shall not be construed nor implemented by the government officials effectuating its provisions to be race based, but founded upon the classification of persons as defined by the U.S. Congress in the 1950 Organic Act of Guam." *Id.*

Thus, if and when the time comes, Plaintiff will be not be able to satisfy the high evidentiary bar required of him by *Davis* and its progeny to prove that the Guam Decolonization Registry Law was animated by a racially discriminatory purpose.

B. Even if "Native Inhabitants of Guam" is Deemed a Racial Classification, the Guam Decolonization Registration Law Still Suffers No Constitutional Infirmity Because it Codifies Preexisting Congressional Intent and Congress May Discriminate As it Chooses Under the Territorial Clause

As explained in the preceding section, the Guam Legislature intended only that the challenged decolonization statutory scheme effectuate Congress' intent to permit the native inhabitants of Guam (as that term was itself defined by Congress in the Organic Act) to express by plebiscite their desires regarding their future political relationship with the United States. Thus, Plaintiff's rather blunt use of constitutional race jurisprudence to impute infirmity to the Guam statutes is unavailing. He omits the singular distinction that sets the instant case apart from the several cases he cites: Guam is an unincorporated territory, not a state. This is a distinction with a difference.

Unincorporated territories occupy what might be termed a *sui generis*

space within American constitutional law. Unlike the several states, where the U.S. constitution applies without issue, the latter does not axiomatically apply in the territories. Rather, the U.S. Congress, acting under the Territorial Clause, U.S. CONST. art. IV, § 3, cl. 2, under color of its plenary power, may pick and choose which portions of the Constitution apply in the unincorporated territories, and which do not. And this remains the case even after Congress formally extends U.S. citizenship to the residents of the respective unincorporated territories. *See Balzac*, 258 U.S. at 308-09.

Case law plainly instructs that Congress can do virtually anything it pleases with/in the territories, including act in ways that might otherwise offend the Constitution. *See Att'y Gen. of Guam*, 738 F.2d at 1019 (holding that the denial to U.S. citizens who reside in an unincorporated territory of the right to vote in U.S. presidential elections is not a constitutional violation); *Wabol*, 958 F.2d at 1462 (upholding facially racial land alienation restrictions in the Commonwealth of the Northern Mariana Islands against equal protection challenges); *Balzac*, 258 U.S. at 314 (holding that the Sixth Amendment right to a jury trial is not applicable in Puerto Rico, despite the fact that residents therein are U.S. citizens).

Guam is an unincorporated territory. *See generally People v. Okada*, 694 F.2d 565 (9th Cir. 1982); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985); *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988). As earlier explained, because the statutes challenged here proceed

from Congress's plenary power via the Organic Act, Plaintiff's reliance on non-territorial race cases is misguided. Indeed, none of the race discrimination cases Plaintiff cites address the situation at bar, that is, where the challenged governmental action is that of an unincorporated territory acting within congressionally condoned bounds. Indeed, in the unincorporated territories, Congress is free to engage in what may properly be termed "discrimination" so long as that discrimination is supported by a rational basis. *See, e.g.*, *Califano v. Torres*, 435 U.S. 1, 5 (1978) (upholding Congress' discriminatory treatment of the territories by subjecting the challenged discrimination only to rational basis review); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) ("Congress, which is empowered under the Territory Clause of the Constitution . . . to make all needful Rules and Regulations respecting the Territory . . . belonging to the United States, may treat Puerto Rico differently from States so long as there is a rational basis for its actions.") (internal citation and internal quotation marks omitted).

Because Congress is free to discriminate against the unincorporated territories, it is also free to discriminate in their favor, even where that discrimination would otherwise violate the Constitution. *See Wabol*, 958 F.2d at 1462; *accord King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977); *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) ("Were we to apply sweepingly *Duncan*'s definition of 'fundamental rights' to unincorporated territories, the effect would be

immediately to extend almost the entire Bill of Rights to such territories. This would repudiate the *Insular Cases*."); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) ("[T]he Territory Clause permits exclusions or limitations directed at a territory and coinciding with race or national origin, so long as the restriction rests upon a rational basis.").

