dismissal.

ARGUMENT

I. PLAINTIFF'S CASE IS NOT RIPE FOR ADJUDICATION

Even taking as true every allegation set forth in the Complaint, Plaintiff fails to show that he has suffered anything more than a purely speculative injury. Hence the instant litigation is premature, and dismissal is appropriate.

To invoke the jurisdiction of the federal courts, a claimant must satisfy the threshold requirement imposed by Article III of the U.S. Constitution by alleging an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). To satisfy this requirement, claimants must show they "[have] sustained or [are] immediately in danger of sustaining some direct injury" as a result of the defendant's conduct, and that the injury or threat of injury is "'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 101-02 (citations omitted). Abstract injury is insufficient. *Id.* at 101.

The policy underlying the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Accordingly, "ripeness is peculiarly a question of timing," *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974), and a federal

court ought not resolve issues involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (citation and internal quotation marks omitted). In other words, in the absence of immediate and certain injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).

Two factors must be considered in determining whether a controversy is ripe for adjudication: the hardship to the parties of withholding court consideration, and whether the issue is fit for judicial consideration. *Abbott Labs.*, 387 U.S. at 149. "The burden of establishing ripeness and standing rests on the party asserting the claim." *Colwell*, 558 F.3d at 1121 (citation omitted). Plaintiff has failed to establish that the instant matter is ripe for adjudication; therefore this case must be dismissed.

Plaintiff cannot establish that he will suffer immediate hardship because his claims are based on contingent future events. "To meet the hardship requirement, a litigant must show that withholding review would result in *direct* and *immediate hardship* . . . ." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (emphases added) (quoting *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v.*

United States, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted).

In this case, Guam law plainly provides that the future plebiscite at issue in this case will only be held "on a date of the General Election at which seventy percent (70%) of eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission." 1 GCA § 2110 (2005). Here, nothing indicates that the criterion of the Guam Election Commission's ("Commission") successful registration of seventy percent (70%) of the eligible voters has been met. Without this threshold criterion being met, there can as yet be no political status plebiscite in which "Native Inhabitants of Guam" may register votes concerning their desired future political relationship with the United States. In other words, the plebiscite at issue here exists solely in an indefinite future and represents exactly the kind of "contingent future event[ ] that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 581; *Texas*, 523 U.S. at 300 (1998). Indeed, there is cause to believe that it "may not occur at all" considering that the Decolonization Registry law was enacted some eleven years ago, and fewer than 5,000 voters have been duly registered by the Commission to date. Furthermore, as a matter of administrative law, it is significant that the Commission has not yet even determined what number is necessary to meet the "seventy percent (70%) of eligible voters" requirement prescribed by the statute. Because the plebiscite at issue is a contingent future event that may not occur as anticipated or at all, this

Court could find itself adjudicating a phantom controversy—a purely academic enterprise. This is precisely the sort of judicial exercise the ripeness doctrine is designed to prevent.

To further illustrate the uncertainty about when the plebiscite will be held one need only review the legislative history of 1 GCA § 2110. Guam Public Law 25-106, which created the Guam Decolonization Registry, went into effect on March 24, 2000, and set the date of the plebiscite for July 1, 2000. Guam Pub. L. 25-106:10. Public Law 25-148 changed the date of the political status plebiscite to November 7, 2000, "unless the Guam Election Commission determines that it won't be adequately prepared to hold the Plebiscite on that date, in which case the Guam Election Commission may determine by majority vote of Commission members to hold the Plebiscite on a later date." Guam Pub. L. 25-148:7. Public Law 27-106, which went into effect on September 30, 2004, created the existing requirement for seventy percent (70%) of eligible voters to register before triggering the plebiscite. Guam Pub. L. 27-106:VI:23. Most recently, in April 2011, Bill 31-154 was introduced in the Guam Legislature, which proposed that the plebiscite be held in 2014. Then, on September 19, 2011, Public Law 31-154 went into effect, again without setting a date for the plebiscite. Guam Pub. L. 31-154. Thus, more than eleven years have passed without any real certainty as to when the plebiscite will be held.

