NO. _____

In The
Supreme Court of the United States

GOVERNMENT OF GUAM, *et al.*,

Applicants,

v.

REA MIALIZA O. PAESTE, *et al,*

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMERGENCY APPLICATION FOR STAY PENDING CERTIORARI

Michael F. Williams*
Susan M. Davies
Daniel A. Bress
Peter A. Farrell
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
michael.williams@kirkland.com
susan.davies@kirkland.com
daniel.bress@kirkland.com
peter.farrell@kirkland.com
Telephone: (202) 879-5000
Fax: (202) 879-5200

***- counsel of record**

Rodney J. Jacob
Calvo Fisher & Jacob LLP
One Lombard Street, Second Floor
San Francisco, CA 94111
kfisher@calvofisher.com
rjacob@calvofisher.com
Telephone: (415) 374-8370
Facsimile: (415) 374-8373

Arthur B. Clark
Sandra C. Miller
Office of the Governor of Guam
Ricardo J. Bordallo Governor's Complex
Adelup, Guam 96910
arthur.clark@guam.gov
sandra.miller@guam.com
Telephone: (671) 475-9370
Facsimile: (671) 477-4826

Counsel for Applicants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Appendix

EMERGENCY APPLICATION FOR STAY PENDING CERTIORARI

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Applicants Government of Guam, Eddie Baza Calvo, Benita Manglona, and John Camacho, in their official capacities[1] ("Applicants") respectfully move for a stay pending the timely filing of a petition for writ of certiorari. In addition, or in the alternative, Applicants request that the Court treat this application for stay as a petition for writ of certiorari, grant the petition, and summarily reverse the decision of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents the question of whether officers of the Territory of Guam, acting in their official capacities, may be subject to liability under 42 U.S.C. § 1983 for their administration and enforcement of the Guam Territorial Income Tax ("GTIT"), which is created by federal statute, enacted by Congress and signed by the President. The answer to that question is plainly "no," as the Territory of Guam and its officers possesses sovereign immunity to the same extent as federal agencies and officials, and neither Guam nor Congress has authorized lawsuits against the Territory arising from the administration of the GTIT.

The Ninth Circuit's decision below violates not only settled principles of sovereign immunity, it defies a settled precedent from this Court holding that officers of Guam are not "persons" under § 1983. In *Ngiraingas v. Sanchez*, 495

[1] Effective February 9, 2015, Anthony C. Blaz succeeded Benita Manglona as Director of the Guam Department of Administration.

U.S. 189 (1990) (*Ngiraingas II*), this Court expressly held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." *Id.* at 193. Yet the Ninth Circuit below held that "'a Guam officer sued in his official capacity *is* a 'person' within the meaning of § 1983." App. 17a (quoting *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370-71 (9th Cir. 1992) (emphasis in original)). As this Court only weeks ago reminded lower courts, "lower court judges are certainly free to note their disagreement with a decision of this Court," but under the Supremacy Clause they must nonetheless follow this Court's rulings. *DIRECTV, Inc. v. Imburgia*, No. 14-462, slip op. at 5 (Dec. 14, 2015). Indeed, the Ninth Circuit's refusal to follow *Ngiraingas II* is made even worse by the fact that there can be no liability under § 1983 for actions undertaken "under color" of federal law, which is the case here. *See FDIC v. Meyer*, 510 U.S. 471, 485-86 (1994) ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself.").

The Ninth Circuit cast aside these principles in this case and affirmed an injunction requiring, among other things, that Guam and its officers pay income-tax refunds within a set timeframe, even though there is no basis in federal law for mandating deadlines for income-tax refunds. In so holding, the Ninth Circuit's ruling creates an exceptional burden for the Territory of Guam, not contemplated by Congress, at a time when the overseas territories of the United States are facing unprecedented fiscal challenges. Applicants therefore respectfully ask this Court for a stay of the Ninth Circuit's judgment pending the filing and disposition of a

petition for writ of certiorari or, in the alternative, that the Court treat this application as a petition for certiorari, grant the writ, and reverse the judgment of the Ninth Circuit.

JURISDICTION

The Supreme Court, or a Justice of the Supreme Court, may stay the execution and enforcement of the Ninth Circuit's judgment for a reasonable time to enable Applicants to obtain a writ of certiorari from the Supreme Court. *See* 28 U.S.C. § 2101(f). The Court has jurisdiction to grant certiorari and vacate the judgment of the Ninth Circuit. *See id.* § 1254(1). The Ninth Circuit had jurisdiction to review the final judgment of the district court. *See id.* § 1291.

STATEMENT OF THE CASE

Guam is an unincorporated territory of the United States. 48 U.S.C. § 1421a. Guam is located in the North Pacific Ocean, approximately three-quarters of the way from Hawaii to the Philippines.[2] The territory has an estimated population of 161,785 as of July 2015. *See id.* Except for a period during World War II, when Japan invaded and occupied Guam, the United States Navy administered Guam's affairs from 1898 until 1950. *See Ngiraingas II*, 495 U.S. at 186.

In 1950, Congress enacted the Organic Act of Guam, which created the local government on Guam and established its operations. *See* Act of Aug. 1, 1950, ch. 512, § 1, 64 Stat. 384. The Organic Act provided the Secretary of the Interior with general administrative supervision over Guam in its relations with the federal

[2] *See* Central Intelligence Agency, The World Factbook, Guam, https://www.cia.gov/library/publications/the-world-factbook/geos /gq.html (last visited Dec. 21, 2015).

government, except in matters within the program responsibility of another federal agency. *See* 48 U.S.C. § 1421i(a). It also established that "the second sentence of section 1 of the fourteenth amendment," including the equal protection clause, would apply in Guam with the same force and effect as in the United States. *Id.* § 1421b(u).

Under the Organic Act, Congress established an income-tax regime for Guam. *See* 48 U.S.C. § 1421i. According to the Organic Act, residents of Guam do not pay any income tax to the federal government of the United States; instead, they pay a territorial income tax to the Government of Guam. *See id.* § 1421i(b). Rather than writing an entirely new tax code for Guam, however, Congress applied the provisions of the Internal Revenue Code ("IRC") to Guam as the Guam Territorial Income Tax ("GTIT"). *See id.* § 1421i(a). As such, IRC § 1, 26 U.S.C. § 1, applies to residents of Guam as GTIT § 1, and so on. *See Gumataotao v. Dir. of Dep't of Revenue & Taxation*, 236 F.3d 1077, 1080 (9th Cir. 2001). Congress mandated that the provisions of the IRC would apply to residents of Guam as the GTIT unless "manifestly inapplicable or incompatible" with the intent of the Organic Act. 48 U.S.C. § 1421i(d)(1). One of Congress's purposes in establishing this regime was to help the Government of Guam become self-sufficient. *See* Bruce Leiserowitz, *Comment, Coordination of Taxation between the United States and Guam*, 1 BERKELEY J. INT'L L. 218, 220 (1983) (citing 96 Cong. Rec. 7577 (1950)).

Congress also provided that the Governor of Guam would be responsible for the administration and enforcement of the GTIT. *See* 48 U.S.C. § 1421i(c). Under

the Organic Act, the Governor or his delegate has the same administrative and enforcement powers and remedies with regard to the GTIT as the Secretary of the Treasury and other United States officials have with respect to the IRC. *See id.* § 1421i(d)(2). The Governor has delegated authority to the Director of the Department of Administration and the Director of the Department of Revenue and Taxation to assist with administration and enforcement of the GTIT. App. 39a.

Guam, like other governmental entities throughout the United States, has suffered economic hardship and experienced budget deficits. *Id.* Its GDP per capita is similar in strength to Puerto Rico's.[3] Guam's income per capita is less than Puerto Rico's and almost half of Mississippi's, the poorest state.[4] In order to provide essential services to its constituents, Guam has been forced at times to delay payment of tax refunds to some of its taxpayers. App. 39a-40a. During the 1990s and 2000s, Guam fell behind in paying tax refunds. The situation continued until the current governor sought authority to issue a series of bonds with the objective of paying outstanding refund claims. App. 40a. As of June 30, 2013, the Government of Guam is current on all tax refund payments. When Guam had to delay its

---

[3] *See* Central Intelligence Agency, The World Factbook, Guam, https://www.cia.gov/library/publications/the-world-factbook/geos/ gq.html (last visited Dec. 21, 2015); *id.*, Puerto Rico, https://www.cia.gov/library/ publications/the-world-factbook/geos/gq.html (last visited Dec. 21, 2015).

[4] *Compare* Bureau of Labor Statistics, Dep't of Labor, Gov't of Guam, Household and Per Capita Income: 2010, http://bls.guam.gov/wp-content/uploads/bsk-pdf-manager/76_HOUSEHOLDPER CAPITA INCOME-2010.PDF (last visited Dec. 21, 2015) ($12,864 per capita income for Guam in 2010), *with* World Bank, World Bank Data, Puerto Rico, http://data.worldbank.org/country/puerto-rico (last visited Dec. 21, 2015) ($19,310 per capita income for Puerto Rico in 2013), *and* Mississippi Department of Employment Security, Mississippi Per Capita Income by County, http://www.mdes.ms.gov/media/8639/pci.pdf (last visited Dec. 21, 2015) ($33,657 per capita income for Mississippi in 2012).

payment of tax refunds, Guam paid interest on the principal of the delayed payment, as required under the IRC and the GTIT. *See* 26 U.S.C. § 6611.

Traditionally, the Government of Guam paid tax refunds on a first-in, first-out basis, the same way the Internal Revenue Service ("IRS") ordinarily pays federal income-tax refunds. App. 40a. The IRS allows taxpayers to apply for an expedited income-tax refund in certain circumstances, however, such as when a "hardship situation that necessitates a quicker refund than normal systemic processing can provide." Internal Revenue Manual § 5.1.12.20(1). The Government of Guam also paid refunds to some individuals on an "expedited" basis, with the objective of prioritizing payment of tax refunds "to those people who needed it the most because of medical emergency, death in the family, or financial hardship." App. 41a. Between 2005 and 2009, the Government of Guam paid an average of about 5,000 refunds, totaling approximately $15 million, on an expedited basis. *Id.*

Plaintiffs brought a class-action lawsuit against the Government of Guam and its officers challenging both the late payment of tax refunds and the expedited-refund program. As for the late payments, plaintiffs brought a claim under the Organic Act of Guam, 48 U.S.C. § 1421i, alleging that the failure promptly to refund tax overpayments violated the Government's responsibility to administer and enforce the GTIT. App. 8a. As for the expedited refund program, plaintiffs brought a claim under 42 U.S.C. § 1983 alleging that the process for granting relief was so arbitrary that it violated the principle of equal protection. *Id.*

The district court granted summary judgment in favor of plaintiffs on both claims. App. 10a. The district court entered a permanent injunction prohibiting the expedited-refund program, requiring the Government of Guam to pay tax refunds within six months of receiving a claim, and mandating that the Government submit to regular reporting obligations in order to ensure compliance. App. 12a. The district court also awarded substantial attorney's fees and costs. App. 13a.

Guam and its officers appealed to the Ninth Circuit. On appeal, Guam argued that no defendant in the case is a "person" within the meaning of § 1983, that the challenged actions concerning the administration of the GTIT were not taken "under color of" territorial law for purposes of § 1983, and that the district court's injunction was based upon an unlawful interpretation of the IRC. App. 10a-24a. Guam also argued that sovereign immunity precluded plaintiffs' claims. App. 16a. The Ninth Circuit held that Guam had waived the first two arguments, concerning the application of § 1983, but it nevertheless exercised its discretion to consider and resolve them. App. 17a. On this point, the Ninth Circuit found that the arguments fell within the narrow exception to the waiver doctrine where "the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised." *Id.* (quoting *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2003)). The Ninth Circuit nevertheless rejected all of Guam's arguments and affirmed the district court.

In her opinion for the Ninth Circuit, Judge Berzon "express[ed] no view as to Guam's entitlement to sovereign immunity from the § 1983 claim in the case." App. 16a. But the opinion nevertheless went on to hold that the principle of *Ex parte Young*, 209 U.S. 123 (1908), would allow a claim against officers of Guam in their official capacities for injunctive or declaratory relief. App. 16a-17a. The opinion cited the recent decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), for the proposition that federal courts may grant injunctions against federal officials to address violations of federal law under *Ex parte Young*. App. 19a.

The Ninth Circuit then rejected Applicants' argument that the territory and its officers are not "persons" for purposes of § 1983. The Applicants noted that the Supreme Court had expressly held—in a decision based upon the text and history of the Enforcement (Ku Klux Klan) Act of 1871, Ch. 22, 17 Stat. 13 (1871)—that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." *Ngiraingas II*, 495 U.S. at 192. They also noted that the Ninth Circuit itself had held, in the decision affirmed by the Supreme Court, that because Guam "is in essence an instrumentality of the federal government, much like a federal department or administrative agency, the territory "is not a 'person' chargeable with violating territorial law under § 1983." *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371-72 (9th Cir. 1988) (*Ngiraingas I*). The opinion acknowledged that this Court in "*Ngiraingas II* did not, it is true, expressly state that the prospective-relief exception applies to official-capacity suits against territorial officers,"

App. 19a, but the opinion went on to state that the Supreme Court's statutory analysis and the Ninth Circuit's own earlier decisions were nevertheless inapplicable to lawsuits for prospective injunctive relief, App. 19a-22a. Citing Justice Brennan's dissent in *Ngiraingas II*, Judge Berzon's opinion stated that it would be "flatly inconsistent" with the manifest intent of § 1983 to find that no liability attaches at least to natural persons for acts under color of territorial law. App. 21a (quoting *Ngiraingas II*, 495 U.S. at 204 n.10 (Brennan, J., dissenting)).

The Ninth Circuit also rejected Applicants' argument that none of the conduct at issue was undertaken under color of territorial law. The panel held "the relevant inquiry focuses not on whose law is being implemented, but rather on whether the authority of the state was exerted in enforcing the law." App. 26a (quoting *Tongol*, 601 F.2d at 1097). As such, the decision held that Guam's officers acted under color of territorial law even though they were applying a law that was entirely federal, enacted by Congress and approved by the President, and even though the officers derived their authority to administer and enforce the law from the Organic Act.