C. *Rice v. Cayetano* is Inapposite, or Alternatively, Distinguishable—And In Any Event, This Court Ought Not Reach This Complex Constitutional Law Question Given That This Case is Not Ripe for Adjudication

Plaintiff invokes *Rice v. Cayetano*, 528 U.S. 495 (2000), to support his untenable assertion that the statutory definition of "Native Inhabitants of Guam" must fail here for the same reason the statutory definition of "Hawaiian" failed there—namely, that because the United States has not formally recognized the "Native Inhabitants of Guam" as an Indian tribe, *Morton v. Mancari*, 417 U.S. 535 (1974), offers no doctrinal cover, and therefore the challenged Guam statutes necessarily utilize a racial, as opposed to political, classification. Momentarily setting aside several other factors distinguishing *Rice* from the present case, Plaintiff's argument effectively ignores more than a century of well-settled jurisprudence, enshrined in the *Insular Cases*[4] and their progeny, which long ago carved

[4] *Delima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). Although the *Insular Cases* are (in)famous for giving judicial sanction to American imperialism at the turn of the twentieth century by withholding from those territories acquired after the

out for unincorporated territories like Guam an exceptionalism entirely independent from that of federal Indian law. Put plainly, *Mancari* need not apply to shield the challenged Guam statutes in the first instance because they arguably are already so shielded by the *Insular Cases* and their progeny. Moreover, this Court already approved this conclusion, if only tacitly, in a series of 1980s decisions concerning the territorial status of

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Spanish-American War all but a few constitutional protections and by denying them the promise of eventual statehood—via the unprecedented doctrine of territorial incorporation—another reading of the *Insular Cases* posits that their more important content is that they authorize territorial de-annexation, i.e. the United States retains the power to de-annex so-called "unincorporated territories" even after said territories have become subject to exclusive U.S. sovereignty, and even after their inhabitants have been made U.S. citizens. *See generally* Christina D. Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (reasoning that the *Insular Cases* effectively smuggled a theory of secession into American constitutional law for unincorporated territories, or territories not bound in permanent union to the rest of the United States). In this one aspect, the *Insular Cases* inversely reflect the right of self-determination as it is understood in international law inasmuch as the latter (1) considers colonialism obsolete, criminal, and contrary to law, and (2) vouchsafes to colonized polities a range of political status options which necessarily includes, indeed highlights, outright independence. *See* Principles Which Should Guide Members in Determining Whether or not an Obligation Exists To Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960); *see also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 74-75 (1995). Though Plaintiff has preemptively narrated the instant lawsuit along very narrow constitutional law lines, the reality is that this case is, constitutionally speaking, much more complex. It involves the United States' international obligations relative to the fundamental right of self-determination as it is understood in international law. Finally, that international law is a part of U.S. law is beyond doubt. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Filártiga v. Peña-Irala*, 630 F.2d 876, 886-87 (2nd Cir. 1980); *Estate of Ferdinand E. Marcos v. Marcos*, 978 F.2d 493, 502 (9th Cir. 1992).

Guam. *See generally Okada*; *Sakamoto*; and *Ngiraingas*.

Plaintiff's reliance on *Rice v. Cayetano* is misguided on additional grounds, including (1) that the state election at issue in that case is not at all similar to the political status plebiscite at issue in this case, and (2) that the problematic date utilized in the Hawaii statute for determining whether or not someone qualified as a "Hawaiian," i.e., 1778, is completely distinguishable to the date utilized in the Guam statute for determining whether someone is a "Native Inhabitant of Guam," i.e., 1950. These points are elaborated below.