For these reasons, this case is not ripe for adjudication and altogether lacks the immediacy that constitutes an indispensable condition of federal

judicial review.

II. THE GUAM DECOLONIZATION REGISTRATION LAW UTILIZES NO RACIAL CLASSIFICATION AND VIOLATES NO FEDERAL CONSTITUTIONAL OR STATUTORY LAW

A. "Native Inhabitants of Guam" Is a Facially Race-Neutral Classification, and Plaintiff Cannot Prove that the Guam Decolonization Registration Law Was Motivated by Race-Based Animus

Plaintiff currently resides in Guam but is not qualified to register his opinion regarding the territory's future political relationship with the United States because he does not come within the statutory definition of "Native Inhabitants of Guam," defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 3 GCA § 21001(e) (2005). This language clearly indicates that the plebiscite seeks to determine the desires of "native inhabitants," not merely Chamorros. On its face, anyone who became a U.S. citizen by operation of the 1950 Organic Act (and descendants of those citizens) qualifies as a "native inhabitant." In other words, the definition does not preclude non-Chamorros from voting in the plebiscite, should one be held. Thus, it is facially neutral as to race. Plaintiff argues here that because the statutory definition of "Native Inhabitants of Guam" works to constitute a plebiscite electorate *largely* comprised of one racial group, i.e. those who identify racially and ethnically as "Chamorros," it is necessarily infirm. *See* Plaintiff-Appellant's Opening

Brief at 1, 4 (Sept. 3, 2013) ("Op. Br.").[2] Plaintiff contends that this classification "cannot survive strict scrutiny because its method of achieving its goal is not narrowly tailored." Op. Br. at 18, 39.

Plaintiff misstates the law of this case. That the challenged statutory scheme may have a disproportionate racial impact is insufficient for a finding of racial discrimination. A statute that is facially neutral as to race receives more than rational basis review *only* where there is proof of a discriminatory purpose. Under *Washington v. Davis*, 426 U.S. 229, 239 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), an ostensibly race-neutral government classification is deemed unconstitutional only if it was enacted with discriminatory intent. *See Arlington Heights*, 429 U.S. at 264-65 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). *Washington v. Davis* is the seminal case articulating this requirement for proof of discriminatory intent. There, applicants for the police force in Washington, D.C., were required to take a test, and statistics revealed that Blacks failed the examination much more often than Whites. *See Davis,* 426 U.S. at 234-35. The Court, however, explained that proof of a discriminatory impact is insufficient, by itself, to show the existence of a

[2] Whether this disparate impact is a statistical reality is uncertain.

racial classification. *Id.* at 239. Justice White, writing for the majority, said the Court never had held that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Id.* The Court explained that discriminatory impact, "[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (citation omitted).

Courts have repeatedly reaffirmed the principle that discriminatory impact alone is not sufficient to prove a racial classification. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 292-93, 97 (1987). In that case, statistics clearly showed racial inequality in the imposition of the death penalty. However, the Court ruled that in order for the defendant to demonstrate an equal protection violation, he "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292. Because the defendant relied solely on the statistical study for evidence and could not prove bias on the part of the prosecutor or jury in his case, no equal protection violation existed. *Id.* at 292-93, 297. Moreover, the Court said that to challenge the law authorizing capital punishment, the defendant "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect." *Id.* at 297-98.

The Court has held that showing such a purpose requires a rather high

level of proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (citation omitted).

Finally, the Court specifically indicated in *Davis* that this principle applies to claims of racial discrimination in the context of voting just as in other racial discrimination contexts. *See* 426 U.S. at 240 (approving the conclusion reached in *Wright v. Rockefeller*, 376 U. S. 52 (1964), which upheld a New York congressional apportionment statute against claims of racial gerrymandering because challengers "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines . . . ."); *Bolden*, 446 U.S. at 66-68.

