IN THE SUPREME COURT OF GUAM

ROBERT A. UNDERWOOD and FRANK B. AGUON JR.
Petitioners,

vs.

THE GUAM ELECTION COMMISSION
Respondent,

FELIX P. CAMACHO and MICHAEL CRUZ,
Real Parties in Interest.

Supreme Court Case No.: WRM06-003

OPINION

Cite as: 2006 Guam 17

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Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; RICHARD H. BENSON, Justice *Pro Tempore*; J. BRADLEY KLEMM, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] Petitioners Robert A. Underwood and Frank B. Aguon, Jr. ("Underwood/Aguon") filed a Verified Petition for a Writ of Mandamus, requesting that this court order the Respondent Guam Election Commission "to comply with its non-discretionary duty and conduct a runoff as mandated by the Organic Act." In particular, Underwood/Aguon argue that the Real Parties in Interest Felix P. Camacho and Michael Cruz ("Camacho/Cruz") were improperly certified as winners of the 2006 gubernatorial election because the Commission failed to include overvotes in the total number of votes cast, in violation of the Organic Act. Underwood/Aguon argue that had the overvotes been included in the mathematical determination of whether Camacho/Cruz met the threshold requirement of 50% plus one vote, Camacho/Cruz would have in fact achieved less than the requisite majority, and as such, a runoff election would be required pursuant to the Organic Act.

[2] Guam's Governor and Lieutenant Governor are elected pursuant to section 1422 of the Organic Act, which provides: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam." 48 U.S.C. § 1422. Consequently, the issue before us is whether the Commission properly excluded overvotes in determining whether the Camacho/Cruz team were "elected by a majority of votes cast," as such term is used in the Organic Act of Guam. 48 U.S.C. § 1422.

[3] We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of

will or choice, or final selections of a gubernatorial slate, may be properly included in the total number of votes cast. The converse of this rule is that the persons who overvote, or vote for both gubernatorial slates, do not express their will in deciding who should be the next Governor and Lieutenant Governor, and in doing so, they assent to the will of the voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast." For this reason, we deny the Verified Petition for a Writ of Mandamus.

I.

[4] On November 7, 2006, the Guam Election Commission conducted the General Election, *inter alia*, so that the voters of Guam could determine who shall be elected to the offices of Governor and Lieutenant Governor. Petitioners Underwood/Aguon ran on the Democratic ticket for Governor and Lieutenant Governor against the Real Parties in Interest, the Republican team of Camacho/Cruz.

[5] According to the Commission's Summary Report prepared on November 13, 2006, the Underwood/Aguon team received 18,700 votes and the Camacho/Cruz team received 19,560 votes. Petitioner's Excerpts of Record ("ER") at 2 (Nov. 22, 2006). In this same report, the Commission reported 668 write-in votes which were not credited to either candidate, 657 undervotes and 504 overvotes.

[6] It is undisputed that the Underwood/Aguon votes, Camacho/Cruz votes, and write-in votes must be included in the total number of votes cast ("the base") for purposes of mathematically determining whether Camacho/Cruz received the requisite majority. This amounts to a sum total of 38,928 votes. It is also undisputed that undervotes, or blank ballots, are not to be included in the

base. *Gutierrez v. Ada*, 528 U.S. 250 (2000), *rev'g sub nom. Ada v. Gov't of Guam*, 179 F.3d 672 (1999).

[7] Thus, the only issue in dispute with respect to determining whether Camacho/Cruz received a majority of votes cast is whether the 504 overvotes should be included in, or excluded from, the base. If the Commission excludes the overvotes, then the base, or pool of votes cast from which the calculation of a majority is made, results in the Camacho/Cruz team receiving 50.25% of the vote. If the Commission includes the 504 overvotes, then the Camacho/Cruz team will have garnered 49.60% of the vote, and in this case, a runoff election would have been required pursuant to the Organic Act.

