve elections for  
25 public offices or something that would amend the law, change

1 the law in some way or propose an addition or -- to the law;  
2 something that would affect the political and juridical rights  
3 of the stakeholders in that election. That is why the Puerto  
4 Rico cases are important, because there, the advisory nature  
5 of the plebiscites did not affect the political or juridical  
6 rights of the plaintiffs.

7 Now, I don't understand, frankly, what the argument  
8 is -- or if I do, I disagree with it -- that merely because  
9 race and the Equal Protection Clause like the Fourteenth or  
10 Fifteenth Amendment, as expressed in this Voting Rights Act --  
11 merely because those weren't specific issues in the Puerto  
12 Rico cases, how that obviates the need to answer the ripeness  
13 and standing questions presented here. And merely because  
14 your claim is (inaudible) equal protection case, voting rights  
15 or equal protection under the Fourteenth or Fifteenth  
16 Amendment, doesn't somehow wave away the necessity that the  
17 (inaudible) is ripe and that you have an imminent injury  
18 before you can walk into an Article 3 or Article 2 -- 4 --  
19 Article 4 court.

20 And that's -- now, that, as Mr. Adams pointed out  
21 -- that -- what that does is that leaves open a gap. And what  
22 do we do in a case where it's an advisory plebiscite that is  
23 not binding on the -- doesn't even speak for the Government of  
24 Guam. It speaks for the native inhabitants of Guam, and then  
25 it's transmitted to Congress and the UN and the President.

1 They're not obligated to do it. We've never had a case like  
2 that before. Say the Courts -- say all the Courts. And I  
3 think the example that Mr. Adams suggest, as well, you know,  
4 the district judges in Alabama might be looking at this  
5 closely. And I used to practice there. I think he might be  
6 right, because one of the questions that's currently over  
7 there comes out is that Alabama's Constitution has tons of  
8 discriminatory and racially -- racial provisions in it. Maybe  
9 not tons anymore, but it still has provisions that have  
10 subsequently been found unconstitutional by the United States  
11 Supreme Court and the courts in Alabama. So -- but they're  
12 still on the books.

13 But does that automatically confer standing on any  
14 citizens of Alabama to go out and challenge it? I mean, it's  
15 still on the books. I submit that if judge -- Chief Judge  
16 Myron Thompson in Alabama was faced with that question, he  
17 would say, "Well, not unless it affects you." Just because  
18 you don't like something doesn't mean that you have an injury  
19 sufficient to bring a case in Court.

20 Now we're getting into the injury question a little  
21 bit. Can Congress have intended -- and I don't think that the  
22 Court has to get into the question just yet because I haven't  
23 seen any suggestion in any of the cases either party has cited  
24 that suggests the Voting Rights Act is some sort of blanket  
25 dispensary that dispenses with the need of ripeness or

1 standing under Article 3. So *Chisom v. Roemer*, which says  
2 that the Voting Rights Act should be (inaudible) broadly, who  
3 can disagree with that? And if we were holding and if we were  
4 dealing with a plebiscite that was intended to modify the law  
5 here or to speak for the entirety of the Government of Guam or  
6 the entirety of the island of Guam, Mr. Davis might have a  
7 point. If we were dealing with an election that was for  
8 public office or office of trustee, as in *Rice v. Cayetano*, he  
9 might have a point.

10 But this is advisory, so the question is, what was  
11 Congress thinking. Now, I know I've done my research and I've  
12 done -- I haven't found anything. Doesn't mean it's not  
13 there, but I haven't found anything that suggests that the  
14 Voting Rights Act -- not that it's not intended to apply in  
15 Guam, but that it wasn't conceiving this kind of situation as  
16 applied in the territories with the former colonized people  
17 who were made citizens by the unilateral act of a foreign  
18 government in 1950 and never had their actual own say, one of  
19 the most significant attributes of that citizenship. It's not  
20 that I wasn't -- my son was born here, and he didn't have a  
21 choice either. But that's not what we're talking about.  
22 We're talking about the choices that was made by people who  
23 never had a choice, that people in the states all at one time  
24 had that choice that Guam has yet to have.

25 THE COURT: What about Mr. Adams's argument

1 earlier that he cites to Mr. Ed Alvarez's deposition, where he  
2 says that the results from the plebiscite would trigger a  
3 constitutional process to occur?

4 MR. WEINBERG: I'm glad you brought that up, and  
5 I'm also glad that Mr. Adams did too, because I didn't know if  
6 we could talk about such things. If Mr. Adams wants to submit  
7 testimony of Mr. Alvarez, I'm happy to have it, provided the  
8 entirety of it is in the record.

9 THE COURT: I'm not sure if that's appropriate,  
10 but I'm just curious how you would respond to that.

11 MR. WEINBERG: Well, what Mr. Alvarez said was  
12 that, assuming that there was -- when we have a (inaudible) --  
13 being hopeful, when we do have that plebiscite and it is held,  
14 at that point it will trigger another process. And so what  
15 that means to me is that -- it says that there's enough  
16 interest in one of the three options by the native inhabitants  
17 of Guam and their descendants to do something to modify the  
18 status quo, at which time it will engender a whole new  
19 Constitution (inaudible) or as in the Constitution -- like we  
20 had (inaudible) the whole (inaudible) -- the Commonwealth  
21 (inaudible).

22 And what we do not have in this case, on this  
23 statute, is the suggestion that when that occurs, that it will  
24 be limited to native inhabitants (inaudible). And in fact,  
25 Mr. Alvarez's additional testimony during the deposition was

1 -- he said, no, he (inaudible) at that point, the questions  
2 would be presented to everyone, and all the qualified  
3 registered voters, not only the -- not merely the native  
4 inhabitants.

5           But whether that part of it is in or not, what is  
6 -- I think both the parties can agree as to what Mr. Adams  
7 said Mr. Alvarez said, which is that this is only preliminary.  
8 It's preliminary to the next stage. And the next stage is  
9 where -- that's where, at that point, I would have to release  
10 a little bit with him and agree that at that point we're  
11 talking about something that Mr. Davis may have a serious  
12 (inaudible) -- may have an interest in when he's talking about  
13 the future of the island as a poll, not merely his desires as  
14 someone who is a descendant than someone who's made a citizen  
15 by virtue of --

16           THE COURT: So you're conceding that if there is  
17 a vote that is taken later and the vote is -- that vote is  
18 open to all qualified registered voters, whether they're  
19 inhabitants or non-inhabitants of Guam, back in the '50s or  
20 descendants therefrom, that at that point, Mr. Davis is denied  
21 the right to vote, then you can see that there would be a  
22 violation?

23           MR. WEINBERG: I will concede it's a much  
24 narrower question. Narrower question. I don't want to  
25 concede, you know, that at this point, but I would have -- I

1 have to concede it. And I think that -- that in interest,  
2 Mr. Aguon may be able to talk about this a little bit from an  
3 international law point of view, that the United Nations might  
4 in fact take a different view of something that reaches back  
5 60 years, to decide the state of a non-self-governing  
6 territory as the only people who are permitted to vote.

7 And so I don't -- I can't concede that because I  
8 don't -- I don't -- I can't see it. But I do think that it  
9 would create much more problems. I concede that.

10 THE COURT: Which -- for the government?

11 MR. WEINBERG: For the government, yes. And/or  
12 anybody promoting such a plebiscite.

13 THE COURT: Okay.

14 MR. WEINBERG: And, of course, as a practical  
15 matter Congress would (inaudible) into it, but these are all  
16 hypothetical. But, yes, I do concede that it's a much -- a  
17 much, you know, narrower question in that situation.

18 THE COURT: I think so, yeah.

19 MR. WEINBERG: This question about the John Davis  
20 case in the CNMI, Mr. Adams and I have actually had some  
21 private exchanges with that. If this is a Section 2 in the  
22 Organic Act case and that CNMI wasn't a section 1971,  
23 according to U.S.C. Section 1971 case. If you look at the --  
24 if -- just a technical point. And I don't think the Court has  
25 to decide it, but -- or maybe drop a footnote if it wanted to

1 do. If the Court would look at Section 1 of Public Law  
2 89-110, which is a federal law, it says, "This act shall be  
3 known as the Voting Rights Act of 1965." And that act then  
4 amended Section 1971 that is relied upon by -- by Mr. Davis,  
5 John Davis in the CNMI.

6 So that was, in fact, the voting rights case.  
7 This is -- but now from Mr. Adams says, oh, but that was -- or  
8 that was Section -- 1971 case. This is a Section 2 case. And  
9 Section 2 deals with the qualification. Well, I think he's  
10 splitting hairs. This case -- Mr. Dave -- Mr. Dave Davis's  
11 case is a case in which he challenges this advisory plebiscite  
12 and registration for it on the basis of, he said, racially  
13 discriminatory against (inaudible). Mr. John Davis in the  
14 CNMI made exactly the same argument. He says it violates the  
15 Fifteenth Amendment, Section 1971 up there of the Voting  
16 Rights Act. But what he says is, "I'm being discriminated  
17 because" -- "against because I cannot register before this  
18 election if and when it happens." That is the identical claim  
19 of injury Mr. John -- Dave Davis here presents.