Finally, the Ninth Circuit affirmed the injunction requiring Guam to pay income-tax refunds within six months of determining that claims are valid and not subject to investigation or audit. App. 27a-31a. Judge Berzon's opinion recognized that the provision cited by the district court in support of its six-month deadline does not actually establish a six-month deadline for payment of refunds. App. 28a (citing 26 U.S.C. § 6532(a)(1)). But the Ninth Circuit then upheld the deadline as

"well within the court's broad discretion for fashioning relief." App. 29a. In response to arguments that the IRC and the GTIT give Applicants discretion to defer refund payments as necessary for its own budgeting purposes, so long as Guam pays interest on the unpaid principal, *see* 26 U.S.C. § 6611, the Ninth Circuit concluded that, "[i]f anything, allowing Guam six months to honor refund requests it has determined to be valid and not subject to audit or investigation is more solicitous than necessary to Guam's concerns." App. 30a.

Guam and its officers timely sought rehearing *en banc* on September 9, 2015, pointing out, among other things, the conflict between the Ninth Circuit's ruling and the decisions of the Supreme Court in *Ngiraingas II*, 495 U.S. 182, and of the Ninth Circuit in *Ngiraingas I*, 858 F.2d 1368. The Ninth Circuit denied the petition for rehearing on October 2, 2015 without calling for a response. Guam and its officers filed a motion for recall and stay of the mandate pending the filing and disposition of a petition for certiorari on December 3, 2015. The Ninth Circuit denied the motion on December 16, 2015 without calling for a response.

REASONS FOR GRANTING A STAY

The Court should grant a stay of the Ninth Circuit's judgment pending the filing and disposition of a petition for writ of certiorari. In order to obtain a stay, an applicant must show: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The same standard applies when the Circuit Justice must

order the recall of the mandate in addition to entering a stay. *See, e.g.*, *Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). The application for a stay in this case readily meets these standards.

I. THERE IS A "REASONABLE PROBABILITY" THAT THIS COURT WILL GRANT THE PETITION FOR CERTIORARI AND A "FAIR PROSPECT" THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE THE JUDGMENT BELOW.

The errors in the Ninth Circuit's decision are sufficiently serious that the Court is likely to grant certiorari and reverse the judgment below. The Ninth Circuit upheld an injunction sought under § 1983 against officers of the Government of Guam, and affirmed an award of attorneys' fees under § 1988, even though sovereign immunity bars suit against Guam and its officers. The Ninth Circuit compounded the errors in its decision by holding that an officer of Guam is a "person" subject to suit under § 1983, even though this Court reached the opposite conclusion, and by holding that plaintiffs had alleged deprivations "under color" of territorial law arising from the administration of Guam's income tax, which is a *federal* statute, applying the *federal* IRC to Guam. Furthermore, the Ninth Circuit upheld the district court's injunction even though its six-month deadline for payment of income-tax refunds was based upon an erroneous interpretation of the IRC and the remedies it provides taxpayers awaiting refunds.

The Ninth Circuit's ruling conflicts with precedent of this Court, with prior precedent of the Ninth Circuit, and with decisions of other federal courts of appeals. The ruling misapplies federal law in a way that threatens to disrupt the administration of law in Guam and upset well-settled principles governing the

relationship between the United States and its territories. In light of these serious problems with the Ninth Circuit's decision, the standards for securing a stay of the judgment pending certiorari are satisfied here.

A. The Doctrine of Sovereign Immunity Precludes Plaintiffs' Lawsuit Against Guam And Its Officers Under § 1983.

The Ninth Circuit committed a fundamental error of law in conflict with this Court's precedent when it disregarded sovereign immunity and affirmed the injunction against Guam's officers in their official capacities. Absent consent to be sued, sovereign immunity acts as an absolute bar to suit against a sovereign. *See Alden v. Maine*, 527 U.S. 706, 755 (1999). The protections of sovereign immunity extend to officers acting in their official capacities. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 113 (1984); *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Moreover, "[s]overeign immunity is jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and its protections are not waived when a defendant fails to raise sovereign immunity as a defense in the trial court, *see United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940); *see also Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991) ("Under federal law, the sovereign immunity of the federal government may not be waived by the failure to plead.") (Alito, J.). The Ninth Circuit thus could not reject Applicants' sovereign immunity arguments because they were raised for the first time on appeal.

Guam and its officers are entitled to sovereign immunity to the same extent as federal agencies and officials. *See Ngiraingas I*, 858 F.2d at 1372. This Court has stated that when a territorial government administers the laws within its

jurisdiction, "it is not acting as an independent political community like a State but as 'an agency of the federal government.'" *United States v. Wheeler*, 435 U.S. 313, 321 (1978), *superseded by statute on irrelevant grounds as stated in United States v. Lara,* 541 U.S. 193 (2004) (quoting *Domenech v. Nat'l City Bank of N.Y.*, 294 U.S. 199, 204-05 (1934)); *see also United States v. Husband R. (Roach)*, 453 F.2d 1054, 1059 (5th Cir. 1971) ("Thus in exercising [the] powers concerning vehicular traffic and operation of passenger buses, the Governor [of the Panama Canal Zone], acting under delegation from the President, is in effect the agent and creature of Congress."). The Ninth Circuit itself has observed, "[s]ince Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. § 1421a, the Government of Guam is in essence an instrumentality of the federal government." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1986); *see also Ngiraingas I*, 858 F.2d at 1372 (holding "[t]he government of Guam is in all respects an instrumentality of the federal government"). Consistent with this principle, the Ninth Circuit previously had held that "there is no reason why Guam should enjoy less immunity than the federal government itself." *Sakamoto*, 764 F.2d at 1286; *Ngiraingas I*, 858 F.2d at 1372.

Guam's sovereign immunity is implicit from the Organic Act. *See Newby v. Guam*, No. CVA09-016, 2010 WL 797292, at *8 (Guam. Mar. 5, 2010) ("This court has recognized that while sovereign immunity is inherent, Congress in the Organic Act of Guam provided a specific mechanism by which that immunity may be

waived."). Section 3 of the Organic Act declared Guam to be an unincorporated territory of the United States and granted the Government of Guam "power to sue by such name." Organic Act of Guam, ch. 512, § 3, 64 Stat. 384, 384 (codified as amended at 48 U.S.C. § 1421(a)). Although the Organic Act does not expressly grant broad immunity to Guam, the history and structure of the Act indicate "that both Congress and the Executive Branch believed that Guam had inherent sovereign immunity." *Marx v. Guam*, 866 F.2d 294, 298 (9th Cir. 1989). The Organic Act endowed Guam with the immunity that is characteristic of sovereign governments. *See Kawananakoa v. Polyblank*, 205 U.S. 349, 354 (1907) (holding "for the territory of Hawaii it is enough to refer to the organic act" as the basis for establishing sovereign immunity). As this Court held in affirming Puerto Rico's sovereign immunity, "it has been, moreover, settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is the case as to Porto Rico." *Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913).

Indeed, just two years after the Organic Act came into effect, the Ninth Circuit affirmed Guam's sovereign immunity, noting that the Organic Act endowed Guam with the same powers and immunities as the unincorporated territories of Hawaii and Puerto Rico. *See Crain v. Guam*, 195 F.2d 414, 417 (9th Cir. 1952). Congress revisited the subject of Guam's sovereign immunity a few years later, but only to authorize Guam to waive its immunity "with the consent of the legislature [as] evidenced by enacted law" in contract and tort claims. Act of Sept. 21, 1959,

Pub. L. No. 86-316, 73 Stat. 588, 589 (codified as amended at 48 U.S.C. § 1421(a)). In other words, Congress found it necessary to enact legislation in 1959 that would allow Guam to decide whether to enact laws waiving its own sovereign immunity. Rather than denying or limiting Guam's sovereign immunity:

> The proposed amendment …, in effect, enable[d] the Legislature of Guam to waive the sovereign immunity which was conferred upon the government of Guam by the Congress through the enactment of the Guam Organic Act when, in the legislature's opinion, the best interests of both the people and the government of Guam would be served by allowing such an action to be brought.

Marx, 866 F.2d at 298 (quoting 1959 U.S. Cong. & Admin. News 2660). Neither Guam nor Congress waived the sovereign immunity of Guam with respect to lawsuits under § 1983 as a result of this amendment. Furthermore, neither Guam nor Congress has enacted any such waiver of sovereign immunity at any time since.

Because Guam possesses sovereign immunity and has not waived its sovereign immunity, the Ninth Circuit was wrong to affirm the injunction against Guam's officers in their official capacities. The Ninth Circuit claimed to "express no view as to Guam's entitlement to sovereign immunity from the § 1983 claim in this case." App. 16a. The Supreme Court had already held, however, that Guam and its officers are not subject to lawsuits under § 1983, *see Ngiraingas II*, 495 U.S. at 185, and the Ninth Circuit previously had affirmed that Guam and its officers possess sovereign immunity, *see, e.g.*, *Marx*, 866 F.2d at 298 ("Thus, controlling authority and the legislative history of the Organic Act compel our holding that the government of Guam has inherent sovereign immunity."). Accordingly, the Ninth Circuit could not plausibly hold that Guam lacked sovereign immunity in this case.

Instead, the Ninth Circuit held that the principle of *Ex parte Young*, 209 U.S. 123 (1908), authorized the lawsuit against Guam's officers despite Guam's sovereign immunity. App. 16a. But *Ex parte Young* establishes a narrow exception to Eleventh Amendment state sovereign immunity. *See Papasan v. Allain*, 478 U.S. 265, 277 (1986). The exception "has been tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold *state* officials responsible to the supreme authority of the United States." *Id.* (emphasis added). The doctrine of *Ex parte Young* has no application to sovereign immunity, like Guam's, that is embodied in federal law. Rather, *Ex parte Young* is predicated on the principle that, notwithstanding the Eleventh Amendment, the "State has no power to impart [to an officer] any immunity from responsibility to the supreme authority of the United States." *Id.*, 478 U.S. at 277 (quoting *Ex parte Young*, 209 U.S. at 160). That principle is misplaced and unnecessary in the context of federal-territorial relations, where a territory acts as "an agency of the federal government." *Wheeler*, 435 U.S. at 319; *see also Ngiraingas II*, 495 U.S. at 190 ("Territories are not States under the Fourteenth Amendment.").

The Ninth Circuit cited no precedent of this Court holding that *Ex parte Young* applies to territories or federal agencies that do not possess Eleventh Amendment sovereign immunity. The panel suggested that the recent decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), supported that position. App. 19a. But *Armstrong* decidedly did not hold that *Ex parte Young*

applies against federal officials. Rather, the decision in *Armstrong* stands for the very different proposition that the Supremacy Clause does not provide a separate cause of action for injunctive relief against state officers. *See Armstrong*, 135 S. Ct. at 1384. Contrary to the Ninth Circuit's characterization of the case, App. 19a, the opinion in *Armstrong* does not apply *Ex parte Young*, and it certainly does not extend the principle of *Ex parte Young* to suits against federal officials.

Even if the Court were to decide to extend the *Ex parte Young* doctrine to the territories, this case would be a particularly unsuitable candidate for doing so. The principle of *Ex parte Young* does not permit "that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, [just because] the relief may be labeled 'equitable' in nature." *Edelman v. Jordan*, 415 U.S. 651, 666 (1974). While *Ex parte Young* may authorize injunctions with "ancillary" financial effects, that is true in cases where "the fiscal consequences to state treasuries" of the injunctions were incidental and "the necessary result of compliance with [injunctions] which by their terms were prospective in nature." *Edelman*, 415 U.S. at 668. In this case, by contrast, monetary relief drawn from the treasury of Guam is at the heart of the district court's injunction. Simply put, the Ninth Circuit cannot disguise an action for payment of money as an "injunction," even where it is claimed that taxes were "paid it over to the State pursuant to an allegedly unconstitutional tax exaction." *Id.* at 668-69. There is no good argument for affirming the injunction under *Ex parte Young*. Rather, sovereign immunity precludes the injunction against the

officers of Guam, and the Ninth Circuit should have vacated the injunction in this case.

B. Under This Court's Precedent, Guam And Its Officers Are Not "Persons" Subject To Suit Under § 1983, And The Officers' Actions Were Not Undertaken "Under Color" Of Territorial Law For Purposes of § 1983.

The Ninth Circuit also departed from this Court's precedent in ruling that Applicants were "persons" subject to suit under § 1983. This Court squarely held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983" because "Congress did not intend to encompass a Territory among those 'persons' who could be exposed to § 1983 liability." *Ngiraingas II*, 495 U.S. at 191-92. Despite this holding, the Ninth Circuit held that "a Guam officer sued in his official capacity is a 'person' within the meaning of § 1983." App. 17a (citing *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370-71 (9th Cir. 1992)). The conflict between this Court's clear precedent and the Ninth Circuit's ruling justifies summary reversal here.

As an initial matter, the Ninth Circuit cannot avoid review by claiming Applicants waived their statutory arguments by presenting them for the first time on appeal. App. 14a-17a. These arguments are part of Applicants' jurisdictional defense that sovereign immunity precludes plaintiffs' claims. Furthermore, even for "a claim not raised by petitioner below, [the Court] would ordinarily feel free to address it [if] it was addressed by the Court below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Although the Court may not grant certiorari "when the question presented was not pressed *or* passed upon below … this rule operates

(as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon[.]" *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added). Granting review on these grounds is particularly appropriate "where the issue is … one of importance to the administration of federal law." *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 120-21 (1988) (plurality opinion)). The applicability of § 1983 to unincorporated territories is undoubtedly a question "of importance to the administration of federal law," and the Ninth Circuit's erroneous resolution of that question merits this Court's review.