[8] The overvotes issue was presented to the Commission at its post-election meeting on November 9, 2006. At that time, counsel for the Commission submitted a legal opinion indicating that Guam law found at 3 GCA §11114 requires that overvotes be excluded from the base for purposes of determining whether Camacho/Cruz garnered a majority of votes cast.

[9] After excluding the overvotes from the base, the Commission certified the results of the election, and declared the Camacho/Cruz slate as the winner of the gubernatorial election.

[10] The instant petition followed.

II.

[11] This court has original jurisdiction over petitions for writs of mandamus pursuant to sections 1424-1(a)(2) and 1424-1(a)(3) of the Organic Act, codified at 48 U.S.C §§ 1424-1(a)(2), (a)(3) (Westlaw through Pub. L. 109-382 (2006)), and 7 GCA § 31202 (2005).

III.

[12] A petitioner bears the burden of showing that a writ should issue. *People of Guam v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 3. The decision of whether to issue a writ of mandamus lies within the discretion of the court. 7 GCA § 31401; *see also Gray v. Super. Ct.*, 1999 Guam 26 ¶12.

[13] The primary purpose of a writ of mandamus is to compel the performance of a legal duty. 7 GCA § 31202 ("[A writ of mandate] may be issued by any court . . . to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.") (alterations in original); *see, e.g., A.B. Won Pat Guam Int'l Airport Auth. ("GIAA") v. Moylan*, 2005 Guam 5 ¶ 10.

[14] As a general rule, mandamus will not lie to compel the exercise of discretion in a particular manner. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 12. However, mandamus will issue to compel the performance of a statutorily required ministerial act. *Id.* ¶ 11 (observing that mandamus is appropriate where there is a "clear, present and ministerial duty to act . . . .").

IV.

[15] Petitioners Underwood/Aguon contend that because overvotes should be counted for purposes of determining the base, a writ of mandate must issue ordering the Commission to conduct a runoff election as a result of the failure of any one slate to be "elected by a majority of votes cast," as such term is used in the Organic Act. 48 U.S.C. § 1422. For the reasons stated below, we deny the instant petition for extraordinary relief.

A. Section 1422 of the Organic Act of Guam

[16] "The Organic Act serves the function of a constitution for Guam." *GIAA*, 2005 Guam 5 ¶ 21 (quoting *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir .1996); *see also People v. Perez*, 1999 Guam 2 ¶ 15 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution.").

[17] Section 1422 of the Organic Act provides, with respect to the election of the Governor and Lieutenant Governor of Guam:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people . . . . If no candidate receives a majority of the votes cast in any election, . . . a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. § 1422.

[18] Underwood/Aguon primarily rely on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672 (1999), in asserting that the phrase "votes cast" as used in the Organic Act necessarily includes overvotes, and for this reason, a runoff election is required. In opposition, Camacho/Cruz assert that the Ninth Circuit case is no longer good law, and more importantly, they contend that local law found at 3 GCA § 11114 defines the phrase "votes cast" to exclude overvotes, and therefore, the local law controls the disposition of the issue before us.

[19] The issue before us is clearly an Organic Act issue. More specifically, we are tasked to consider the statutory interpretation of the phrase "elected by a majority of the votes cast," as such phrase is used in the Organic Act. To this extent, we disagree with Camacho/Cruz's assertion that our inquiry must begin and end with the local law found at 3 GCA § 11114 (2005). This is because of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws

which are in derogation of the provisions of the Organic Act." *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam ("In re Request of Governor Camacho 2004")*, 2004 Guam 10 ¶ 33 (quoting H.R.Rep. No. 105-742 (1998), 1998 WL 658802 at *3); *see also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam ("In re Request of Governor Camacho 2003")*, 2003 Guam 16 ¶ 15 n.5.

[20] "We underscored this principle in *In re Request of Governor Gutierrez,* when we stated that 'the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.'" *In re Request of Governor Camacho 2004,* 2004 Guam 10 ¶ 33 (quoting *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 41).