20 The relief that they seek, that they both sought,  
21 isn't the same. I want to register. I want to participate.  
22 I want on that registry so that I can vote too, so that the  
23 claim of injury is the same, the relief is the same. We're  
24 splitting hairs if we're saying, oh, well that was for a  
25 different section, that was a different (inaudible),

1 different -- because when you look at them, there's not --  
2 there's not any substantive difference. There really isn't.  
3 And I think that if I had brought a Section 1971 -- 42 U.S.C.  
4 1971 argument, that I was seeking relief ultimately under --  
5 would have been found under Section 2, the Court would have  
6 granted it in the right kind of case. So that argument is  
7 just not (inaudible).

8           The -- yes, but the Organic Act says --  
9 arguments, the statutory -- I have a statutory standing  
10 argument, runs afoul, runs into the same problem that we've  
11 been talking about that Chief Judge Manglona (inaudible). It  
12 doesn't subsume the Article 3 requirements of ripeness or  
13 standing just because the Congress said that there shall be no  
14 discrimination between qualification or registration to the  
15 voter. The question ultimately has to be answered quote --  
16 for what. Here, the answer to that question is, voting to  
17 express my desire as a native inhabitant of Guam (inaudible)  
18 thereof on these three options.

19           Now, then that gets into the question of that  
20 question that will not be presented if -- in the CNMI: What's  
21 your claim of injury? That you don't get to have -- that you  
22 don't get to water down with (inaudible). Now, if you -- how  
23 are you injured, Mr. Davis, Mr. Dave Davis?

24           THE COURT: Why don't we make it easier. Just  
25 say Guam Davis and Saipan Davis. That makes it easier for me,

1 because they're both Davis.

2 MR. WEINBERG: How is Guam Davis injured by not  
3 being -- is he not permitted to own land or does he run the  
4 risk that he not be permitted to vote, that he won't be  
5 permitted to own land, as CNMI Davis has? There's a claim  
6 there. There's -- and judge -- Chief Judge Manglona said so.  
7 There's a claim -- there's his claim for injury.

8 So -- but here, what's Mr. Guam Davis's claim? Well,  
9 the injury is just there. It's just there because I don't get  
10 to participate, because I don't get to join a list. But how?  
11 And he never tries to answer in any of the pleadings that I've  
12 served. His argument of injury is there's a registry and I  
13 want on it.

14 THE COURT: Well, he's saying that -- as I  
15 understand it, he's saying there's a stigma attached to the  
16 fact that he's not been allowed to register, and now he feels  
17 like a second class citizen. At least that's what I  
18 understand from his arguments.

19 MR. WEINBERG: This stigmatization argument, all  
20 right. Well, he doesn't claim that he's a native inhabitant.  
21 If he wants to claim that they're treated differently, he has  
22 to point to some privilege or benefit. It's not a public  
23 office. It's not a right to something. It's not like they  
24 get popsicles on Sundays and other people don't. You've got  
25 to point to something that there's state action -- while we're

1 talking about state action, that somebody is actually  
2 equally -- similarly situated people are treated differently.  
3 And his is only, well, I don't get to express my advice at the  
4 same time that the native inhabitants do. It's like  
5 Mr. Alvarez says, your day will come. Right now, we want to  
6 see if there's anything in this vote. And if there  
7 isn't (inaudible). Obviously, it's come 14, 16 years, going  
8 back to the ripeness -- 14, 16 years. I don't know how long  
9 it's going to be before you actually had a vote, all sorts of  
10 difficulties we're seeing so far (inaudible).

11           The stigma -- now, Your Honor, on the  
12 stigmatization question -- and I want to address the *Catholic*  
13 *League* case. And I tried to address it in some prior  
14 pleadings, and I just invite the Court to reread that decision  
15 for itself.

16           THE COURT: I've read it.

17           MR. WEINBERG: It's a fractured morality  
18 decision. It's really difficult. I've tried to paraphrase  
19 it, I think, in a who said what and what votes were, and I'm  
20 still not quite sure. But those members of the Ninth Circuit  
21 en banc who did agree that it was -- that there was standing,  
22 looked at it and said there is standing because here's a  
23 select group of people in this case, Catholics, right, who  
24 were singled out by their government opprobrium -- and to be  
25 chastised. Their religious beliefs were -- because the things

1 that they -- I don't -- the archbishop or the pope or  
2 something were saying in that, their belief systems were being  
3 criticized by the government.

4 Now, we don't have that. That's why I can say those  
5 kind of cases are sui generis in part. Is there an injury  
6 similar to those cases where -- for example, in the Ten  
7 Commandments case where somebody walks into a courtroom and  
8 they see the Ten Commandments, does the plaintiff in that case  
9 have an injury? And the courts have looked at it and go,  
10 well, you know, they have injury, if they have to go there.  
11 You know, the lawyers have a regular (inaudible) over there or  
12 a witness for a case and they're compelled to be there, and  
13 compelled to be there on the visage of the judge, and he's  
14 saying that "I've got the Ten Commandments behind me, what do  
15 you got?"

16 Okay. So there is a -- there is an attack on the  
17 citizens belief system, and citizens ought to be entitled to  
18 challenge that. And that, I think, is why that the *Catholic*  
19 *League* stigmatization argument is just too weak. It doesn't  
20 create an ipso facto standing injury. I don't think the  
21 Supreme Court has ever accepted that. Just because you  
22 disagree with your government on this, and just because you  
23 disagree with your -- the government on the way that you're  
24 doing this plebiscite -- you know, what's a better way to do  
25 it, I think, would be let's have all four questions, or maybe

1 even five, I can add a fifth, but let's add status quo to that  
2 and let's add commonwealth to that. We'll have five  
3 questions, and we'll let everybody vote, but let's have --  
4 let's do it right, if Mr. Davis, Guam Davis, wants to change  
5 the way that -- well, he should run for office. He should  
6 propose it or start a citizens referendum to propose that.  
7 And he's perfectly entitled.

8           But just because he disagrees with the way that it's  
9 being presented at this time and the questions -- and there  
10 are reasons to support that, but we don't have to defend them  
11 here. Just because he disagrees with it doesn't give him an  
12 injury (inaudible).

13           Your Honor, at this time, if I could, I would  
14 like to offer up a little time to Mr. Aguon and then come back  
15 to --

16           THE COURT: That's fine.

17           Mr. Aguon.

18           MR. AGUON: Good afternoon, Your Honor. May it  
19 please the Court. On the way over here, I thought of a  
20 million different ways to attempt to (microphone noise) to  
21 more or less reorient itself along another, albeit not  
22 discussed normative baseline, and that is what we are really  
23 doing here today in this hearing, this particular set of  
24 circumstances. And defendants' counsel, the Attorney  
25 General's Office, has argued quite competently in all of its

1 briefs about standing and -- as well as the constitutional  
2 component of ripeness. But I want to try to invite the Court  
3 to consider that at its core, ripeness, despite it's leading  
4 into, in many cases, the injury and fact prong of the standing  
5 analysis for Article 3's requirement of a live case in  
6 controversy, to realize the ripeness at its core is a  
7 credential doctrine that serves as an extra, if supplemental,  
8 if you will, sort of trigger that the federal court, when  
9 faced with a case that has not been fully factually developed,  
10 should really take into consideration.

11           And the normative baseline of judicial restraint, I  
12 think, is a thing that's been underplayed grossly in this case  
13 thus far. And I find myself in a very unique position of  
14 being the attorney for the amicus who raised ripeness as --  
15 for the first time in this case. And I did so because, to me,  
16 it was very alarming to see that issue, knowing that it is a  
17 threshold issue that goes to the very, very core of the  
18 Court's ability to hear the matter in the first instance. And  
19 because it goes to that very core, I felt compelled to file  
20 the brief on behalf of my client Anne Perez Hattori, who is a  
21 local noted historian and professor who wants to see this  
22 case, of course, adjudicated on the merits, but that day is  
23 not today. And I want to explain why.

24           But I want to start a little bit with explaining that  
25 it's important to take a step back and realize that ripeness

1 serves as a different starting point because federal courts,  
2 such as this one, are courts of limited jurisdiction. And  
3 Article 3's commands are not to be trifled with lightly.  
4 Ripeness exists because it really does serve the purpose,  
5 especially in cases involving complex constitutional and  
6 statutory instruction questions, which are cast aside by  
7 federal courts, but only on the complete factual of the  
8 record.