On the issue of whether Guam and its officers are "persons" under § 1983, the Ninth Circuit purported to distinguish the Court's decision in *Ngiraingas II* on the ground that this case involves only prospective injunctive relief. App. 18a-19a. But the decision in *Ngiraingas II* examined the text and statutory history of § 1983 in painstaking detail to arrive at its conclusion that Congress did not intend to include Guam or its officials as "persons" under § 1983. The distinction between retrospective and prospective relief—while potentially relevant to whether *Ex parte Young* overcomes Eleventh Amendment sovereign immunity—played no part in the Court's statutory analysis. Rather, the Court's "review of § 1983's history uncover[ed] no sign that Congress was thinking of Territories when it enacted the statute over a century ago in 1871." *Ngiraingas II*, 495 U.S. at 187. Moreover, the "successive enactments of the statute, in context, further reveal[ed] the lack of any intent on the part of Congress to include Territories as persons." *Id.* at 189.

Furthermore, at the same time Congress amended § 1983 to establish potential liability for a defendant acting under color of territorial law, "the very same Congress pointedly redefined the word 'person' to make it clear that a Territory would not be included." *Id.* (footnote omitted).

There is no legitimate argument for carving out an exception from the statutory analysis in *Ngiraingas II* for lawsuits seeking only prospective relief. When the Court examined "the confluence of § 1983's language, its purpose, and its successive enactments, together with the fact that Congress has defined 'person' to exclude Territories, it bec[ame] clear that Congress did not intend to include Territories as persons who would be liable under § 1983." *Id.* The Court's review of the text, purpose, and history of § 1983 was categorical and comprehensive. Its holding that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983" was unequivocal. *Id.* The Ninth Circuit should have followed the decision in *Ngiraingas II* in this case.

Similarly, the Ninth Circuit ignored well-established case law limiting the scope of § 1983 to actions taken "under color of" the "statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. § 1983. By the terms of the statute, actions undertaken by officers to administer or enforce federal law are not considered "under color" of state law for purposes of § 1983. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392-93 (1971); *see also FDIC v. Meyer*, 510 U.S. 471, 485-86 (1994) ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself."). To be clear, there is no

territorial law that Applicants are administering in this case. The Applicants are responsible for administering and enforcing the GTIT, a federal statute that mirrors the IRC. 48 U.S.C. § 1421i(e). Their authority derives from the Organic Act, another federal statute. 48 U.S.C. §§ 1421i(c), 1421i(d)(2). Although Congress has "delegated the collection and enforcement functions [of the GTIT] to the Government of Guam, the latter is powerless to vary the terms of the federal income tax laws as applied to Guam, except as permitted by Congress." *Bank of Am. v. Chaco*, 539 F.2d 1226, 1227 (9th Cir. 1976) (per curiam). Given the federal origin and nature of the laws at issue, the acts undertaken by Applicants to administer and enforce GTIT cannot reasonably be considered "under color" of territorial law.

Even after recognizing that suits against territorial officers are "always, in *some* sense, under color of federal law," App. 24a, the Ninth Circuit went one step further and also held that the Guam Department of Revenue and Taxation officers tasked with administering the federally-enacted GTIT acted "under color" of territorial law merely because of their status as territorial officers, App. 26a-27a (citing *Tongol*, 601 F.2d at 1097). The Ninth Circuit purported to apply the "traditional definition" that state officials act "under color" of state law when they exercise power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *See West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). But the Ninth Circuit ignored that the officers here exercised power delegated to them by federal law for purposes of administering and enforcing a federal law. *See* 48 U.S.C.

§§ 1421i(c), 1421i(d)(2). The grant of authority to the Governor to administer and enforce the GTIT, the grant of authority allowing the Governor to delegate administration and enforcement of the GTIT, and, most importantly, the substance of the GTIT itself are established by federal statutes. *See id.*

The Ninth Circuit's refusal to follow this Court's cases interpreting § 1983 was of a piece with its conclusion that sovereign immunity does not preclude plaintiffs' lawsuit. The Ninth Circuit had to ignore the holding in *Ngiraingas II* and the text of § 1983 in order to support its decision that Guam and its officers could be subjected to an injunction under § 1983 despite longstanding precedent insulating territorial officials from such claims. The Court should grant certiorari and reverse the Ninth Circuit's erroneous decision on these grounds as well.

C. The Injunction Against Guam And Its Officers Is Based Upon A Seriously Flawed Interpretation Of The IRC And The Remedies Available To Taxpayers Awaiting Refunds.

The Court should also grant certiorari and reverse the Ninth Circuit's ruling affirming a deadline for Guam and its officers to refund tax overpayments. The Ninth Circuit upheld the injunction on the ground that the timeframe "was well within the court's broad discretion in fashioning relief." App. 29a (citation omitted). In addition to the jurisdictional and statutory problems with the Ninth Circuit's ruling, though, the injunction is also based upon a serious misinterpretation of federal tax law. It also deprives Guam and its officers of discretion established by Congress in the administration and enforcement of Guam's fiscal affairs.

The Organic Act imposes the IRC on Guam and requires the Governor of Guam to administer and enforce the tax code as the GTIT. 48 U.S.C. § 1421i(a).

("[I]ncome-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam . . . ."). Guam cannot vary or alter the terms of the IRC, *id.*, which does not impose a requirement that tax refunds to be paid within any set timeframe. *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1240 (9th Cir. 2015). Rather, the IRC gives tax administrators the flexibility to determine when to pay tax refunds, requiring only that accrued interest be paid on refunds delayed more than forty-five days. 26 U.S.C. § 6611.

The district court imposed an express deadline for payment of tax refunds based on its understanding that the IRC provides "a taxpayer can sue to recover his or her refund six months after its filing date, 26 U.S.C. § 6532(a)(1), signifying that a taxpayer's right to a refund vests at that time …." App. 28a. As the Ninth Circuit recognized, however, the provision cited by the district court does not "vest" any rights in the taxpayer. On the contrary, § 6532(a)(1) is a "limitation, prohibiting suits until six months have elapsed; it does not state directly when the IRS must provide refunds within that period." *Id.* In fact, this limitations period was designed to "afford the Internal Revenue Service an opportunity to investigate tax claims and resolve them without the time and expense of litigation [and to] protect the Treasury by providing strict limitations periods for tax refund suits." *DuPont Glore Forgan Inc. v. Am. Tel. & Tel. Co.*, 428 F. Supp. 1297, 1301 (S.D.N.Y.1977), *aff'd*, 578 F.2d 1366 (2d Cir. 1978), *aff'd,* 578 F.2d 1367 (2d Cir. 1978), *and cert. denied*, 439 U.S. 970 (1978). In other words, the district court interpreted the exhaustion requirement on taxpayer claims for refunds to establish the deadline for

the government's processing and payment of a tax refund. This interpretation turns the exhaustion requirement of the IRC on its head.

In a tacit acknowledgment that the district court had misinterpreted the IRC, the Ninth Circuit stated that it "need not decide whether the district court's statements, if so understood, would constitute legal error." App. 28a. But the Ninth Circuit could not avoid reviewing the lawfulness of the district court's injunction because the payment deadline is contrary to congressional intent. The deadline exceeds the terms of the IRC by imposing a requirement on Guam that is not imposed on the federal government. "Congress intended that Guam should apply the Internal Revenue Code (with those deletions prescribed by section 1421i(d)(1)) to persons and income within its territory just as the United States applies the Code to persons and income within its territory." *Sayre & Co. v. Riddell*, 395 F.2d 407, 412 (9th Cir. 1968). Congress, through the Organic Act, required Guam to implement the IRC without varying its terms. 48 U.S.C. § 1421i(a). As discussed above, the six-month deadline imposed by the injunction has no basis in the plain language of the IRC. The injunction thus imposes a limitation upon Guam that does not apply to the federal government, directly contrary to what Congress intended.

The IRC grants the United States Secretary of the Treasury the discretion to immediately pay tax refunds or to prioritize budgetary needs, delay payment, and incur interest. Through the Organic Act, Congress intended to grant the Governor of Guam that same latitude. The injunction affirmed by the Ninth Circuit would

rob the Governor of Guam and its legislature of the power to develop a budget based on their priorities. Instead, the injunction forces the Governor to conform to the district court's opinion of proper processing time for tax refunds, instead of the decisions of Guam's elected officers. This is contrary to the intent of Congress as expressed in the Organic Act, which grants the Governor broad powers of general supervision and control over Guam's budget and cash management. *In re Request of Gutierrez*, No. CRQ01-001, 2002 WL 187459, at *12(Guam Feb. 7, 2002) ("The Governor's duties to supervise and control the executive branch for the purpose of the proper execution of the laws includes the power of expenditure.") (internal citations omitted); *see also, Santos v. Calvo,* No. D.C. Civ. 80-0223A, 1982 WL 30790, at *5 (D. Guam 1982) ("The few state court decisions that have dealt with this issue have held that the executive branch is responsible for the administration of appropriations.") Because requiring Guam to pay all tax overpayments within a time period *not* set by statute would frustrate congressional intent, this Court should grant Guam's application to stay the injunction.

II. THERE IS A LIKELIHOOD THAT APPLICANTS WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

It is likely that Applicants will suffer irreparable injury in the absence of a stay. The injunction entered by the district court purports to require the Government of Guam to organize its budgets and appropriations according to the district court's erroneous views about the appropriate length of time that claimants should wait for a tax refund, not the priorities determined by the governor and legislature. This interference with the administration of Guam's public affairs is

itself a form of irreparable harm. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *see also New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). If the injunction were to take effect, then the Government of Guam would immediately, on pain of contempt, be deprived of its independent authority to allocate funds from its treasury in order to maintain compliance with the district court's order. That sort of interference with the Territory's "orderly management of its fiscal affairs" creates an irreparable harm that sovereign immunity and other statutory protections are designed to prevent. *Cf. Barnes v. E-Systems, Inc. Group Hosp. Med. & Surg. Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J. in chambers) (granting stay to prevent irreparable harm arising from violations of Tax Injunction Act).

In addition to the likelihood of immediate disruption to Guam's administration of public affairs, the Ninth Circuit's ruling also subjects Guam and its officers to new potential liabilities never contemplated by Congress or the Government of Guam. Absent a stay, the district court will enforce its award under § 1988 of $1,697,615 in attorney's fees to the plaintiffs' counsel despite well-settled precedent and history showing that Congress never intended that Guam or its officers would be subject to suit under § 1983. Indeed, the Ninth Circuit's ruling creates the anomalous and pernicious result that residents of Guam may sue taxing officials under § 1983 for alleged violations of the IRC—and even seek recovery of attorney's fees under § 1988—while similarly-situated citizens of the mainland United States may not bring suit at all. As even the Ninth Circuit acknowledged,

"many governments struggle to balance their budgets, particularly in times of economic uncertainty and increasing fiscal demands." App. 30a. But the Ninth Circuit's ruling creates an exceptional burden for the Territory of Guam, not contemplated by Congress, at a time when the overseas territories of the United States are facing unprecedented fiscal challenges. The Court should grant a stay of the Ninth Circuit's judgment to protect Guam and its residents from the likelihood of irreparable harm that may occur while the Court considers whether to reverse the Ninth Circuit's decision.

III. THE COURT SHOULD, IN THE ALTERNATIVE, TREAT THE APPLICATION AS A PETITION FOR CERTIORARI, GRANT THE PETITION, AND SUMMARILY REVERSE.

In addition to granting the application for a stay, or in the alternative to the other relief requested, the Court should treat the application as a petition for certiorari, grant the petition, and summarily reverse the Ninth Circuit's decision. *See* S. Ct. R. 16.1. Summary disposition is appropriate where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 344 (9th ed. 2007).

As set forth above, the Ninth Circuit's result is clearly erroneous in several respects—from brushing aside Guam's claims of sovereign immunity and ignoring the decision of this Court in *Ngiraingas II*, to affirming an injunction whose operative provisions are based upon a novel and incorrect interpretation of federal tax law. The Court may not need to allow full briefing and plenary consideration in order to determine that the injunction is wrong as a matter of law.

In the event, however, that the Court determines that plenary consideration may be warranted, then Applicants ask that the Court extend the time for filing an amended petition for certiorari for 30 days from the initial deadline, to and including Monday, February 1, 2016. While Applicants ask the Court to treat this application as a petition for certiorari, the time within which to file their petition absent an extension expires on December 31, 2015. Applicants retained new counsel of record in connection with these proceedings. Counsel of record had no involvement in the appeal to the Ninth Circuit and was retained only recently to prepare a petition for a writ of certiorari. Additional time would permit counsel of record to review the record below, research the relevant legal issues in the case, and prepare and file an amended petition that would be helpful to the Court. If the stay is granted, then Applicants are not aware of any party that would be prejudiced by the granting of a 30-day extension for the submission of an amended petition.

December 21, 2015

Respectfully submitted,

/s/ *Rodney J. Jacob*

Rodney J. Jacob
CALVO FISHER & JACOB LLP
One Lombard Street, Second Floor
San Francisco, CA 94111
Telephone: (415) 374-8370
Facsimile: (415) 374-8373

Arthur B. Clark
Sandra C. Miller
OFFICE OF THE GOVERNOR OF GUAM
Ricardo J. Bordallo Governor's Complex
Adelup, Guam 96910
Telephone: (671) 475-9370
Facsimile: (671) 477-4826

Michael F. Williams*
Susan M. Davies
Daniel A. Bress
Peter A. Farrell
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Telephone: (202) 879-5000
Fax: (202) 879-5200

*- counsel of record

APPENDIX

TABLE OF CONTENTS

Page

Case: 13-15389, 12/16/2015, ID: 9795076, DktEntry: 83, Page 1 of 1

FILED

DEC 16 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REA MIALIZA O. PAESTE; JEFFREY F. PAESTE; SHARON M. ZAPANTA, individually and on behalf of all others similarly situated; GLENN ZAPANTA, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

GOVERNMENT OF GUAM; EDDIE BAZA CALVO, in his official capacity; BENITA MANGLONA, in her official capacity; JOHN CAMACHO, in his official capacity,

Defendants - Appellants.

Nos. 13-15389, 13-17515, 14-16247

D.C. No. 1:11-cv-00008
District of Guam,
Agana

ORDER

Before: WARDLAW, BERZON, and OWENS, Circuit Judges.

Defendants-Appellants' motion for recall and stay of the mandate pending the filing and disposition of a petition for writ of certiorari with the United States Supreme Court is DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 14 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

REA MIALIZA O. PAESTE; et al.,

Plaintiffs - Appellees,

v.