[21] The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, courts are compelled to "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33. Thus, the Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law. "[T]he court must declare a legislative enactment unconstitutional if an analysis of the constitutional claim compels such a result." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41.

[22] Consequently, only after construing the relevant Organic Act language *in its constitutional sense* may we then properly assess the constitutionality of 3 GCA § 11114 and its applicability to the issue before us.

1. Organic Act: "elected by a majority of the votes cast"

[23] In construing the Organic Act provision that requires our Governor and Lieutenant Governor to be "elected by a majority of the votes cast" we find ample guidance in cases from the United States Supreme Court.

[24] To begin with, in 1877, in the case of *County of Cass v. Johnston*, 95 U.S. 360 (1877), the Court established the following basic rule:

> This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.

Id. at 369 (emphasis added). The general principle which can be gleaned from this case is that where a voter does not express his will in an election, he assents to those voters who do.

[25] In *Newberry v. United States*, 256 U.S. 232 (1921), the Court again recognized that inherent in the concept of an election is making a final choice of an officer:

> The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence – *final choice of an officer* by the duly qualified electors.

Id. at 250 (emphasis addded).

[26] Years later in *United States v. Classic*, 313 U.S. 299 (1941), the Court again recognized that an election is an expression of choice: "From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *Id.* at 318.

[27] Similarly, in *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court invalidated a law permitting a primary in Louisiana in which the vote would end in no selection among Congressional

candidates. The Court stated with respect to the use of the term "election" in federal statutes: "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make *a final selection* of an officeholder. . . ." *Id.* at 71 (citing Noah Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "the act of choosing a person to fill an office") (emphasis added)). In *Foster*, the Supreme Court clearly pronounced that to "elect" is to "choose."

[28] More recently, in *Bush v. Gore*, 531 U.S. 98 (2000), the Court provided the following direction when it comes to defining a "vote." First, we are instructed that "[i]n certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements." *Id.* at 103. In overturning the Florida Supreme Court's order for a recount on the basis that the recount procedures violated equal protection, the United States Supreme Court deferred to Florida law in its analysis. *Id.* at 116 (citing *Boardman v. Esteva,* 323 So. 2d 259, 268 n.5 (Fla. 1975) ("The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties . . . [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct. . . .") (alterations in original). Thus, under Florida law, the Court determined that a "legal vote" under Florida law is one in which there is a "clear indication of the intent of the voter." *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000) (quoting Fla. Stats. §§ 101.5614(5)-(6)(2000)), *rev'd by Bush v. Gore*, 531 U.S. 98 (2000).

[29] These pronouncements of the United States Supreme Court are consistent in their views of an election and a vote, and they lend much guidance to the issue before us. Applying the above cases to the issue before us, we hold that in order to determine, in the constitutional sense, whether a

gubernatorial slate has been "elected by a majority of the votes cast," only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. More specifically, because the Organic Act concludes that the Governor and Lieutenant Governor be "elected" by a majority, that is, "finally selected" by a majority, it is a logical premise that *the base* from which such majority is determined includes only those votes which would similarly indicate "a final selection of an officeholder," as instructed by the Court in *Foster*, 522 U.S. at 71. *See also Newberry*, 256 U.S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates."). Stated another way, those voters who have properly expressed a choice are the same voters who should make up the base in determining whether, under our Organic Act of Guam, a candidate has been "elected by a majority of the votes cast by the people." 48 U.S.C. § 1422.

[30] Like the voters in *County of Cass*, 95 U.S. 360, the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor. Accordingly, we hold that the 504 persons who did not express a choice or selection of a Governor and Lieutenant Governor in the November 7, 2006 General Election have assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election.

[31] In so holding, we construe the Organic Act to require that the Governor and Lieutenant Governor of Guam be elected by a "majority of all those who cared to make any choice among gubernatorial candidates." *Gutierrez*, 528 U.S. at 256. To hold otherwise would be to "impute to the Congress a strange preference for making it hard to select a Governor." *Id.* (rejecting the argument that "votes cast" means "ballots cast" because under such an interpretation of section 1422

"the statute could require a runoff . . . even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates.").