9           In this case, the most important consideration is  
10 that the most important events envisioned by the challenge  
11 statutory decolonization scheme have not yet occurred. Here,  
12 plaintiff's entire claim is predicated on an alleged statutory  
13 -- sorry. Here, plaintiff's entire claim is predicated on an  
14 alleged fact; namely, that the statutory definition of a  
15 native inhabitant of Guam will have a disproportionate impact  
16 along racial line.

17           First, as it stands, until the index or list of the  
18 names is first even compiled and maintained by the commission  
19 as envisioned by the statute, said alleged disproportionate  
20 impact could not even be determined.

21           Second, well-settled race jurisprudence provides that  
22 a disproportionate impact alone is not enough to prove a  
23 constitutional violation. Plaintiff would still have to prove  
24 that the statutory definition of native inhabitant of Guam was  
25 motivated by race-based animus and especially designed to

1 facilitate an unconstitutional racial purpose --

2 THE COURT: Didn't he try to argue that though, I  
3 think initially, before there was -- the legislature changed  
4 "Chamorro" to "native inhabitant," that's where he's arguing  
5 that there's this pretext of race-based classification?

6 MR. AGUON: Yes, Your Honor. You're right. But  
7 I think that if you come back to a point that was made very  
8 well by the defendants' briefing, that the actual operative  
9 provisions of all the statutes, every single one of them that  
10 he's actually challenging do not implore the word "Chamorro."  
11 They implore "native inhabitant of Guam." And there's an  
12 entire line of Ninth Circuit cases that say you can't take --  
13 you can't try to unfairly extrapolate so much legislative  
14 attempt from a mere title -- a word in the title. And so  
15 that's the only time it actually appears.

16 But I guess the primary point I really want to make  
17 before I go into the details about 1 GCA 2110(a) and the other  
18 three provisions is that there is something to be said that in  
19 this case, a record -- a fully developed and factual record,  
20 which is important for the prudential elements of ripeness, is  
21 utterly lacking, against which a federal court, be it this  
22 Court or the Ninth Circuit Court or, ultimately, the Supreme  
23 Court, it must actually have a court of record, and a record  
24 involving all of the working parts of the challenge statutory  
25 scheme, which I'd like to now go into.

1           First, as stated by defendants, the statutory  
2 requirement of the 70 percent eligible voters has not been  
3 met. I would like to actually draw the Court -- because I --  
4 both parties did brief the matter, but as amicus, I find  
5 myself in a delightful role of trying to do -- engage in a  
6 more close construction of the plain language of these  
7 statutes, because like some of the cases, the statutes haven't  
8 been meticulously mined for their (inaudible) to evidence the  
9 true legislative intent. So 1 -- the 1 GCA 2110(a) -- I don't  
10 know if the -- if Your Honor has that before her, but --

11           THE COURT: I do.

12           MR. AGUON: But the quote is as follows: "The  
13 political status plebiscite mandated in subsection (a) of this  
14 section shall be held on the date of the general election by  
15 which 70 percent of eligible voters pursuant to this chapter  
16 have been registered as determined by the Guam Election  
17 Commission."

18           I won't belabor this point because this was the only  
19 actual provision that was sort of meticulously briefed as to  
20 why this issue was not ripe. That's one statutory condition  
21 precedent that has not been satisfied.

22           But there's other condition precedent set out in the  
23 statute that have also not been briefed and not been  
24 satisfied. The second one I would say, hugely important, is a  
25 provision on public education which must proceed, according to

1 the plain language of the -- of the challenge statute, the  
2 political status plebiscite and that section -- the citation  
3 for that section is 1 GCA Section 2109(b). Although defendant  
4 did just bring it up, I would like to freely and closely  
5 examine the plain language of the statute: "Upon consultation  
6 with *I Maga'lahaen Guåhan* and *I Liheslaturan Guåhan* the  
7 Commission on Decolonization and the Guam Election Commission  
8 shall determine the date for the conducting of a political  
9 status plebiscite, which shall take place," quote, "following  
10 the completion," and quote, "of the public education program  
11 for purposes of fulfilling the education outreach provisions  
12 of this chapter."

13 So, therefore, the public education campaign, which  
14 is a separate and discreet working part of this challenge  
15 statutory scheme, also (inaudible) against the filing of  
16 ripeness, and that's because it has to be completed before any  
17 such political status plebiscite can be held.

18 THE COURT: Has it started?

19 MR. AGUON: We don't know. And that's precisely  
20 my point. Before -- this Court is utterly lacking any kind of  
21 record as to when the triggering date could be said to have  
22 started. And at the agency level, if we leave this purely as  
23 a matter of administrative law, that hasn't been determined.  
24 So it's, again, harkening back to the very wide judicial  
25 restraint reflex of a federal court.

1           So the next -- the third and final closely,  
2 meticulously analyzed section that has not been briefed is the  
3 position papers. This hasn't made it into a single brief in  
4 this case, including my own, because preparing for this, I got  
5 to really read them again, probably for the 200th time, to  
6 find --

7           THE COURT: Two hundred times?

8           MR. AGUON: I'm exaggerating. But I really have  
9 read it so many times, I almost gave myself a headache,  
10 because I just -- it became almost wildly and abundantly clear  
11 to me that the condition precedent not been satisfied in this  
12 case prior to the calling (inaudible) of such a referendum.  
13 And this section is 1 GCA Section 2109, and this is in regard  
14 to position papers. Quote, "The commission, in conjunction  
15 with the commission's task forces, shall conduct an extensive  
16 public education program throughout the island," quote, "based  
17 on the position papers submitted by each task force."

18           We've already heard that Ed Alvarez, who is the  
19 current director of the decolonization commission in Guam, we  
20 -- his name was never brought up, and I'm very happy about it  
21 because I just talked to him last week and, from my  
22 understanding, the three respective political status papers  
23 which the statute envisions as a threshold of a threshold of  
24 the threshold requirement actually requires that the public  
25 education campaign be tailored around those position papers.

1           So what I found in preparing for this oral argument  
2 is not just a condition precedent, but a condition  
3 pre-precedent hasn't been satisfied. And that's precisely why  
4 this entire case is improperly before this Court and divested  
5 this Court of subject matter jurisdiction under the dictates  
6 of Article 3, as well as the supplemental, albeit closely  
7 related, prudential concerns of Article 3 that any time a  
8 federal court does so reach into a complex case, it should  
9 actually have a fully developed factual record.

10           And I will be happy to intervene on the record in  
11 that case when that happens, but that is not -- that day is  
12 not today. Today what we have is plaintiff engaging in  
13 precisely the kind of request for declaratory relief to -- for  
14 a pre-enforcement of a statute that has never been threatened  
15 with prosecution against him to -- I guess the plainest way to  
16 say this is, in my opinion, I will submit to this Court that  
17 Davis is engaging in -- inviting the Court to engage in  
18 umpiring empty shadows, as we saw in the *Union Carbide* case,  
19 the *Wolfson v. Brammer* case. We saw this in a whole plethora  
20 of Ninth Circuit cases that didn't make it into oral argument  
21 today.

22           But I think opposing counsel is quite aware of the  
23 numerous case law from the Ninth Circuit, such as *Wolfson and*  
24 *Brammer* and *Thomas* -- the Thomas case, as well. These are  
25 Ninth Circuit cases that say you are not entitled -- you don't

1 have a direct and immediate harm for purposes of ripeness if,  
2 for example, you are claiming that of -- a statute that hasn't  
3 been actually enforced against you is going to cause you an  
4 injury.

5           So in the *Thomas* case that the Ninth Circuit  
6 examined, a pre-enforcement challenge to an Alaska housing  
7 statute, prohibiting marital status discrimination, the  
8 landlord who filed that action believed that premarital  
9 cohabitation is a sin, and so they argued that the law  
10 infringed on their First Amendment right to religion and free  
11 speech. The Court held that it was not ripe because there was  
12 no respective tenant complaining about them, there was no  
13 investigation by state authorities against the landlords, and  
14 there was absolutely no imminent enforcement action threatened  
15 against the landlords.

16           This is exactly the kind of thing that Judge  
17 Manibusan raised in his report and recommendation. It's what  
18 was raised in the *Brammer and Wolfson -- Wolfson v. Brammer*  
19 case in Ninth Circuit, as well as this circuit, as well as  
20 even an older case from the U.S. Supreme Court which, despite  
21 opposing counsel's objections to the contrary, has never been  
22 overruled. *Poll v. Oman* [sic] has yet to be satisfactorily  
23 discussed, in my opinion.

24           THE COURT: Can you just clarify, though, with  
25 regard to the misdemeanor -- potential misdemeanor

1 prosecution, is it the -- is it the certifier that would be  
2 prosecuted, not the voter who's trying to vote?