GOVERNMENT OF GUAM; et al.,

Defendants - Appellants.

No. 13-15389

D.C. No. 1:11-cv-00008
U.S. District Court of Guam

MANDATE

REA MIALIZA O. PAESTE; et al.,

Plaintiffs - Appellees,

v.

GOVERNMENT OF GUAM; et al.,

Defendants - Appellants.

No. 13-17515

D.C. No. 1:11-cv-00008
U.S. District Court of Guam

REA MIALIZA O. PAESTE; et al.,

Plaintiffs - Appellees,

v.

GOVERNMENT OF GUAM; et al.,

Defendants - Appellants.

No. 14-16247

D.C. No. 1:11-cv-00008
U.S. District Court of Guam

The judgment of this Court, entered August 26, 2015, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Margoth Turcios
Deputy Clerk

Case: 13-15389, 10/02/2015, ID: 9706006, DktEntry: 75, Page 1 of 1

FILED

OCT 02 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REA MIALIZA O. PAESTE; JEFFREY F. PAESTE; SHARON M. ZAPANTA, individually and on behalf of all others similarly situated; GLENN ZAPANTA, individually and on behalf of all others similarly situated, Plaintiffs - Appellees, v. GOVERNMENT OF GUAM; EDDIE BAZA CALVO, in his official capacity; BENITA MANGLONA, in her official capacity; JOHN CAMACHO, in his official capacity, Defendants - Appellants.	Nos. 13-15389, 13-17515, 14-16247 D.C. No. 1:11-cv-00008 District of Guam, Agana ORDER

Before: WARDLAW, BERZON, and OWENS, Circuit Judges.

The panel has voted unanimously to deny appellants' petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REA MIALIZA O. PAESTE; JEFFREY F. PAESTE; SHARON M. ZAPANTA, GLENN ZAPANTA, individually and on behalf of all others similarly situated, *Plaintiffs-Appellees*, v. GOVERNMENT OF GUAM; EDDIE BAZA CALVO, in his official capacity; BENITA MANGLOÑA, in her official capacity; JOHN CAMACHO, in his official capacity, *Defendants-Appellants*.	Nos. 13-15389 13-17515 14-16247 D.C. No. 1:11-cv-00008 OPINION

Appeal from the United States District Court
for the District of Guam
Consuelo B. Marshall, Senior District Judge, Presiding

Argued and Submitted
June 9, 2015—Honolulu, Hawaii

Filed August 26, 2015

Before: Kim McLane Wardlaw, Marsha S. Berzon,
and John B. Owens, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Civil Rights

The panel affirmed the district court's summary judgment and permanent injunction in a class-action brought by Guam taxpayers against Guam and several of its officers in their official capacities alleging (1) that defendants violated the tax provisions of the Organic Act of Guam, 48 U.S.C. § 1421i, by failing timely to refund income tax overpayments, and (2) in a claim brought pursuant to 42 U.S.C. § 1983, that Guam's expedited tax refund program violated plaintiffs' equal protection rights.

On appeal, Guam challenged the taxpayers' equal protection claim as not cognizable under 42 U.S.C. § 1983, arguing that no defendant was a "person" within the meaning of § 1983 and that the challenged actions were not taken under "color of territorial law." Guam asserted that it could raise the definition of "person" for the first time on appeal because it implicated subject matter jurisdiction. The panel held that the question of whether a party is a person under § 1983 is not a jurisdictional question but rather a statutory one and therefore Guam's § 1983 arguments did not implicate subject matter jurisdiction. The panel, however, exercised its discretion to consider the arguments.

Determining that it was bound by *Guam Society of Obstetricians & Gynecologists v. Ada* , 962 F.2d 1366, 1371 (9th Cir. 1992), the panel held that the official-capacity

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

defendants were "persons" within the meaning of § 1983 for purposes of prospective relief. Addressing the merits, the panel held that the district court did not abuse its discretion in issuing a permanent injunction that required Guam to pay refunds within six months once it determined that the requests were valid and not subject to investigation or audit. The panel held that the six-month provision was well-supported and within the court's broad discretion in fashioning relief. The panel noted that Guam raised no substantive challenge to the district court's holding that Guam violated equal protection, nor to its holding that Guam violated the Organic Act.

COUNSEL

William N. Hebert (argued), Kathleen V. Fisher, and Genevieve P. Rapadas, Calvo Fisher & Jacob LLP, San Francisco, California for Defendants-Appellants.

David Stein (argued), Daniel C. Girard, and Amanda M. Steiner, Girard Gibbs LLP, San Francisco, California; Ignacio Cruz Aguigui, Lujan Aguigui & Wolff LLP, Hagåtña, Guam, for Plaintiffs-Appellees.

OPINION

BERZON, Circuit Judge:

Like many state, local, and territorial jurisdictions, Guam has struggled for years with chronic budget deficits. Guam settled on a unique solution to its financial problems: It refused to refund over-withheld income taxes, using the money to fund government spending. Confronted with meritorious and uncontested claims for tax refunds, Guam did not issue the refunds, often for several years at a time.

Apparently recognizing that some Guam taxpayers desperately needed their excess tax payments — to which the Guam government has no legal claim — Guam established an "expedited refund" process. Purportedly, taxpayers facing, for example, medical or funeral expenses, would move to the front of the line and be granted refunds without waiting for Guam to make good on the huge backlog of claims. In practice, the expedited refund process was effectively standardless, and it devolved into arbitrariness and favoritism.

A group of Guam taxpayers brought this class-action suit against Guam and several of its officers in their official capacities. The taxpayers alleged that Guam violated the tax provisions of the Organic Act of Guam, 48 U.S.C. § 1421i, by failing timely to refund overpayments, and, via a claim brought under 42 U.S.C. § 1983, the taxpayers also challenged the arbitrary expedited refund program as a violation of equal protection.

The district court granted summary judgment to the taxpayers on both claims, entered a permanent injunction both ending the expedited refund program and requiring

Guam to pay approved refunds in a timely manner, and awarded substantial attorney's fees and costs. Guam challenges the district court's orders on a number of grounds. We affirm.

I.

Taxpayers Rea Mializa Paeste, Jeffrey Paeste, Sharon Zapanta, and Glenn Zapanta, on behalf of a class of Guam taxpayers (collectively, "the Taxpayers"), brought this suit against Guam, along with the Governor, the Director of the Department of Revenue and Taxation, and the Director of the Department of Administration of Guam in their official capacities (collectively, "Guam"), challenging systematic delay and unfairness in Guam's handling of income tax refunds. The Taxpayers asserted one claim, against all the defendants, under the Organic Act of Guam, 48 U.S.C. § 1421i;[1] and another, against all but Guam itself, under 42 U.S.C. § 1983, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment, extended to Guam by 48 U.S.C. § 1421b(u).[2]

---

[1] "Congress organized Guam as an unincorporated possession of the United States through the 1950 Organic Act of Guam" and "provided an income tax scheme for Guam in 48 U.S.C. § 1421i." *Gumataotao v. Dir. of Dep't of Revenue & Taxation*, 236 F.3d 1077, 1079 (9th Cir. 2001).

[2] 48 U.S.C. § 1421b(u) provides: "The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the second sentence of section 1 of the fourteenth amendment," which includes the equal protection clause. *See also* 48 U.S.C. § 1421b(n) ("No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.");

The district court granted a motion for class certification.[3] After discovery, the court granted the Taxpayers' motion for summary judgment as to both claims. It issued findings of fact and conclusions of law in support of its grant of summary judgment.

The district court's findings of fact, which Guam does not challenge on appeal, paint a troubling picture of Guam's tax-refund practices. Guam has, "[s]ince the early 1990s, . . .

Attorney Gen. of Territory of Guam ex rel. All U.S. Citizens Residing in Guam Qualified to Vote Pursuant to Organic Act v. United States, 738 F.2d 1017, 1018 (9th Cir. 1984). Because the Taxpayers relied on this statutory equal protection guarantee, we express no view as to the direct applicability of constitutional equal protection. *Cf. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599–601 (1976) (holding that a Puerto Rico statute violated equal protection); *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 n.19 (9th Cir. 1990) (indicating that "not every right subsumed within the [equal protection] clause can ride the fundamental coattails of [equal protection] into the territories"). We do note, however, that the so-called "Insular Cases," which established a less-than-complete application of the Constitution in some U.S. territories, has been the subject of extensive judicial, academic, and popular criticism. *See, e.g.*, Juan Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid, 77 Rev. Jur. U.P.R. 1 (2008); *Last Week Tonight with John Oliver*: *U.S. Territories*, Youtube (Mar. 8, 2015), https://www.youtube.com/watch?v=CesHr99ezWE.

[3] The class certified was defined, in relevant part, as:

> All persons and entities who have filed or will file a claim for refund of an overpayment of the Guam Territorial Income Tax: (i) which the Government of Guam has processed or will process and deemed valid; (ii) who have met the procedural requirements outlined in 26 U.S.C. §§ 7422(a) and 6532(a); and (iii) who nonetheless have not received or will not receive their refund six months after filing the claim for refund.

financed chronic budget deficits by regularly delaying the payment of [Guam income tax] refunds to its taxpayers" such that "many . . . refunds [were] not paid in a timely manner" and "during [some] periods, no refunds were paid to any one." Guam failed timely to pay refunds even after Guam's Legislature enacted two separate statutes requiring that money be set aside for that purpose.

"Traditionally, the Government of Guam has paid [income tax] refunds in a first-in, first-out order, the same way the Internal Revenue Service ordinarily pays federal income tax refunds."[4] But, in light of the chronic delays, for years Guam paid some refunds on an "expedited" basis, out of the chronological order otherwise applicable. The expedited refund process was not governed by any "formal rule-making process or any regulations," — nor, it appears, any consistently followed set of standards. The result was starkly unequal treatment of refund requests.

The director of the Department of Revenue and Taxation ("DRT") testified, for example, that the reasons taxpayers offered for requesting expediting returns were ranked, from medical needs as the most serious to financial hardship as the least. In reality, however, "[w]hile taxpayers experiencing medical emergencies [were] often unable to obtain expedited refunds, other taxpayers with less urgent [financial] needs receive[d] their refunds on an expedited basis." Indeed, "the greatest number of refunds [was] paid to DRT's 'catch-all' category of 'financial' hardship" despite it purportedly being "the lowest priority."

[4] The IRS generally issues the vast majority of its refunds within twenty-one days, including some 90% in 2012.

The process was also opaque and tedious. Guam did not "formally approve or reject requests for expedited refunds," so some taxpayers stood in line at DRT's offices day after day to check on the status of their refund requests. In practice, to obtain an expedited refund, a taxpayer would often need to "persuade one of a series of public officials to include his or her name on a list," given to DRT, resulting in expedited refunds for those with the right political connections. DRT employees also successfully expedited their own refunds, and those of family and friends, often without filling out the purportedly required form, submitting supporting documentation, or visiting the DRT. Similarly, the named plaintiffs' refunds were expedited, even though they submitted no requests for expedited treatment, in an apparent attempt to render this case moot.

Based on these facts, the district court concluded that the Taxpayers were entitled to summary judgment on both claims. It also entered a permanent injunction prohibiting Guam from operating its expedited refund program. The injunction further provided that, as to any refund claim that contained no material errors and was not subject to an audit or other investigation, "the Government of Guam shall pay the corresponding refund no later than six months after the filing of the claim for refund or six months from the due date for filing the claim for refund, whichever is later . . . ."[5]

[5] Since the injunction was entered, Guam has apparently timely paid all refunds.

Finally, the court awarded substantial attorney's fees and costs to the Taxpayers.[6]

These consolidated appeals followed.

II.

Guam challenges the Taxpayers' equal protection claim as not cognizable under § 1983, which provides:

> Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or *Territory* or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (emphases added). Guam contends that no defendant is a "person" within the meaning of § 1983, and that the challenged actions were not taken "under color of" territorial law. Guam is wrong.

[6] Guam's challenges to the award of attorney's fees and costs are addressed in a memorandum disposition filed concurrently with this opinion.

A.

The Taxpayers contend that both of Guam's arguments regarding § 1983 are waived, as they were not raised before the district court until long after judgment was entered on the merits.[7] *See Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2003). Guam responds that at least the definition of "person" may be raised for the first time on appeal as it implicates subject matter jurisdiction, and, in the alternative, that the court should exercise its discretion to reach the § 1983 arguments.

Three circuits have held that "whether [a party] is a 'person' under § 1983 is not a jurisdictional question" but rather "a statutory one." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005); *accord Barker v. Goodrich*, 649 F.3d 428, 433 n.1 (6th Cir. 2011); *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 821 (3d Cir. 1991) (en banc). We agree and so hold.

Whether the defendant is a "person" within the meaning of the statute is "a necessary inquiry for the purposes of

[7] In opposing taxation of costs, Guam eventually did argue to the district court that the Taxpayers' claims were under color of federal law rather than territorial law. The territory now contends that raising this argument before the district court in the context of taxation of costs was sufficient to avoid waiver. We disagree. Guam filed three notices of appeal, consolidated by this court: one as to the court's summary judgment order and permanent injunction, another as to attorney's fees, and a third as to costs. The "under color" argument was made to the district court only *after* Guam filed its opening brief with this court as to the summary judgment and permanent injunction issues, which included its § 1983 arguments. An argument made after final judgment on the merits as to a derivative costs matter is not a timely presentation of a challenge to the § 1983 claim.

establishing the essential elements of [a] § 1983 claim." *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). But, as a general matter, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002) (same). Here, the Taxpayers' § 1983 claim, including their contention that the defendants are "persons" within the meaning of the statute, was not "made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous." *Steel Co.*, 523 U.S. at 89 (internal quotation marks omitted). Indeed, that claim was not only arguable but, as the district court held, actually meritorious. Thus, Guam's statutory argument does not implicate subject matter jurisdiction. "Recharacterizing an issue of statutory interpretation as 'jurisdictional' is mere wordplay." *Settles*, 429 F.3d at 1105.

