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The attached is an amended/corrected amicus brief that was filed on behalf of Anne Perez Hattori. Although we didn't formally coordinate efforts and although Julian makes different points that I do (or maybe because of it), this brief dovetails nicely with what I'll be filing today. Plus, it's a very pleasurable read.
~Rob

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United States Court of Appeals for the Ninth Circuit

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Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Anne Perez Hattori. Date of service: 10/01/2013. [8805664]--[COURT UPDATE: Attached corrected brief. Resent NDA. 10/03/2013 by RY] (JA)

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Amicus Brief of Anne Perez Hattori - Filed (Oct. 1, 2013).pdf
298K

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15199

ARNOLD DAVIS,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v

GUAM, GUAM ELECTION COMMISSION, ALICE M. TAIJERON, MARTH C. RUTH, JOSEPH F. MESA, JOHNNY P. TAITANO, LEONARDO M. RAPADAS,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF AMICUS CURIAE OF ANNE PEREZ HATTORI IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Anne Perez Hattori ("Hattori") is a resident of Guam who satisfies the challenged Guam statutory definition of a "Native Inhabitant of Guam" by virtue of being a lineal descendant of a pre-1950 resident of Guam who gained U.S. citizenship through operation of the Guam Organic Act.[1] Thus, Hattori has a direct and concrete personal interest in whatever outcome, if any, is reached in this case. Agreeing, the U.S. District Court of Guam below granted Hattori's Motion for Leave to File Brief as *Amicus Curiae* in Support of Defendants' Motion to Dismiss. Further, it is Hattori—and not the parties in this case—who raised the issue of ripeness for the first time in the proceedings below. Further still, Hattori, via counsel, participated in oral argument below by leave of court.

Hattori submits this brief in an effort to assist this Court in more fully examining not only the dispositive issue of ripeness in this case, but also the complex constitutional law issues implicated by the same.

INTRODUCTION

This case is a wolf in sheep's clothing. Though deceptively styled as a reverse discrimination case, this lawsuit has nothing to do with preventing

[1] All parties, through their attorneys, have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or her counsel made a monetary contribution to the preparation or submission of this brief.

race discrimination or safeguarding civil rights. This case seeks to deny a multi-racial, multi-ethnic group of people, namely the pre-1950 residents of the U.S. unincorporated territory of Guam and their descendants, from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States. This right has been too long denied. And if the flood of recent migrants to Guam is allowed to vote in the plebiscite, this colonized polity will yet again be denied even this symbolic expression of self-determination by dint of simple vote dilution. Attempting to disguise such an injustice beneath the cloak of civil rights is as shameful as it is transparent.

Plaintiff alleges that the Guam Decolonization Registry Law, codified at 3 GCA §§ 21000–21031, constitutes race-based discrimination violative of the Fourteenth and Fifteenth Amendments of the United States Constitution, the Voting Rights Act, codified at 42 U.S.C. §§ 1973(a)-(p), and the Guam Organic Act of 1950, codified at 48 U.S.C. §1421 *et seq.* Specifically, Plaintiff argues that because the statutory definition of "Native Inhabitants of Guam" will produce a plebiscite electorate predominantly comprised of one racial group, i.e., Chamorros, and thereby disproportionately impact other racial groups, it infringes on his constitutional rights. Plaintiff's claims fail for several reasons.

First, Plaintiff's claims are not ripe for adjudication. No date has been set for the political status plebiscite. Further, the only "injury" that

Plaintiff claims to suffer from, the right to be listed on the decolonization registry, is not grounded in either the Constitution or the Voting Rights Act. Further still, Plaintiff's contention that he has been denied the right to register for the plebiscite is based on a flawed construction of Guam law. The registry is meant only to identify eligible voters; it is not a pre-requisite to participating in the plebiscite itself. Moreover, because Plaintiff has alleged nothing more than a purely speculative injury, he has failed to carry his burden of establishing ripeness in this case—a burden this Court requires he carry. *See Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009).

Second, Plaintiff's claim that the Guam Decolonization Registry Law is unconstitutional because it will disproportionately impact certain racial groups fails for the plain reason that the U.S. Supreme Court has consistently held that a showing of disparate impact alone is insufficient to support a constitutional challenge under the Fourteenth and Fifteenth Amendments; a plaintiff must prove that the challenged statute was motivated by race-based animus. *See Washington v. Davis*, 426 U.S. 229, 242 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 66-68 (1980). The Guam statute is not only facially neutral as to race, but it also amply evidences a non-race-based legislative intent. Plaintiff has failed to establish any race-based animus here and so his claims cannot be sustained.

Third, even if the Guam Decolonization Registration Law was deemed to utilize a race-based classification, the statute would still suffer no constitutional infirmity because this Court, together with the Supreme Court, have consistently held that the Constitution enjoys a unique application in unincorporated territories such as Guam, whereby Congress, acting pursuant to its sweeping authority under the Territorial Clause, may engage in patently discriminatory action which would otherwise offend the Constitution. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Att'y Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984); *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992); *People v. Okada*, 694 F.2d 565 (9th Cir. 1982).

Finally, Plaintiff's double misapprehension of the difference between a state and an unincorporated territory on the one hand, and the difference between a state election involving the placement of public officers into a state agency and a political status plebiscite involving a colonized polity's symbolic first step toward decolonization on the other hand, renders his reliance on *Rice v. Cayetano*, 528 U.S. 495 (2000) overreaching. That case does not govern this one, and even if it did, what sealed the impugned statute's fate in that case—namely, race-based animus deducible from pertinent legislative history surrounding its passage—is not present here. Try as he may, Plaintiff cannot credibly contend otherwise.

For these reasons, amicus requests affirmance of the district court's