[32] In light of our holding above, we reject Underwood/Aguon's argument that the actual marking of the ballot for both slates is an expression of some sort, either of protest against one team of candidates or of support for another team of candidates. Again looking to the United States Supreme Court for guidance, we are reminded of the familiar case of *Burdick v. Takushi*, 504 U.S. 430 (1992), where the Court stated eloquently that the election process is not meant to be a platform for expression of discontent or some other display. It is meant to choose between candidates:

> [T]he function of the election process is "to winnow out and finally reject all but the chosen candidates," not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.

Id. at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974) (second alteration in original). In other words, while an overvote may presumably stand for voter error or even connote a sense of discontentment with the final choice of candidates, the function of an election is to express one's will in the "selection of an officeholder" and not to express one's discontent.

2. Ninth Circuit Case: *Ada v. Government of Guam*

a. Treatment of Ninth Circuit precedent

[33] It is appropriate at this juncture to discuss the circuitous path that Guam courts have taken in the development of *stare decisis*. To begin with, when the Supreme Court of Guam stood for the first time in 1996 as the first level appellate court of Guam,[1] the pronouncement was made that

[1] *See generally* Guam Pub. L. 12-85 (July 1, 1974) ("Court Reorganization Act of 1974"); *Guam v. Olsen*, 431 U.S. 195 (1976); U.S. Pub. L. 98-454 § 709, 98 Stat. 1732 (October 5, 1984); Guam Pub. L. 21-147 (January 14, 1993); Guam Pub. L. 23-34 (June 28, 1995).

decisions of its predecessor entity, the District Court of Guam Appellate Division, would be considered non-binding authority. *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4.[2] At that time, and until 2004, the Ninth Circuit Court of Appeals retained reviewing jurisdiction over the Supreme Court of Guam on a *certiorari* basis. Our cases were thus reviewable by the Ninth Circuit Court of Appeals as the third step in the path of appellate review ending, as in all states, with the United States Supreme Court. With the historic passage of House Resolution 2400, in 2004, the *certiorari* review period of the Ninth Circuit was terminated, thus putting the Supreme Court of Guam on par with state supreme courts. Pub. L. No. 108-378, 118 Stat. 2206 (codified as amended in sections of 48 U.S.C. chap. 8A) (Oct. 30, 2004).

[34] As previously stated, the issue in the case *sub judice* involves an interpretation of the Organic Act of Guam. The Organic Act has the unique distinction of being Guam's *de facto* constitution, and, at the same time, a federal law. *See generally* 48 U.S.C. chap. 8A. This creates the anomalous situation wherein two separate and independent court systems – the federal and local courts – have original jurisdiction over questions arising under the Organic Act and could conceivably render

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[2] In *People v. Quenga*, 1997 Guam 6 ¶ 14 n.4, we stated:

> It may go without saying, but this Court does not recognize the decisions of the Appellate Division as controlling our construction of law. We consider its opinions as precedent that is binding upon the trial courts of Guam, but these decisions, like those of the Court of Appeals, are considered persuasive authority when we consider an issue. In providing for a Supreme Court of Guam, Congress adopted a model that puts Guam on a par judicially with the several States, which grants this Court the authority to interpret Guam's laws. The decisions of this Court will be reviewed in due time and course by the Supreme Court of the United States alone. *See* 48 U.S.C. §§1424-2 (1994) (also providing a period of fifteen (15) years during which the Ninth Circuit Court of Appeals retains certiorari review of this Court's decisions). While we note our authority to modify pre-existing interpretations of our laws that have been determined by federal tribunals, the Appellate Division's opinion in *Herradura* does not present, on its face, any occasion for reconsideration. It appears well supported in law and well reasoned. The Appellant did not invite our attention to *Herradura* as a wrongly decided precedent. It should be underscored that the creation of the Supreme Court of Guam did not erase pre-existing case law. Precedent that was extant when we became operational continues unless and until we address the issues discussed there. We will not divert from such precedents unless reason supports such deviation. We choose to let *Herradura* stand, without our reaching the merits of the issue presented, because we see no reason to reconsider its conclusions.