Nor, as Guam contends, is there a circuit split on this question. Both Seventh Circuit cases on which Guam relies as holding to the contrary grounded their jurisdictional holdings on Eleventh Amendment sovereign immunity. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992) (concluding that a suit against a state official was "an effort to obtain a judgment binding the State of Illinois as an entity" and therefore barred by the Eleventh Amendment); *Toledo, Peoria & W. R. Co. v. State of Ill., Dep't of Transp.*, 744 F.2d 1296, 1298-99 (7th Cir. 1984) (relying on state sovereign immunity in concluding that "[t]his section 1983 action against . . . a state agency[] fails for lack of federal court jurisdiction"). While the statutory definition of "person" is "[s]imilar to and often conflated with Eleventh Amendment immunity," the concepts are distinct. *Barker*, 649 F.3d at 433 n.1. There is no circuit split as to the

non-jurisdictional nature of the statutory question "when stripped of its Eleventh Amendment component." *Bolden*, 953 F.2d at 821.

Guam does not contend that it is entitled to Eleventh Amendment immunity, but does assert *federal* sovereign immunity, arguing that it is entitled to immunity to the same extent accorded the federal government. This argument is also unavailing.

Even if Guam enjoys sovereign immunity, of whatever sort, from the Taxpayers' § 1983 claim, that claim was not brought against Guam itself, but only against its officers in their official capacities, and only for declaratory and injunctive relief.[8] Under the principle of *Ex parte Young*, 209 U.S. 123 (1908), "official-capacity actions for prospective relief are not treated as actions against" Guam itself. *Guam*

[8] We express no view as to Guam's entitlement to sovereign immunity from the § 1983 claim in this case. *Compare Marx v. Gov't of Guam*, 866 F.2d 294, 297–98 (9th Cir. 1989) (holding that Guam enjoys common-law sovereign immunity) *with Fleming v. Dep't of Pub. Safety,* 837 F.2d 401, 408 (9th Cir. 1988) (holding that the Commonwealth of the Northern Mariana Islands "lacks eleventh amendment immunity and . . . in the Covenant [establishing the Commonwealth] it waived any common law sovereign immunity from federal suit it might otherwise have possessed"), *abrogated on other grounds as recognized in DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *see also Ngiraingas v. Sanchez*, 495 U.S. 182, 192 n.12 (1990) ("*Ngiraingas II*") (declining to address whether Guam was entitled to Eleventh Amendment immunity from a § 1983 suit); *id*. at 202–06 (Brennan, J., dissenting) (concluding that the Eleventh Amendment does not apply to Guam, and that whatever common-law immunity Guam enjoys grants it no immunity from suit under federal law in federal court); *see generally* Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183 (2011) (surveying the caselaw regarding territorial sovereign immunity).

Soc. of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1371 (9th Cir. 1992) (internal quotation marks omitted).

In sum, Guam's § 1983 arguments do not implicate subject-matter jurisdiction. Thus, our ordinary practice applies, under which we typically "decline to consider arguments raised for the first time on appeal." *Dream Palace*, 384 F.3d at 1005. "We have, however, laid out several narrow exceptions to the rule — among them, the case in which the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised." *Id*. (internal quotation marks omitted). Under this exception, we exercise our discretion to consider Guam's § 1983 arguments.[9]

B.

Guam Society of Obstetricians & Gynecologists v. Ada held that a Guam officer sued in his official capacity *is* a "person" within the meaning of § 1983. 962 F.2d at 1370–71. Guam's arguments to the contrary are meritless.

Two years before we decided *Ada*, *Ngiraingas II* held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." 495 U.S. at 192. Nearly all of the Supreme Court's analysis addressed whether Guam itself was a "person," concluding, based principally on § 1983 legislative history, that it was not. *See id*. at 187–92. But the plaintiffs in that case had also sued

[9] Because we find Guam's contentions meritless, the Taxpayers will suffer no prejudice as a result of Guam's failure to raise these matters before the district court.

several Guam officials in their official capacities *for damages*. *Id*. at 184. The Supreme Court noted the conclusions of the district court and this court that "because a judgment against those defendants in their official capacities would affect the public treasury, the real party in interest was the Government of Guam." *Id*. at 184–85. The Court's own analysis as to the officials was limited to the following: "Petitioners concede, and we agree, that if Guam is not a person, neither are its officers acting in their official capacity." *Id*. at 192 (citation omitted).

Two years later, *Ada* held that a Guam official "is a 'person' when sued in his official capacity for prospective relief." 962 F.2d at 1370. *Ada* binds us, and *Ngiraingas II*, an earlier-decided Supreme Court decision, offers no basis for us, as a three-judge panel, to reconsider *Ada*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

Even if we could revisit *Ada*, we would decide the issue in accord with that case. *Ada* acknowledged the general statement as to Guam officers in *Ngiraingas II*, but pointed out the established "distinction between suits against governmental officials for damages, such as *Ngiraingas*, and those for injunctive relief." *Id*. at 1371. As *Ada* noted, "state officers, when sued for damages in their official capacities, are," like states, "not 'persons' within the meaning of [§] 1983," because "a judgment against a state official in his or her official capacity runs against the state and its treasury." *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63–65 (1989); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). But, as *Ada* explained, the "rule is entirely different" with regard to prospective relief, which does *not* run directly against the state's treasury; suits for such relief "are not treated as actions against the State." *Id*. (internal quotation

marks omitted). The court concluded: "We can see no reason why the same distinction between injunctive and damages actions against officials should not apply to a territory." *Id.*[10]

There is, indeed, no reason why these established principles, applicable to states, should not apply to territories as well. *Accord McCauley v. Univ. of Virgin Islands*, 618 F.3d 232, 240–41 (3d Cir. 2010) (citing *Will*, 491 U.S. at 71 n.10; *Brow v. Farrelly*, 994 F.2d 1027, 1037 n.12 (3d Cir. 1993), *as amended* (May 26, 1993)); *see also Playboy Enter., Inc. v. Pub. Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 31 n.8 (1st Cir. 1990) (concluding that *Ngiraingas II* did not foreclose § 1983 liability, in part because the plaintiffs sought only injunctive relief); *cf. Pistor*, 791 F.3d at 1112 (noting that *Graham*'s "same principles fully apply" in the context of Indian tribes). *Ngiraingas II* did not, it is true, expressly state that the prospective-relief exception applies to official-capacity suits against territorial officers. But that silence indicates little; the Court did not address prospective relief at all, because the plaintiffs sought none. *See* 495 U.S. at 184. Particularly given the cursory treatment of the official-capacity defendants in that case, and the plaintiffs' concession there that the same rule would apply to both Guam and the official-capacity defendants, we do not read *Ngiraingas II* to establish markedly different treatment of official-capacity suits as between states and territories.

[10] Guam's suggestion that *Ada* was wrong because the *Ex Parte Young* principle applies only to suits against state officers is baseless. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (noting that "federal courts may in some circumstances grant injunctive relief" under the *Ex parte Young* principle "not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials").

Guam puts forward another theory as to why *Ada* is not binding — that it is inconsistent with *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988) ("*Ngiraingas I*"), the case reviewed by the Supreme Court in *Ngiraingas II*. *Ngiraingas I* concluded that Guam "'is in essence an instrumentality of the federal government,' much like a federal department or administrative agency," and so "Guam, like the federal government, should not be held liable on the same terms as other entities." *Id*. at 1370–71 (citation omitted) (quoting *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985)).[11] Thus, we held, Guam itself was not a "person" within the meaning of § 1983. *Id*. at 1372 (internal quotation marks omitted).

In reliance on *Ngiraingas I*, Guam now argues that its officers should be treated in the same way as federal officers for the purposes of § 1983. Section 1983 "provides no cause of action against federal agents acting under color of federal law." *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995). But *Ngiraingas I* is unhelpful to Guam for several reasons.

First, if there really were an irreconcilable conflict in our caselaw, "we could not simply pick one [case] to follow — we would be required to call this case en banc." *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (citing *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc)); *see also United States v.*

[11] Guam also relies on *Sakamoto*. But the relevant portion of *Sakamoto* held only that Guam was entitled to immunity from antitrust law, did not involve § 1983 or the meaning of "person," and is not pertinent here outside of *Ngiraingas I*'s reliance upon it. 764 F.2d at 1286, 1288–89.

Washington, 593 F.3d 790, 798 n.9 (9th Cir. 2010) (en banc).[12]

Second, the portion of *Ngiraingas I* on which Guam relies is almost surely no longer binding precedent. Although *Ngiraingas II* affirmed *Ngiraingas I*'s holding that Guam is not a "person" under § 1983, it did so on an entirely different rationale. *See Ngiraingas II*, 495 U.S. at 185, 187–92. The dissent in *Ngiraingas II* understood the majority opinion in *Ngiraingas II* as rejecting our "conclusion that Guam is outside the coverage of § 1983 because it is an instrumentality of the Federal Government," observing that our interpretation was "flatly inconsistent" with the statute's manifest intent that at least natural persons *could* be held liable for acts under color of territorial law. 495 U.S. at 204 n.10 (Brennan, J., dissenting); *see also Ada*, 962 F.2d at 1371.

Finally, there is a third reason that the argument based on *Ngiraingas I* does not avail Guam. *Ngiraingas I*'s analysis of official-capacity suits is not inconsistent with *Ada*. The portion of *Ngiraingas I* on which Guam relies is its analysis as to whether *Guam* was a "person," not as to whether its officials were. As to the officials sued in that case, we relied,

[12] Guam suggests that, if there were an irreconcilable conflict, the proper course would be to follow the earlier-decided case, relying on *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005), *overruled on other grounds by United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014). Not so. *Rodriguez-Lara* did approvingly cite *H & D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000), which noted that "[w]hen panel opinions appear to conflict," panels of the Fifth Circuit follow "the earlier opinion." But we do not follow the Fifth Circuit's rule, and we do not understand *Rodriguez-Lara* to have jettisoned the rule established by our en banc court in *Wards Cove* with a "*see also*" citation.

as the Supreme Court noted, *Ngiraingas II*, 495 U.S. at 185, on the established doctrine that "a suit where the relief sought would affect the public treasury and public administration[] is deemed to be a suit against the government itself" in holding that "the individual defendants acting in their official capacities [were] not amenable to suit under section 1983," *Ngiraingas I*, 858 F.2d at 1372. In other words, *Ngiraingas I*'s holding as to the official-capacity defendants was explicitly predicated on the fact that the suit was one seeking damages. *Ada* recognized the rule precluding suits for damages against officials in their official capacities, but also recognized the established, contrary principle applicable to suits seeking prospective relief. 962 F.2d at 1371.

In sum, the official-capacity defendants in this case are "persons" within the meaning of § 1983 for purposes of prospective relief.

C.

Guam next argues that none of the conduct at issue in this case was undertaken under color of territorial law. The Organic Act, which established Guam's territorial income tax, is, indeed, a federal statute passed by Congress and signed by the President. *See* 48 U.S.C. § 1421i. Section 1421i establishes, with some exceptions not important in this case, a Guam tax code "mirroring the provisions of the federal" Internal Revenue Code, another federal statute, and delegates enforcement and collection authority to Guam officials. *Bank of Am., Nat. Trust & Sav. Ass'n v. Chaco*, 539 F.2d 1226, 1227-28 (9th Cir. 1976) (per curiam); *see also Gumataotao*, 236 F.3d at 1079–81; *Sayre & Co. v. Riddell*, 395 F.2d 407, 410 (9th Cir. 1968) (en banc). How, Guam

asks, could the implementation of two federal statutes constitute action under color of *territorial* law?

At the outset, we note some confusion regarding the extent to which the Taxpayers rely on § 1983. In its briefing, Guam asserted that both the claims in this case were brought under § 1983; the oral argument suggested confusion on this score. The complaint is quite clear, however, that only the equal protection claim is asserted under § 1983, and the district court was even clearer: "Plaintiffs' first cause of action . . . is for violation of the Organic Act of Guam, 48 U.S.C. § 1421i," while "Plaintiffs' second cause of action . . . is under 42 U.S.C. § 1983 for violation of the Equal Protection Clause." The district court was right — only the equal protection claim was asserted under § 1983.

This clarification goes a long way towards answering Guam's argument. The equal protection claim brought under § 1983 is that Guam officials established an expedited refund process that was so standardless and arbitrary that it violated principles of equal protection. That process was not established by Congress and signed by the President; it is not mentioned in the Organic Act or the Internal Revenue Code. It was created and administered entirely by Guam officials. Those officials used the power vested in them by virtue of their position as territorial officers to authorize or refuse refunds of tax overpayments collected by Guam, held by Guam, and obliged to be refunded by Guam. No officer or agency of the federal government was involved at any point.

Moreover, even if implementation of a federal law (other than the Constitution) did in some sense underlay the § 1983 claim, that circumstance would not alter our conclusion that the defendants acted under color of territorial law. "The

traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). "Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id*. at 50; *see also Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

We recognize that suits against territorial officers are importantly different from those against state officers. Because territories are organized under federal law, *see* U.S. Const. art. IV, § 3, cl. 2, the actions of territorial officers are always, in *some* sense, under color of federal law. But that cannot be, and is not, the sense in which that term is used in § 1983. Section 1983 does not generally authorize challenges to actions taken under color of federal law, but it does, expressly, contemplate suits for violations of federal rights under color of territorial law. *See District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973) (noting that, "*with the exception of the Territories*, actions of the Federal Government and its officers are at least facially exempt from [§ 1983's] proscriptions" (emphasis added)) (footnote omitted); *Ada*, 962 F.2d at 1371. So the same general principles apply to the interpretation of "under color" in cases involving territorial officers as apply in cases involving state officers. Otherwise, the inclusion of "Territory" in § 1983 would be rendered largely nugatory.

All of the § 1983 defendants in this case were *territorial* officers, accused of administering the expedited refund program while acting in their official capacities, or, in other

words, using "power possessed by virtue of [territorial] law and made possible only because [they were] clothed with the authority of [territorial] law." *West*, 487 U.S. at 49 (internal quotation marks omitted).[13] For that reason, *Williams v. United States*, 396 F.3d 412 (D.C. Cir. 2005), on which Guam relies, undercuts its argument. *Williams* held that the defendant's conduct was not undertaken under color of District of Columbia law, even though he had arrested the plaintiff for a violation of District of Columbia law, because he was "a federal official, not a D.C. official" and "the District of Columbia had no authority over him and thus did not exercise coercive power through him." *Id*. at 415 (internal quotation marks and alteration omitted). In other words, while the officer applied and effectuated District of Columbia law, he was still, as a federal official, acting under color of federal law. Here, the opposite is the case. The defendants are, and acted as, Guam officers, not officers of the federal government, and so, even if they were effectuating federal law, they were acting under color of territorial law.