3 MR. AGUON: That's a little unclear. But what is  
4 clear is that the language is sufficiently general enough to  
5 actually (microphone noise) the legalities for both parties.

6 THE COURT: Well, I mean, your -- if Mr. Davis or  
7 anyone else -- a non-inhabitant falsely certifies that he is a  
8 native inhabitant, then of course he would be committing  
9 perjury, I suppose. Let's see. Yup, that's right.

10 MR. AGUON: Yeah, as a misdemeanor.

11 THE COURT: Yeah. Perjury here. But I was just  
12 under the impression that it really focuses in on the --  
13 insofar as registry, it be the person who is conducting the  
14 registry at Guam Election Commission -- if he or she allowed  
15 someone like Mr. Davis to register or certify that he is a  
16 native inhabitant when he knows he's not -- when they know  
17 he's not, then they would be prosecuted for a misdemeanor.

18 MR. AGUON: Actually, that's a better reading of  
19 the statute.

20 THE COURT: I think -- at least that's -- when I  
21 just read that --

22 MR. AGUON: I'm just reading it now, GCA 21009.

23 THE COURT: When I read that 200 times. Go  
24 ahead.

25 MR. AGUON: No, I'm laughing only because I'm

1 really happy you brought that up. That further (inaudible) in  
2 favor of a finding that this is not right. First of all,  
3 because the only plain -- the only possible orbit of eminence  
4 at all in this case is that tiny section that we now know,  
5 upon closer reading, likely or at least arguably doesn't apply  
6 to it but, as it said, applies to another third party not  
7 before this Court. It doesn't even militate in his favor.  
8 And the Ninth Circuit cases are quite clear in saying that  
9 that might be the only hardship, but even that kind of  
10 hardship, even that grand of a hardship is not enough to get a  
11 Court to issue a decision whose concrete character is not  
12 fully going to resolve this case.

13           And this is the perfect case to illustrate the class  
14 (inaudible) that federal courts should again be guided by the  
15 spirit of Article 3's limitations on judicial power, guided so  
16 foremostly by that power. That's exactly why we should not --  
17 or this Court should not engage in umpiring these empty  
18 hypothetical situations.

19           And I want to -- I'm deviating from my outline which  
20 I prepared, but now I'm really getting into it. So I have a  
21 number of issues that I take issue with the characterization  
22 of the cases that have been brought up so far. What I see  
23 opposing counsel's sort of fatal flaw in his reading of the  
24 Voting Rights Act is this over reliance on words such as "any"  
25 and "all," when the very same sentence contains the word

1 "election," and I haven't heard a word about that. The word  
2 "election" is -- it hasn't been construed, and I haven't found  
3 a single case that's construed it in a fashion that opposing  
4 counsel says it should so read.

5 That's not the only part about this Section 2 of the  
6 Voting Rights Act that I find issue with. There's also a  
7 section that in and of itself has generated a plethora of  
8 cases; that is, the qualifying language states the political  
9 subdivisions. Surely the opposing counsel can't be unaware of  
10 all the cases that have come up where it was a city board  
11 taking some action and the Court had to determine before  
12 whether or not that city board, that political subdivision of  
13 state, was a political subdivision for purposes of having that  
14 section applied against its actions.

15 Instead, all we've gotten today, as well as  
16 (inaudible), is overemphasis on other words that I don't think  
17 are the legally operative words in the provisions. "Any" and  
18 "all" is not -- cannot be the ceiling of the construction. We  
19 should have cases that construe the word "election," cases  
20 that construe state and political subdivision, and utterly  
21 lacking before this Court is any case so construing those  
22 words.

23 THE COURT: Do you think I should then dismiss  
24 the case and say, "Look, there's no ripeness, there's no  
25 standing, but if, in fact, there is an actual vote and you're

1 denied the right to vote, then I may look at your case, I may  
2 consider it, Mr. Davis"?

3 MR. AGUON: Can you repeat that one more time?

4 THE COURT: Just as in the CNMI Davis case, do  
5 you think that this Court should -- should basically say,  
6 "Look, I'll dismiss it without prejudice based on standing and  
7 ripeness, and that if and when the plebiscite vote occurs here  
8 on Guam and you are denied -- you, Mr. Guam Davis, are denied  
9 the right to vote, then the Court would obviously consider  
10 whether or not you really do have standing at that point"?

11 MR. AGUON: Yes. I could definitely see why you  
12 pose the question precisely that way, because that's a very  
13 close -- almost perfect reading of the CNMI case in the first  
14 place. She essentially said there was no -- it wasn't ripe  
15 because, similarly put, there's no initiative date that has  
16 been set. And so in your fact pattern hypothetical, you're  
17 saying if we so set that date.

18 But, again, I would like to just caution the Court  
19 because I generally would tend to agree with you, but I want  
20 to caution the Court that unlike the CNMI case, there's so  
21 many other statutorily incremental (inaudible) prescribed  
22 processes and mechanisms all separately and discreetly working  
23 together to eventually one day, down the road, lead to that  
24 plebiscite, and that's very different from the CNMI case. And  
25 actually, the CNMI case should be distinguished for a much,

1 much, much more important reason, and that is, the initiative  
2 itself, the technicality almost -- it was almost a  
3 technicality in the judge's view that a date hadn't been set,  
4 but the technicality made all the difference. Just the one  
5 simple fact that hasn't been set. And she even stressed word  
6 "inevitable."

7           It's beautiful. It's almost a delicious case for our  
8 side, because this is very -- it's even probably even like  
9 exponentially more inevitable than the so-called election/vote  
10 at issue in that case. In CNMI -- I don't know how familiar  
11 you are with all the facts of the case, but the last time I  
12 read it, I saw that five initiatives -- not one, two, three,  
13 four, but the five initiatives were presently sitting in the  
14 CNMI Election Commission. Even that wasn't enough to militate  
15 a finding of ripeness. Just because they're sitting there,  
16 that isn't enough.

17           And the judge further conceded that, in her opinion,  
18 that initiative might be set not for November, but for the  
19 next one. She actually put language in there -- if you read  
20 it closely, she's actually almost conceding, without saying,  
21 that it will probably be in the next one (inaudible) case.

22           This case is sharply different. Not only has a date  
23 not been set, but the entire history of the enactment and all  
24 of the metastasizing, metamorphosizing changes of that same  
25 statute really show that we have absolutely no idea. So

1 unlike the CNMI case, which the judge conceded might happen  
2 in, say, just one more -- like one more road stop down the  
3 road, we are absolutely barred from making a similar  
4 assumption about the inevitability in this case precisely  
5 because the course of conduct by the parties, the actual facts  
6 of the case that has been set and reset and reset, and now  
7 perhaps in their infinite wisdom or perhaps not wisdom, the  
8 legislature said, "Oh, you know what. This is getting a  
9 little embarrassing about the date, so let's just X out that  
10 part and we're going to make it 70 percent," because maybe  
11 they also in their infinite wisdom decided that they -- even  
12 without saying "not ripe," they realize that there's so much  
13 that hasn't happened yet in this case. And that's another  
14 reason why this case, in my opinion, isn't ripe.

15           So I want to discuss now another thing, the Puerto  
16 Rico case. Opposing counsel discussed the Puerto Rico cases  
17 and dismissed them, but I think he dismissed them on one  
18 ground alone, and that dismissal was the fact that they --  
19 none of the cases involved a race-based challenge. What I  
20 want to say is, in a way that's not disrespectful, but I  
21 think, in my humble opinion, that's what makes a good lawyer,  
22 lawyer well, when you use cases and mine them for propositions  
23 that even -- that are aside from just the (inaudible) holding.  
24 And we all know as legally-trained minds, it's not just the  
25 holdings that matters, for example, and not just that issue.

1 It's the reasoning. It's the logic. There are propositions  
2 that are pulled in unexpected ways that judges who currently  
3 write decisions could not never tell 20 years down the road.

4 And I submit forcibly that the Puerto Ricans actually  
5 stand sharply for the proposition that these plebiscites are  
6 unlikely the run-of-the-mill civil domestic law type of  
7 elections. There are non-binding -- and defendant briefed  
8 this so beautifully in his very first motion to dismiss. The  
9 qualitatively (inaudible) nature of a plebiscite is -- alone  
10 should be enough to show a federal court that that  
11 transmission of political desire, which is about a political  
12 relationship with the United States down the road is not -- is  
13 -- it's not -- those Puerto Rico cases are completely  
14 relevant. They're actually intentionally more relevant than  
15 the cases he cited about whites and blacks in Mississippi,  
16 because whites and black in Mississippi share an entirely  
17 different political history. And if we proceed with this case  
18 in a manner that almost clumsily blurs the two categories,  
19 we're actually not being good lawyers. Unincorporated  
20 territories occupy a special place of exceptionalism under  
21 federal -- under fundamental (inaudible) of the U.S.  
22 constitutional law.