opposing opinions. While a direct conflict is not likely, and is not the case in this instance, any such conflict between the federal and local court systems in interpreting our *de facto* constitution may be ultimately resolved by this nation's highest tribunal – the United States Supreme Court.

[35] Under the principles of *stare decisis* as they exist in American jurisprudence, we do not regard the termination of the Ninth Circuit review as a termination of the precedential value of cases involving Organic Act issues that rose to the Ninth Circuit through the federal appellate process, as in the instant case, or through the local court appellate process during the Ninth Circuit review period. Rather, Ninth Circuit cases that address Organic Act issues will be binding on the trial courts of Guam to the extent that this court has not addressed such issues. Moreover, Ninth Circuit cases that address Organic Act issues will be followed by this court, insofar as such cases are reasonably supported by law. That is, because the Supreme Court of Guam is now the final arbiter of questions arising through the jurisdiction of the courts of Guam (short of final *certiorari* review by the United States Supreme Court), we recognize our authority to depart from Ninth Circuit cases interpreting the Organic Act of Guam only in the rare instance where we believe that such cases are unsupported by law.

b. The merits of the Ninth Circuit opinion

[36] Underwood/Aguon rely heavily on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672, where the court held that "'a majority of the votes cast in any election' means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates." *Id.* at 678. In particular, Underwood/Aguon argue that while the United States Supreme Court reversed the Ninth Circuit opinion, the reversal only spoke to the issue of whether the term "any election" meant the gubernatorial election or the general election. We disagree.

[37] First, the Ninth Circuit court's reference to overvotes was not necessary to the adjudication of the case. We therefore regard it as dicta. Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999) (quoting *Grigsby v. Reib*, 153 S.W. 1124, 1126 (Tex. 1919); *In re Tuttle*, 291 F.3d 1238, 1242 (10th Cir. 2002) (describing dicta as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.") (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir.1995)). "Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense, although they may at times have persuasive effect." *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24 (Mo.1940); *see also Mun. of San Juan v. Rullan*, 318 F.3d 26, 28 n.3 (1st Cir. 2003) ("Dicta – as opposed to a court's holdings– have no binding effect in subsequent proceedings in the same (or any other) case.") (citation omitted); *Dunn Constr. Co. v. Craig*, 3 So.2d 834, 835 (Miss. 1941) (stating that when an issue "is not before the Court, . . . any opinion expressed thereon is mere dictum not binding on any one."); *Medford v. Bd. of Trustees*, 175 P.2d 95, 97 (Kan. 1946) ("Dicta and obiter dicta which go beyond the case may be respected but should not control a judgment in a subsequent case when the precise point is presented, argued and considered by the entire court."); *Buehler v. Bd. of Supervisors*, 183 N.E. 384, 386 (N.Y. 1932) (stating that when a statement made "was not necessary to the decision [it] is not binding upon this court").

[38] The Ninth Circuit *Ada* case, where there were 609 overvotes, clearly was not argued and not decided on the issue of overvotes. 179 F.3d at 675. As stated at oral argument by counsel for Underwood/Aguon, Appellant Gutierrez in *Ada* did not need the 609 votes to prevail in the Ninth

Circuit; he needed only the 1,313 blank ballots. Concededly, Appellee Ada needed both the undervotes and the overvotes to secure a runoff, but Ada was the appellee in the Ninth Circuit case, so the overvotes were irrelevant to the Appellee's position and therefore not relevant to the outcome. Therefore, since the 609 votes would not have been determinative in the *Ada* case, it fits squarely into the definition of dicta.