Guam argues otherwise, maintaining that the particular contours of Congress's delegation to Guam officials of authority to administer Guam's income tax, *see Chaco*, 539 F.2d at 1227, indicates that the defendants were in reality acting under color of federal law. We see no basis for establishing a special carve-out limited to the relationship between Congress and Guam officials established by the tax provisions at issue here. Our caselaw indicates that these

[13] While this case, unlike *Ada*, does not challenge the enforcement of a territorial statute, *see* 962 F.2d at 1368, § 1983 refers as well to an "ordinance, regulation, custom, or usage," thereby expressing a conception of action under color of territorial (or state) law broader than one limited only to statutes. 42 U.S.C. § 1983.

defendants would be properly sued under § 1983 even if the actions they took as territorial officers were *required* by federal law.

In *Tongol v. Usery*, 601 F.2d 1091 (9th Cir. 1979), a class of plaintiffs sued the federal Secretary of Labor and three California state defendants, seeking to invalidate a regulation promulgated by the Secretary that required state officials to recover overpayments of unemployment benefits despite state laws permitting waiver of such recoupment. *Id*. at 1094. The district court invalidated the regulation, and we affirmed. *Id*. at 1095–96. The district court held, however, that attorney's fees were not available under 42 U.S.C. § 1988 for the plaintiffs' claim under § 1983, because the suit attacked a federal regulation, and the state, through the official-capacity defendants, was "simply implementing the federal regulations as it was obliged to do." *Id*. at 1096–97 (internal quotation marks omitted). We disagreed.

The "under color" requirement of § 1983, we held in *Tongol*, was satisfied even though the regulation implemented was federal. "[T]he relevant inquiry focuses not on whose law is being implemented, but rather on whether the authority of the state was exerted in enforcing the law." *Id*. at 1097. "The state officials who sought to recover these . . . overpayments were empowered to act only by virtue of their authority under state law," and so "were acting 'under color of state law' within the meaning of section 1983." *Id.*

Similarly here, even if the territorial officials had been obliged by federal law to institute the arbitrary expedited refund process — which they most certainly were not — they were empowered to act only in their capacities as territorial

officers. Thus, they were acting under territorial law within the meaning of § 1983.[14]

III.

We arrive, finally, at Guam's only challenge to the district court's merits decisions.[15] Guam challenges one particular provision of the district court's permanent injunction, the requirement that Guam pay refunds within six months once Guam determines that the requests are valid and not subject to investigation or audit. According to Guam, that requirement is grounded in a legal error. We review the district court's legal conclusions underlying the injunction de novo and the scope of the injunction for abuse of discretion. *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014).

The district court stated in its conclusions of law that "the provisions of the Internal Revenue Code applicable on Guam generally require Defendants to pay refunds to taxpayers no later than six months after the filing date of the corresponding claims for refund," a legal conclusion Guam contends is

[14] Nor do we think, as Guam suggests, that our decision today undercuts our cases interpreting and applying the tax provisions of the Organic Act. We are not interpreting those provisions, but simply applying the settled meaning of § 1983. Furthermore, to the extent that, as Guam contends, territorial residents may have greater access to attorney's fees under § 1988 than those who challenge similar tax practices by the federal government, that is a product of Congress's choice to include those acting under color of territorial law, but not those otherwise acting under color of federal law, within the scope of § 1983.

[15] Guam has raised no substantive challenge to the district court's holding that Guam violated equal protection, nor to its holding that Guam violated the Organic Act by failing to "set[] aside revenues as needed to refund overpayments and pay[] the refunds owed to Guam taxpayers."

wrong. In support of the six-month deadline in the injunction, the district court provided the following analysis: "Under the Internal Revenue Code, a taxpayer can sue to recover his or her refund six months after its filing date, 26 U.S.C. § 6532(a)(1), signifying that a taxpayer's right to a refund vests at that time, unless there is an offset, audit, or some other administrative reason that justifies continued withholding of the payment."

Section 6532(a)(1) provides, in relevant part:

> No suit or proceeding under [26 U.S.C. §] 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time . . . .

26 U.S.C. § 6532(a)(1). As Guam points out, § 6532(a)(1) is, on its face, a limitation, prohibiting suits until six months have elapsed; it does not state directly when the IRS must provide refunds within that period. The district court recognized as much. Guam challenges the six-month provision of the injunction as impermissibly based on an interpretation of § 6532(a)(1) as something more than a requirement that a request for a refund pend for the requisite period before a suit seeking a tax refund can be filed in court.

We need not decide whether the district court's statements, if so understood, would constitute legal error. Our question here is solely whether the district court's inclusion in the injunction of a six-month deadline for paying refunds was an abuse of its discretion. To decide that

question, we consider that provision in the context of the totality of the district court's articulated concerns, as expressed during the summary judgment hearing.

In discussing the Organic Act claim at the hearing, the Taxpayers suggested that an injunction should require Guam to pay refunds "in a timely manner" and "in an ordinary course." The court expressed concern that an injunction including a vague limitation "to the effect [of] 'a reasonable time period' or 'in due course,'" would "just bring another lawsuit because there's no guidance being given as to a time frame for" disbursing refunds. The Taxpayers agreed that was a "fair point" and suggested that "it's fairly evident from the Internal Revenue Code[,] which allows a taxpayer to file a lawsuit to [sic] their refund after six months, that the corollary to that is that once six months has passed, they have a right to their refunds" and "[s]o if the Court is interested in setting a time period, that would certainly be one which makes sense to us."

This colloquy indicates that the district court included the six-month pendency period of § 6532(a)(1) only as a benchmark for a reasonable time limitation, and included that time period in the injunction to give sufficient specificity for enforcement purposes. Understood in this light, the six-month provision of the district court's injunction was well-supported. Section 6532(a)(1) is certainly indicative of Congress's expectation that six months is a sufficient period for administrative processing of a valid claim for a tax refund. And a reasonable time limitation was amply justified by Guam's chronic failure to pay refunds, sometimes for years, and the court's concern that an indefinite injunction would only spark new litigation. Such a limitation was well within the court's broad discretion in fashioning relief. *See State of*

Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 857 (9th Cir. 2003).

Guam contends that, even apart from the purported legal error, the six-month period was simply too short, and unjustifiably tied Guam's hands in administering its budget. More broadly, Guam suggests that, under the Internal Revenue Code and the Organic Act, it has the power to defer refund payments for its own budgetary purposes for as long as it pleases, so long as it eventually pays the overpayment back with interest. *See* 26 U.S.C. § 6611.

We thoroughly disagree. These tax overpayments were never Guam's to begin with, and it has no legal claim to them. *See Weber v. C.I.R.*, 138 T.C. 348, 356 (2012) ("[T]he IRS 'shall' refund any overpayment not otherwise credited . . . .") (quoting 26 U.S.C. § 6402(a)); *Estate of Michael ex rel. Michael v. Lullo*, 173 F.3d 503, 509 (4th Cir. 1999) ("If a tax payment is an 'overpayment,' the IRS must refund it.") (quoting 26 U.S.C. § 6402(a)).[16] If anything, allowing Guam six months to honor refund requests it has determined to be valid and not subject to audit or investigation is more solicitous than necessary to Guam's concerns. We discern no abuse of discretion in the district court's six-month limitation, and affirm the district court's injunction in full.

IV.

We acknowledge that many governments struggle to balance their budgets, particularly in times of economic uncertainty and increasing fiscal demands. But, as the district

[16] We express no view as to extraordinary circumstances, such as war or natural disaster, that might justify delay in refunding tax overpayments.

court correctly concluded, Guam's solution — refusing to pay concededly valid requests for income tax refunds for years on end — was illegal. Guam's policy also fell most heavily on taxpayers of limited means, while expedited refunds were available to those with personal or political connections. As the district court held and its injunction assures, Guam must find another way to deal with its fiscal difficulties.

AFFIRMED.

FILED
DISTRICT COURT OF GUAM
JAN 30 2013
JEANNE G. QUINATA
CLERK OF COURT

UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

RIA MIALIZA O. PAESTE, et al.,

Plaintiffs,

v.

GOVERNMENT OF GUAM, et al.,

Defendants.

No. CV 11-00008 CBM

PERMANENT INJUNCTION AND FINAL JUDGMENT

On August 21, 2012, the Court held a hearing on Plaintiffs' motion for summary judgment. (Doc. No. 153.) Following argument by the parties, the Court granted Plaintiffs' motion as to both claims, granted Plaintiffs' request for declaratory relief, and then issued a minute order to that effect. (Doc. No.171.) The Court issued in a separate document findings of fact and conclusions of law in support of its ruling and in support of the permanent injunction and final judgment set forth below.

I. TERMS OF THE PERMANENT INJUNCTION

A. Timely Payment of Refunds

For purposes herein, a "claim for refund" refers to a valid tax return or other claim for refund recognized by the Internal Revenue Code in effect on Guam. The Government of Guam is required to comply with this Court's Order regarding the timely payment of refunds beginning one month from the entry of this Order, and the time limits imposed apply not only to claims for refund filed in the future, but also to claims for refund that have already been filed as of the date of the entry of this Order.

1. For any GTIT claim for refund designated "E" status (or otherwise determined to contain an error which must be corrected before a refund can be paid) that is later amended, supplemented, or otherwise corrected such that a refund is determined to be owed, the Government of Guam shall pay the refund no later than six months after the claim for refund is designated "A" status or otherwise determined to have a refund owed, or six months from the due date for filing the claim for refund, whichever is later in time.

2. For any GTIT claim for refund designated "S" status (or otherwise subject to audit, investigation, or some other such practice that is expressly authorized by the provisions of the Internal Revenue Code in effect on Guam) that is later designated as "A" status or otherwise determined to have a refund owed, the Government of Guam shall pay the corresponding refund no later than six months after the claim for refund is designated "A" status or otherwise determined to have a refund owed, or six months from the due date for filing the claim for refund, whichever is later in time.

3. For any GTIT claim for refund designated "A" status or otherwise determined to have a refund owed that have not previously been designated as "E" or "S" status, the Government of Guam shall pay the corresponding refund no

later than six months after the filing of the claim for refund or six months from the due date for filing the claim for refund, whichever is later in time.

4. No part of this Order shall be construed to interfere with the Government of Guam's right to conduct offsets, garnishments, audits, or any other such processes or procedures that are expressly authorized by the provisions of the Internal Revenue Code in effect on Guam.

B. Reporting Requirements

5. For a period of five years, beginning one month from the date of this Order, Defendants shall serve on Class Counsel a written report, on a quarterly basis, that states, separately for each tax year:

a. The number and dollar value of GTIT refunds paid during the quarter leading up to the date the report is served.

b. The number and dollar value of GTIT refunds paid during the quarter leading up to the date the report is served, which were paid more than six months after the corresponding claims for refund were filed.[1]

c. For each of the following categories, the number of claims for refunds that have not yet been paid and the total dollar amount owed:

i. Claims for GTIT refunds the DRT has designated as "A status" (or otherwise processed and concluded that refunds were owed).

ii. Claims for GTIT refunds the DRT has designated as "E status" or "S status" (or some other designation indicating a problem that needs to be resolved before a refund can be paid).

iii. Claims for GTIT refunds that were filed at least six months ago.

---

[1] For the purposes of this paragraph, the date on which a claim for GTIT refund was filed shall be the later of (i) the filing due date for the claim, (ii) the actual filing date of the claim, and (iii) the date on which the refund was converted to "A status" if it was initially marked "E status" or "S status" (or some other designation indicating a problem that needed to be resolved before the refund could be paid).

These reports will be due on March 31, June 30, September 30, and December 31 of each year unless these dates fall on a weekend or court holiday, in which case the reports will be due the following court workday. The first report shall be filed no later than April 1, 2013, as March 31, 2013 falls on a Saturday.

6. The written reports shall contain the signature of at least one Defendant who attests that the report is compiled based on the information obtained from electronically stored DRT records.

C. Suspension and Discontinuation of Expedited Refund Payments

7. The Government of Guam and Defendants Calvo, Mangloña, and Camacho shall immediately suspend and discontinue the operation of the GTIT expedited refund program, i.e., prioritizing the payment of refunds to some taxpayers based on hardship, need, or any other reason. The Department of Revenue and Taxation shall prioritize the processing of claims for GTIT refunds and the payment of GTIT refunds according to the filing date of the claim for refunds.

8. If, within five years of entry of this order, Defendants move for modification of this injunction to initiate a new practice of prioritizing certain GTIT refunds based on taxpayer need, Defendants shall first present Class Counsel with written notice, 30 days in advance, of their intent to do so. Any such motion must include a detailed description of the laws, regulations, and/or rules that will underlie the practice. The proposed practice must comport with the Organic Act of Guam, the United States Constitution, and all other applicable laws. Class counsel shall have the right to object to and take discovery related to any proposal before a decision on its legality will be made.

D. Enforcement

9. If, after six months following the entry of this Order, Defendants have failed to fully comply with the terms of this injunction, Plaintiffs may file a motion with the Court requesting appointment of a receiver pursuant to Fed. R. Civ. P. 66, sequestration of government funds, initiation of contempt proceedings,

or any other order necessary to ensure compliance with the terms of this injunction.

E. Miscellaneous

10. This Order shall be deemed to have been served upon Defendants at the time of its execution by the Court. The injunction shall bind Defendants and all other persons and entities listed in Rule 65(d)(2) of the Federal Rules of Civil Procedure, including Defendants' successors in office. *See* Fed. R. Civ. P. 25(d); *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012). Defendants shall, within five (5) days of the date of this Order, email a copy of this Order to DRT and DOA personnel involved in the processing and payment of Guam income tax refunds.