23 And this leads me to my second- or third-to-the-last  
24 point, and that is *Rice v. Cayetano*. I also think that  
25 opposing counsel have overly relied on the (inaudible) case,

1 and that is because -- and it relates to the Puerto Rico case  
2 and why I think the Puerto Rico case is so utterly useful to  
3 us, because it's one -- it's one of very few cases that  
4 actually show us that the real -- maybe the real term to be  
5 construed in any of these cases and statutes is the word  
6 "states." Guam is not an incorporated state. It's not a  
7 state. It is, my definition, a nonintegral part of the United  
8 States of America, Justice Sotomayor recently came, the entire  
9 subject matter of that judicial district conference was the  
10 fact that Guam and the other unincorporated territories occupy  
11 sui generis unique legal space especially carved out by the  
12 Constitution.

13 And so just throwing out the cases that only actually  
14 deal with states is not actually a sophisticated reading of  
15 how those cases even apply. So I submit the Puerto Rico cases  
16 are much more relevant to this case than the *Rice v. Cayetano*  
17 case.

18 And I want to explain one last thing about  
19 exceptionalism. There's also a clumsy dismissal of *Morton v.*  
20 *Mancari* and that whole line of exceptionalism. Great. I'm  
21 glad it's being dismissed because he's right on that. We  
22 don't occupy a *Morton v. Mancari* type of special political  
23 relationship with the United States, but we don't need that.  
24 We have an entirely separate independent grounds for  
25 exceptionalism, and that is, the entire law that governs this

1 land, the Insular Cases. The Insular Cases are like the Jolly  
2 Green Giant compared to what *Morton v. Mancari* is. *Morton v.*  
3 *Mancari* is a constantly changing phenomena with federal Indian  
4 law, which there is the Constitutional crisis about, there is  
5 no doubt. The recent case, *United States v. Lara*, was nothing  
6 else. It was a glaring red flag that the days of federal  
7 Indian law and (inaudible) exceptionalism might be coming to a  
8 close.

9 Not so with the U.S. territories. U.S. territorial  
10 jurisprudence, the jurisprudence from the U.S. and how it  
11 treats its unincorporated, not incorporated, territories. The  
12 Insular Cases and hundreds of years of progeny, these cases  
13 sharply distinguish *Rice*. They said, we don't need *Mancari*,  
14 we're not like Hawaii, we're not a state. We don't need  
15 *Mancari*. We have the Insular Cases and their progeny case.  
16 So there's an entirely separate realm of complex  
17 constitutional and statutory (inaudible) at issue.  
18 Thankfully, this Court doesn't have to address any of them,  
19 not one of them, because the case is not ripe.

20 Before I close -- I just realized I told myself to be  
21 very calm. I'm not passionate, but I see --

22 THE COURT: Passionate is good. That's okay.  
23 Makes me wish I was a lawyer again.

24 MR. AGUON: Really? This is (inaudible) right  
25 now.

1           THE COURT: You don't look nervous.

2           MR. AGUON: I am because I guess -- because in my  
3 true opinion, as -- not as a lawyer but as a person who lives  
4 here, this case is hugely important. It is precious  
5 important. The rights at issue are (inaudible), but they're  
6 complex questions of deep legal and political constitutional  
7 statutory construction in nature. Tenth Circuit case just  
8 this year is the perfect case to close with probably, because  
9 it said -- that is a (inaudible) case -- it said a federal  
10 court never should wade into, quote, "constitutionally torrid  
11 waters unless," quote, "it's absolutely unavoidable."

12           Let me repeat that, because the gravity of that  
13 sentence should really be brought to bear on the facts of this  
14 case. A federal court under the (inaudible) guided by the  
15 spirit of the Article 3 limit on judicial power "should never  
16 wade into constitutionally torrid waters unless absolutely  
17 unavoidable." This actually (inaudible) another cannon of  
18 construction that I haven't even brought up. It's another one  
19 that we add to the cart, avoidance of cannon, the statutory  
20 construction on avoidance. When there's two plausible  
21 construction is available, you choose the one that doesn't  
22 (inaudible) the Constitution. And that serves the deeper  
23 political American legal value, the Constitution ought to be  
24 somewhat (inaudible). So you shouldn't just willy nilly  
25 challenge these -- this foundational or semi-sacred document.

1           And the exact same reasoning applies here. These are  
2   incredibly torrid waters. Constitutionally speaking,  
3   everything I just said about *Mancari*, the political versus  
4   racial distinction, that's actually underneath the issues on  
5   this case. When the time comes and this case is ripe, I will  
6   happily defend the vote, along with the AG's office.

7           But that day is not today. Today there's a whole  
8   stream of conditions precedent that has not only been not met,  
9   but have been grossly not been met, and we are not -- nowhere  
10   close to establishing a political plebiscite. And that alone  
11   should be reason enough for this Court to dismiss. And I  
12   swear to God that the very last thing I'm going to say --

13           THE COURT: Well, whoa, whoa --

14           MR. AGUON: -- the very last thing, Judge, is  
15   that something that hasn't been briefed by the parties is very  
16   simple, but it should be the bell that we end this with, and  
17   that is the idea -- the well-settled rule that it is the  
18   plaintiff's burden to establish that his case is ripe. It is  
19   not our burden, as a matter of law, to prove that it is not  
20   ripe. Plaintiff has failed in this regard. Plaintiff has not  
21   established, honestly, not with a single case, like directly  
22   on ripeness and directly on this fact pattern. Plaintiff has  
23   not satisfied his legally imposed burden of ripe -- to prove  
24   ripeness. And I just want to leave that with the Court, that  
25   it is not any other party but the plaintiff who actually bears

1 legal burden to prove that it is ripe. Thank you.

2 THE COURT: Thank you, Mr. Aguon.

3 Okay. Hold on. Let me just look at the time. Gina?

4 (Pause.)

5 THE COURT: All right. So you have one hour  
6 left, government and amicus. And you have one hour,  
7 Mr. Adams. Okay. Go ahead.

8 MR. WEINBERG: We're not going to need that much  
9 time.

10 THE COURT: Okay.

11 MR. WEINBERG: I just wanted to wrap up  
12 (inaudible) amicus has actually more than adequately covered a  
13 number of them now. I wanted to touch also on why *Rice* is  
14 distinguishable. Again, *Rice v. Cayetano* is distinguishable  
15 because it involved a benefit or a public office there.  
16 Public office was -- it was for the office of trustees of the  
17 office of (inaudible) -- it was an actual office where people  
18 were having an actual election in court. And I really like  
19 what Mr. Aguon said: We need to look at the word "election"  
20 and define it. This may be that very case. But I'm just  
21 frankly amazed at his constraint, at what -- his energy, that  
22 he's able to pull himself back, because I thought if I had  
23 half his energy on this -- and I'm chomping at the bit to get  
24 to those very questions, but I have to be respectful of the  
25 fact that Article 3 says, you know, it's not ripe, it's not

1 ripe. So I commend his restraint on that.

2 I wanted to mention also that -- and the Court had  
3 mentioned this during Mr. Adams's presentation, that when it  
4 comes to the injury here, what the Court -- what Congress  
5 giveth, Congress taketh away. So as Mr. Aguon was pointing  
6 out, here we have, thanks to the Insular cases, beginning with  
7 the Insular Cases and proceeding through *Sakimoto versus Duty*  
8 *Free Shoppers* and *Leon Guerrero v. Clinton* and *Wabel v.*  
9 *Villacrusis* which just the Ninth Circuit emphasize over and  
10 over again that the Congress can do whatever it wants when it  
11 comes to these kind of questions.

12 Now, granted, they have (inaudible) equal protection  
13 rights in the Organic Act with respect to voting. And I'm not  
14 here to argue that the Voting Rights Act is not (inaudible).  
15 I am here, though, to question, is this election -- is this a,  
16 quote, "election"; is this a, quote, "vote," closed quote,  
17 within the meeting of the Voting Rights Act if it is a  
18 nonbinding referendum plebiscite that doesn't either -- is not  
19 for a particular office or won't change the political or  
20 juridical rights of the plaintiff in any way.

21 So I think we do at that time have to look at that  
22 question. And what I was seeing too, that because -- echos  
23 what Mr. Aguon was saying, is that we actually have three line  
24 of cases, three equal protection cases that come up that end  
25 in *Rice v. Cayetano*. And there have been cases (inaudible)

1 analysis, there and voting rights cases that are for all equal  
2 protection. The analysis is the same, whether it's for voting  
3 rights or employment discrimination or for what. There's that  
4 line of cases, equal protection. There's the *Morton v.*  
5 *Mancari* case line of cases about can we treat native  
6 inhabitant or Native Americans or American Indians  
7 differently, and if so, how can we, meaning Congress in that  
8 instance, carve out a distinction.