At issue in *Rice* was an attempt by a Caucasian resident of Hawaii to vote in a statewide election for trustees of the Office of Hawaiian Affairs ("OHA"), a state agency created to administer programs designed for the benefit of two subclasses of Hawaiian citizenry, namely "Native Hawaiians" and "Hawaiians," the larger latter class being defined as those persons who are descendants of the aboriginal peoples inhabiting the Hawaiian Islands in 1778. *Id.* at 509 (citing Haw. Rev. Stat. §§ 10-2 (1993)). To register to vote for OHA trustees, Rice was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." *Id.* at 510. Rice so attested, and Hawaii denied his application. *Id.* In contrast, at issue here is not a statewide election for public officers of a state agency. Indeed, the international law-guaranteed, congressionally-approved political status plebiscite whereby "Native Inhabitants of Guam" are to take their first

constitutive step toward the decolonization of the American-administered territory of Guam could not be more dissimilar to the state election at issue in *Rice*.

The date utilized by the Hawaii statute in *Rice* for determining who qualifies as a "Hawaiian" in order to vote in the OHA trustee election served a qualitatively different purpose than the date utilized by the Guam statute in this case for determining whether or not someone qualifies as a "Native Inhabitant of Guam" in order to participate in a political status plebiscite. There, the relevant date was the year 1778, which marked the year of first contact between the aboriginal peoples of the Hawaiian archipelago and the European/Western world via Captain Cook. For this reason, the Court was able to determine with rather minimal effort that the statutory definition of "Hawaiian" was tantamount to racial discrimination because it singled out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). Thus, the Court concluded that the "very object of the statutory definition in question" was to "treat the early Hawaiians as a distinct people," a legislative purpose it deemed demonstrable race-based animus. *Id.* Oppositely, here the relevant date in the Guam statute is 1950, which, as explained above, is intended only to effectuate the Congress' intent 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). Moreover, unlike the legislative history that so troubled the Court in *Rice*, here the relevant statutes contain the above-quoted Legislative Findings and Intent section, which clearly show that the Guam statutes were animated by no racially discriminatory purpose.

Closely tracking the Court's reasoning in *Rice*, the only way the Guam statutes could be considered somewhat akin to the Hawaii statutes would be if the former were to utilize a significantly earlier date, e.g., 1521, or the year of first contact between Guam and the European/Western world via Ferdinand Magellan. Hypothetically, if 1521 were the relevant date, an argument might be advanced that the legislation was animated by a race-based motive inasmuch as a Court would be hard pressed, as it was in *Rice*, to deduce any object other than an impermissible attempt to insulate a racially distinct group. Fortunately here, that is not the case.

In any event, the case at bar implicates questions of profound constitutional dimension and so it is, at this time, particularly ill-suited for adjudication on the merits given that it is not ripe. *Accord Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

CONCLUSION

Plaintiff steadily ignores the settled rule that in order to succeed on his racial discrimination claims, he must first prove that the Guam Decolonization Registration Law was motivated by race-based animus. That Plaintiff cannot prove this is fatal to his case. Moreover, this case implicates a question of profound constitutional dimension: whether an unincorporated territory, acting within congressionally approved parameters, may limit the electorate in a political status plebiscite to members of the colonized polity in order to effectuate the decolonization remedy guaranteed them under domestic and international law. Despite this profundity, Plaintiff does little more in these pleadings than retreat unconvincingly to the orthodox bunker of run-of-the-mill race jurisprudence. Plaintiff not once demonstrates why the cases he cites have any bearing on the constitutional nuances here at issue, namely Congress's sweeping authority to limit the plebiscite electorate to "Native Inhabitants of Guam." Plaintiff misapprehends the nature of the exceptionalism afforded the territories pursuant to the territorial incorporation doctrine, which, despite its doctrinal deficiencies, confers an exceptionalism separate and apart from that of the tribes. Finally, that this case implicates deep constitutional construction only bolsters the position amicus herein advances, i.e., that this case is not ripe for adjudication, and judicial review of the same is improper.

Thus, affirmance is plainly warranted.

DATED: October 2, 2013

Respectfully submitted,

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DATED: October 2, 2013.

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