In *City of Mobile, Alabama v. Bolden*, black voters in Mobile, Alabama, challenged that city's method for selecting its governing commission, arguing that the at-large electoral system violated their constitutional rights. 446 U.S. at 65. The plaintiffs relied primarily on the fact that few black commissioners had been elected under the at-large voting system. The Court rejected the voters' reasoning that this showing of

disparate impact was enough to render the voting system unconstitutional. *Id.* at 65-74. In so doing, the Court wrote that such voting laws only "violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Id.* at 66 (citations omitted).[3] For this proposition this Court cited the basic maxim that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," *id.*, and that "[t]he Court explicitly indicated in *Washington v. Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *Id.* at 67. Perhaps to eliminate any remaining doubt about its rejection of disparate impact as the predominant theory in equal protection claims, and specifically those involving voting, the Court went on to declare:

> Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a

[3] In 1982, Congress amended the Voting Rights Act in response to portions of the Court's opinion in *Bolden*. *See* 42 U.S.C. § 1973, as amended, 96 Stat. 134. This enactment did not impact the Court's holdings with regard to either the Fourteenth Amendment equal protection claims or the voters' disparate impact Fifteenth Amendment claims, 446 U.S. at 62. It would seem that *Bolden* still controls in these spheres. *Accord Rogers v. Lodge*, 458 U.S. 613, 617-19 (1982) (upholding the requirement of proof of discriminatory intent in all types of equal protection cases, including those concerning voting).

variety of other contexts involving alleged racial discrimination.

Id. at 67-68 (footnote and citations omitted). This Court should heed this reasoning here, and uphold the Guam Decolonization Registration Law against Plaintiff's disparate impact challenge.

As will be shown, Plaintiff simply cannot prove that the challenged statutory scheme was animated by any racially discriminatory motive.

The Guam Legislature explained at length that the purpose behind the enactment of the Guam Decolonization Registry Law, 3 GCA §§ 21000 - 21031, was to implement the process of decolonization taken up in the first instance by the United States via the 1950 Organic Act, *see* 48 U.S.C. §§ 1421-28 (2005 & Supp. 2007), and earlier, via the 1898 Treaty of Paris. *See* Treaty of Peace, United States-Spain, Dec. 10, 1898, 30 Stat. 1754. In the relevant "Legislative Findings and Intent" section, the Guam Legislature plainly states that its intent was to "permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America." 3 GCA § 21000 (2005). The Legislature further states that "the right has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam." *Id.* The Legislature then pronounces that the native inhabitants of Guam remain

due their inalienable right of self-determination by operation of, among others, the 1898 Treaty of Peace between the United States and Spain, the 1950 Organic Act of Guam, the United States Immigration and Nationality Act, the United Nations Charter and several UN resolutions concerning non-self-governing territories, and the International Covenant on Civil and Political Rights. *Id.*

Illustratively, the Guam Legislature goes on to make specific reference to portions of the legislative history surrounding the passage in the U.S. Congress of the 1950 Organic Act, wherein U.S. representatives stated in no ambiguous terms:

> In addition to its obligation under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self-governing Territory. Under Chapter XI of the Charter of the United Nations, ratified by the Senate June 26, 1945 (59 Stat. at p. 1048), we undertook, with respect to the people of such Territories, to insure political advancement, to develop self-government, and taking 'due account of the political aspirations of the peoples . . . .' to assist them in the progressive development of their free political institutions . . . ."

Id. (quoting S. REP. No. 2109, 81st Cong., 2d Sess. 15 (1950), *reprinted in* 1950 U.S. CODE CONG. & AD. NEWS 2840, 2841). The Legislature further states, "[i]t is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950 and to use this knowledge to further petition Congress and other entities to achieve the stated goals." *Id.* Finally, as if to put to rest any remaining doubt as to its legitimate non-race-based animus, the Legislature announces, "[t]he intent of this Chapter