9           And we have the line of cases which are the Insular  
10 Cases in their progeny. Now, me, in my grandiosity, was  
11 seeing this as a case where I would be going to the United  
12 States Supreme Court and saying, "and here these three lines  
13 of cases converge, and this is the time now to revisit the  
14 Insular Cases in light of *Rice* and in light of *Morton* and see,  
15 you know, can we ask this question. Can we ask the question  
16 of the people who are defined as native inhabitants; if you  
17 had a choice, what would it be."

18           But that -- those principles of judicial restraint  
19 that Mr. Aguon keeps reminding us of, they come first.

20           THE COURT: I just want to just --

21           MR. WEINBERG: Yes.

22           THE COURT: -- have you clarify something. So  
23 you're saying should the Court -- should this Court classify  
24 this not really as an election, not really as a vote per se,  
25 but just really a poll? Is that what you're saying?

1           MR. WEINBERG: I am, Your Honor. I don't see a  
2 way -- I don't -- the word "plebiscite" is used, but does not  
3 really define --

4           THE COURT: All right.

5           MR. WEINBERG: I think I did say in one of my  
6 earlier pleadings that, actually, plebiscite referendum is not  
7 action -- is not even provided for plebiscites like this in  
8 the Organic Act. And in fact, I don't remember whether I  
9 cited it, but I remember seeing a Guam case in which somebody  
10 was challenging some sort of plebiscite, and the case was  
11 dismissed, and his argument was that there was no plebiscite  
12 -- that plebiscite has been provided for in the Organic Act.  
13 And a case -- the Court actually dismissed it because it was  
14 moot, apparently, that whatever the election was it had  
15 already been held. He was challenging government action to  
16 hold a plebiscite, and the Court dismissed it because by the  
17 time it came to the Court, the election already had been held.  
18 I think I pled this in one of my pleadings.

19           THE COURT: Yeah. I mean, are you trying to say  
20 that I should reach that particular conclusion, that this is  
21 really not an election case? I'm not sure what you're trying  
22 to say there. It sounded like you were trying to say that.

23           MR. WEINBERG: I would love for the Court to say  
24 that, but I think that's beyond -- I think that -- I don't  
25 think the Court needs to get to that question and I don't

1 think that's a question really for this Court to decide.  
2 Perhaps we might argue it at the higher level or the Ninth  
3 Circuit or the Supreme Court. But when the arguments get to  
4 the appellate process, then I think that they would  
5 (inaudible) that question.

6 Your Honor asked the question -- I don't remember if  
7 it was Mr. Adams or Mr. Aguon -- and I think this is right --  
8 should the Court dismiss now on ripeness until he's actually  
9 denied the right to vote. And I don't remember exactly what  
10 the answer was. I think the answer was this: There is no  
11 injury -- or it's not ripe, separate from the injury  
12 question -- it is not ripe until there's an election that we  
13 can identify that will actually -- it's on the calendar. At  
14 that point, it's ripe enough. And Mr. Adams had made the --

15 THE COURT: Well, not just on the calendar, but  
16 that he's been denied the right to vote.

17 MR. WEINBERG: Well, he hasn't been (inaudible).

18 THE COURT: No, no. I mean in the future.  
19 That's what I'm talking about. Right?

20 MR. WEINBERG: Okay.

21 THE COURT: Well, once it's scheduled and then he  
22 goes in to try to vote and he's denied the right to vote, then  
23 don't you think that's when the injury occurs?

24 MR. WEINBERG: I would not argue that you have to  
25 wait until he's actually been trying to get into the voting

1 poll --

2 THE COURT: Yeah.

3 MR. WEINBERG: -- and they reject him there. I  
4 think that once it's clear that he doesn't meet the  
5 eligibility requirements of who gets to vote, just threw it  
6 down, and once a -- once the election is set, then it's as  
7 ripe as it's ever going to be. I think that in my original  
8 motion to dismiss, I had jumped over that, like a big frog,  
9 over that question of, you know what, there may never be an  
10 election. Or if Mr. Guam Davis's argument is, I'm not getting  
11 any younger, well, it may not be one within his lifetime, at  
12 least -- I don't mean to be morbid.

13 But I don't think that -- I don't think he has to  
14 walk up to the voting ballot to vote, the polling place and  
15 say, "I want to vote now" and then he can go get a TRO. I  
16 think that setting the date for the election will kick it in  
17 and say, okay, we now have a (inaudible) case controversy  
18 here. Here is a, quote, election, which will need to define  
19 in that case.

20 What I would prefer to see to go is -- this Court do  
21 as an alternative basis, is to address the question itself on  
22 the merits of, all right, so you've been denied. You've been  
23 denied to vote, okay.

24 So, obviously, at this point here, if the Court  
25 dismisses purely on ripeness grounds, as judge -- Chief Judge

1 Manglona for the most part did, I would like to see an  
2 alternative holding from the Court addressing these issues  
3 raised by the Puerto Rico cases that have been raised here  
4 today, all right, what is it? At least noting that these are  
5 questions, because assuming that the Court does affirm the  
6 magistrate judge's and the dismissal of -- or adopt the  
7 recommendation that it should be dismissed on ripeness  
8 grounds, then the case goes up. And assuming that, I'll be  
9 making the same arguments again as an alternative basis for a  
10 (inaudible).

11 So knowing that, I'm sure that Ninth Circuit would  
12 benefit from some analysis at this level of -- you know, of  
13 here is a solid reason it's not ripe, but here also was a  
14 serious question that would have to be answered. And I think  
15 that -- and that is, as judicial economy does suggest, that to  
16 answer to them to provide alternative holdings would be in the  
17 interest of all concerned, because otherwise, we'll -- we  
18 might be back sometime, although, according to Mr. Guam Davis,  
19 that will be in the year 2015 or 2025.

20 Let me try and wrap up here. So, yeah, this case is  
21 -- it's exciting. It's exciting for me. It's -- all the  
22 visual adjectives that Mr. Aguon used, it's all that for me,  
23 as well. I would love to see this case -- I'd love to get to  
24 the merits of this. The Court got a little bit of a preview  
25 of what a trial would be like with the issues, and testimony

1 would be necessary to make these arguments about the  
2 convergence of the *Rice v. Cayetano*, *Morton v. Mancari*, and  
3 the Insular Cases in light of what do the rights of citizens  
4 of Guam mean. It's fascinating, exciting.

5 But Article 3 doesn't permit (inaudible). That's the  
6 problem. If so, it does not exist. That day may never come,  
7 but if it does, we'll know it. Mr. Aguon may have coined a  
8 new legal term, (inaudible) I'm not stuttering here, for  
9 purposes of the record -- conditions pre-pre-pre-precedented.  
10 He's absolutely right. And the case just isn't far enough  
11 along yet to say, yes, you know what, something is going to  
12 happen soon enough (inaudible). Thank you.

13 THE COURT: So you agree with Mr. Aguon that you  
14 don't think I should be wading into this constitutionally  
15 torrid waters?

16 MR. WEINBERG: I have to agree. I don't have a  
17 choice (inaudible) as much as I would like the Court to do so.

18 THE COURT: All right. Thank you.

19 Mr. Adams?

20 MR. ADAMS: Your Honor, I'm going to address a  
21 number of lingering issues sort of in sequence, and I'll try  
22 to make it clear when I move from one to the next.

23 THE COURT: Okay.

24 MR. ADAMS: Let me start head long with Guam's  
25 characterization of *United States v. Blaine County, Montana*.

1 This case was cited in Mr. Weinberg's oral argument, but it  
2 has a prominent place in Document 24. It's actually their  
3 opening on the first page of it, in their reply to opposition  
4 to motion to dismiss. And I just wanted to be positive that  
5 this Court fully understands this case about which I'm  
6 intimately familiar.

7 THE COURT: Sorry. Which page is that?

8 MR. ADAMS: It's on Document 24, page 1.

9 THE COURT: Okay.

10 MR. ADAMS: It starts out that -- the defendants  
11 used *United States v. Blaine County* for the proposition that  
12 "there is nothing constitutionally wrong with compiling a  
13 registry that identifies qualified voters by race." Now, less  
14 this Court make a mistake in relying on that assertion, I want  
15 to be very clear what *United States v. Blaine County* is about  
16 and what, in particular, this quoted language is about.

17 This is not a redistricting case before this Court  
18 right now. Redistricting cases are enormously complicated.  
19 They're governed by something called *United States v. --* or  
20 *Thornburg v. Gingles*. There's things called Gingles  
21 preconditions, which I won't even get into, but they're math  
22 puzzles.

23 And the first Gingles precondition -- by the way,  
24 *U.S. v. Blaine County* was a redistricting case.

25 The first Gingles precondition is that you are able

1 to draw a hypothetical district where the minority would be a  
2 majority. Okay. That's the first precondition.