11. Plaintiffs shall file their motion for attorney's fees and costs no later than 14 days after the entry of this Order. See generally Fed. R. Civ. P. 54.

12. The Court shall retain jurisdiction over this matter for all proceedings involving the interpretation, enforcement, or modification of this Permanent Injunction.

II. CONCLUSION

The Clerk of Court is directed to enter judgment in this matter in favor of Plaintiffs and against Defendants.

IT IS SO ORDERED.

DATED: January 30, 2013

By /s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

FILED
DISTRICT COURT OF GUAM
JAN 30 2013
JEANNE G. QUINATA
CLERK OF COURT

UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

RIA MIALIZA O. PAESTE, et al., Plaintiffs, v. GOVERNMENT OF GUAM, et al., Defendants.	No. CV 11-00008 CBM THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 21, 2012, the Court held a hearing on Plaintiffs' motion for summary judgment. (Doc. No. 153.) Following argument by the parties, the Court granted Plaintiffs' motion as to both claims, granted Plaintiffs' request for declaratory relief, and then issued a minute order to that effect. (Doc. No. 171.) The Court now issues the following findings of fact and conclusions of law in support of its ruling and in support of the permanent injunction and final judgment which will be issued separately.

I. FINDINGS OF FACT

A. Background

1. Plaintiffs Rea Mializa O. Paeste, Jeffrey F. Paeste, Sharon M. Zapanta, and Glenn Zapanta are longtime residents and taxpayers on Guam, (Uncontroverted Fact No. 1), who brought suit to challenge government practices relating to the administration of the Guam Territorial Income Tax ("GTIT"). (Amend. Compl., Doc. No. 33.) Plaintiffs allege that for several decades, the Government of Guam has run annual deficits and has financed those deficits by withholding the payment of GTIT refunds to Guam taxpayers, often falling several years behind in the payment of those refunds. (*Id.*) Plaintiffs further allege that during the same time period, the Government has "expedited" refunds to certain taxpayers, allowing them to receive their refunds out of the "first-in, first-out" sequence and ahead of other taxpayers who filed their returns earlier. (*Id.*)

2. Plaintiffs' first cause of action, brought against Defendants Government of Guam, Governor Calvo, Director of the Department of Administration Mangloña, and Director of Department of Revenue and Taxation (DRT) Camacho, all in their official capacities, is for violation of the Organic Act of Guam, 48 U.S.C. § 1421i. Plaintiffs' second cause of action, against the individual Defendants only (again in their official capacities), is under 42 U.S.C § 1983 for violation of the Equal Protection Clause. Plaintiffs have standing to assert both claims, as they have had to wait years for their GTIT refunds (and will likely be owed GTIT refunds again in the coming years as well), while taxpayers who filed refunds after the Plaintiffs received their refunds sooner because of the Defendants' practice of expediting refunds to certain taxpayers.

3. The Court granted Plaintiffs' motion for class certification in January 2012, (Doc. No. 83), certifying a class defined as

> All persons and entities who have filed or will file a claim for refund of an overpayment of the Guam Territorial Income Tax: (i) which the Government of

> Guam has processed or will process and deemed valid; (ii) who have met the procedural requirements outlined in 26 U.S.C. §§ 7422(a) and 6532(a); and (iii) who nonetheless have not received or will not receive their refund six months after filing the claim for refund.
>
> Any judge to whom this case is assigned, his or her spouse, and all persons within the third degree of relationship to either of them, whether by blood relation or marriage, are excluded from the class.

4. In the same Order, the Court appointed the law firms Lujan Aguigui & Perez LLP and Girard Gibbs LLP to serve as Class Counsel. (*Id.*)

5. As an unincorporated territory of the United States, Guam is required to administer its income tax in accordance with provisions of the Internal Revenue Code made applicable to Guam through the mirroring provisions in the Organic Act, 48 U.S.C. § 1421i. (Uncontroverted Fact No. 2.) Under the Organic Act, the Governor or his delegates are responsible for any function needful to the administration and enforcement of the income-tax laws in force in Guam. 48 U.S.C. § 1421i(c),(d). The Governor of Guam has delegated authority to Defendants Mangloña and Camacho to assist with administering and enforcing the GTIT. (Uncontroverted Facts Nos. 5-6.) Residents of Guam pay the GTIT into Guam's treasury rather than to the Internal Revenue Service. (Uncontroverted Fact No. 3.)

B. Guam's Budget Deficits And Delayed Refund Payments

6. Since the early 1990s, the Government of Guam has financed chronic budget deficits by regularly delaying the payment of GTIT refunds to its taxpayers. Accordingly, many GTIT refunds are not paid in a timely manner, (Uncontroverted Fact No. 7), and "during [some] periods, no refunds were paid to any one." (Terlaje Decl., ¶ 10 [Doc. No. 165].) For example, in October 2011, the Government of Guam owed an estimated $333,656 in GTIT refunds to individual taxpayers for the 2005 tax year, $720,274 for the 2006 tax year, $5,911,472 for the 2007 tax year, $27,394,221 for the 2008 tax year, $61,924,038

for the 2009 tax year, and $93,557,570 for the 2010 tax year. (Uncontroverted Fact No. 8.)

7. This practice of not paying all GTIT refunds in a timely manner has persisted even after Guam's Legislature twice enacted legislation requiring the Government of Guam to set aside money for the timely payment of GTIT refunds. Government officials have not complied with either of the laws passed to compel timely payment of GTIT refunds. 11 G.C.A. § 50101, et seq.; 11 G.C.A. § 51101, et seq.; (Aguigui Decl., Ex. 1 at 225:3-8, Ex. 25 (Request for Admission No. 1), Ex. 26 (Response to Request for Admission No. 1), Ex. 3 at 28:2-6, 28:20-30:2, 41:14-42:7, 44:17-45:2; Defs.' Answer at ¶ 18; Governor's Answer at ¶ 14; Amend. Compl. at ¶ 22.) In June 2012, the Government of Guam owed approximately $30 million in GTIT refunds to taxpayers. (Uncontroverted Fact No. 11.) Guam's Public Auditor projects the Government will owe an additional $105 million for 2012 GTIT refunds. (Aguigui Decl., Ex. 20 at 3.)

C. The Practice Of "Expediting" Income Tax Refunds To Certain Taxpayers

8. Traditionally, the Government of Guam has paid GTIT refunds in a first-in, first-out order, the same way the Internal Revenue Service ordinarily pays federal income tax refunds. (Uncontroverted Fact No. 13.)[1] The IRS Manual states that an individual owed a refund may request a manual refund, which is "a refund that is not generated through normal Master File processing." Internal Revenue Manual § 5.1.12.20(1). One cause of a manual refund is that a "hardship situation

[1] Defendants seek to exclude certain emails, sent from IRS employees to Defendants, on hearsay grounds. The emails state that the IRS pays refunds on a first-in, first-out basis, that the IRS does not prioritize refunds based on hardship, and that "it seems that Guam is asserting preferential treatment which is definitely not the case with the IRS"). (*See* Aguigui Decl., Ex. 24 at 2-3 of 4.) Defendants' hearsay objection is overruled because the statements were made by IRS employees and concern the customary activities of the IRS. *See* Fed R. Evid. 803(8); *United States v. Jefferson*, No. 1:07-CR-209, 2009 WL 2447845, at *2 (E.D. Va. Aug. 8, 2009). In addition, the Court takes judicial notice of the statements on the IRS website noted in the text above. Fed R. Evid. 201.

necessitates a quicker refund than normal systemic processing can provide . . . ." *Id.* § 21.4.4.2(1)(b). Some common reasons for manual refunds are "the taxpayer has [an economic] hardship situation that necessitates a quicker refund than normal systemic processing can provide, systemic constraints are preventing a normal computer-generated refund, e.g., the taxpayer's account has a bankruptcy freeze, or the taxpayer is affected by a federally declared disaster." *Id.* § 5.1.12.20(2). The IRS notes, however that even without a request for a manual refund," The IRS issued more than 9 out of 10 refunds to taxpayers in less than 21 days [in 2012]. The same results are expected in 2013." Internal Revenue Service Publication 2043, *available at* http://www.irs.gov/pub/irs-pdf/p2043en.pdf, last visited Jan. 29, 2013. "[S]ome tax returns take longer to process than others for many reasons, including when a return includes errors, is incomplete, needs further review, is impacted by identity theft or fraud, includes Form 8379, Injured Spouse Allocation,which could take up to 14 weeks to process." *Id.*

9. For a number of years, the Government of Guam has paid GTIT refunds to some individuals on an "expedited" basis, meaning the individuals receive their refunds before they would under the first-in, first-out sequence, and before other taxpayers who have been waiting as long or longer. (Aguigui Decl., Ex. 25 (Request for Admission Nos. 2-4), Ex. 26 (Response to Request for Admission No. 2-4), Ex. 1 at 67:15-68:1.) For each tax year from 2005 through 2009, the Government paid an average of about 5,000 refunds totaling approximately $15 million on an expedited basis. (Uncontroverted Fact No. 14.)

10. Defendants state that their purpose behind paying expedited GTIT refunds is to "prioritize payment of tax refunds to those people who needed it the most" because of medical emergency, death in the family, or financial hardship. (Uncontroverted Fact No. 15.) Taxpayers who come to the DRT to request an expedited refund are generally asked to fill out a Request for Refund Assistance Form that contains a space for taxpayers to state the reason for their request and to

indicate (i) whether they are submitting supporting documentation, and (ii) whether they first tried other avenues for securing money. (Uncontroverted Fact No. 17.) Defendants admit that up to 10% of expedited refunds are paid to taxpayers who do not submit one of these forms, however, and the majority of expedited refunds are paid to taxpayers submit no supporting documentation with their claim, according to DRT records. (Uncontroverted Facts No. 23-24.) There are no published administrative rules setting forth the procedure outlined above. DRT considers this process to be within its internal operating procedures. (Decl. L. Terlaje at ¶ 15, Doc. No. 165.)

11. There has never been a formal rule-making process or any regulations issued in connection with the payment of expedited GTIT refunds. (Uncontroverted Fact No. 16.) For example, the DRT does not have a rule requiring that a taxpayer's wealth or income be taken into account; a taxpayer's income is "not a basis" for evaluating the requests. (Aguigui Decl., Ex. 2 at 117:8-14 [Doc. No. 159].) Thus, according to the DRT Deputy Director, millionaires are "absolutely" permitted to apply for expedited refunds. (*Id.* at 120:6-12.) The primary written criteria used by DRT employees for evaluating expedite requests are contained in a memorandum entitled "Expedite Requests for Income Tax Returns Procedure," which lists the "hardship" criteria in the following order: "1. Medical Referral, 2. Death/Relationship to decedent, 3. Financial Hardship." (Uncontroverted Fact No. 20.)[2] DRT employees and other

[2] Although Defendants "controverted" this fact by offering evidence of additional DRT policies and guidelines, none of the additional policies and guidelines bear on the evaluation of expedite requests. The uncontroverted testimony of the DRT Deputy Director is that DRT uses only those criteria set forth above. (Aguigui Decl., Ex. 7 at 46:4-7 [Doc. No. 159].) Defendants have also pointed to a statute enacted in 2011, 5 G.C.A. § 1512.3, which discusses "emergency tax refund payments." To the extent the statute purports to add rules to govern the payment of expedited refunds, there is no evidence in the record that DRT employees ever consulted or followed those rules before paying GTIT refunds on an expedited basis. Finally, Defendants refer to the Internal Revenue Manual provisions discussing the payment of "manual refunds," but Defendants have never contended or offered evidence that DRT employees expedited refunds pursuant to the Manual's guidelines.

government officials make decisions about which taxpayers should receive expedited refunds based on their own interpretation of the "hardship" criteria. (Uncontroverted Fact No. 21.) DRT officials interpret the "hardship" categories in different ways. For example, while the DRT Director testified that he prioritizes "medical and then death and then financial," (Aguigui Decl., Ex. 13 at 51:12-23 [Doc. No. 159-42]), the DRT Deputy Director testified that she sometimes prioritizes financial hardships over both medical and death related requests, (*id.*, Ex. 7 at 149:16-150:6 [Doc. Nos. 159-24, 159-25]), and another). Another DRT employee testified that she approves medical and death related expedite requests in equal proportions. (*Id.*, Ex. 12 at 56:3-24 [Doc. No. 159-40].) There is no procedure for taxpayers to appeal a decision concerning their request for an expedited refund. (Uncontroverted Fact No. 29.)

12. Defendants do not formally approve or reject requests for expedited refunds. (Uncontroverted Fact No. 18.) Instead, the taxpayer must persuade one of a series of public officials to include his or her name on a list which is eventually transmitted to the DRT's Electronic Data Processing Branch for processing. (Uncontroverted Fact No. 19, 22.) Defendants have no written rules, however, for the Electronic Data Processing Branch employees to use in order to determine the order in which to pay refunds to the taxpayers whose names appear on the lists. (*See id.*)

13. The uncontroverted testimony of several senior DRT officials is that "on many occasions" taxpayers with compelling need for expedited refunds—such as the need to pay for urgent medical care—have applied for but not received expedited refunds. (*E.g.*, Aguigui Decl., Ex. 1 at 76:14-22 [Doc. No. 159-2]; *see also id.*, Ex. 10 at 59:11-21 [Doc. No. 159-33], Ex. 1 at 158:8-13 [Doc. No. 159-4].) While taxpayers experiencing medical emergencies are often unable to obtain expedited refunds, other taxpayers with less urgent needs receive their refunds on an expedited basis. Although roughly half of incoming expedite requests are

medical related, (Aguigui Decl., Ex. 7 at 62:3-63:15, 130:14-131:54 [Doc. No. 159]), and the "vast majority" come with supporting documents, (Terlaje Decl., at ¶¶ 5-6 [Doc. No. 165]), under 40% of expedited refunds are paid to taxpayers with a substantiated medical-related need. (Uncontroverted Fact No. 26.) Instead, the greatest number of refunds is paid to DRT's "catch-all" category of "financial" hardship, which Defendants assert is the lowest priority category. (*Id.*)

14. Some DRT employees testified that they requested expedited refunds for themselves, and none reported having their request denied. (E.g., Aguigui Decl., Ex. 15 at 67:24-68:14 [Doc. No. 159-45], Ex. 14 at 20:15-19 [Doc. No. 159-44], Ex. 9 at 99:20-100 [Doc. No. 159-31].) Likewise, many DRT employees testified they helped friends or family members receive expedited refunds. (*E.g.*, Aguigui Decl., Ex. 12 at 65:23-66:19 [Doc. No. 159-40], Ex. 8 at 107:16-108:6 [Doc. No. 159-28].) The DRT Deputy Director testified, for example, that she is asked by family and friends about "five times a month" for expedited refunds and that she has personally approved requests on behalf of family members even when they did not come to the DRT to make the request or submit supporting documents. (Aguigui Decl., Ex. 7 at 170:8-171:4 [Doc. No. 159-25]; *see also id.*, Ex. 12 at 50:10-51:3 [Doc. No. 159-40].) One individual who did contracting work on behalf of the DRT testified that he obtained an expedited refund by calling a DRT employee that he knew and requesting his refund—he did not fill out a request form, did not submit paperwork, and did not even visit the DRT, but received his refund just a few weeks later. (Aguigui Decl., Ex. 5 at 41:11-42:4 [Doc. No. 159-18].)