[39] Only holdings that are necessary for the adjudication of a case should be treated as precedent. Quinn, *supra* at 711 (stating that "dicta could be anything not necessary to the resolution of the case"). In addition, while a holding may not address the main issue of the case, but still is necessary to reach a conclusion, then in that case, it also may be treated as precedent. *Id.* This is not the case with the Ninth Circuit's discussion regarding overvotes – overvotes were clearly not necessary to the adjudication of the case before it and the references to overvotes can accordingly be regarded as dicta. "[I]f a court decides a point of law, after the adversarial parties have raised it and argued it and after the court has thought about it carefully, then it is binding on some range of courts (possibly including the court that decided the point) if it was a matter of some importance in the decided case." *Id.* at 684. Nevertheless, as with the issue of overvotes in *Ada*, when a court's statements are "not necessary to the actual holding of the case," then such "statements are properly considered dicta, and are not binding." *Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 355 (3rd Cir. 2002).

[40] Second, we believe that upon review, the United States Supreme Court expressly rejected the Ninth Circuit's rationale which supports the inclusion of overvotes in determining the majority of the votes cast. In particular, the Court expressly rejected the Ninth Circuit's notion that the use of the term "votes cast" in the Organic Act means "ballots cast." *Gutierrez*, 528 U.S. at 255-56. Rather, in construing the phrase "majority of votes cast" in section 1422, the Court stated that when

Congress used the term "votes" in the context of "votes cast," it undoubtedly meant "votes" and not "ballots." *Id.* The Court recognized:

> It would be equally odd to think that after repeatedly using "votes" or "vote" to mean an expression of choice for the gubernatorial slate, Congress suddenly used "votes cast in any election" to mean "ballots cast." And yet that is just what would be required if we were to treat the phrase respondents' way, for they read "votes cast in any election" as referring to "ballots containing a vote for any office." Surely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to "votes" for gubernatorial slates, would have said "ballots." To argue otherwise is to tag Congress with an extravagant preference for the opaque when the use of a clear adjective or noun would have worked nicely. But even aside from that, Congress has shown that it recognizes the difference between ballots and votes in the very context of Guamanian elections. From 1972 until 1998, 48 U.S.C. § 1712 expressly required that the Guam Delegate be elected "by separate ballot and by a majority of the votes cast for the office of Delegate." There is simply no reason to think that Congress meant "ballots" when it said "votes" in § 1422.

Id. This holding lies directly contrary to the Ninth Circuit opinion wherein the court stated that "[a]dmittedly, this interpretation equates 'votes cast' with 'ballots cast.'" *Ada*, 179 F.3d at 677 n.5.

[41] Importantly, to the extent that the Ninth Circuit's statement regarding overvotes remains viable, we nonetheless conclude that it is unsupported by law. That is, the Ninth Circuit case of *Ada v. Government of Guam* qualifies in this instance as a rare case where, due to unsound reasoning on the part of the Ninth Circuit Court of Appeals as discussed below, we must depart from, and ultimately reject, the Ninth Circuit Court's interpretation of the Organic Act of Guam.

[42] This is because while the United States Supreme Court did not expressly address the issue of overvotes, the *rationale* employed by the Ninth Circuit in concluding that undervotes should be counted to determine the majority of the votes cast is *the very same rationale* used by that court to similarly count overvotes. This rationale, which equates "ballots" with "votes," was expressly overturned by the United States Supreme Court. *See Gutierrez*, 528 U.S. at 255-56.

[43] Moreover, the Ninth Circuit court, in concluding that both undervotes *and* overvotes should be counted in determining whether a gubernatorial team achieved the requisite majority of votes cast, declined to apply the principles pronounced by the Supreme Court in *Cass*, 95 U.S. at 369 ("[T]he

established rule as to the effect of elections in the absence of any statutory regulation to the contrary [is that a]ll qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.") (emphasis added). The Ninth Circuit further declined to apply the similar principle found in the Third Circuit case of *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), where the court agreed with a previously announced rule that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." *Id.* at 941 (quoting *Euwema v. Todman*, 8 V.I. 224, 231 (D. V.I. 1971)). In doing so, the Third Circuit Court also failed to consider the Supreme Court cases which discuss the nature of the "vote" and the purpose of an "election." *See, e.g.*, *Foster*, 522 U.S. at 71 (relying on federal statutes' references to an election as "actions of voters and officials meant to make a final selection of an officeholder"); *Newberry*, 256 U.S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates.").

[44] To interpret the relevant Organic Act language as the Ninth Circuit court has, especially in the face of clear guidance by the Supreme Court as to the definition of vote and the purpose of an election, would be to rewrite our Organic Act, as the Ninth Circuit erroneously did in the *Ada* case. For these reasons, we find that the Ninth Circuit case is unsupported by law, and thus we exercise our authority to depart from, and reject, the Ninth Circuit case to the extent that it has any remaining precedential value subsequent to its reversal by the United States Supreme Court.

3. *Smith* and other cases

[45] Petitioners Underwood/Aguon also rely on the case of *Smith v. Board of Commissioners*, 65 N.W. 956 (Minn. 1896), where the issue was how to calculate a "majority of votes cast" on a referendum to change the county seat. In that case, the court held that unintelligible as well as

intelligible ballots must be considered in determining the denominator from which to calculate the 55% majority. *Smith*, however, is of limited precedence because it is a referendum case, and as the Supreme Court in *Gutierrez*, instructs, "[r]eferendums are exceptions to the normal legislative process, and passage of a referendum is not itself essential to the functioning of government." 528 U.S. at 256.

[46] Moreover, when presented with the reasoning in *Smith*, other cases have declined to follow it. For instance, in *State ex rel. Short v. Clausen*, 130 P. 479 (Wash. 1913), on a proposition to issue water bonds, the issue was whether to count unintelligible ballots as well as intelligible ones. There, the court declined to follow *Smith*, 65 N.W. 956, and held that only those ballots which clearly express the voter's choice can count. That case reasoned that only ballots that reflect the voter's choice can be counted as for or against the proposition. 130 P. at 480.

[47] In yet another case, *State ex rel. Consolidated School District v. Smith*, 109 S.W.2d 857 (Mo. 1937), in determining whether undervotes or overvotes would be included in the aggregate number of votes cast in an election to authorize school board bonds, the court held that both undervotes and overvotes are not included. On the same reasoning we adopt here, since an undervote reflects no choice any more than does an overvote, that neither should be counted. The Missouri court held that the term "votes" required "showing a preference either in the affirmative or negative for the proposition voted on." *Id.* at 858.

[48] However, as pointed out by the Supreme Court in *Gutierrez* in response to the argument that passing a referendum requires a majority of voters going to the polls and not a majority of persons voting in a particular referendum issue: "[T]here is no uniform rule, and even if there were, treatment of referendums would not be a plausible model for elections of officials." 528 U.S. at 256 (citations omitted).

[49] We therefore place no weight on Underwood/Aguon's reliance on the *Smith* case on this issue, primarily because the case involved a referendum, and in the *Gutierrez* case, the Supreme

Court has instructed us to deal with referendums differently. *See* 528 U.S. at 256. Beyond that, *Smith* appears to be an anomaly, a case where the determination of a "majority" is simply deviated from by other cases faced with the same issue. *See also Stembredge v. Newton*, 99 S.E.2d 133, 134 (Ga. 1957); *Port of Palm Beach Dist. v. State*, 22 So. 2d 581, 582 (Fla. 1945).

C. Constitutionality of 3 GCA § 11114

[50] Having defined the phrase "elected by a majority of the votes cast" in the constitutional sense, we next consider whether 3 GCA § 11114 (2005) is in conflict with such definition.

[51] An analysis of the constitutionality (or organicity) of a local statute "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41; *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33.

[52] A party challenging the constitutionality of a local law bears the burden of establishing its unconstitutionality. *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41 ("[H]e who alleges the unconstitutionality of an act bears the burden of proof . . . [and] the validity of acts is to be upheld if at all possible with all doubt resolved in favor of legality and unconstitutionality will be decreed only when no other reasonable alternative presents itself. . . .")

[53] In this case, Underwood/Aguon bears the burden of establishing that 3 GCA § 11114 lies in violation of the Organic Act of Guam.

[54] Title 3 GCA § 11114, entitled "Ballot, Invalid Portions Rejected; Blank Ballots and Improperly Marked Ballots are Not 'Votes Cast' for Calculating a Majority," states:

> If a voter indicates either:
>
> (a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;
>
> (b) by writing the names of persons for an office in the blank spaces, or
>
> (c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible

> to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. *A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.*

(Emphasis added.)

[55] The above statute clearly requires the Commission to exclude overvotes from the base in its determination of what constitutes a majority in any election,[3] and therefore, we find that section 11114 is not inconsistent with section 1422 of the Organic Act of Guam. In particular, the exclusion of overvotes is not inconsistent with our holding above that "in order to determine, in the constitutional sense, whether a gubernatorial slate has been 'elected by a majority of the votes cast,' only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast." *See* ¶ 29.

[56] Again here, the primary support relied upon by Underwood/Aguon in challenging the above statute is the Ninth Circuit opinion. Because we have declined to follow what is left of the Ninth Circuit opinion, we hold that Petitioners Underwood/Aguon have failed to establish the unconstitutionality of the local law which, as it stands today with respect to the exclusion of overvotes in the determination of a majority of votes cast is not inconsistent with the relevant

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[3] In fact, most states have enacted legislation which does not allow a vote to be counted if the will of the voter cannot be ascertained. We were reminded of this in *Bush v. Gore*, 531 U.S. 98 (2000), where in his dissent, Justice John Paul Stevens noted that the United States Supreme Court had "never before called into question the substantive standard by which a State determines that a vote has been legally cast." *Id.* at 125. In making this observation, Justice Stevens notes that the majority of states have adopted statutes which "apply either an 'intent of the voter' standard or an 'impossible to determine the elector's choice' standard in ballot recounts." *Id.* at 125-26. He further noted that there were statutes in Arizona, Connecticut, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Texas, Utah, Vermont, Virginia, Washington and Wyoming which will not count votes where the "intent of the voter" cannot be ascertained, and that Alabama, Alaska, Arizona, California, Colorado, Delaware, Idaho, Illinois, Iowa, Maine, Minnesota, Montana, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and West Virginia all had statutes refusing to count a vote if it is "impossible to determine" the intent of the voter. *Id.* at 124 n.2. At issue in the *Bush v. Gore* case was the Florida statute which defined a vote as "a clear indication of the intent of the voter." *See Gore v. Harris*, 772 So. 2d 1243 (2000).

provision of section 1422 of the Organic Act as defined in the constitutional sense.[4]

V.

[57] We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. The converse of this rule is that the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor, and have thereby assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast."

[58] The Verified Petition for a Writ of Mandamus ordering the Commission to conduct a runoff for failure of the Camacho/Cruz team to be elected by a majority of the votes cast is hereby **DENIED.**

J. BRADLEY KLEMM
J. BRADLEY KLEMM
Justice *Pro Tempore*

RICHARD H. BENSON
RICHARD H. BENSON
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.
DEC 19 2006
By: IMELDA B. DUENAS
Assistant Clerk of Court
Supreme Court of Guam

[4] We also reject Underwood/Aguon's related argument that 3 GCA § 11114 should not be complied with because of the Commission's historical practice of not including overvotes in determining whether a gubernatorial slate has garnered the requisite majority. We agree with Camacho/Cruz that failure to enforce the law in prior elections does not forgive the failure to follow the law in this election.