3 The second precondition is that the data shows  
4 there's reasonably polarized voting. Okay.

5 Now, when the government, as I have done in other  
6 cases, attempt to establish these preconditions, they relay on  
7 data sets. And there are very few states in the country that  
8 register voters by race. South Carolina is one. Florida is  
9 another. Thankfully, I have done Section 2 cases in both of  
10 these states, and so I can tell you that in those states, they  
11 actually ask you, when you register, your race. It's a dream  
12 for plaintiffs because they're able to more precisely  
13 characterize they're satisfied with the Gingles one  
14 precondition and the Gingles two precondition.

15 *United States v. Blaine County* does not stand for the  
16 proposition that the defendants are presenting it does. It  
17 does not stand for the proposition that it's perfectly okay to  
18 classify and register people on the basis of race. What this  
19 language quoted stands for -- and if you look at the case, you  
20 can see this -- it was the battle of experts, the battle of  
21 experts (inaudible). The expert for the United States was Dr.  
22 Theodore Arrington of the University of North Carolina in  
23 *United States v. Blaine County*. And Dr. Arrington said, "Oh,  
24 we have this great race (inaudible) to establish the Gingles  
25 preconditions because there's registration on the basis of

1 race.

2 And the defendant, Blaine County said, "Oh, no, no,  
3 no. You should have to use the census data to establish the  
4 Gingles precondition."

5 And Dr. Arrington said, "It's better data. Why would  
6 I want to rely on the census data if I have this registration  
7 data by race?"

8 And the Ninth Circuit said, "Indeed, race identified  
9 registration, unless they're arguably superior alternatives,  
10 such as the use of census data," because they make no  
11 assumptions about registration (inaudible) race in particular  
12 communities.

13 I would submit to the Court *United States v. Blaine*  
14 *County* had absolute nothing to do with this case.

15 Next, it is interesting to hear the Government of  
16 Guam (inaudible) to concede that both prongs of *Texas v.*  
17 *United States* regarding ripeness have been satisfied in this  
18 case. Let me elaborate. The first prong is fitness for  
19 resolution. This is *Texas v. United States* has relied on the  
20 Court in the CNMI.

21 The two-part ripeness test which we both -- both  
22 parties cite in our brief. First is fitness for resolution.  
23 The Court in the CNMI said that satisfied constitutional  
24 issues as they are here. Second prong, are to the parties.  
25 Hardship to the parties of withholding resolution. That's

1 where the CNMI Davis fit. Well, we just heard the government  
2 of Guam and we hear the plaintiff both in unison saying we  
3 would be like to deal with these issues. It's only the amicus  
4 that has stepped in and aggressively challenged ripeness.  
5 Because we'll be back here again some day and one of the  
6 factors in deciding the second prong of *Texas v. United States*  
7 is judicial resources. We're already far along in this case.  
8 We've done depositions, we've done discovery, we're getting  
9 there.

10 Now voting cases does not resolve quickly. A  
11 Voting Rights Act case, and I'll get into -- later on I'll get  
12 into the different Voting Rights Act versus not Voting Rights  
13 Act versus 1971, but for now let's just call this general  
14 Voting Rights Act case, especially section two where there's  
15 normally complicated cases. You do not want this case before  
16 this Court after the election has been set. Because they take  
17 a long time, they do a lot of depositions, there's experts,  
18 battle of experts as we saw in *United States versus Blaine*  
19 *County*. Though it weighs in favor of hearing the merits on a  
20 case so developed as this one is. And as the defendants  
21 indicated, getting to the merits of this case weighs in favor  
22 of both part- -- weighs in favor of continuing to hear this  
23 case and denying the motion to dismiss on ripeness.

24 It is also noteworthy that the defendants almost  
25 concede that there are problems with the constitutional

1 aspects of this plebiscite where it's a closer -- and I don't  
2 want to put words in Mr. Weinberg's mouth -- but I think we  
3 all know what they are -- where there are serious  
4 constitutional problems with this plebiscite. Now is the time  
5 to decide them, not when we're on the eve of the election. I  
6 cite *Harry v. Judd* in our briefs. That's a case in the  
7 Eastern District of Virginia where the plaintiffs lost because  
8 of latches in an election case. Latches have a role in  
9 election cases like it does not in other areas. Elections are  
10 messy things. They take a lot of time to gear up and courts  
11 do not want to be hearing election-related cases if the  
12 election is approaching. When I say approaching, eight months  
13 before an election is almost imminent. So I think that weighs  
14 in favor of the plaintiffs.

15           Next, the amicus cited the burdens of the  
16 plaintiff in this matter. I would draw your attention toward  
17 *Adams v. Johnson* which both parties cite, which sets the  
18 standard for this Court. And that is that there be no doubt  
19 in those set of facts to support the claim. The standard  
20 articulated by the amicus, I would submit, is not accurate,  
21 that it is not a hair trigger dismissal of a case, that is not  
22 the -- the bar is not as high as the amicus has set this case.

23           Next, there's a question of law that lurks in  
24 this case involving the amendments last year which shows up as  
25 one Guam Code Annotated 2109 sub B. And it is unclear whether

1 2109 sub B replaced or supplemented the 70 percent  
2 requirement.

3           Neither party, I think, has drawn a conclusion as  
4 to which is the correct answer but this Court could. Or  
5 perhaps -- strike that. If 2109(b) replaced the 70 percent  
6 threshold, ripeness is closer, okay. If the governor and the  
7 legislature -- I'm sorry, the decolonization or the governor  
8 conduct a compressed campaign, education campaign, perhaps not  
9 to the satisfaction of the amicus but at least did something  
10 and then said we're going to have the election on  
11 January 15th, I would submit that 2109(b) may in fact allow  
12 them to do that. And so that lurks over any ripeness standing  
13 in this case. And I think the 2109 has to be (inaudible)  
14 with.

15           I would also -- next, I would draw attention to  
16 the fact that Guam has conceded that the conduct in the  
17 plebiscite would trigger a constitutional process and that  
18 weighs in favor of the plaintiff in this motion.

19           Puerto Rico cases. Couple of things regarding  
20 that. First of all, all of those cases came before a water  
21 shed (inaudible) when the Supreme Court in *Association of Data*  
22 *Processing versus Camp*, in 1970, total (inaudible) the merits  
23 and standing issues. Before that, they were all blended up  
24 together as I would submit the amicus brief only did, when  
25 talking about legitimate purpose of the plebiscite. That's

1 pre1970 standing analysis. But the only before this Court now  
2 is the issue of injury and whether or not the plaintiff has  
3 suffered an injury, and I'll get to that a little bit. But I  
4 want to make sure it's clear that the Puerto Rico cases have  
5 minimal applicability not only for the reasons I mentioned  
6 earlier, but because they were decided before *Association of*  
7 *Data Processing versus Camp* in 1970.

8           *Terry v. Adams*, I mentioned this earlier but it  
9 bears reemphasizing because of the position of the amicus.  
10 *Terry v. Adams* is the Jaybird case where the private parties  
11 got together and picked nominees, there was no election  
12 process, there was no state action there, but yet the Supreme  
13 Court found an injury in *Terry v. Adams*, and I think *Terry v.*  
14 *Adams* of course being one of the six cases that I think  
15 control this one rebuts many of the arguments.

16           Now, let's now turn toward this Section 2 versus  
17 1971 issue as it relates to the CNMI. Counsel for Guam said  
18 that it's really one in the same thing. That we're talking  
19 about the same thing, Section 2 1971, the remedy sought is  
20 the same and so forth. What this does is completely disregard  
21 the history of the enactment of Section 2 in 1975. Section 2  
22 in 1971 are not the same thing. Section 2 was passed because  
23 1971 was inadequate. That the 1957 Civil Rights Act was not  
24 enough to stop these registration games going on, not enough  
25 to deal with the phony arguments some of the states were

1 coming up with as to why people wouldn't be allowed to vote.  
2 "Well, you don't understand this particular character question  
3 where you're not qualified to participate in this election" or  
4 an argument we heard from the government, "if you don't like  
5 it, go run for office and fix it." That was an argument the  
6 segregationists made. And it's not an argument that should  
7 apply in 2012.

8           So Section 2 was enacted because of the games the  
9 segregationists were playing. I would turn the Court's  
10 attention to a great historical discussion in this in *South*  
11 *Carolina v. Katzenbach*. It's 383 U.S. at 311. And in  
12 particular, the historical context starts at 316. And the  
13 Court drew careful attention to the games that were being  
14 played with registration, with grandfather clauses, with  
15 emphatic excuses and trickery being played by southern states,  
16 disguised what they were really doing. "You don't have to  
17 worry about it" they would say. "If he just comes back with a  
18 better answer as to how many bubbles are in a bar of soap,  
19 we'll let him register" or when we heard today, that this  
20 isn't racial, it says native inhabitants. There were all  
21 sorts of games being played that 1971 was inadequate to  
22 address and that's why Congress passed Section 2. And Section  
23 2 was not at issue in the CNMI, full stop. It was not at  
24 issue in the CNMI case. Section 2 is a more powerful weapon  
25 against racial discrimination. And it was not at issue in the

1 CNMI case. So it is disingenuous to say that we're dealing  
2 with the same thing between Section 2 and 1971. We are not  
3 splitting hairs. They are different statutes.

4 Now, I would submit that the only way this Court  
5 can rule in favor of the defendants is by ignoring finding  
6 precedent in *Catholic League, Heckler v. Mathews*. The  
7 Government of Guam characterized *Catholic League* as a  
8 "fractured plurality of the Court." Well, the logic of  
9 Catholic league was accepted by the United States Supreme  
10 Court in *Heckler v. Mathews*. It wasn't just a fractured  
11 plurality of the Ninth Circuit. It was also the United States  
12 Supreme Court in *Heckler v. Mathews* that held that a stigmatic  
13 harm is sufficient to the standing whenever the stigmatic harm  
14 is accompanied by an act directed toward the person as was Mr.  
15 Davis's denial. This is not a theoretical issue. It's a real  
16 concrete issue.

17 Imagine if *Catholic League*, the facts of *Catholic*  
18 *League*, which is a resolution condemning Catholicism, was  
19 partnered with actual action where the Catholics weren't  
20 allowed to do something in San Francisco. That's what we have  
21 here. We have *Catholic League* plus in this case.

22 Let me address *Rice*, the district court ruling in  
23 *Rice*. And then I'll deal with *Morton versus* -- I'll deal with  
24 the *Morton*.

25 In *Rice*, there's a couple of important

1 differences. The procedural posture is totally different in  
2 *Rice* because it occurred when an election was imminent toward  
3 the latches issue that I warned it against. And the Court in  
4 the district court in *Rice* frankly made a giant mistake in  
5 denying the -- I think it was TRO, denying the TRO in *Rice*.  
6 And on appeal it never came up because the election already  
7 heard. So we never got to confront this. But there's two  
8 important things to realize about the *Rice* district court  
9 opinion. The Court did, did deal with some -- (inaudible) the  
10 district court opinion how the district court in *Rice* relied  
11 on special (inaudible) elections. They said okay, you can  
12 exclude people from the vote because in *Ball v. James* and  
13 *Salyer Land Trust*, the Supreme Court said it was okay to do  
14 that in a like water district election. You weren't on the  
15 water grid so you didn't have -- you didn't have a right to  
16 vote. But the Supreme Court in *Rice* obliterated that logic  
17 and said you can rely on *Ball* and *Salyer* to exclude people  
18 from election when race discrimination is alleged. When you  
19 exclude people because of their blood, those special district  
20 cases are not -- (inaudible). That's the first distinction  
21 between the district court and *Rice*.

22           The second one, and this is probably the most  
23 important one, that covers this whole case, the Supreme Court  
24 reasoning in *Rice* binds this Court whereas the (inaudible)  
25 district court reasoning does not. The Supreme Court

1 reasoning in *Rice* binds this Court where the CNMI case does  
2 not. And I would submit that we have on briefs that one  
3 cannot read the Supreme Court in *Rice* and accept the  
4 plebiscite as constitutional.

5           Let me deal with *Morton versus Mancari*. The  
6 facts of this case were much different and here's what they  
7 were: In the 1930s, the Bureau of Indian Affairs, pursuant to  
8 an act of Congress was given hiring preferences to Native  
9 Americans. Congress specifically gave the benefit to a group  
10 of Native Americans and said they've enjoyed (inaudible)  
11 preferences. And about 1970, Congress passed the  
12 nondiscrimination provisions of the employment -- in  
13 employment. And the plaintiff said "hey, you've got to stop  
14 giving these benefits to Native Americans" and the Supreme  
15 Court -- and the Court in the case said, "well the 1970 did  
16 not supercede the 1930 law, Indian tribal rights have special  
17 congressionally sanctioned benefits" and that is the key.  
18 Until Congress speaks, until Congress repeals those provisions  
19 in the Organic Act, until Congress does not make Section M and  
20 N and U applicable on this island, they apply. And so we can  
21 have all sorts of academic and theoretical discussions about  
22 special rights and whether the Voting Rights Acts should be  
23 diluted here or whether we have to do a watered-down version  
24 of 1971, but until Congress says so, this Court cannot.  
25 Because those laws apply with equal force on this island and

1 regardless of any particular historical context.

2 Now, I might not like that, amicus clearly  
3 doesn't like that, but the point is that's what we have. And  
4 Congress has the final word on this and they have not simply  
5 not carved out a special, if you will, tribal relationship.  
6 Now, Congress could do that tomorrow and say that they have a  
7 right to conduct an election. But they haven't done that.  
8 And so we're stuck.

9 Now, over and over and over again, the amicus  
10 dismisses the plaintiff (inaudible) in other words, this is  
11 about an election that might happen in the future, there's  
12 condition of precedence upon precedence upon precedence. None  
13 of that takes into account the experience of the plaintiff.  
14 None of it deals with the real genuine stigmatization --  
15 (inaudible), none of it deals with the real genuine document  
16 that was given back to him by the government denying his voter  
17 registration. And in civil rights cases, the defendant always  
18 have lots of reasons why a law shouldn't apply or it's not  
19 ripe, but frequently, those reasons overlook the experience of  
20 the injured party and I would submit in this particular case,  
21 it has. For example, when we heard the amicus argue, well it  
22 hasn't been enforced against you. But it has. He's been  
23 denied the right to register, it has been enforced and it is  
24 ripe. It's not theoretical. We have the document that shows  
25 it.

1           So this Court was cautioned by the amicus to not  
2       wade into constitutional waters unless they were absolutely  
3       unavoidable was the term. And I would submit that view  
4       contradicts the Supreme Court in *Lorance versus AT&T*, the time  
5       line cases I talked about, where the Supreme Court said we  
6       don't have to wait for the injury to become really bad, the  
7       injury occurred the moment it occurred. Not when it gets  
8       particularly uncomfortable or most painful is what the Supreme  
9       Court said.

10           THE COURT: Does that case involve a similar  
11       plebiscite? That's the one you just brought up, right?

12           MR. ADAMS: Yeah -- no, this is the racial  
13       discrimination case in employment. It was a union work rule  
14       that essentially discriminated against an employee. And  
15       because of the statute of limitations issues, the time was  
16       important to figure out when the injury occurred.

17           THE COURT: Okay.

18           MR. ADAMS: And the Court ruled -- I think it was  
19       Justice Scalia, which probably means the plaintiff lost. But  
20       I think what the Court ruled was -- well I know the Court  
21       ruled that the injury occurred at the moment that a  
22       discriminatory act occurred, not when , as he said, "the  
23       consequences are most painful." Okay.

24           But I would submit that the standard is not that  
25       something is absolutely unavoidable. The Court should not

1 refrain from hearing the merits of a case because something --  
2 unless it's absolutely unavoidable. All throughout the  
3 history of voting law, federal courts are willing to wade into  
4 these torrid waters whether or not the passions on both sides  
5 were extreme, as they were far worse than here. But because  
6 of the fundamental issues at stake, the right to fully  
7 participate in the political process, any political process,  
8 without regard to racial classification, those Courts in the  
9 1950s waded into those torrid Constitutional waters and I  
10 would ask that that Court do the same and deny the motion for  
11 dismissal. Thank you.

12 THE COURT: Thank you, Mr. Adams. All right, the  
13 Court would like to amend all of the parties for their fine  
14 oral amounts and the thorough written briefs. I really  
15 appreciated reading all of your briefs and listening to you  
16 today. I know this is a very important issue and the Court  
17 will hold this matter under advisement. I'll issue a decision  
18 and order shortly. So the case will be under advisement and  
19 thank you, have a nice Thanksgiving. We are now in recess.  
20 Thank you.

21 THE CLERK: Please rise.

22  
23 (Proceedings concluded at 3:55 p.m.)

24 \* \* \*

## CERTIFICATE OF REPORTER

CITY OF HAGATNA        )  
                              )  ss.  
TERRITORY OF GUAM     )

I, Veronica F. Reilly, Official Court Reporter of the District Court of Guam, do hereby certify the foregoing pages 1 to 97, inclusive, to be a true and correct transcript made of the electronic recording of the within-entitled proceedings, to the best of my ability, at the date and time therein set forth.

Dated this 5th of July, 2013.

/s/Veronica F. Reilly  
Veronica F. Reilly