15. The DRT Deputy Director approved expedited refunds to the named Plaintiffs even though the Plaintiffs did not submit a Request for Refund Assistance Form, supply supporting documentation, or know that the DRT Deputy Director was doing so. (Uncontroverted Fact No. 27.) The DRT Deputy Director approved expedited refunds for the named plaintiffs with the concurrence of

Defendant Camacho. (Uncontroverted Fact No. 28.) During his deposition, when asked about this decision, Defendant Camacho was unable to say whether the Deputy Director's actions were consistent with the procedures that govern payment of expedited refunds, as there are no applicable rules or regulations. (Aguigui Decl., Ex. 13 at 37:4-15 ("was there any place that there's a set of regulations or rules that you could go look at to see whether this was an improper action on her part? A We don't have – we don't have any rules or regulations, yes. Q So you're unable to say – other than the way it normally worked, you're unable to say whether she did anything wrong when she submitted the form ... correct? A Correct.") [Doc. No. 159].) Defendants concede that the decision to expedite the named Plaintiffs' refunds was an attempt to "obtain a tactical advantage in this litigation." [Doc. No. 180 at 5.]

16. Defendant Camacho believes Guam may lawfully pay expedited refunds to certain taxpayers while others who filed earlier await payment of their refunds. (Uncontroverted Fact No. 30.)

II. CONCLUSIONS OF LAW

A. Legal Standard For Summary Judgment Motions

17. Summary judgment should be granted when the moving party demonstrates that there is no genuine issue as to any material fact and that judgment as a matter of law is appropriate. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Plaintiffs Are Entitled To Summary Judgment On Their Organic Act Claim.

18. Under the Organic Act of Guam, the Defendants are required, in the ordinary course, to set aside money to refund overpayments of the GTIT and to pay those refunds to the taxpayers to whom they are owed. The Organic Act imposes affirmative obligations on Guam's officials, 48 U.S.C. § 1421i(c) (2006), and allows Guam taxpayers to seek injunctive and declaratory relief if those

obligations are not met. *See Simpao v. Gov't of Guam*, No. CV 04-00049, 2005 WL 6777982 (D. Guam Mar. 17, 2005). Specifically, the Act makes the Governor and his delegates responsible for the "administration and enforcement" of the GTIT, stating that they "shall" perform each function necessary for "the administration and enforcement" of the GTIT. 48 U.S.C. § 1421i(c). The use of the word "shall" imposes a "mandatory duty" on Defendants, *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 778 (9th Cir. 2006), and "administration and enforcement" of the GTIT necessarily includes refunding overpayments of the tax. *See Arbon Steel & Serv. Co., Inc. v. United States*, 315 F.3d 1332, 1334 (Fed. Cir. 2003) ("We interpreted 'administration and enforcement' to encompass the collection of the tax and the issuance of refunds" (citing *Int'l Bus. Machs. Corp. v. United States*, 201 F.3d 1367, 1372 (Fed. Cir. 2000))); *U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1382 (Fed. Cir. 2002) ("'[A]dministration and enforcement' encompass the 'assessment and collection of tax payments and issuance of refunds . . . .'" (quoting *Int'l Bus. Machs.*, 201 F.3d at 1372)). The effect of this statutory language is to require Defendants to perform the fundamental tasks needed for administration of the GTIT in the ordinary course, which includes setting aside revenues as needed to refund overpayments and paying the refunds owed to Guam taxpayers.

19. In addition, the provisions of the Internal Revenue Code applicable on Guam generally require Defendants to pay refunds to taxpayers no later than six months after the filing date of the corresponding claims for refund. Defendants are obligated to administer the GTIT consistent with the aspects of the federal tax scheme made applicable on Guam through the Organic Act's mirroring provisions. *See* 48 U.S.C. § 1421i(a), (d)(1); *Bank of Am., Nat. Trust & Sav. Ass'n v. Chaco*, 539 F.2d 1226, 1227-28 (9th Cir. 1976); *Sayre & Co. v. Riddell*, 395 F.2d 407, 412 (9th Cir. 1968) ("The general conclusion that we draw . . . is that Congress intended that Guam should apply the Internal Revenue Code . . . just as

the United States applies the Code to persons and income within its territory."). Like the Organic Act, the Internal Revenue Code requires the refunding of overpaid income tax. 26 U.S.C. § 6402(a) (2006) (requiring that the Secretary shall refund the balance of overpaid taxes to the paying taxpayer); *Estate of Michael ex rel. Michael v. Lullo*, 173 F.3d 503, 509 (4th Cir. 1999) ("If a tax payment is an 'overpayment,' the IRS must refund it." (citing § 6402(a))). Under the Internal Revenue Code, a taxpayer can sue to recover his or her refund six months after its filing date, 26 U.S.C. § 6532(a)(1), signifying that a taxpayer's right to a refund vests at that time, unless there is an offset, audit, or some other administrative reason that justifies continued withholding of the payment.

20. There are no genuine disputes of material fact with respect to Plaintiffs' Organic Act claim. Plaintiffs are therefore entitled to summary judgment on their Organic Act claim.

C. Plaintiffs Are Entitled To Summary Judgment On Their Section 1983 Claim.

21. Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

42 U.S.C § 1983 (2006).

22. "To state a claim under § 1983, [a plaintiff] 'must allege a violation of his constitutional rights and show that the defendant's actions were taken under color of state law.'" *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 921 (9th Cir. 2011) (quoting *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001)), cert. denied, 132 S. Ct. 1000 (2012).

1. Defendants' Actions Were Taken Under Color of State Law.

23. "State action for purposes of section 1983 ". . . may emanate from rulings of administrative or regulatory agencies as well as from legislative or judicial action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). "Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* at 50; *see also Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992) ("Guam next argues that the plaintiffs cannot maintain this action against Governor Ada under 42 U.S.C. § 1983 because he is not a 'person' within the meaning of that statute. We hold that he is a 'person' when sued in his official capacity for prospective relief.").

24. Plaintiffs bring their section 1983 claim against Defendants Calvo, Mangloña and Camacho in their official capacities. Mr. Calvo is the Governor of Guam and is responsible, either directly or indirectly, through one or more redelegations of authority, for any function needful to the administration and enforcement of the GTIT. Ms. Mangloña, the Director of the Department of Administration, has been delegated authority by the Governor to assist with administering the GTIT. As Director of the DRT, Mr. Camacho has been delegated authority by the Governor to administer and enforce the GTIT, including the DRT's payment of expedited refunds to certain taxpayers. Each of the defendants is acting in his or her official capacity and "exercised power 'possessed by virtue of [Guam] law.'"

2. Defendants' Actions Violated The Equal Protection Clause.

25. Plaintiffs allege that Defendants are violating Plaintiffs' and class members' constitutional right to the equal protection of law under the Fourteenth Amendment. The Equal Protection Clause mandates that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause applies on Guam. *See* 48 U.S.C. § 1421b(n); *see also Attorney General of Territory of Guam ex rel. All U.S. Citizens Residing in Guam Qualified to Vote Pursuant to Organic Act v. United States*, 738 F.2d 1017, 1018 (9th Cir. 1984) ("The Organic Act incorporated specifically, as part of a bill of rights, the privileges and immunities clause of the Constitution, 48 U.S.C. § 1421b(u), and the equal protection clause of the fourteenth amendment, 48 U.S.C. § 1421b(n).").

26. The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In other words, it "requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 602 (2008) (alteration in original) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)). "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" *Id.*

27. Because Plaintiffs do not contend that Defendants are classifying taxpayers in a way that involves a fundamental right or is based on a category of persons entitled to special judicial protection, the Court uses the "rational basis" standard to evaluate Defendants' conduct. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This standard requires that the governmental action "classify the

persons it affects in a manner that is rationally related to legitimate governmental objectives." *Id.* "[T]he pertinent inquiry is whether the classification ... advances legitimate legislative goals in a rational fashion." *Id.* at 234.

28. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). Accordingly, Defendants "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446; *see also Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) ("Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.").

29. In this case, Defendants' practice of expediting refunds is arbitrary and capricious and is therefore not rationally related to any legitimate government interest. Even if one assumes for the sake of argument that Defendants' stated purpose of prioritizing refund payments to taxpayers most in need is legitimate, the "expedited refund" practice is based on classifications far too attenuated from that purpose to pass constitutional scrutiny.

30. There are no genuine disputes of material fact with respect to Plaintiffs' section 1983 claim, as counsel for Defendants acknowledged during oral argument. As discussed above, there are almost no written rules for the program and to the extent policies exist, they are applied inconsistently. Considered in its entirety, the expedited refund process is too lacking in uniform and consistent practices, procedures, and outcomes to satisfy equal protection requirements. The process and the results are arbitrary and capricious and therefore not rationally

related to a legitimate government interest. Several courts have found comparably arbitrary applications of law or policy in violation of the Equal Protection Clause. *See, e.g.*, *Christian Heritage Academy v. Oklahoma Secondary School Activities Assn.*, 483 F.3d 1025, 1034, 1036 (10th Cir. 2007) (finding no rational basis for state-organized school-activities association's requirement that private schools receive a majority vote of members to participate because the voting process was "ultimately unguided and entirely discretionary," a school could be rejected "for any reason, including dislike or distrust" as "no standards or restrictions" are imposed on the voters, and there was no way to know whether a school was excluded for a reason that would advance a legitimate purpose); *Allen v. Leis*, 154 F. Supp. 2d 1240, 1270-71 (S.D. Ohio 2001) (holding that a county's pay-for-stay program—intended to defray the costs of confinement of pretrial detainees and prisoners—was being applied in an unconstitutional manner because jail officials retrieved a book-in fee of up to $30 based on "what type of or the amount of currency a detainee has on his or her person when processed" at the jail; detainees with $30 or more in cash paid the full fee while those with less than $30 in cash paid only as much as they had in their possession); *see also Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 338 (1989) (finding that a tax assessor's practice of valuing real property based on recent purchase prices and making only "minor modifications" to assessments of land that had not been sold "resulted in gross disparities in the assessed value of generally comparable property" and thus denied the plaintiffs the equal protection of the laws). Plaintiffs are therefore entitled to summary judgment on their section 1983 claim.

D. Plaintiffs Are Entitled To Declaratory Relief And A Permanent Injunction.

1. Entitlement to Declaratory Relief

31. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006).

32. In light of the findings of fact and legal conclusions set forth above, the Court holds that the Defendants are in violation of the Organic Act of Guam and that Defendants Calvo, Mangloña, and Camacho are in violation of section 1983 in light of their roles in administering the GTIT in a manner that violates the Equal Protection Clause. The Court enters declaratory judgment for Plaintiffs as to both claims.

2. Entitlement to Injunctive Relief

33. The decision to issue a permanent injunction "rests within the equitable discretion of the district courts, and such discretion must be exercised consistent with traditional principles of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). An injunction should be granted once the plaintiff demonstrates:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. at 391.

34. Given the pattern, over more than twenty years, of the Defendants' failure to pay refunds in a regular and timely manner, and the Court's consideration of the

four criteria as discussed below, the Court finds that a permanent injunction is appropriate.

35. Defendants' failure to administer the GTIT in a manner consistent with the Organic Act of Guam and the Equal Protection Clause causes irreparable injury to Plaintiffs and members of the class. "Violation of a constitutional right in, and of itself, constitutes irreparable injury." *Napa Valley Publ'g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1182 (N.D. Cal. 2002) (citing *Topanga Press, Inc. v. City of L.A.*, 989 F.2d 1524, 1528–29 (9th Cir.1993)); *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("We have stated that '[a]n alleged constitutional infringement will often alone constitute irreparable harm.'" (quoting *Goldie's Bookstore v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir.1984))).

36. Plaintiffs and the class have no adequate remedy at law. Requiring taxpayers to bring tax refund suits every year offers no solution because the problem is systemic and cannot be addressed piecemeal. Instead, the type of overarching change that only permanent injunctive relief can provide is required. *See Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 1000 n.9 (9th Cir. 1994) (noting that the potential for "a multiplicity of damage suits" is sufficient to support a finding there is "no adequate remedy at law") (citing *Cont'l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994)). Moreover, constitutional violations, such as equal protection violations, "cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

37. The balance of hardships also weighs in favor of injunctive relief, as the relief contemplated requires no more of the Defendants than what the law already requires, and the alternative would be to continue to subject the members of the class to the unlawful practices that have already persisted for decades. Moreover, by paying refunds on time and in a first-in, first-out sequence, the Government of

Guam will save money in interest owed on refunds and conserve the substantial resources previously devoted to processing expedite requests.

38. Finally, the public interest supports a permanent injunction. The public has an interest in the lawful administration of the GTIT as indicated by the Guam legislature's two attempts to compel the Government to pay refunds on time through the passage of legislation. Those laws have been largely ignored and the requested injunctive relief is needed to bring the administration of the GTIT into compliance with the Organic Act and the Equal Protection Clause.

IT IS SO ORDERED.

DATED: January 30, 2013

By _____
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE