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35GL-19-1362
Speaker Tina Rose Muña Barnes

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HONORABLE TINA ROSE MUÑA BARNES
Speaker
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HONORABLE LEEVIN TAITANO CAMACHO
Attorney General of Guam
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2019 DEC 27 PM 4:47

Re: Davis v. Guam

Dear Speaker Muña Barnes and Attorney General Camacho:

Buenas Yan Hafa Adai!

I am pleased to report the timely filing of Guam's petition for writ of certiorari in *Davis v. Guam, et al.* in the Supreme Court of the United States. A copy of the petition has been attached for your convenience.

As you know, Attorney Mike Phillips was instrumental in providing Guam with an extended timeline to petition. His work allowed the filing firm, Kirkland & Ellis LLP, the opportunity to strongly voice Guam's insistence to hold our plebiscite pursuant to our local laws. In reading the petition, you will see that it builds on a strong foundation of legal work established by our attorneys

1362

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at the Office of the Attorney General and from Attorney Julian Aguon. I am hopeful that the Supreme Court will agree, grant certiorari review, and ultimately decide this issue in Guam's favor.

Senseramente,

LOURDES A. LEON GUERRERO
I Maga'hågan Guåhan
Governor of Guam

cc via email: *Sigundo Maga'låhen Guåhan*
Michael F. Phillips, Esq.
Julian Aguon, Esq.

No. _____

In the
Supreme Court of the United States

GUAM, GUAM ELECTION COMMISSION, and MICHAEL J. PEREZ, ALICE M. TAIJERON, G. PATRICK CIVILLE, JOSEPH P. MAFNAS, JOAQUIN P. PEREZ, GERARD C. CRISOSTOMO, and ANTONIA GUMATAOTAO, in Their Official Capacities as Members of the Guam Election Commission,

Petitioners,

v.

ARNOLD DAVIS, on behalf of himself and all others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 26, 2019

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QUESTION PRESENTED

Shortly after the end of World War II, Congress extended citizenship to certain inhabitants of Guam through the 1950 Organic Act of Guam, 48 U.S.C. § 1421 *et seq.* Fifty years later, the government of Guam decided to invite that same class of people to express their views on the island's future political relationship with the United States. Under the 2000 Plebiscite Law, "native inhabitants of Guam"—defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons"—can indicate their preference for one of three "political status options": (1) "Independence," (2) "Free Association with the United States of America," or (3) "Statehood." 1 Guam Code Ann. §§ 2102(b), 2110.

The results of this political-status poll are purely advisory. The plebiscite does not select political officials, does not empower the government to take (or refuse to take) a course of action, and does not effectuate any change in the political status quo. The only consequence is that Guam will "promptly transmit" the results of the plebiscite "to the President and the Congress of the United States of America, and to the Secretary General of the United Nations." *Id.* § 2105.

The question presented is:

Whether the Fifteenth Amendment permits Guam to invite only "native inhabitants of Guam" to participate in a potential political-status plebiscite that would yield only a nonbinding, symbolic expression of self-determination preferences.

PARTIES TO THE PROCEEDING

Guam and the Guam Election Commission are petitioners here and were defendants-appellants below.

Michael J. Perez, Alice M. Taijeron, G. Patrick Civille, Joseph P. Mafnas, Joaquin P. Perez, Gerard C. Crisostomo, and Antonia Gumataotao, in their official capacities as members of the Guam Election Commission, are petitioners here and were defendants-appellants below or have been substituted in their official capacities as the successors to former members and defendants-appellants Joseph F. Mesa, Leonardo M. Rapadas, Joshua F. Renorio, Martha C. Ruth, Johnny P. Taitano, and Donald I. Weakley.

Arnold Davis, on behalf of himself and all others similarly situated, is respondent here and was plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Guam is an unincorporated territory of the United States.

The Guam Election Commission is an autonomous instrumentality and an independent commission of the government of Guam, established and organized pursuant to Guam law.

STATEMENT OF RELATED PROCEEDINGS

Davis v. Guam, et al., No. 17-15719 (9th Cir.) (opinion issued and judgment entered July 29, 2019; mandate issued Aug. 20, 2019).

Davis v. Guam, et al., No. 13-15199 (9th Cir.) (opinion issued and judgment entered May 8, 2015; mandate issued June 2, 2015).

Davis v. Guam, et al., No. 1:11-cv-00035 (D. Guam) (order adopting magistrate judge's report and recommendation and granting defendants' motion to dismiss without prejudice issued Jan. 9, 2013; decision and order granting plaintiff's motion for summary judgment issued Mar. 8, 2017).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

This petition presents a basic question about territorial rights to self-determination. To date, the inhabitants of Guam have had limited authority over their political status and the future of the island. In 2000, the Guam Legislature took a small step toward remedying this unfortunate history by enacting a Plebiscite Law "to permit the native inhabitants of Guam . . . to exercise the inalienable right to self-determination of their political relationship with the United States of America." 3 Guam Code Ann. § 21000. The law defines "native inhabitants of Guam" by reference to a category that originated with an Act of Congress: the 1950 Organic Act of Guam. Specifically, "native inhabitants of Guam" includes "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons." 1 Guam Code Ann. § 2102(b).

The Plebiscite Law contemplates a targeted, advisory referendum or "political-status plebiscite" by these native inhabitants on their preferred political status: (1) independence, (2) free association, or (3) statehood. *Id.* § 2110. The outcome of any such plebiscite will neither commit the government of Guam to pursuing or advocating for any particular status, nor trigger any direct, formal, or official decision on any public issue. And while Guam may well decide to pursue the particular political status favored in the results, it need not do so. Simply put, the Plebiscite Law contemplates an informational survey of a distinct political group first recognized by an Act of Congress.

In the decision below, however, the Ninth Circuit held that the Fifteenth Amendment categorically prohibits Guam from inviting "native inhabitants of Guam" to participate in a political-status plebiscite. That decision rests on an unprecedented expansion of the Fifteenth Amendment across two dimensions, both of which independently warrant this Court's review.

First, the Ninth Circuit extended the Fifteenth Amendment "right to vote" to include Guam's political-status plebiscite. It is undisputed that the plebiscite "will not, itself, create any change in the political status of the Territory" and, as such, would have an extraordinarily "limited immediate impact." App.13. Indeed, the only action that the Plebiscite Law obligates Guam to take is "to transmit the results of the plebiscite to Congress, the President, and the United Nations." App.13. Accordingly, the results of the plebiscite, if any, would not "decide[]" any "public issue[]" or "select[]" any "public official[]" in the traditional sense of the right to vote. *Rice v. Cayetano*, 528 U.S. 495, 523 (2000) (quoting *Terry v. Adams*, 345 U.S. 461, 468 (1953)). Yet the Ninth Circuit held that the plebiscite is a "vote" within the meaning of the Fifteenth Amendment because its results purportedly "constitute a decision on a public issue for Fifteenth Amendment purposes." App.13.

Second, the Ninth Circuit held that limiting eligible participants to "native inhabitants of Guam"—defined as a category of persons who became U.S. citizens by an Act of Congress and descendants of those persons—created an impermissible race-based classification and thus *per se* violated the Fifteenth

Amendment. App.41. Brushing aside Guam's argument that the Plebiscite Law defines voters solely by *political status*, and a political status created in the first instance by Congress, the court concluded that the law's definition of "native inhabitants of Guam" could "only be sensibly understood as a proxy for . . . racial classification." App.33. And the court held that race-based voting discrimination is always impermissible, so it declined to consider "whether Guam's targeted interest in the self-determination of its indigenous people is genuine or compelling," or whether the Plebiscite Law could satisfy any level of scrutiny. App.41.

The Ninth Circuit's sweeping decision distorts the Fifteenth Amendment beyond this Court's precedents and has dire consequences for Guam. The opinion effectively erases a distinct political group of native inhabitants. Although that group is readily identifiable by their shared experiences under colonization and their unique political relationship with the United States, the court reduced them to a crude racial category. This judicial substitution puts the island and its inhabitants in an impossible position. Now that the Ninth Circuit has converted a political class—a class of people created by an Act of Congress in the first place—into a racial one, it will be incredibly difficult for them to speak with a common voice about the island's ongoing political relationship with the United States. The decision below thus nullifies the island's distinct political history and prevents Guam from hearing from inhabitants who have never been able to exercise their right to self-determination and who are now prohibited from even symbolic expression of that right.

The Court should grant certiorari to review the Ninth Circuit's decision and provide much-needed clarity on the contours of the Fifteenth Amendment "right to vote," including what constitutes a "vote" and what types of classifications are prohibited. The Fifteenth Amendment issue is clearly and cleanly presented in the decision below, and it allows this Court to address these important issues in a case of great significance to the people and government of Guam.

OPINIONS BELOW

The Ninth Circuit's operative summary-judgment opinion is reported at 932 F.3d 822 and reproduced at App.1–42, and its prior opinion on appeal from the motion to dismiss is reported at 785 F.3d 1311 and reproduced at App.78–94. The district court's summary-judgment opinion is unreported but available at 2017 WL 930825 and reproduced at App.43–77, and its prior opinion granting Guam's motion to dismiss is unreported but available at 2013 WL 204697 and reproduced at App.95–117.

JURISDICTION

The Ninth Circuit issued its opinion on July 29, 2019. On November 6, 2019, Justice Kagan extended the time for filing a petition for certiorari to and including December 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment provides, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States

or by any state on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

Under 48 U.S.C. § 1421b(u), the Fifteenth Amendment has "the same force and effect" in Guam as in the United States. Section 1421b(u) is reproduced in full at App.118.

The relevant provisions of the Guam Code and the 1950 Organic Act of Guam are reproduced at App.118–24.

STATEMENT OF THE CASE

A. Historical and Political Context

1. Throughout the course of Guam's history, its native inhabitants have been unable to exercise the right to determine their own political status. Spain colonized Guam in the 1500s and maintained control over the island until the end of the Spanish-American War. App.3. Following the war, the 1898 Treaty of Paris gave Guam to the United States, and the U.S. Navy controlled Guam from then until 1950, except for an interlude of Japanese occupation during World War II. App.3.

Throughout the colonial period, Guam's population consisted mostly of an indigenous group known as the "Chamorro," who had no autonomy in the governance of Guam under either Spain or U.S. control. *See* App.3. As of the 1950 census, 45.6% of Guam residents were Chamorro, 38.5% were white, and the remainder belonged to other races. App.5.

2. In 1950, Congress passed the Organic Act of Guam, which established a tripartite government for Guam and extended U.S. citizenship to three groups: (1) individuals born before April 11, 1899, who lived in

Guam on that date as Spanish subjects, and who continued to reside in some part of the United States thereafter; (2) individuals born in Guam before April 11, 1899, who lived in Guam on that date, and who continued to reside in some part of the United States thereafter; and (3) individuals born in Guam on or after April 11, 1899. App.32–33 (citing 8 U.S.C. § 1407 (1952)).

Congressional reports on the Organic Act emphasized the importance of "confer[ring] upon the people of Guam the measure of self-government and civilian administration to which they have long been entitled." S. Rep. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2848. The Senate Report accompanying the bill also noted that "the United States has . . . treaty obligations with respect to Guam as a non-self-governing territory" and, in particular, an affirmative duty "to develop self-government" in the territory. S. Rep. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2841. As a statement by the Secretary of the Interior explained, the Act "would contribute toward fulfillment of the obligation assumed by the United States under . . . the United Nations charter to promote the political, economic, social, and educational advancement of the inhabitants of the non-self-governing Territories." S. Rep. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2848.

In 1952, Congress enacted the Immigration and Nationality Act ("INA"), which repealed the citizenship provisions of the Organic Act and instead extended citizenship to all persons born in Guam after the INA's passage. App.5.

3. In 1996, the Guam legislature passed "An Act to Establish the Chamorro Registry" ("the Registry Act"), which instituted a registry of "Chamorro individuals, families, and their descendants." Guam Pub. L. No. 23-130, § 1 (1996) (codified as amended at 3 Guam Code Ann. §§ 18001–31, *repealed in part by* Guam Pub. L. No. 25-106 (2000)). The Registry Act defined "Chamorro" as (1) inhabitants of Guam as of April 11, 1899 who were Spanish subjects and afterwards continued to reside in Guam or elsewhere in the United States, (2) persons born in Guam who resided there on April 11, 1899 and afterwards continued to reside there or elsewhere in the United States, and descendants of either of these two categories of people. Guam Pub. L. No. 23-130, § 2.

4. In 1997, the Guam legislature passed an act establishing the "Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination" with the purpose of "ascertain[ing] the desire of the Chamorro people of Guam as to their future political relationship with the United States." Guam Pub. L. No. 23-147, § 5 (1997) (codified at 1 Guam Code Ann. §§ 2101–15, *repealed in part by* Guam Pub. L. No. 25-106 (2000)). Among other provisions, that law called for a "political status plebiscite." Guam Pub. L. No. 23-147, § 10. Only "Chamorro people," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality," *id.* § 2(b), would be permitted to participate in the plebiscite, which would ask a single question:

> In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):
>
> 1. Independence ( )
> 2. Free Association ( )
> 3. Statehood ( )

Id. § 10. This plebiscite never occurred.

5. In 2000, the Guam legislature replaced the earlier law with the 2000 Plebiscite Law, which is at issue here. Guam Pub. L. No. 25-106 (2000) (codified at 3 Guam Code Ann. §§ 21000–31, 1 Guam Code Ann. §§ 2101–15). The 2000 Plebiscite Law provides that "native inhabitants of Guam," defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons," 1 Guam Code Ann. § 2102(b), may participate. The purpose of this targeted plebiscite is "to permit the native inhabitants of Guam . . . to exercise the inalienable right to self-determination of their political relationship with the United States of America." 3 Guam Code Ann. § 21000.

In enacting the Plebiscite Law, the Guam legislature recognized that this "inalienable right to self-determination" had "never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam." *Id.* The legislature also stressed that "[t]he intent of

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

The plebiscite is nonbinding; its results have no legal effect and do not require Guam to adopt any official or desired political relationship with the United States. The only direct consequence is that "the Commission [on Decolonization] shall promptly transmit [the results of the plebiscite] to the President and the Congress of the United States of America, and to the Secretary General of the United Nations." 1 Guam Code Ann. § 2105.

B. Procedural History

1. Respondent Arnold Davis, who is not a "native inhabitant of Guam," challenged the 2000 Plebiscite Law. App.10–11. He sued for declaratory and injunctive relief, on behalf of himself and others similarly situated, against Guam, the Guam Election Commission, and the Commission's members in their official capacities, App.96, alleging that the 2000 Plebiscite Law violated the Fourteenth and Fifteenth Amendments to the Constitution, the Voting Rights Act of 1965, and the 1950 Organic Act of Guam, App.11.

2. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that "there was no case or controversy." App.103. The district court agreed, ruling that Davis could not demonstrate standing or ripeness. App.109, 116–17. Accordingly, it dismissed the complaint without prejudice. App.117.

Davis appealed and the Ninth Circuit reversed, holding that, although the plebiscite had not yet been scheduled at the time Davis sued, he had alleged present unequal treatment by the law's registration requirements. App.84–85.

3. On remand, both parties moved for summary judgment. The district court sided with Davis and permanently enjoined Guam from conducting a plebiscite restricted to "native inhabitants of Guam" as defined by the 2000 Plebiscite Law (with reference to the 1950 Organic Act). App.44. In reaching this result, the court determined that the Plebiscite Law violated both the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. App.60, 69–75. On the Fifteenth Amendment issue, the district court rejected defendants' argument that the plebiscite "is not an election within the meaning of the Fifteenth Amendment because 'no public official will be elected, nor will any issue of state law or policy be decided.'" App.68. It also concluded that the 2000 Plebiscite Law's definition of "native inhabitants of Guam" impermissibly used ancestry as a proxy for race to exclude non-Chamorro residents. App.60.

4. The Ninth Circuit affirmed, basing its entire decision on the Fifteenth Amendment. Like the district court, the Ninth Circuit concluded that the plebiscite constituted a "vote" under the Fifteenth Amendment. App.17–18. The Ninth Circuit relied primarily on *Terry v. Adams*, 345 U.S. 461 (1953), and *Rice v. Cayetano*, 528 U.S. 495 (2000), and extrapolated a rule that "the Amendment includes any government-held election in which the results commit a government to a particular course of action."

App.12–18. While it candidly acknowledged that Guam's plebiscite "will not, itself, create any change in the political status of the Territory" and will have only a "limited immediate impact" by obligating Guam "to transmit the results of the plebiscite," it decided that this consequence was significant enough to make the political-status plebiscite a "vote." App.13.

The Ninth Circuit then concluded that the 2000 Plebiscite Law, although facially neutral, impermissibly used "native inhabitants of Guam" as a "proxy for race." App.41. The court dismissed defendants' argument that "native inhabitants of Guam" is fundamentally a *political* classification rooted in an Act of Congress, not an ancestry- or race-based status. App.38–41. The Ninth Circuit made "no judgment about whether Guam's targeted interest in the self-determination of its indigenous people is genuine or compelling." App.41. The court thought this inquiry irrelevant because "established Fifteenth Amendment principles . . . single out voting restrictions based on race as impermissible whatever their justification." App.41.

REASONS FOR GRANTING THE PETITION

The decision below turns on a critical question that this Court has never addressed in this context: What are the limits of the Fifteenth Amendment in an advisory plebiscite implicating the self-determination of a U.S. territory?

The Ninth Circuit held that Guam's 2000 Plebiscite Law, which is effectively a targeted survey of public opinion that neither selects government officials nor directs public policy, is nonetheless a "vote" within the meaning of the Fifteenth

Amendment. That interpretation extends the reach of the Fifteenth Amendment beyond this Court's precedent, has no basis in history, and destroys Guam's ability to ask its native inhabitants about important political-status issues. All of this Court's Fifteenth Amendment precedents implicate the right to vote in traditional elections, such as those involving the selection of public officials. Those decisions neither imply nor support a holding that the term "vote" includes more than that. The history of the Fifteenth Amendment also suggests that the drafters and ratifying states understood it to affect traditional elections with direct political consequences, and indicates that the "right to vote" would not cover a nonbinding political-status plebiscite.

In addition to radically expanding the Fifteenth Amendment "right to vote," the Ninth Circuit's decision overreaches across a second dimension by adding a new protected class. The text of the Fifteenth Amendment forbids discrimination only "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Guam's 2000 Plebiscite Law uses a category of people defined by reference to, and incorporation of, a political status conferred by an Act of Congress in 1950: the Organic Act of Guam. 1 Guam Code Ann. § 2102(b). Yet the Ninth Circuit held that "native inhabitants of Guam" is an impermissible proxy for race. Its decision thus broadens the classifications protected by the Fifteenth Amendment and eviscerates Guam's ability to hear from a category of people who have never been permitted to exercise their right to self-determination.

This Court should grant certiorari to clarify the scope of the Fifteenth Amendment and reject the Ninth Circuit's unprecedented expansion of Fifteenth Amendment protections. Guidance from this Court on these important issues will bring much-needed clarity to the law and ensure proper, consistent enforcement of the Fifteenth Amendment.

I. The Court Should Grant Certiorari To Reverse The Ninth Circuit's Novel Extension Of The Fifteenth Amendment "Right To Vote."

A. The Ninth Circuit Erred in Holding that a Nonbinding Political-Status Plebiscite Is a "Vote" for Purposes of the Fifteenth Amendment.

The Ninth Circuit erred in extending the Fifteenth Amendment "right to vote" beyond the text and purpose of the Amendment and the precedent of this Court. To date, decisions in the Fifteenth Amendment context have naturally arisen in (and addressed) only traditional voting issues, such as the selection of public officials and participation in general elections. Indeed, the Court's clearest statement of what counts as a vote—"any election in which public issues are decided or public officials selected"—comes from a case involving the election of state officials who "compose[d] the governing authority of a state agency." *Rice*, 528 U.S. at 498–99, 523; *see also id.* at 514. Existing precedent thus fails to answer the dispositive question here: Whether the Fifteenth Amendment "right to vote" covers a nonbinding political-status plebiscite that has no direct legal consequence and simply provides information about

the self-determination preferences of a segment of the populace. This case thus presents a clean opportunity to reconcile almost 150 years of case law and clarify the boundaries of the Fifteenth Amendment "right to vote," including whether a mere poll of public opinion is a "vote."

From the very beginning, this Court's Fifteenth Amendment jurisprudence has developed in the context of the "right to vote" in traditional elections with direct political consequences. In 1875, five years after ratification, *Minor v. Happersett* relied in part on the Fifteenth Amendment in rejecting the Fourteenth Amendment claim of a woman who wished to vote "for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers," but was precluded from doing so by a state statute restricting the franchise to men. 88 U.S. 162, 163 (1875).[1] The Court noted that the Fifteenth Amendment would have been unnecessary had the Fourteenth Amendment created an affirmative right to vote. *Id.* at 175. The very next year, *United States*

[1] This Court referenced the Fifteenth Amendment in four cases before *Minor*, but those cases were not resolved on Fifteenth Amendment grounds. *See Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 656 (1874) (mentioning the Fifteenth Amendment only in passing); *Wash., Alexandria & G.R.R. Co. v. Brown*, 84 U.S. (17 Wall.) 445, 447 (1873) (mentioning the Fifteenth Amendment only in passing in the statement of the case, not in the Court's opinion); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873) (discussing the historical context of the Fifteenth Amendment and noting that black citizens "could never be fully secured in their person and their property without the right of suffrage"); *White v. Hart*, 80 U.S. (13 Wall.) 646, 648 (1872) (mentioning the Fifteenth Amendment only in passing).

v. Reese rejected a criminal indictment accusing two election officials of "refusing to receive and count . . . the vote of [a black] citizen," 92 U.S. 214, 215 (1875), in a municipal election "for members of the . . . city council," *id.* at 224 (Clifford, J., concurring). The Court held that the enabling statute exceeded Congress's authority under the Fifteenth Amendment. *See id.* at 217–18.

Less than a decade later, the Court approved the validity of an indictment alleging that several individuals had assaulted a black man for exercising his "right and privilege of suffrage in the election of a lawfully qualified person as a member of the [C]ongress of the United States of America." *Ex parte Yarbrough*, 110 U.S. 651, 656 (1884); *see also id.* at 656–67. And in 1915, the Court held in *Guinn v. United States* that an amendment to Oklahoma's state constitution imposing a combined literacy test and grandfather clause was "void in so far as it attempted to debar [qualified black citizens] from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma." 238 U.S. 347, 356–57, 368 (1915).

So too for this Court's decisions from the mid-twentieth century. Those cases articulated a broader view of *who* must comply with the Fifteenth Amendment (*i.e.*, quasi-governmental political organizations), but they did not expand *what kinds* of "votes" the Amendment covers beyond the traditional election-centric categories. *Smith v. Allwright*, for example, held that the Democratic Party of Texas could not exclude black voters from voting in primaries for "nominees for a general election." 321

U.S. 649, 664–65 (1944). And *Terry v. Adams*, one of the two main cases that the Ninth Circuit relied upon below, similarly required a dominant political association to open its primary elections to black voters. 345 U.S. 461, 469–70 (1953) (plurality opinion). Neither case broadened the Fifteenth Amendment's scope beyond the selection of political officials or suggested that the Fifteenth Amendment applies to any variety of census, poll, advisory referendum, or survey. In fact, both decisions stressed the significant political ramifications of the relevant elections. *See id.* at 469 ("The only election that has counted in this Texas county for more than fifty years has been that held by the [political association] . . . ."); *id.* at 484 (Clark, J., concurring) (explaining that the association was "the decisive power in the county's recognized electoral process"); *Smith*, 321 U.S. at 664 (noting that the primary election was "part of the machinery for choosing officials, state and national").

This Court's more recent precedents likewise do not support expanding the Fifteenth Amendment "right to vote" beyond traditional elections. *Rice*, the other case that the Ninth Circuit heavily cited below, concerned the selection of Hawaiian public officials who managed state finances. 528 U.S. at 498–99. The Court emphasized that the "vote" in that case was directly related to the election of quasi-public officials: "[I]t is . . . apparent that [the agency] remains an arm of the State." *Id.* at 521. And *Rice* repeatedly stressed the practical consequences of the Hawaiian election. For example, the Court explained that "a State [may not] fence out whole classes of its citizens from *decisionmaking in critical state affairs*," and that "[a]ll citizens, regardless of race, have an interest in

selecting officials who make policies on their behalf." *Id.* at 522–23, 535 (emphases added). Nothing in the opinion indicates that the Fifteenth Amendment covers more than concrete political choices.

To be sure, this Court's Fifteenth Amendment jurisprudence also includes decisions concerning general race-based obstacles to voting in traditional elections, including discriminatory voting qualification or registration requirements. *See generally, e.g., Louisiana v. United States*, 380 U.S. 145 (1965) (voter-registration tests); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (municipal boundaries); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La. 1960) (purge of voter-registration rolls), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960) (per curiam); *Lane v. Wilson*, 307 U.S. 268 (1939) (voter-registration time limits); *Myers v. Anderson*, 238 U.S. 368 (1915) (voter qualifications). But while those cases clarify that the Fifteenth Amendment is not limited to election-day harms, they do not expand *what kinds* of "votes" the Amendment covers. Indeed, the laws at issue in those cases plainly impaired the ability of black citizens to vote in the type of traditional political elections at the core of the Fifteenth Amendment "right to vote." *See, e.g., Louisiana*, 380 U.S. at 148–49 (discussing the primary system and, in particular, the Democratic Party primary election); *Gomillion*, 364 U.S. at 341 (right to vote in municipal elections); *Myers*, 238 U.S. at 375–77 (same); *Lane*, 307 U.S. at 270–71 & n.1 (registration for Oklahoma's general election); *McElveen*, 180 F. Supp. at 12 (voter-registration requirements applicable to "any election in the State of Louisiana").

The Court's reasoning matches its election-centric jurisprudence. Several cases imply that the Fifteenth Amendment is most concerned with traditional elections that have direct political ramifications. For example, in twin 1875 decisions—fresh in the wake of the Fifteenth Amendment's 1870 ratification—the Court described the Fifteenth Amendment as prohibiting "discrimination *in the exercise of the elective franchise.*" *United States v. Cruikshank*, 92 U.S. 542, 543 (1875) (emphasis added); *see also Reese*, 92 U.S. at 218 (referring to the right the Fifteenth Amendment protects as "exemption from discrimination *in the exercise of the electoral franchise*" (emphasis added)); *id.* at 220 (similar).[2] Notably, the majority in *Reese* declined to adopt the broader view espoused in Justice Hunt's dissenting opinion—*i.e.*, that the Fifteenth Amendment protects the right to vote "not at specified elections or for specified officers, not for Federal officers or for State officers, but the right to vote in its broadest terms." *Id.* at 248 (Hunt, J., dissenting). Tellingly, however, even Justice Hunt's "broadest terms" did not stretch the Fifteenth Amendment beyond elections; instead, his conception of "the right to vote in its broadest terms" was broad only *within* the context of traditional elections: he would have held the Amendment applied to all "elections held for state or municipal as well as for federal officers . . . at all elections by the people,—

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[2] This early formulation is consistent with later Fifteenth Amendment decisions. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 38 (1892) ("The fifteenth amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise . . . .").

state, county, town, municipal, or of other subdivision." *Id.* at 248–49.

More recent decisions have a similar theme. Both the *Terry* plurality and *Rice* majority described the Fifteenth Amendment "right to vote" in terms of "election[s] in which public issues are *decided* or public officials *selected*." *Terry*, 345 U.S. at 468 (emphases added); *see also id.* at 467 (forbidding "discriminat[ion] against . . . voters in elections to *determine* public governmental policies or to *select* public officials" (emphases added)); *Rice*, 528 U.S. at 514, 523.

Relatedly, this Court has often framed the importance of voting rights around the need to select public officials. For example, *Yarbrough* explained that "[i]t is . . . essential to the successful working of [a republican] government that the great organisms of its executive and legislative branches should be the free choice of the people." 110 U.S. at 666. And *Smith* similarly emphasized that "[t]he United States is a constitutional democracy [whose] law grants to all citizens a right to participate *in the choice of elected officials* without restriction . . . because of race." 321 U.S. at 664 (emphasis added); *cf. United States v. Classic*, 313 U.S. 299, 317 (1941) (explaining that Congress's power over federal elections includes the power to "regulate primary elections when . . . they are a step in the exercise by the people of their choice of representatives"); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."). Simply stated, "voting" is of constitutional significance precisely because it has concrete political consequences.

In sum, this Court's decisions support the most plausible reading of the Fifteenth Amendment's text, purpose, and history: that it applies only to "votes" with direct political consequences. Existing precedent offers no support for the Ninth Circuit's ruling that a nonbinding political-status plebiscite that neither selects government officials nor determines public policy is a "vote" within the meaning of the Fifteenth Amendment. That extension of the Fifteenth Amendment warrants certiorari review.

B. Historical Context Confirms that a Nonbinding Political-Status Plebiscite Is Not a "Vote."

History further supports what this Court's jurisprudence directs: a nonbinding political-status plebiscite is not a "vote" under the Fifteenth Amendment. The political discourse surrounding the creation and ratification of the Fifteenth Amendment contained two recurring themes: (1) the preservation of Republican strength through the enfranchisement of black voters, and (2) the goal of giving black voters electoral power in their states and communities. *See* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 22, 47–50, 74, 77–78, 165 (1965); *cf.* Earl M. Maltz, *The Coming of The Fifteenth Amendment: The Republican Party And The Right To Vote In The Early Reconstruction Era*, 69 Cath. U. L. Rev., 4–5 (2019) (forthcoming). This historical context—which the Ninth Circuit overlooked—reinforces that the "right to vote" is concerned only with elections that have tangible political effects.

In the months before the ratification of the Fifteenth Amendment, the voting rights of black Americans across the nation were inconsistent and unstable. By 1869, blacks could vote in just a few northern states, but (because of recent federal statutes) could vote in the former-confederate states. *See* Gillette, *supra*, at 26–27, 80; *see also* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 Geo. L.J. 259, 270–71 (2004). This patchwork situation created incentives for a heavily Republican Congress to pass a constitutional amendment forbidding racial discrimination in voting. On one hand, nationwide enfranchisement would shore up Republican power in northern states, many of which had recently refused to voluntarily enfranchise black Americans. *See* Gillette, *supra*, at 26–27, 46–48, 80. And on the other, a constitutional amendment would permanently entrench race-neutral voting rights in the South and insulate enfranchisement laws from repeal by a future pro-confederacy Congress. *See id.* at 44, 49, 52, 73; *cf.* Chin, *supra*, at 272.

Contemporaneous statements by politicians and the public alike confirm that the pragmatic desire motivating the Fifteenth Amendment was to let black citizens cast meaningful ballots in elections. In congressional debates, for example, politicians emphasized that the Republican party "need[ed] votes in Connecticut . . . [and] Pennsylvania," Gillette, *supra*, at 48, and that the "loyal state governments in the South" created during reconstruction "would collapse without loyal [black] voters to support [them]," *id.* at 50. Newspapers echoed these

observations, explaining that "where [black] men vote, there the cause of Republicanism is entirely safe," and that black suffrage "would make [several Northern] states safely Republican." *Id.* at 43.

The nationwide ratification debates also focused heavily on the same practical and "strategic" consequences of giving black Americans influence over concrete political decisions. *Id.* at 79–80; *see also id.* at 159; *cf. id.* at 81 (noting that the debates were "the same in . . . substance . . . throughout the country"). In the former confederacy, for example, many legislatures readily adopted the Fifteenth Amendment precisely because it *did not* appear to dramatically alter the political status quo. *Id.* at 92–93, 103. Congress had already expanded the franchise by federal statute in these states, so "[w]hite southerners from every political faction believed that the Fifteenth Amendment did not have a practical effect in the South." *Id.* at 93. Moreover, the sporadic commentary on the Amendment's potential effect often focused on political power. For example, the Republican Governor of North Carolina "urged ratification primarily because a guarantee . . . would be placed in the federal constitution, 'where no future change or convulsion [could] destroy it.'" *Id.* at 93 (citation omitted). And some Republicans who objected to the Amendment did so because they thought it did not do enough to secure real influence for black Americans, given that it neither conferred a right to hold office nor banned poll taxes and literacy tests. *Id.* at 94, 102.

Similarly, the reactions of southern Democrats often turned on simple questions of political power.

Some thought that the Amendment could be turned to the Democratic Party's advantage because "force and bribery would bring [black] voters into the Democratic camp." *Id.* at 95. Others thought that the Amendment would be irrelevant because Congress would not enforce it, *id.*, or because states could still bar black Americans from office and impose property, tax, and education requirements, *id.* at 98.

Parallel pragmatic themes echoed across the country, including in the border states, the mid-Atlantic region, and the American west. In the border states, Democrats often opposed the Fifteenth Amendment because it threatened to "change the balance of power," *id.* at 105; *cf. id.* at 109, while some Republicans saw it as an opportunity "to preserve Republican control . . . and secure domination," *id.* at 106, 108. In the mid-Atlantic, "[p]oliticians of both parties recognized the practical effect of the enfranchisement of [black voters]." *Id.* at 113; *cf. id.* at 126, 130. Mid-Atlantic newspapers also discussed "the balance of power" and "the practical effect of ratification." *Id.* at 114–15. The "whole effect of this Fifteenth Amendment," declared one paper, "is merely to confer the ballot upon [black Americans] scattered through the Northern States." *Id.* at 115. Accordingly, Democrats vigorously fought ratification in several of these states. *Id.* at 116–17, 124–25. In the Midwest, Republicans weighed the political risks of ratification against the prospects of enfranchising new Republican voters, *id.* at 132–33, 138–40, 146, while Democrats wanted to preserve the political status quo, *see id.* at 133, 147. And on the west coast, some Republicans claimed that opposition to

ratification was motivated by Democratic desire to "keep . . . control of the legislature." *Id.* at 156.

Finally, additional historical evidence shows that the Fifteenth Amendment "right to vote" refers only to traditional elections with direct political consequences. In 1867, Congress enacted several conditions for former-confederate states to satisfy before they could resume participation in the federal government. *See generally* The Military Reconstruction Act of 1867, 14 Stat. 428–29 (Mar. 2, 1867). Relevant here, the former-confederate states were required to draft new constitutions "provid[ing] that the elective franchise shall be enjoyed by all such persons" "of whatever race, color, or previous condition [of servitude]" and submit these constitutions for congressional approval. 14 Stat. 429, § 5. To comply with this federal mandate, several states adopted constitutions that framed voting rights in terms of concrete political choices. South Carolina's constitution, for example, provided that "every [qualified] inhabitant . . . shall have an equal right *to elect officers* and be elected to fill public office." S.C. Const. Art. 1, § 31 (Apr. 16, 1868) (emphasis added). This phrasing confirms that the "right to vote" was understood as the right to participate in concrete political decisionmaking.

In short, the Fifteenth Amendment's history is deeply intertwined with concerns of practical political power. While some politicians and members of the public who supported the Amendment surely were motivated by loftier goals of social equality rather than pure expediency, *see, e.g.*, Gillette, *supra*, at 81, 85, the overriding theme of contemporaneous political

debate was the practical consequences for future elections. In light of this historical understanding, it was incorrect to assume—as the Ninth Circuit did—that the "right to vote" extends to *any* government assessment of public opinion, even if it is purely advisory and informative.

II. The Court Should Grant Certiorari To Reverse The Ninth Circuit's Decision That Forbids Guam From Relying On A Political Classification.

By its terms, the Fifteenth Amendment forbids discrimination "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Guam's 2000 Plebiscite Law concerns none of these classifications. Rather, the law draws distinctions based solely on *political* status: the term "native inhabitants of Guam" includes individuals (and their descendants) who became U.S. citizens in 1950 by virtue of an Act of Congress. 1 Guam Code Ann. § 2102(b). Despite this clear-cut political classification based on a category of people memorialized in time by a transformational Act of Congress, the Ninth Circuit held that the definition of "native inhabitants of Guam" was a race-based distinction that triggered fatal Fifteenth Amendment scrutiny. This conclusion conflicts with both this Court's voting precedents and Guam's political history.

Critical here is an accurate understanding of what the political-status plebiscite seeks to accomplish. The prospective participants ("native inhabitants of Guam") represent a historically, politically, and socially distinct class of individuals—a class that has endured nearly 500 years of colonial

occupation, suffered Japanese occupation in World War II, and, most recently, exists at the political whims of the U.S. government. Indeed, "native inhabitants of Guam" is a class of people defined *entirely by reference to a law imposed by Congress.* 1 Guam Code Ann. § 2102(b).

Despite this clear historical and political context, the Ninth Circuit's decision below effectively nullifies these shared political experiences and erases nearly half a millennium of history. It is not enough, according to the Ninth Circuit, that the "native inhabitants of Guam" are connected by a common history of colonialization and a shared political identity forced upon them by the federal government. Instead, the Ninth Circuit equated this carefully drawn and targeted class of people to the most pernicious cases of race-based line-drawing. That conclusion badly misunderstands both the law and Guam's political history. Worse yet, it puts Guam's native inhabitants in an impossible position. On one hand, these inhabitants lack fundamental political rights and protections because of their tenuous relationship with the United States. Although they are nominally U.S. citizens, they cannot vote for federal political leaders or exert direct influence over the federal government that controls them. But on the other, they cannot join together as a political body to express their opinions on the status quo or the territory's future political relationship with the United States. This Court should step in to restore balance to the situation by clarifying the longstanding rule that the Fifteenth Amendment does not apply to classifications based on political status.

As a preliminary matter, this Court has never held that the Fifteenth Amendment prohibits discrimination on the basis of political status. After all, the plain language of the Amendment addresses only "race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Political status is not on this list, so governments presumably may discriminate on that basis. *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 217 (2009) (Thomas, J., concurring) ("The Fifteenth Amendment . . . renders unconstitutional any federal or state law that would limit a citizen's access to the ballot *on one of the three bases enumerated* in the Amendment." (emphasis added)).

Longstanding precedent confirms that the Fifteenth Amendment protects only against enumerated forms of discrimination. *Reese*, for example, rejected the criminal indictment of two election officials who had been charged under a federal voting-rights law that was not explicitly limited to the enumerated forms of discrimination. 92 U.S. at 216–17. Because the statute was broader than the Amendment, this Court held that it was not "appropriate legislation" under Congress's Fifteenth Amendment enforcement power. *Id.* at 218–22; *see also* U.S. Const. amend. XV, § 2. *Cruikshank* likewise rejected an indictment charging several individuals with assaulting black voters because it failed to allege "that the intent of the defendants was to prevent [the victims] from exercising their right to vote *on account of their race*." 92 U.S. at 556 (emphasis added). And

more recently, this Court has approved "literacy test[s given] to all voters irrespective of race or color." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959).

To be sure, classifications beyond those listed in the Fifteenth Amendment—such as political categories and ancestry—may occasionally be impermissible "prox[ies]" for race. *See Rice*, 528 U.S. at 514–15. But despite the Ninth Circuit's best efforts to link the Plebiscite Law's political basis to a racial classification, there is no such proxy here. *See* App.33 (deciding that the Plebiscite Law "can only be sensibly understood as a proxy for . . . racial classification"); App.37–40. Rather, any link between politics and race is a byproduct of *Congress's* historical decision to confer citizenship on a particular group of people, and not the result of present invidious discrimination by Guam lawmakers. In other words, although race and political status may overlap for the majority of "native inhabitants of Guam," that connection is incidental and unavoidable because of Guam's unique past and political relationship with the United States. *Cf. Rice*, 528 U.S. at 515 ("'[R]acial discrimination' is that which singles out 'identifiable classes of persons . . . *solely* because of their ancestry or ethnic characteristics.'" (emphasis added; ellipses in original) (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987))). Indeed, that connection was *created by* an Act of Congress.

This case is nothing like those in which this Court has identified unlawful racial proxies. *Guinn*, for example, struck down Oklahoma's literacy test, which exempted individuals (and their descendants) who

could vote "on January 1, 1866"—"a date which preceded the adoption of the 15th Amendment." 238 U.S. at 357, 363. The Court stressed that the *only possible reason* for the 1866 cutoff was "the continuance of [the conditions] which the 15th Amendment prohibited." *Id.* at 365. Specifically, the Court was "unable to discover how, unless the prohibitions of the 15th Amendment were considered, the *slightest reason* was afforded for basing the classification upon a period of time prior to the 15th Amendment." *Id.* (emphasis added).

In contrast to the pernicious 1866 cutoff in *Guinn*, the year 1950 has an overwhelmingly *non-racial* significance: it is when thousands of Guam's residents first became U.S. citizens by an Act of Congress. Because these are the very same people who have "never been afforded" the "inalienable right to self-determination, . . . having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation," 3 Guam Code Ann. § 21000, it makes perfect sense to use 1950 as a benchmark to allow those people to express their political preferences. There is no more appropriate way for Guam to empower those that have been systematically ignored.

Beyond their special political relationship to the United States by virtue of the Organic Act, these "native inhabitants of Guam" share additional non-racial characteristics. For example, the 1950 inhabitants had long lived under colonial management, and they had recently experienced Japanese occupation during World War II. In light of all these significant political markers, it beggars belief

to say that Guam's decision to use the 1950 Organic Act as a reference point is akin to "transparent racial exclusion[s]." *Rice*, 528 U.S. at 513 (citing *Guinn*, 238 U.S. at 364–65).

A simple hypothetical illustrates the point. Imagine that if in 1951, one year after the Organic Act, Congress decided to survey the people to whom it had just granted citizenship to see whether they were satisfied with the arrangement. Under the Ninth Circuit's view of the Fifteenth Amendment, Congress could not do so. This bizarre result creates a paradox: governments may create distinct political groups, but must then immediately cease to recognize them.

Comparison to other Fifteenth Amendment precedents further confirms that the political group captured by the Plebiscite Law is not a racial gerrymander. In *Gomillion*, for example, the Court reversed the dismissal of a claim that the Alabama legislature had "alter[ed] the shape of [a city] from a square to an uncouth twenty-eight-sided figure" to cut out black voters. 364 U.S. at 340. Although this action did not explicitly deny the right to vote based on race, the Court explained that "statutes that . . . *obviously discriminate* against colored citizens" may still be unconstitutional. *Id.* at 342 (emphasis added). Indeed, Alabama had "*never suggested* . . . any countervailing municipal function which [the redistricting was] designed to serve." *Id.* (emphasis added). And in *Lane*, the Court rejected Oklahoma's decision to give previously unregistered voters—*i.e.*, predominately black voters—just twelve days to register in the aftermath of the Court's earlier invalidation of the state's grandfather clause. 307

U.S. at 271, 276–77. *Lane* emphasized that, under these circumstances, there was "*no escape* from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid." *Id.* at 277 (emphasis added). The plainly invidious laws of *Gomillion* and *Lane* are nothing like the carefully crafted political classification here.

Finally, analogous decisions in the due-process context underscore that political classifications are acceptable even if they incidentally overlap with racial markers. For example, this Court in *Morton v. Mancari* upheld a statutory provision "accord[ing] an employment preference for qualified Indians in the Bureau of Indian Affairs," and expressly rejected the argument that the "preference constitutes invidious racial discrimination." 417 U.S. 535, 537, 551, 553 (1974). The Court explained that the program was "not even a 'racial' preference" in the first place, because it was "not directed towards a 'racial' group consisting of 'Indians'" and "instead . . . applie[d] only to members of 'federally recognized' tribes . . . . In this sense, *the preference [was] political rather than racial in nature.*" *Id.* at 553 n.24 (emphasis added). Simply put, the government may sometimes permissibly single out political classes for special treatment, even when the selected group is strikingly similar to a racial bloc.

Rather than employ these principles, the Ninth Circuit held that a few facts, plucked out of context, show racial-discrimination-by-proxy. But none of this evidence so obviously establishes a violation of the Fifteenth Amendment to warrant summary judgment. Indeed, the Ninth Circuit looked at *other* Guam

statutes that supposedly use "express racial classification[s]." App.33. Specifically, the Registry Act, which "established an official list of 'Chamorro people,'" "tied the definition of Chamorro to the race-neutral language of the Organic Act," and laws governing the Chamorro Land Trust Commission defined "Native Chamorro" to include "any person who became a U.S. citizen [because] of the Organic Act of Guam or descendants of such person." App.35. Similarly, the court cited an earlier, since-repealed-and-replaced version of the Plebiscite Law, which "called for a plebiscite limited to the 'Chamorro people of Guam.'" App.35. But just because *some* statutes define a racial group in terms of a political event does not mean that *every* statute that references the same political event is inextricably linked to race and fatally flawed under the Fifteenth Amendment.

The Ninth Circuit also emphasized the "timing of the 2000 Plebiscite Law's enactment," App.38, noting that Guam finalized the new version of the law, which omitted reference to the Chamorro people, "just one month" after this Court held in *Rice* that Hawaii could not limit participation in the election of public officials to "descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778, and which peoples thereafter have continued to reside in Hawaii," 528 U.S. at 509 (quoting Haw. Rev. Stat. § 10-2 (1993)). According to the Ninth Circuit, this timing is proof positive that the Guam legislature intended to evade *Rice*. But that is pure speculation. The more likely explanation is that the Guam legislature decided that the better focus of a potential political-status plebiscite about the island's political relationship with

the United States was the distinct political class of residents most affected by that relationship.

In sum, the decision below effectively precludes Guam from *ever* passing a law that references the class of U.S. citizens created by the 1950 Organic Act. This is unprecedented, extends the Fifteenth Amendment far beyond its text, history, and existing jurisprudence, and improperly makes a transformative event in the island's history categorically off-limits.[3]

III. This Case Presents An Exceptionally Important Question And Is An Ideal Vehicle.

This Court gets few opportunities to explore the outer bounds of the Fifteenth Amendment, and this case presents a clean opportunity and maximum flexibility to provide much-needed guidance. Indeed, the correct resolution is critical to Guam's political future.

In most cases involving the Fifteenth Amendment, any Fifteenth Amendment issue is

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[3] After deciding that the 2000 Plebiscite Law creates a race-based classification, the Ninth Circuit struck down the law without considering whether it could satisfy strict scrutiny. The court relied on a single quote from *Rice*—that "[t]here is *no room* under the Amendment for the concept that the right to vote in a particular election can be allocated based on race," App.18 (quoting *Rice*, 528 U.S. at 523)—to conclude that "[t]he Fifteenth Amendment's prohibition on race-based voting restrictions is both fundamental and absolute," so "the levels of scrutiny applied to other constitutional restrictions are not pertinent," App.18. But *Rice* said nothing of the sort; indeed, its language is similar to this Court's description of other rights amenable to a scrutiny-based analysis. This presents yet another reason to grant certiorari.

hopelessly entangled with Fourteenth Amendment, Voting Rights Act, or other claims that may render it an afterthought. *See* Maltz, *supra*, at 2; *cf. Smith*, 321 U.S. at 658 (noting cases decided just on Fourteenth Amendment grounds). This case, however, contains no distractions. The decisions below cleanly resolved the Fifteenth Amendment claim, and this issue is outcome-determinative because the Ninth Circuit ruled only on Fifteenth Amendment grounds. App.1–2 & n.1.

As an additional benefit, this case also includes several Fifteenth Amendment issues in one neat package. The Ninth Circuit expansively defined the term "vote" and decided that a political classification is a racial one. It also held that Fifteenth Amendment scrutiny is absolute. *See supra* n.3. This court can address any (or all) of these issues in this case.

For example, even if the Court agrees that the Plebiscite Law calls for a "vote" and contains a race-based classification, the Court should hold the law still satisfies constitutional scrutiny. The law clearly furthers a "compelling state interest" in allowing native inhabitants—who have long been excluded from the governance of their own home—to finally express their political preferences. This is the sort of interest alluded to in *Cipriano v. City of Houma*, which left open whether, "in some circumstances," a state might "constitutionally limit the franchise to qualified voters who are . . . 'specially interested' in the election." 395 U.S. 701, 704 (1969) (citation omitted). Guam's singular past makes its native inhabitants "specially interested" in communicating their views about the territory's relationship with the United

States. And the law is narrowly tailored: Guam cannot determine the political preferences of its native inhabitants without identifying and asking these individuals.

* * *

The right to self-determination is fundamental to democracy. Yet because of centuries of colonialism, this "right has never been afforded [to] the native inhabitants of Guam." 3 Guam Code Ann. § 21000. The decision below perpetuates that oppressive history and continues to deny Guam's native inhabitants a voice in their political future. This Court should grant certiorari, restore the Fifteenth Amendment to its proper scope, and permit Guam to vindicate its native inhabitants' expressive rights to self-determination through political-status plebiscite.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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December 26, 2019

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15719

ARNOLD DAVIS, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. RENORIO; DONALD I. WEAKLEY; LEONARDO M. RAPADAS,

Defendants-Appellants.

Argued and Submitted: Oct. 10, 2018
University of Hawaii Manoa
Filed: July 29, 2019

Before: Kim McLane Wardlaw, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

OPINION

BERZON, Circuit Judge:

Guam's 2000 Plebiscite Law provides for a "political status plebiscite" to determine the official preference of the "Native Inhabitants of Guam"

regarding Guam's political relationship with the United States. Guam Pub. L. No. 25-106 (2000). Our question is whether the provisions of that law restricting voting to "Native Inhabitants of Guam" constitutes an impermissible racial classification in violation of the Fifteenth Amendment.[1]

Rice v. Cayetano, 528 U.S. 495 (2000), and *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016), respectively invalidated laws in Hawaii and the Commonwealth of the Northern Mariana Islands limiting voting in certain elections to descendants of particular indigenous groups because those provisions employed "[a]ncestry [as] a proxy for race" in violation of the Fifteenth Amendment. *Rice*, 528 U.S. at 514. Guam's 2000 Plebiscite Law suffers from the same constitutional flaw. History and context confirm that the "Native Inhabitants of Guam" voter eligibility restriction so closely parallels a racial classification as to be a proxy for race. Its use as a voting qualification therefore violates the Fifteenth Amendment as extended by Congress to Guam.

I

The factual background of this case is intertwined with the history of Guam (the "Territory"), of its indigenous people, and of its colonization. We recognize that this history, like history in general, is subject to contestation both as to exactly what happened in the past and as to the interpretation of

[1] Because we affirm the district court on Fifteenth Amendment grounds, we do not address Davis's arguments that the 2000 Plebiscite Law violates the Fourteenth Amendment, the Voting Rights Act, and the Organic Act of Guam.

even well-established facts. We do not attempt to settle those debates. "Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue." *Rice*, 528 U.S. at 500.

Guam has long been inhabited by an indigenous people, commonly referred to as Chamorro. *See* William L. Wuerch & Dirk Anthony Ballendorf, *Historical Dictionary of Guam and Micronesia* 40-44 (The Scarecrow Press, Inc. 1994); Developments in the Law, *Chapter Four: Guam and the Case for Federal Deference*, 130 Harv. L. Rev. 1704, 1722 (2017). Beginning in the sixteenth century, Spain colonized Guam. Then, in 1899, after the Spanish-American war, Spain ceded Guam to the United States through Article II of the 1898 Treaty of Paris. Until 1950, Guam remained under the control of the U.S. Navy, except for a Japanese occupation from 1941 through 1944. *See Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002). In 1950, responding to petitions from Guam's inhabitants, Congress passed the Organic Act of Guam. Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. §§ 1421-24) ("Organic Act").

The Organic Act (1) designated Guam as an unincorporated territory of the United States subject to Congress's plenary power, 48 U.S.C. § 1421a; (2) established executive, legislative, and judicial branches of government for the Territory, *id.* §§ 1422-24, as well as a limited Bill of Rights modeled after portions of the Bill of Rights in the Federal

Constitution, *id.* § 1421b;[2] and (3) extended U.S. citizenship to three categories of people:

> (a)(1): All inhabitants of the island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality[, and their children.]
>
> (a)(2): All persons born in the island of Guam who resided in Guam on April 11, 1899, including those temporarily absent from the island on that date, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality[, and their children.]
>
> (b): All persons born in the island of Guam on or after April 11, 1899 . . . Provided, That in the case of any person born before the date of enactment of [the Organic Act], he has taken no affirmative steps to preserve or acquire foreign nationality.

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[2] Absent an act of Congress, federal constitutional rights do not automatically apply to unincorporated territories. *Guerrero*, 290 F.3d at 1214. In 1968, Congress amended the Organic Act to extend certain federal constitutional rights to Guam, including the Fifteenth Amendment. *See* 48 U.S.C. § 1421b(u).

8 U.S.C. § 1407 (1952), *repealed by* Pub. L. No. 82-414, §§ 101(a)(38), 301(a)(1) 66 Stat. 163, 171, 235 (1952) (codified at 8 U.S.C. §§ 1101(a)(38), 1401(a)).

According to the 1950 Census—which derived its racial categories from "that which is commonly accepted by the general public"—the Chamorro population comprised the single largest racial group in Guam at the time (45.6%). *See* U.S. Bureau of the Census, *Census of Population: 1950*, Vol. II at 54-46 tbl. 36 (1953) ("1950 Census"). The second largest racial group was White (38.5%), and the rest of the population was Filipino, Chinese, or other races. Virtually all non-Chamorro people residing in the Territory were either already U.S. citizens (99.4% of all Whites were U.S. citizens) or were born outside the jurisdiction of the United States and therefore likely not citizens by authority of the Organic Act (e.g., 94.4% of Filipinos were non-citizens). As of 1950, 98.6% of all non-citizens in Guam were Chamorro. *Id.* at 54-49 tbl. 38.

The citizenship provisions of the Organic Act were in force for less than two years. In 1952, Congress enacted the Immigration and Nationality Act of 1952 ("INA"), which, among other things, repealed the citizenship provisions of the Organic Act, *see* Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280, and conferred U.S. citizenship on all persons born in Guam after passage of the new INA. *See id.* §§ 101(a)(38), 301(a)(1), 66 Stat. 163, 171, 235 (codified at 8 U.S.C. §§ 1101(a)(38), 1401(a)).

In the decades following passage of the Organic Act, some of Guam's inhabitants continued to advocate for more political autonomy. Those efforts

eventually resulted in, among other things, "An Act to Establish the Chamorro Registry," enacted by the Guam legislature in 1996. Guam Pub. L. No. 23-130, §1 (codified as amended at 3 Guam Code Ann. §§18001-31) ("Registry Act"), *repealed in part by* Guam Pub. L. No. 25-106 (2000). The Registry Act created a registry of "Chamorro individuals, families, and their descendants." *Id.* § 1. It referred to the "Chamorro" as the "indigenous people of Guam" who possess "a distinct language and culture." *Id.*[3] The Act's stated purpose was for the registry to "assist in the process of heightening local awareness among the people of Guam of the current struggle for Commonwealth, of the identity of the indigenous Chamorro people of Guam, and of the role that Chamorros and succeeding generations play in the

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[3] Another section of the Registry Act defined "Chamorro":

> (a) Chamorro means those persons defined by the U.S. Congress in Section IV of the organic Act of Guam . . . and their descendants:
>
> (1) All inhabitants of the island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and have taken no affirmative steps to preserve or acquire foreign nationality; and
>
> (2) All persons born in the island of Guam, who resided in Guam on April 11, 1899, including those temporarily absent from the island on that date, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality.

Registry Act § 20001(a).

island's cultural survival and in Guam's political evolution towards self-government." *Id.*

One year later, the Guam legislature established the "Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination," Guam Pub. L. No. 23-147 (1997) (codified at 1 Guam Code Ann. §§ 2101-15) ("1997 Plebiscite Law"), *repealed in part by* Guam Pub. L. No. 25-106 (2000). The Legislature established the Commission on Decolonization "in the interest of the will of the people of Guam, desirous to end colonial discrimination and address long-standing injustice of [the Chamorro] people." *Id.* § 1. The purpose of the Commission on Decolonization was to "ascertain the desire of the Chamorro people of Guam as to their future political relationship with the United States." *Id.* § 5. It was charged with writing position papers on the political status options for Guam and with conducting a public information campaign based on those papers. *Id.* §§ 6-9. The 1997 Plebiscite Law also called for a "political status plebiscite" during the next primary election, in which voters would be asked:

> In recognition of your right to self-determination, which of the following political status options do you favor?
>
> 1. Independence
> 2. Free Association
> 3. Statehood

Id. § 10. Voting in the plebiscite was to be limited to "Chamorro People," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign

nationality." *Id.* §§ 2(b), 10. The Commission on Decolonization was then directed to "transmit [the results of the plebiscite] to the President and Congress of the United States and the Secretary General of the United Nations." *Id.* § 5.

Before the planned date of the self-determination plebiscite, the Supreme Court in *Rice v. Cayetano* invalidated a Hawaii law restricting the right to vote in certain elections to "Hawaiians," defined as the descendants of people inhabiting the Hawaiian Islands in 1778. 528 U.S. at 499. A month after Rice was decided, the Guam legislature enacted the law at issue in this case. Guam Pub. L. No. 25-106 (2000) (codified at 3 Guam Code Ann. §§ 21000-31, 1 Guam Code Ann. §§ 2101-15) ("2000 Plebiscite Law").

The 2000 Plebiscite Law contains several interrelated provisions: First, it leaves the Registry Act intact and creates a separate "Guam Decolonization Registry" in which those voters qualified for the new political status plebiscite would be listed.[4] 3 Guam Code Ann. §§ 21000, 21026. Those

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[4] The 2000 Plebiscite Law modified the definition of "Chamorro" in the Registry Act, to the following:

> (a) '*Chamorro*' shall mean:
>
> (1) all inhabitants of the Island of Guam on April 11, 1899, including those temporarily absent from the Island on that date and who were Spanish subjects; *and*
>
> (2) all persons born on the Island of Guam prior to 1800, and their descendants, who resided on Guam on April 11, 1899, including those temporarily absent from the Island on that date, and their descendants;
>
> (i) 'descendant' means a person who has proceeded by birth, such as a child or grandchild, to the remotest

qualified to register, and therefore to vote, in the plebiscite must be "Native Inhabitants of Guam," defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." *Id.* § 21001(e).

Second, the 2000 Plebiscite Law retains the Commission on Decolonization but amends portions of the 1997 Plebiscite Law to replace all references to "Chamorro" with "Native Inhabitants of Guam." 1 Guam Code Ann. §§ 2101-02, 2104-05, 2110. As revised, the law establishing a new plebiscite provides:

> The general purpose of the Commission on Decolonization shall be to ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America. Once the intent of the Native Inhabitants of Guam is ascertained, the Commission shall promptly transmit that desire to the President and the Congress of the United States of America, and to the Secretary General of the United Nations.

Id. § 2105.

Finally, the 2000 Plebiscite Law states that "[t]he intent of [the law] shall *not* be construed nor implemented by the government officials effectuating

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> degree, from any 'Chamorro' as defined above, and who is considered placed in a line of succession from such ancestor where such succession is by virtue of blood relations.

2000 Plebiscite Law § 12.

its provisions to be race based, but founded upon the classifications of persons as defined by the U.S. Congress in the 1950 Organic Act of Guam." 3 Guam Code Ann. § 21000. Rather, the intent of the law is "to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America," as that "right has never been afforded." *Id.*

One subsequent amendment to the plebiscite relevant to this case followed. In 2010, the Guam legislature passed a law providing that individuals who received or had been preapproved for a Chamorro Land Trust Commission ("CLTC") property lease would be automatically registered in the Guam Decolonization Registry. Guam Pub. L. No. 30-102, § 21002.1 (codified at 3 Guam Code Ann. § 21002.1). The CLTC was created in 1975 to administer leases for lands that the United States had seized from Guam inhabitants during and after World War II and had later returned to the Guam government. *See* Guam Pub. L. 12-226 (codified as amended at 21 Guam Code Ann. §§ 75101-75125). Persons eligible to receive CLTC leases must be "Native Chamorros," defined as "any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such person." 21 Guam Code Ann. §§ 75101(d), 75107(a).

Arnold Davis, a non-Chamorro resident of Guam, sought to register for the Guam Decolonization Registry and thereby to qualify as a voter in the plebiscite. He was denied registration because he did not meet the definition of "Native Inhabitant of

Guam." Davis filed suit in 2011, challenging the 2000 Plebiscite Law on grounds that it violated the Fourteenth and Fifteenth Amendments of the Constitution, the Voting Rights Act of 1965, and the Organic Act.

At the time the suit was filed, the plebiscite had not yet occurred, and no date was set for it to take place. *Davis v. Guam*, Civil Case No. 11-00035, 2013 WL 204697, *2-3 (D. Guam 2013) ("*Davis I*"). Relying on the uncertain timing of the plebiscite, the district court initially dismissed the case for lack of standing and ripeness. *Id.* at *9. We reversed that dismissal on appeal, holding that Davis's alleged unequal treatment was a sufficient injury to establish standing and that his claim was ripe because he adequately alleged that he was "currently being denied equal treatment under Guam law." *Davis v. Guam*, 785 F.3d 1311, 1315-16 (9th Cir. 2015) ("*Davis II*").

After remand to the district court the parties filed cross-motions for summary judgment. The district court granted Davis's motion for summary judgment and permanently enjoined Guam from conducting a plebiscite restricting voters to Native Inhabitants of Guam. *Davis v. Guam*, No. CV 11-00035, 2017 WL 930825, at *1 (D. Guam 2017) ("*Davis III*").

The district court concluded, first, that the plebiscite was an election for Fifteenth Amendment purposes because the result of the vote would decide a public issue. *Id.* at *11. Next, the court determined that although "Native Inhabitants of Guam" is not an explicit racial classification, the history and structure of the 2000 Plebiscite Law reveal that "the very object of the statutory definition in question here . . . is to

treat the Chamorro people as a 'distinct people.'" *Id.* at *8 (quoting *Rice*, 528 U.S. at 515). The 2000 Plebiscite Law therefore used "ancestry as a proxy for race," the district court held, in violation of the Fifteenth Amendment. *Id.*

The court also decided that the 2000 Plebiscite Law violated the Equal Protection Clause of the Fourteenth Amendment. Applying strict scrutiny, the court held the law was not narrowly tailored to a compelling state interest as all inhabitants of Guam, not just its "Native Inhabitants," have an interest in the results of the plebiscite. *Id.* at *12-*14. The district court concluded that less restrictive alternatives exist, including "conducting a poll with the assistance of the University of Guam." *Id.* at *14.

This appeal followed. "We review a district court's decision on cross motions for summary judgment *de novo*." *Commonwealth Election Comm'n*, 844 F.3d at 1091.

II

Congress has provided that the Fifteenth Amendment "shall have the same force and effect [in Guam] as in the United States." 48 U.S.C. § 1421b(u); *accord Davis II*, 785 F.3d at 1314 n.2. That Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. The Fifteenth Amendment is "comprehensive in reach," and applies to "any election in which public issues are decided or public officials selected." *Rice*, 528 U.S. at 512, 523 (quoting *Terry v. Adams*, 345 U.S. 461, 468 (1953)).

Guam argues that the Fifteenth Amendment is inapplicable to the plebiscite because that vote will not *decide* a public issue. It notes that the 2000 Plebiscite Law requires Guam to transmit the results of the plebiscite to Congress, the President, and the United Nations but will not, itself, create any change in the political status of the Territory. That is so. But, despite its limited immediate impact, the results of the planned plebiscite commit the Guam government to take specified actions and thereby constitute a decision on a public issue for Fifteenth Amendment purposes.

We begin by noting that any suggestion that the Fifteenth Amendment be read restrictively should be viewed with skepticism. The right to vote is foundational in our democratic system. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Protecting the franchise is "preservative of all rights," because the opportunity to participate in the formation of government policies defines and enforces all other entitlements. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). For that reason, the Fifteenth Amendment is "comprehensive in reach." *Rice*, 528 U.S. at 512. The text of the Fifteenth Amendment states broadly that the right "to vote" shall not be denied. U.S. Const. amend. XV, § 1. It does not qualify the meaning of "vote" in any way. In light of the text and the unique importance of the Fifteenth Amendment, where there is any doubt about the

Fifteenth Amendment's boundaries we err on the side of inclusiveness.

We have no need here to define the precise contours of what it means to "decide" a "public issue" under the Fifteenth Amendment. *See Rice*, 528 U.S. at 523. It is at least clear that the Amendment includes any government-held election in which the results commit a government to a particular course of action. That requirement is met here.

First, the issue the 2000 Plebiscite Law would decide is public in nature. A basic premise of our representative democracy is "the critical postulate that sovereignty is vested in the people." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995). Because the government "derives all its powers directly or indirectly from the great body of the people," *The Federalist No. 39*, at 241 (James Madison) (Clinton Rossiter ed., 1961), the government necessarily exercises authority on behalf of the public when it acts. In that sense, its actions are of public concern.

The Supreme Court acknowledged this foundational principle in *Terry v. Adams*, which addressed a related question—whether an election held by a private organization constituted state action for purposes of the Fifteenth Amendment. *Terry* held that the Jaybird Democratic Association's primary elections, which functionally determined the Democratic Party's candidates for public office in a Texas county, violated the Fifteenth Amendment by excluding black voters. 345 U.S. at 470 (plurality opinion). The Court concluded that although the Jaybird primaries were private in the sense that they

were conducted by a private entity, they served a public function because they chose candidates for public office. The Jaybird primaries were therefore covered by the Fifteenth Amendment. *Id.* at 469-70.

A plurality of the Court explained this conclusion as follows: "Clearly the [Fifteenth] Amendment includes any election in which public issues are decided or public officials selected. Just as clearly the Amendment excludes social or business clubs." *Id.* at 468-69. Decades later, the *Rice* majority adopted the formulation of the *Terry* plurality—that the Fifteenth Amendment applies to "any election in which public issues are decided or public officials selected." 528 U.S. at 523 (quoting *Terry*, 345 U.S. at 468). This focus is confirmed by another passage in the *Terry* plurality opinion on which *Rice* relied. That passage specified that the Fifteenth Amendment establishes a right "not to be discriminated against as voters in elections to determine *public governmental policies* or to select public officials, national, state, or local." *Id.* at 514 (emphasis added) (quoting *Terry*, 528 U.S. at 467).

In this case, the 2000 Plebiscite Law prescribes that the Commission on Decolonization—a governmental body—will make an official transmission to Congress, the President, and the United Nations, and the results of the plebiscite will determine the content of the message transmitted. *See* 1 Guam Code Ann. § 2105. What a governmental body will communicate to other governmental entities is assuredly a "public issue"—a matter of "governmental polic[y]." *Terry*, 345 U.S. at 467-68.

Second, the election called for by the 2000 Plebiscite Law commits Guam to a particular course

of action: A governmental commission with prescribed duties would be bound to transmit the result of the plebiscite to the federal government and to the United Nations. By requiring the transmission of the plebiscite results, the 2000 Plebiscite Law mandates that the Commission on Decolonization take a public stance in support of the result. 3 Guam Ann. Code § 21000 ("It is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950 and to use this knowledge to further petition Congress and other entities to achieve the stated goals."). So, regardless of whether the result of the plebiscite ultimately affects the political status of Guam, the plebiscite will "decide" a public issue—what position a governmental entity will advocate before domestic and international bodies.

The plebiscite therefore will both concern a "public issue"—Guam's official communication with other governmental bodies—and "decide" it, in that it will commit a governmental body to communicate the position determined by the plebiscite. Given these two features, the election is, under *Rice*, subject to the Fifteenth Amendment's protection against racial restrictions on the right to vote.

Were this plebiscite not covered by the Fifteenth Amendment, the scope of the Amendment's prohibition on race-based voting restrictions in elections would be significantly narrowed. Elections regularly require a governmental body to take a stance on issues even though there may be no on-the-ground changes in policy. For example, state initiatives sometimes authorize permission to make a policy change, but the actual policy change is

contingent on future occurrences. *See, e.g.*, Proposition 7, Assemb. B. 807, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (allowing the state legislature to vote to change daylight savings time, if the change is allowed by the federal government).[5] Moreover, in presidential elections, political parties in several states employ nonbinding primaries, in which primary voters may express their preference for a candidate but the delegates to a party's national convention are not, technically, bound by that preference. *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2219 n.127 (2001).[6] Concluding that the Fifteenth Amendment only applies to elections triggering an immediate substantive action would exempt a broad category of elections from Fifteenth Amendment protection.

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[5] State statutory and constitutional limits govern what propositions can be the subject of state initiatives or referenda. *See, e.g.*, *Am. Fed'n of Labor v. Eu*, 36 Cal. 3d 687, 703 (1984) (holding that a state initiative requiring the legislature to enact a resolution which did not itself change California law exceeded scope of the initiative power under the California Constitution); *Harper v. Waltermire*, 213 Mont. 425, 428 (1984) (same with respect to Montana initiative under the Montana Constitution). Those limits are distinct from the question of whether the Fifteenth Amendment applies if an initiative or referendum *is* held.

[6] We do not decide whether these elections are definitively subject to the requirements of the Fifteenth Amendment. We note them only as examples of the type of elections that might be affected if the Fifteenth Amendment applied only to elections that triggered immediate substantive outcomes.

We hold that Guam's 2000 Plebiscite Law is subject to the requirements of the Fifteenth Amendment.

III.

We turn to the core of the Fifteenth Amendment issue: Does the 2000 Plebiscite Law deny citizens the right to vote "on account of race?" U.S. Const. amend XV, § 1.[7]

The Fifteenth Amendment's prohibition on race-based voting restrictions is both fundamental and absolute. *See Shaw v. Reno*, 509 U.S. 630, 639 (1993). As "[t]here is *no room* under the Amendment for the concept that the right to vote in a particular election can be allocated based on race," the levels of scrutiny applied to other constitutional restrictions are not pertinent to a race-based franchise limitation. *Rice*, 528 U.S. at 523 (emphasis added). This clear-cut rule reflects the importance of the franchise as "the essence of a democratic society" and recognizes that "any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555.

Moreover, the Fifteenth Amendment applies with equal force regardless of the particular racial group

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[7] We address only the constitutionality of the plebiscite under Section 1 of the Fifteenth Amendment. Our opinion affects neither Congress's power under Section 2 to enact appropriate legislation enforcing the Amendment nor the analysis of voting restrictions under the Fourteenth Amendment, which may be subject to heightened scrutiny rather than an absolute bar. *See, e.g.*, *Harper*, 383 U.S. at 667 (holding that poll taxes in elections must be "carefully and meticulously scrutinized" under the Equal Protection Clause (citation omitted)).

targeted by the challenged law. Although originally enacted to guarantee emancipated slaves the right to vote after the Civil War, the generic language of the Fifteenth Amendment "transcend[s] the particular controversy which was the immediate impetus for its enactment." *Rice*, 528 U.S. at 512. The Amendment's prohibition on racial discrimination "grants protection to all persons, not just members of a particular race." *Id.* Its "mandate of neutrality" is thus straightforward and universal: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be" permitted to vote as well. *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 218 (1875)).

Determining whether a law discriminates "on account of race" is not, however, always straightforward. Voting qualifications that, by their very terms, draw distinctions based on racial characteristics are of course prohibited. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (collecting cases). But "[t]he (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). So, in addition to facial racial distinctions, classifications that are race neutral on their face but racial by design or application violate the Fifteenth Amendment.

The well-established hallmarks of such discrimination for constitutional purposes are discriminatory intent, *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481-82 (1997); *City of Mobile v.*

Bolden, 446 U.S. 55, 62-63 (1980) (plurality opinion), and discriminatory implementation, *see Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53 (1959) ("Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.").

One category of facially neutral restrictions that runs afoul of the Fifteenth Amendment is a classification so closely intertwined with race that it is a "proxy for race," as the Supreme Court found to be the case in *Rice*, 528 U.S. at 514. *Rice* addressed a voting qualification in statewide elections for the trustees of the Office of Hawaiian Affairs, a state agency that administers programs for the benefit of descendants of Native Hawaiians. *Id.* at 498-99. The Hawaii Constitution limited voting in those elections to "Hawaiians," defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* at 509 (quoting Haw. Rev. Stat. § 10-2). *Rice* held that the Hawaiian voting restriction was racial "in purpose and operation." *Id.* at 516. It reasoned as follows:

> Ancestry can be a proxy for race. It is that proxy here. . . . For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. The provisions before us reflect the

> State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

Id. at 514-15 (second alteration in original) (citations omitted).

To confirm its conclusion, *Rice* looked to the history of the "Hawaiian" definition at issue and determined that previously proposed versions of the qualification had expressly referred to "Hawaiians" as a race. *Id.* at 515-516. The Court concluded that removal of the "race" reference did not change the classification of individuals allowed to vote in the election. The voter qualification therefore remained race-based although it no longer proclaimed as such. *Id.* at 516. *Rice* provides key guidance for determining whether the 2000 Plebiscite Law's restriction of the vote to "Native Inhabitants of Guam" is race-based.

A

Our first inquiry is whether, as Davis maintains, *Rice* held *all* classifications based on ancestry to be impermissible proxies for race. It did not.

The Supreme Court selected its words carefully when it struck down the voting restrictions at issue in *Rice*. It stated that "[a]ncestry *can* be a proxy for race" in the context of the Fifteenth Amendment, not that it always is. *Id.* at 514 (emphasis added).

The Court's determination that the challenged voting qualification's use of ancestry "is that proxy here," *id.*, rested on the historical and legislative context of the particular classification at issue, not on the categorical principle that all ancestral classifications are racial classifications. The Court focused specifically on the fact that in 1778, the individuals inhabiting the Hawaiian Islands were a "distinct people" with common physical characteristics and shared culture. *Id.* at 515. Limiting the franchise to descendants of that distinct people, the Court reasoned, singled out individuals for special treatment based on their "ethnic characteristics and cultural traditions." *Id.* at 515, 517. *Rice* buttressed that conclusion with evidence from the legislative history of the challenged statute, which referred to "Hawaiians" as a "race." *Id.* at 516. In other words, the Court recognized that ancestral tracing can be *a* characteristic of a racial classification, but is not itself always sufficient to identify such a classification. And it concluded that the ancestral classification at issue was problematic because it operated as a race-based voting restriction. If the Court had meant to suggest that *all* classifications based on ancestry were

impermissible, it would have had no need to examine the unique history of the descendants allowed to vote under the challenged law.

Davis contends that one sentence in *Rice* indicates otherwise—that all ancestry classifications are impermissible racial classifications: "'[R]acial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (second alteration in original) (quoting *Saint Francis Coll.*, 481 U.S. at 613). But that interpretation wrenches the sentence in *Rice* from its context. *Rice* quoted *Saint Francis Coll.* to support its conclusion that the *specific* classification at issue in *Rice* was a racial classification.[8] After an

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[8] *Saint Francis Coll.* does not suggest that all ancestral classifications are racial ones either. That case addressed whether discrimination based specifically on "Arabian ancestry" constituted racial discrimination for purposes of 42 U.S.C. § 1981. 481 U.S. at 607. After recounting the legislative history of § 1981 and the understanding of race at the time the statute was passed in 1870, the Court concluded the following:

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. [Section] 1981, at a minimum, reaches discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*. It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection.

Id. at 613 (footnotes and internal quotation marks omitted).

exhaustive account of Hawaii's history, the Court determined that the voter eligibility classification singled out persons solely because of their ancestral relationship to a culturally and ethnically distinct population, and went on to conclude that "[a]ncestral tracing *of this sort* achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id.* at 517 (emphasis added). Nowhere did the Court suggest that classification by ancestry alone was sufficient to render the challenged classification a racial one.

B

Rice did not go on to explain further the connection between ancestry and race, or to explain what it meant by "ethnic characteristics and cultural traditions." *Id.* And modern courts have generally resisted defining with precision the legal concept of race and more specifically, the relationship between ancestry and the legal concept of race.

Racial categories were once thought to be grounded in biological fact, but shifting understandings of which groups constitute distinct races throughout history reveal such categories to be "social construct[s]," the boundaries of which are subject to contestation and revision. *Ho ex rel. Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 863 (9th Cir. 1998); *see also Saint Francis Coll.*, 481 U.S. at 610 n.4; *United States v. Nelson*, 277 F.3d 164, 176 n.12 (2d Cir. 2002).[9] Still, as a legal concept, a racial category

[9] Examples of this contestation and revision have at times reached our highest court. In the early twentieth century, the Supreme Court decided a number of cases delineating who

is generally understood as a group, designated by itself or others, as socially distinct based on perceived common physical, ethnic, or cultural characteristics. So, for example, *Abdullahi v. Prada USA Corp.* stated that "[a] racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits," 520 F.3d 710, 712 (7th Cir. 2008), a definition also reflected in a federal statute outlawing genocide. *See* 18 U.S.C. § 1093(6) ("[T]he term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."). *Saint Francis Coll.* held that racial discrimination includes discrimination based on "ethnic characteristics," 481 U.S. at 612-613, and *Rice* emphasized that the "unique culture of the ancient Hawaiians," combined with their common ancestry—that is, biological descent—distinguished them as a

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qualified as white and were therefore afforded its privileges. In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court held that a man of the "Japanese race born in Japan" was not a "white person" and therefore was not qualified to be naturalized under the country's then-racially restrictive naturalization laws. It reasoned that the term "white person" was synonymous with the "Caucasian race." *Id.* at 189, 197-98. A year later, the Court, however, held that a man of South Asian descent born in India did not qualify as a "white person" despite acknowledging that many scientific authorities at the time considered South Asians to be members of the Caucasian race. *United States v. Thind*, 261 U.S. 204, 210-15 (1923); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding a state court ruling requiring an American citizen of Chinese descent to attend school for "colored" children and not for white children).

race. 528 U.S. at 514-15.[10] These various concepts remain somewhat distinct, but all embrace the core concept of a group of people distinguished based on certain identifiable traits.

Just as race is a difficult concept to define, so is ancestry's precise relationship to race. Ancestry identifies individuals by biological descent. *See Ancestry*, *Black's Law Dictionary* (10th ed. 2014) ("A line of descent; collectively, a person's forebears; lineage."); *Ancestor*, *Oxford English Dictionary* (2d ed. 1989) ("One from whom a person is descended, either by the father or mother; a progenitor, a forefather."). Racial categories often *incorporate* biological descent, as the mechanism through which present day individuals viewed as a distinct group are thought to be connected to an earlier set of individuals with identifiable physical, ethnic, or cultural characteristics. For example, state laws mandating the enslavement and later segregation and subjugation of African Americans identified them by

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[10] *See also Hernandez v. State of Tex.*, 347 U.S. 475, 478 (1954) ("Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact."); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. Colo. L. Rev. 1355, 1385 (2008) ("Race includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behavior are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group.").

the percentage of blood they possessed from African American ancestors. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1, 24 n.94 (1991). Until 1952, Congress imposed racial restrictions on who could be naturalized as citizens. *See* 8 U.S.C. § 703 (repealed 1952). Among those eligible for naturalization were "white persons, persons of African nativity or descent, and persons who are descendants of races indigenous to the continents of North or South America," as well as those with a "preponderance of blood" from those groups. *Id.* § 703(a)(1), (2). Race and ancestry thus frequently overlap or are treated as equivalents by courts. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

But ancestry and race are not identical legal concepts. State and federal laws are replete with provisions that target individuals based on biological descent without reflecting racial classifications. These include laws of intestate succession, *see, e.g.*, Ariz. Rev. Stat. § 14-2103 (requiring passing of property based on lineage in the absence of a surviving spouse); Cal. Prob. Code §§ 240, 6402 (same); Unif. Prob. Code § 2-103 (Nat'l Conference of Comm'rs on Unif. State Laws 2010) (same); *see also Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("In one form or another, the right to

pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."); citizenship, *see, e.g.*, 8 U.S.C. §§ 1431, 1433 (conferring citizenship on children born outside the United States if at least one parent is a U.S. citizen); *id.* § 1153 (immigrant visa preferences for children of U.S. citizens and lawful permanent residents); and child custody laws, *see, e.g.*, Haw. Rev. Stat. § 571-46(7) (providing visitation privileges for "parents, grandparents, and siblings" of child). As Justice Stevens observed in his dissent in *Rice*, "There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees." 528 U.S. at 545 & n.16.[11]

Moreover, the Supreme Court has squarely rejected any categorical equivalence between ancestry and racial categorization. *Morton v. Mancari*, 417 U.S. 535 (1974), upheld a Bureau of Indian Affairs hiring preference for "Indians," defined as an individual possessing "one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe." 417 U.S. at 553 n.24. Although the hiring preference classified individuals based on biological ancestry, the Supreme Court concluded that the classification was "political rather than racial in nature." *Id. Mancari* determined that the hiring preference treated "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," stressing

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[11] *See also* Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 496 n.21 (2017) (collecting "laws [that] recognize and honor ancestry" outside the Indian law context).

the "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551, 554.

Since *Mancari*, the Supreme Court and our court have reaffirmed ancestral classifications related to American Indians without suggesting that they constitute racial classifications. *See Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 79 n.13, 89 (1977); *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc); *see also Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 851-52 (9th Cir. 2006) (en banc) (Fletcher, J., concurring) (listing federal laws concerning Indians that rely on ancestry); Krakoff, *supra*, at 501 (explaining that American Indian tribal status "assumes ancestral ties to peoples who preceded European (and then American) arrival"). This well-settled law regarding classifications of American Indians confirms that not all ancestral classifications are racial ones.

In sum, biological descent or ancestry is often a feature of a race classification, but an ancestral classification is not always a racial one.

C

That ancestry is not always a proxy for race does not mean it never is.

We have previously outlined the contours of proxy discrimination when addressing statutory discrimination claims:

> Proxy discrimination is a form of facial discrimination. It arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group. For example, discriminating against individuals with gray hair is a proxy for age discrimination because "the 'fit' between age and gray hair is sufficiently close." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The Supreme Court has recognized that "[a]ncestry can be a proxy for race" in the Fifteenth Amendment context. *Rice*, 528 U.S. at 514; *see Commonwealth Election Comm'n*, 844 F.3d at 1092. *Guinn v. United States*, for example, held that although an exemption to a voting literacy test did not expressly classify by race, "the standard itself inherently brings that result into existence." 238 U.S. 347, 364-65 (1915).[12] Although proxy discrimination does not involve express racial classifications, the fit between the classification at issue and the racial group it covers is so close that a classification on the basis of race can be inferred

[12] *See also* Stephen M. Rich, *Inferred Classifications*, 99 Va. L. Rev. 1525, 1532 (2013) (discussing how the Supreme Court has inferred facial racial classifications based on a "legislation's form and practical effect").

without more.[13] For that reason, proxy discrimination is "a form of facial discrimination." *Pac. Shores Props.*, 730 F.3d at 1160 n.23.

Notably, proxy discrimination does not require an exact match between the proxy category and the racial classification for which it is a proxy. "Simply because a class . . . does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516-17. In *Rice* the classification at issue—though not explicitly racial—was so closely intertwined with race, given the characteristics of Hawaii's population in 1778, that the law was readily understood to be discriminatory in "purpose and operation." *Id.* at 516. At its core, *Rice* inferred the racial purpose of the Hawaii law from the terms of the classification combined with historical facts, concluding that Hawaii's racial voter qualification was "neither subtle nor indirect." *Id.* at 514.

Relying on *Rice*, we held in *Davis v. Commonwealth Election Comm'n* that an ancestry-based voting restriction in the Commonwealth of the Northern Mariana Islands ("CNMI") was a proxy for race discrimination in violation of the Fifteenth Amendment. 844 F.3d at 1093. *Commonwealth Election Commission* concerned a provision of the CNMI Constitution limiting voting in certain CNMI elections to U.S. citizens or nationals "who [are] of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood," a classification

[13] We do not address whether ancestry can be a proxy for race in contexts beyond the scope of the Fifteenth Amendment.

defined as someone who was "born or domiciled in the Northern Mariana Islands by 1950 and . . . a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth." *Id.* at 1090 (quoting N. Mar. I. Const. art XII, § 4). We concluded that "the *stated* intent of the provision [was] to make ethnic distinctions," even though the provision was technically tethered to an ancestor's residence in 1950, and even though there was "historical evidence that some persons who were not of Chamorro or Carolinian ancestry lived on the islands in 1950." *Id.* at 1093 (emphasis added). We reasoned that the voter qualification at issue "tie[d] voter eligibility to descent from an ethnic group;" the qualification "referenced blood quantum to determine descent" much like the Hawaiian law invalidated in *Rice*; and the statute implementing the classification referenced race. *Id.* As in *Rice*, the CNMI law left no reasonable explanation for the voting qualifications except that voter eligibility was race-based.

D

Like the classifications invalidated in *Rice* and *Commonwealth Election Commission*, the classification "Native Inhabitants of Guam" in this case serves as a proxy for race, in violation of the Fifteenth Amendment. The 2000 Plebiscite Law limits voting to "Native Inhabitants of Guam," which it defines as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 3 Guam Code Ann. § 21001(e). The Organic Act granted U.S. citizenship to three categories of

people and their descendants. In summary, those categories are:

> (1) Individuals born before April 11, 1899, who lived in Guam on that date as Spanish subjects, and who continued to reside in some part of the U.S. thereafter.
>
> (2) Individuals born in Guam before April 11, 1899, who lived in Guam on that date, and who continued to reside in some part of the U.S. thereafter.
>
> (3) Individuals born in Guam on or after April 11, 1899.

8 U.S.C. § 1407 (1952). This definition is so closely associated with the express racial classification "Chamorro" used in previously enacted statutes that it can only be sensibly understood as a proxy for that same racial classification.[14]

The 2000 Plebiscite Law's immediate predecessors were not shy about using an express racial classification. The Registry Act established an official list of "Chamorro" people, defined according to the Organic Act, as inhabitants of Guam in 1899 who were Spanish subjects or were born in Guam before 1899, and the descendants of those individuals. Registry Act § 20001(a). In its legislative findings and

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[14] Guam acknowledged in the district court that the term "Chamorro" refers to a distinct racial category and does not seriously contest otherwise on appeal. We have similarly recognized "Chamorro" as a racial classification for Fifteenth Amendment purposes. *See Commonwealth Election Comm'n*, 844 F.3d at 1093 (treating "Northern Marianas Chamorro" as a racial classification).

statement of intent, the Registry Act provided: "The Guam Legislature recognizes that the indigenous people of Guam, the Chamorros, have endured as a population with a distinct language and culture despite suffering over three hundred years of colonial occupation by Spain, the United States of America, and Japan." *Id.* § 1. It further stated: "The Guam Legislature . . . endeavors to memorialize the indigenous Chamorro people . . . who continue to develop as one Chamorro people on their homeland, Guam." *Id.* Finally, the Registry Act recognized that "[t]he Legislature intends for this registry to assist in the process of heightening local awareness among the people of Guam of the current struggle for Commonwealth, of the identity of the indigenous Chamorro people of Guam, and of the role that Chamorros and succeeding generations play in the island's cultural survival and in Guam's political evolution towards self-government." *Id.* As part of those purposes, the law recognized that the registry may be used "for the future exercise of self-determination by the indigenous Chamorro people of Guam." *Id.*

The Registry Act formally tied the definition of Chamorro to the race-neutral language of the Organic Act. But the enactment as a whole rested on the concept that the Chamorro were a "distinct people" with a "common culture," the very hallmarks of racial classification *Rice* relied upon in concluding that "Hawaiian" defined a racial group for Fifteenth Amendment purposes. *See* 528 U.S. at 514-15.

The 1997 Plebiscite Law, which the 2000 Plebiscite Law built directly upon, similarly employed

express racial classifications. The 1997 law called for a plebiscite limited to the "Chamorro people of Guam," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality." 1997 Plebiscite Law § 2(b). Like the Registry Act, the 1997 Plebiscite Law repeatedly employed the term "Chamorro" to note a distinct group and described that group as facing "colonial discrimination" and "long-standing injustice." *Id.* § 1.

Additionally, the Guam legislature has long defined the term "Native Chamorro" for purposes of the Chamorro Land Trust Commission to include "any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such person." Guam Pub. L. No. 15-118 (1980) (codified at 21 Guam Code Ann. § 75101(d)). The CLTC qualifies Native Chamorros to lease land the United States previously seized from Guam's inhabitants during and after World War II and later returned to the Guam government. After passage of the 2000 Plebiscite Law, the Guam legislature enacted a law providing that individuals who receive a lease or were preapproved for one through the CLTC are automatically registered in the Guam Decolonization Registry, thereby qualifying them to vote in the plebiscite. 3 Guam Code Ann. § 21002.1.

Several similarities between the 2000 Plebiscite Law and its predecessors reveal that "Native Inhabitants of Guam" is a proxy for "Chamorro," and therefore for a racial classification. First, the 2000 Plebiscite Law's definition of "Native Inhabitants of

Guam" is nearly indistinguishable from the definitions of "Chamorro" in the Registry Act, the 1997 Plebiscite Law, and the CLTC. "Native Inhabitants of Guam" incorporates all the citizenship provisions of the Organic Act, as does the definition of "Native Chamorro" in the CLTC; the Registry Act and the 1997 Plebiscite Law mirror the first two sections of those provisions. *Compare* 2000 Plebiscite Law § 21001(e); 21 Guam Code Ann. § 75101(d); Registry Act § 20001(a); 1997 Plebiscite Law § 2(b), *with* 8 U.S.C. § 1407 (1952).[15] That Guam applies nearly identical definitions to the terms "Chamorro," a racial category, and "Native Inhabitants of Guam" indicates that these terms are interchangeable. The closeness of the association is sufficient to conclude that the term "Native Inhabitants of Guam" is a proxy for the "Chamorro" classification.

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[15] The Registry Act's and the 1997 Plebiscite Law's definition of "Chamorro" do not incorporate the third citizenship provision of the Organic Act, which grants citizenship to individuals born in Guam on or after April 11, 1899. 8 U.S.C. § 1407(b) (1952). Because the INA replaced the citizenship provisions of the Organic Act in 1952, *see* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280, this third provision uniquely includes only individuals who were born in Guam between 1899 and 1952 but were not descendants of individuals residing in Guam before 1899. The inclusion of this third provision into the definition of "Native Inhabitants of Guam" does not meaningfully differentiate the term "Native Inhabitants of Guam" from the term "Chamorro." Even including the third citizenship provision of the Organic Act, it appears that as of 1950 98.6% of people who were non-citizen nationals, and thereby likely received citizenship pursuant to the Organic Act, were categorized as "Chamorro." *See* 1950 Census at 54-49 tbl. 38.

Second, the 2000 Plebiscite Law maintains nearly identically the features of the facially race-based Registry Act and the 1997 Plebiscite Law. This continuity confirms the 2000 Plebiscite Law's changes to the Chamorro classification were semantic and cosmetic, not substantive.[16]

The 2000 Plebiscite Law creates a "Guam Decolonization Registry" that mirrors the earlier Registry Act. The new registry is structured similarly to the earlier one, including requiring an affidavit to register, *compare* 2000 Plebiscite Law § 21002, *with* Registry Act § 20002; administering the registry through the Guam Election Commission, *compare* 2000 Plebiscite Law § 21001(d), *with* Registry Act § 20001(c); and criminalizing false registration, *compare* 2000 Plebiscite Law § 21009, *with* Registry Act § 20009.

The 2000 Plebiscite Law also amends the 1997 Plebiscite Law to eliminate references to "Chamorro" people, but otherwise retains the same features. *See* 2000 Plebiscite Law §§ 7, 9-11. Both statutes establish non-binding elections on Guam's future political status relationship with the United States, the results of which will be transmitted to the federal government and to the United Nations. *Compare* 2000 Plebiscite Law §§ 10-11, *with* 1997 Plebiscite Law §§ 5, 10. Given

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[16] The 2000 Plebiscite Law slightly changed the definition of "Chamorro" in the Registry Act to include individuals born in Guam prior to 1800 and their descendants. *See* 2000 Plebiscite Law § 12; *supra*, n.4. However, this post-hoc revision does not change the near identical resemblance between the definitions of "Native Inhabitants of Guam" in the 2000 Plebiscite Law and the original definition of "Chamorro" in the Registry Act.

the similarity in the substantive provisions and in the definitions of "Chamorro" and of "Native Inhabitants of Guam," the substitution of terms does not erase the 1997 Plebiscite Law's premise for the voting restriction—to treat the Chamorro as a "distinct people." *Rice*, 528 U.S. at 515.

Finally, the timing of the 2000 Plebiscite Law's enactment confirms its racial basis. The 2000 Plebiscite Law was enacted on March 24, 2000, just one month after *Rice* was decided. In *Rice*, Hawaii had revised its definition of "Hawaiian" from an earlier version, by replacing the word "races" with "peoples." *Id.* at 515-16. The Supreme Court concluded based on the drafters' own admission that "any changes to the language were at most cosmetic." *Id.* at 516. Although we have no similar admission, the same is true here. After *Rice*, Guam's swift reenactment of essentially the same election law—albeit with a change in terms—indicates that the Guam legislature's intent was to apply cosmetic changes rather than substantively to alter the voting restrictions for the plebiscite.

Guam's primary argument to the contrary is that "Native Inhabitants of Guam" is not a racial category but a *political* one referring to "a colonized people with a unique political relationship to the United States because their U.S. citizenship was granted by the Guam Organic Act." It attempts to distinguish this case from *Rice* on the ground that the voter qualification here is tethered not to presence in the Territory at a particular date but to the passage of a specific law—the Organic Act—which altered the legal

status of the group to which the ancestral inquiry is linked.

But indirect or tiered racial classifications, tethered to prior, race-based legislative enactments, are subject to the same Fifteenth Amendment proscription on race-based voting restrictions as are explicitly racial classifications. In *Guinn*, the Supreme Court invalidated an Oklahoma constitutional amendment that established a literacy requirement for voting eligibility but exempted the "lineal descendant[s]" of persons who were "on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation." 238 U.S. at 356-7. That classification, like the one at issue here, was facially tethered to specific laws—the voter eligibility laws in existence in 1866 before the Fifteenth Amendment was ratified. In that year, only eight northern states permitted African Americans to vote. *See* Benno C. Schmdit, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 3*, 82 Colum. L. Rev. 835, 862 (1982). *Guinn* held the challenged Oklahoma voting qualification incorporated—without acknowledging their racial character—a set of former race-based statutory restrictions. 238 U.S. at 364-65. In essence, the Court recognized that Oklahoma was reviving its earlier race-based voting restrictions, thereby violating the Fifteenth Amendment.

Nor is Guam's argument that the classification here is political supported by the Supreme Court's recognition that classifications based on American Indian ancestry are political in nature. Laws

employing the American Indian classification targeted individuals "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Mancari*, 417 U.S. at 554; *see also Rice*, 528 U.S. at 518-20; *United States v. Antelope*, 430 U.S. 641 (1977).[17] Both the Supreme Court and we have rejected the application of *Mancari* for Fifteenth Amendment purposes with respect to non-Indian indigenous groups, namely those in Hawaii and the CNMI respectively. *See Rice*, 528 U.S. at 518-20; *Commonwealth Election Comm'n*, 844 F.3d at 1094.[18] Nothing counsels a different result in this case.

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[17] Although *Mancari*'s rationale was premised on the recognized quasi-sovereign tribal status of Indians, "the Supreme Court has not insisted on continuous tribal membership, or tribal membership at all, as a justification for special treatment of Indians," and neither has Congress. *Kamehameha Schs.*, 470 F.3d at 851 (Fletcher, J., concurring) (collecting cases and statutes).

[18] Because we affirm the district court on Fifteenth Amendment grounds, we reserve judgment on whether the *Mancari* exception may apply to the "Native Inhabitants of Guam" classification outside the Fifteenth Amendment context. *Rice*, which rejected the application of *Mancari* to Hawaiians for Fifteenth Amendment purposes, was careful to confine its analysis to voting rights under that amendment. It stated that "[t]he validity of the voting restriction is the only question before us," 528 U.S. at 521, and emphasized the unique character of voting rights under the Fifteenth Amendment. *Id.* at 512, 523-24; *cf. Commonwealth Election Comm'n*, 844 F.3d at 1095 ("[L]imits on who may own land are quite different—conceptually, politically, and legally—than limits on who may vote in elections to amend a constitution."); *Kamehameha Schs.*, 470 F.3d at 853 (Fletcher, J., concurring) (arguing that Native Hawaiians are a political—and not racial—classification for Fourteenth Amendment purposes because, in part, "[u]nlike *Rice*, the case before us does

Here, the parallels between the 2000 Plebiscite Law and previously enacted statutes expressly employing racial classifications are too glaring to brush aside. The near identity of the definitions for "Native Inhabitants of Guam" and "Chamorro," the lack of other substantive changes, and the timing of the 2000 Plebiscite Law's enactment all indicate that the Law rests on a disguised but evident racial classification.

* * * *

Concluding that the 2000 Plebiscite Law employs a proxy for race is not to equate Guam's stated purpose of "providing dignity in . . . allowing a starting point for a process of self-determination" to its native inhabitants with the racial animus motivating other laws that run afoul of the Fifteenth Amendment, *see, e.g.*, *Gomillion*, 364 U.S. at 347; *Guinn*, 238 U.S. at 364-65. Our decision makes no judgment about whether Guam's targeted interest in the self-determination of its indigenous people is genuine or compelling. Rather, our obligation is to apply established Fifteenth Amendment principles, which single out voting restrictions based on race as impermissible whatever their justification. Just as a law *excluding* the Native Inhabitants of Guam from a plebiscite on the future of the Territory could not pass constitutional muster, so the 2000 Plebiscite Law fails for the same reason.

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not involve preferential voting rights subject to challenge under the Fifteenth Amendment").

IV

We hold that Guam's limitation on the right to vote in its political status plebiscite to "Native Inhabitants of Guam" violates the Fifteenth Amendment and so **AFFIRM** the district court's summary judgement order.

Appendix B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF GUAM

No. 11-00035

ARNOLD DAVIS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. RENORIO; DONALD I. WEAKLEY; LEONARDO M. RAPADAS,

Defendants.

Filed: March 8, 2017

DECISION AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

This court heard the following matters on September 1, 2016: Plaintiff's Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56(a) (*see* ECF No. 103); and Defendants' Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 (*see* ECF No. 106). Appearing on behalf of the Plaintiff were Mr. J. Christian Adams of Election Law Center, PLLC, and Mr. Mun Su Park of Law Offices of Park and Associates. Appearing on behalf of the Defendants

were Attorney General of Guam Elizabeth Barrett-Anderson, Deputy Attorney General Kenneth Orcutt, and Special Assistant Attorney General Julian Aguon. After careful consideration and after having reviewed the parties' briefs, relevant cases and statutes, and having heard argument from counsel on the matter, the court hereby **GRANTS** the Plaintiff's Motion for Summary Judgment and finds **MOOT** Defendants' Motion for Summary Judgment for the reasons stated herein.

I. CASE OVERVIEW[1]

This is a civil rights action which deals with the topic of self-determination of the political status of the island and who should have the right to vote on a referendum concerning such. The Plaintiff claims that he is prohibited from registering to vote on the referendum, which is a violation of the Voting Rights Act, the Organic Act of Guam, and his Fifth, Fourteenth and Fifteenth Amendment rights.

A. Factual Background[2]

On November 22, 2011, Plaintiff filed his complaint for declaratory and injunctive relief. *See* Compl., ECF No. 1. In the complaint, he alleges discrimination in the voting process by Guam and the Defendants. *Id.* Plaintiff alleges that under Guam law, a Political Status Plebiscite ("Plebiscite") is to be held concerning Guam's future relationship with the

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[1] The page citations throughout this Decision and Order are based on the page numbering provided by the CM/ECF system.

[2] A portion of the factual background is based on the same information that was contained in a prior decision of the court. *See* Report and Recommendation, ECF No. 44.

United States. *Id.* at ¶ 8. Plaintiff, a white, non-Chamorro, male and resident of Guam, states that he applied to vote for the Plebiscite but was not permitted to do so because he did not meet the definition of "Native Inhabitant of Guam." *Id.* at ¶¶ 20 and 21. "Native Inhabitants of Guam" is defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons." 3 Guam Code Ann. § 21001(e).

The Plebiscite would ask native inhabitants which of the three political status options they preferred. The three choices are Independence, Free Association with the United States, and Statehood. *See* Compl., ECF No. 1, at ¶ 8.

Because Plaintiff was denied the right to register for the Plebiscite, he filed the instant complaint, stating three causes of action. In his first cause of action, he alleges that by limiting the right to vote in the Plebiscite to only Native Inhabitants of Guam, the purpose and effect of the act was to exclude him and most non-Chamorros from voting therein, thereby resulting in a denial or abridgment of the rights of citizens of the United States to vote on account of race, color, or national origin, a violation of Section 2 of the Voting Rights Act of 1965.

In his second cause of action, Plaintiff alleges that Defendants are preventing him from registering to vote in the Plebiscite because he is not a Native Inhabitant of Guam. Thus, Defendants are engaged in discrimination on the basis of race, color, and/or national origin in violation of various laws of the United States.

Lastly, the Plaintiff's third cause of action alleges that he is being discriminated in relation to his fundamental right to vote in the Plebiscite in violation of the Organic Act of Guam, the U.S. Constitution and other laws of the United States for the reason that he is not a Native Inhabitant of Guam.

In his Prayer for Relief, Plaintiff seeks a judgment: enjoining Defendants from preventing Plaintiff and those similarly situated from registering for and voting in the Plebiscite; enjoining Defendants from using the Guam Decolonization Registry in determining who is eligible to vote in the Plebiscite; enjoining Defendant Leonardo Rapadas from enforcement of the criminal law provisions of the Act that make it a crime to register or allow a person to vote in the Plebiscite who is not a Native Inhabitant of Guam[3]; and a declaration that Defendants' conduct has been and would be, if continued, a violation of law.

B. Relevant Procedural Background

On November 22, 2011, Plaintiff filed his complaint herein. *See* Compl., ECF No. 1. On December 2, 2011, the then-Attorney General of Guam, Leonardo M. Rapadas, a named Defendant, on behalf of himself and all named defendants, moved to dismiss the complaint on the ground that it failed to

[3] In the appellate decision issued on May 8, 2015, the Ninth Circuit found that because Plaintiff did not argue on appeal that this court erred by dismissing his claim against Mr. Leonardo Rapadas, the Attorney General of Guam, to enforce a provision of Guam's criminal law that makes it a crime for a person who knows he is not a Native Inhabitant to register for the Plebiscite, any claim of error in that regard was waived. *See Davis v. Guam*, 785 F.3d 1311, 1316 (9th Cir. 2015).

present a case or controversy. *See* Defs.' Mot., ECF No. 17. On January 9, 2013, the court granted Defendants' motion to dismiss finding that the Plaintiff lacked standing and the case was not ripe for adjudication. *See* Order, ECF No. 78. The Plaintiff appealed.

On May 8, 2015, the Ninth Circuit issued its decision, finding that the Plaintiff has standing to pursue his challenge to Guam's alleged race-based registration classification and that the claim was ripe because the Plaintiff alleged he was currently subjected to unlawful unequal treatment in the ongoing registration process. *See Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015).

On October 30, 2015, both parties filed their respective motions for summary judgment. *See* Pl.'s Mot., ECF Nos. 103; and Defs.' Mot., ECF No. 106. The court heard the matter on September 1, 2016, and thereafter took it under advisement.

C. Instant Motions Before the Court

i. Plaintiff's Motion for Summary Judgment

The Plaintiff moves the court for a judgment pursuant to FED. R. CIV. P. 56(a), wherein he seeks the enjoinment of the Plebiscite, and (ii) a declaration from the court that the Plebiscite violates the Fourteenth and Fifteenth Amendments of the United States Constitution, the Voting Rights Act, and the Organic Act. *See* Pl.'s Mot., ECF No. 103.

ii. Defendants' Motion for Summary Judgment

Defendants likewise move the court for a judgment pursuant to Fed. R. Civ. P. 56, wherein they

seek judgment granted in their favor because Plaintiff cannot make a prima facie case of impermissible race-based discrimination under the United States Constitution or any federal statutes. *See* Defs.' Mot., ECF No. 106.

II. JURISDICTION AND VENUE

The court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1331 and 1343, for Plaintiff's claims under the Voting Rights Act, the Organic Act of Guam, and his Constitutional rights under the Fifth, Fourteenth, and Fifteenth Amendments. *See also* 48 U.S.C. § 1424.

Venue is proper in this judicial district, the District Court of Guam, because Defendants are Guam, the Government of Guam and its officials, and all of the events giving rise to Plaintiff's claims occurred here. *See* 28 U.S.C. § 1391.

III. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To demonstrate that a material fact cannot be genuinely disputed, the movant may:

> (A) cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

> (B) show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

A fact is material if it might affect the outcome of the suit under the governing substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Thus, the evidence presented in opposition to summary judgment must be "enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Servs. Co.*, 391 U.S. 253, 288-89 (1968)).

A shifting burden of proof governs motions for summary judgment under Rule 56. *In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary judgment bears the initial burden of proving an absence of a genuine issue of material fact. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Where, as here, the moving party will have the burden of proof at trial, "the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

If the moving party meets that burden, the burden then shifts to the nonmoving party to set forth "specific facts showing that there is a genuine issue for

trial." *Liberty Lobby*, 477 U.S. at 250. "The mere existence of a scintilla of evidence . . . will be insufficient" and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 252; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Viewing the evidence in the light most favorable to the non-moving party, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

A. Guam law on voter qualification for the Plebiscite violates the Fifteenth Amendment's prohibition of racial discrimination in voting.

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. The Fifteenth Amendment applies to Guam. *See* 48 U.S.C. §1421b(u) ("The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the same force and effect there as in the United States or in any State of the United States: . . . the fifteenth [ ] amendment[].").

Plaintiff asserts that Defendants are in violation of the Fifteenth Amendment because Plaintiff was denied the right to register to vote in the Plebiscite on account of his race. Pl.'s Mem. in Supp. of Pl.'s Mot. ("Pl.'s Mem."), ECF No. 104, at 20. Plaintiff is Caucasian with no Chamorro ancestry. Pl.'s Ex. A,

ECF No. 105-1, at 2. He attempted to register to vote in the Plebiscite, but the Guam Election Commission did not accept his application to register and instead marked the form as "void." Pl.'s Ex. C, ECF 105-3, at 1.

i. The Fifteenth Amendment prohibits use of ancestry as proxy for race.

"Fundamental in purpose and effect and self-executing in operation, the [Fifteenth] Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice v. Cayetano,* 528 U.S. 495, 512 (2000). While there were attempts to manipulate the system to exclude others from voting since the passage of the Amendment, the Supreme Court noted that "[t]he Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise." *Id.* at 113. "[R]acial discrimination is that which singles out identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Id.* at 515, citing *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1987) (internal quotation marks omitted).

Recognizing that ancestry can be proxy for race, the court in *Rice* found that the voting qualification requirements for the Office of Hawaiian Affairs ("OHA") trustees, which are chosen in a statewide election, uses ancestry as proxy for race. 528 U.S. at 514. In that case, the Hawaiian Constitution limits the right to vote for the OHA trustees to "Hawaiians," which consists of two subclasses of the Hawaiian citizenry. *Id.* at 498-99. The smaller class, known as

"native Hawaiians," is made up of descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778.[4] *Id.* at 499. The larger class, known as "Hawaiians," is made up of descendants of people inhabiting the Hawaiian Islands in 1778.[5] *Id.* Petitioner Rice is a citizen of Hawaii, but he does not have the requisite ancestry to qualify to vote in the OHA trustee election. *Id.* His application to register to vote for OHA trustees was denied. *Id.* at 510.

The state of Hawaii maintains that the statute "is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race." *Id.* at 514. The state puts forth the following arguments: some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands, the Pacific Northwest, and Tahiti; "the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in

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[4] The statutory definition of "native Hawaiian" is as follows: "'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act . . . provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii."

[5] The statutory definition of "Hawaiian" is as follows: "'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii."

Hawaii in 1778;" and, "the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date." *Id.*

The Supreme Court rejected the state's argument that the classification is not racial in nature, holding that ancestry can be proxy for race. *Id.* In finding that the state "has used ancestry as a racial definition and for a racial purpose", the court noted that "[t]he very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act[6] is to treat the early Hawaiians as a distinct people[.]" *Id.* at 514-15. Looking at the legislative history, the court also noted that the definition of "Hawaiian" was changed to substitute "peoples" for "races" but such change—based on congressional committee records—was "merely technical" and the meaning did not change: "peoples" still meant "races." *Id.* at 516.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Further, "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517.

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[6] The Hawaiian Homes Commission Act set aside approximately 200,000 acres of land and created a program of loans and long-term leases for the benefit of native Hawaiians. *Rice*, 528 U.S. at 507.

ii. "Native Inhabitants of Guam" is a race-based classification.

The statute in question is the definition of "Native Inhabitants of Guam," as provided in Public Law No. 25-106 and codified in 3 Guam Code Ann. § 21001(e), since Guam law requires that only "Native Inhabitants of Guam" be allowed to vote in the Plebiscite.[7] *See* 1 Guam Code Ann. § 2110. "Native Inhabitants of Guam" is defined as "persons who became U.S. Citizens by virtue of the authority and

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[7] Section 2110 of Title 1 of the Guam Code Annotated provides in its entirety the following:

Plebiscite Date and Voting Ballot.

(a) The Guam Election Commission shall conduct a "Political Status Plebiscite", at which the following question, which shall be printed in both English and *Chamorro*, shall be asked of the eligible voters:

> In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):
>
> 1. Independence ( )
>
> 2. Free Association with the United States of America ( )
>
> 3. Statehood ( ).

Persons eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within this Chapter of the Guam Code Annotated, who are eighteen (18) years of age or older on the date of the "Political Status Plebiscite" and are registered voters on Guam.

The "Political Status Plebiscite" mandated in Subsection (a) of this Section shall be held on a date of the General Election at which seventy percent (70%) of eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission.

1 Guam Code. Ann. § 2110.

enactment of the 1950 Guam Organic Act and descendants of those persons." 3 Guam Code Ann. § 21001(e). "Descendant" is defined as "a person who has proceeded by birth . . . from any 'Native Inhabitant of Guam' . . . and who is considered placed in a line of succession from such ancestor where such succession is by virtue of *blood relations*." 3 Guam Code Ann. §21001(c) (emphasis added).

In other words, the voter qualification for the Plebiscite is set up to limit it to only two groups: (1) those individuals who obtained their U.S. citizenship by virtue of the Organic Act in 1950, and (2) their descendants. *Id.* Similar to *Rice*, the voter qualification here is a proxy for race because it excludes nearly all persons whose ancestors are not of a particular race. *See* 528 U.S. at 514-16. As Plaintiff correctly points out, even an adopted child of a descendant cannot vote in the Plebiscite. *See* Pl.'s Reply, ECF No. 115, at 8-9. Bloodline/ancestry is required.

Defendants argue that the statute is not race-based but rather based on "the 1950 date [which] refers to the passage of a specific law that changed the citizenship status of a defined class of people."[8] Defs.' Opp'n., ECF No. 112, at 11. Defendants support their

[8] Defendants also argue that the definition of "Native Inhabitants of Guam" does not "provide that all Chamorro people are eligible to vote" in the Plebiscite and therefore, the statute is not racial. Defs.' Opp'n., ECF No. 112, at 6. The U.S. Supreme Court in *Rice* has already addressed this issue, holding that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516-17.

non-racial argument by pointing to the 1950 census for Guam, which confirms that there are multiple racial or ethnic groups that became U.S. citizens by virtue of the Organic Act. *Id.* at 11-12, 18. It was not limited to one racial group such as Chamorros. *Id.* The court finds this argument to be unpersuasive. *See Davis v. Commonwealth Election Comm'n.*, 844 F.3d 1087, 1093 (9th Cir. 2016) ("While there is historical evidence that some persons who were not of Chamorro or Carolinian ancestry lived on the islands in 1950 [and therefore qualify as a 'full blooded' Northern Marianas descent], *Rice* forecloses this argument. The Fifteenth Amendment will not tolerate a voter restriction which singles out identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." (internal quotation marks and citations omitted)).

The 1950 census data shows that the total population in Guam was 59,498. *See* Pl.'s Ex. D1, ECF No. 105-5, at 4. Out of that number were 26,142 non-U.S. citizens.[9] *Id.* The breakdown of these non-U.S. citizens is as follows: 24 Chinese; 36 Whites; 127 Filipinos; 25,788 Chamorros; and 167 "Other". *Id.* That is a total of 354 non-Chamorros living on Guam in 1950, a diminutive number (approximately 1.4

[9] This number represents the total population of non-U.S. citizens residing on Guam in 1950, who presumably, became U.S. citizens by virtue of the Organic Act. Accordingly, this is the number that represents those who are considered "Native Inhabitants" pursuant to 3 Guam Code Ann. § 21001(e). Those living on Guam who were already U.S. citizens prior to the enactment of the Organic Act do not fall within the definition of "Native Inhabitants." *See id.*

percent) compared to the 25,788 Chamorros on Guam during that same time period.

In *Rice*, the state of Hawaii advanced a similar argument as the Defendants here, noting that the individuals living in Hawaii in 1778 are not exclusively from one particular race but rather, some came from the Marquesas Islands, the Pacific Northwest, and Tahiti. 528 U.S. at 514. The Supreme Court rejected this line of argument. *Id.* It noted that the inhabitants shared common physical characteristics and a common culture, making them distinct people, and the law reflects "the State's effort to preserve that commonality of people to the present day." *Id.* at 514-15. The court further went on to review the history of the statute in question. *Id.* at 515.

In this case, the current Plebiscite law traces its beginnings to Public Law No. 23-130, which became law on December 30, 1996. *See* Pub. L. No. 23-130; Pl.'s Ex. F, ECF No. 105-7. Therein, the Guam Legislature established a Chamorro Registry for the purpose of establishing an index of names by the Guam Election Commission for registering Chamorros and recording their names. *Id.* The Registry was to serve as a tool to educate Chamorros about their status as an indigenous people and their inalienable right to self-determination. *Id.* at § 1.

Shortly after the passage of the above-referenced law, the Guam Legislature passed Public Law No. 23-147, and it became law on January 23, 1997. *See* Pub. L. No. 23-147; Pl.'s Ex. G, ECF No. 105-8. This new law created the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-

Determination ("Commission on Decolonization"). *See* § 4, Pub. L. No. 23-147. The purpose of the Commission was to ascertain the desires of the "Chamorro people of Guam" as it pertained to their future political relationship with the United States. *Id.* at § 5. The law required the Guam Election Commission to conduct a Political Status Plebiscite at the next island-wide Primary Election,[10] during which the "Chamorro people entitled to vote" would be asked to choose among three political status options: Independence, Free Association, and Statehood. *Id.* at § 10. The results of the Plebiscite were to be transmitted to the President and Congress of the United States and the Secretary General of the United Nations. *Id.* at § 5.

In that same public law, "Chamorro people of Guam" was defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality." *Id.* at § 2(b). Thereafter, the Guam Legislature passed Public Law No. 25- 106, which became law on March 24, 2000. *See* Pub. L. No. 25-106; Pl.'s Ex. H, ECF No. 105-9. That law changed the persons entitled to vote from "Chamorro people of Guam" to "Native Inhabitants of Guam". *See* § 11, Pub. L. 25-106. The definition of "Native Inhabitants of Guam" in Public Law No. 25-106 (codified as 3 Guam Code Ann. § 21001(e)), is nearly identical to the

[10] The law was later amended, and it required the Plebiscite to be held on a general election at which seventy percent (70%) of eligible voters have been registered as determined by the Guam Election Commission. *See* § 23, Pub. L. No. 27-106.

definition of "Native Chamorro"[11] as defined in the Chamorro Land Trust Commission Act.[12] *See* 21 Guam Code Ann. § 75101(d).

Public Law No. 25-106 also created a Guam Decolonization Registry, which is a registry for qualified voters of the Plebiscite.[13] *See* Pub. L. No. 25-106. The Guam Legislature also provided for the waiver of an affidavit (required when you register to vote for the Plebiscite) for individuals who have received a Chamorro Land Trust Commission ("CLTC") lease or have been preapproved to receive one (pursuant to 21 Guam Code Ann. § 75107, to be eligible for a CLTC lease, one must be a "Native Chamorro"). *See* § 3, Pub. L. No. 30-102, codified as 3 Guam Code Ann. §21002.1. That same law also automatically registers those individuals into the registration roll of the Guam Decolonization Registry. *Id.*

The specific sequence of events shows that the Guam Legislature passed into law Public Law No. 25-106 soon after the U.S. Supreme Court issued its

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[11] "Native Inhabitants of Guam" is defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons", whereas "Native Chamorro" is defined as "any person who became a U.S. citizen by virtue of the authority and enactment of the Guam Organic Act or descendants of such person." *See* 3 Guam Code Ann. § 21001(e) and 21 Guam Code Ann. § 75101.

[12] The Chamorro Land Trust Commission was created for the administration of the returned land for native Chamorros. *See* Chapter 75 of Title 21 of the Guam Code Annotated.

[13] It was a registry separate and apart from the Chamorro Registry that was created by Public Law No. 23-130.

decision in *Rice,* wherein the court invalidated the use of ancestry as a voting qualification requirement, because it was determined to be a proxy for race. *See* 528 U.S. 495 (2000). The *Rice* decision was issued on February 23, 2000, and Public Law No. 25-106 was passed by the legislature on March 9, 2000, and enacted into law on March 24, 2000. *See id.* and Pl.'s Ex. H, ECF No. 105-9.

The court finds that similar to *Rice,* the use of "Native Inhabitants of Guam" as a requirement to register and vote in the Plebiscite is race-based and that the Guam Legislature has used ancestry as a racial definition and for a racial purpose. It is clear to the court that the Guam Legislature attempted to manipulate the system to exclude others from voting by immediately deleting the term "Chamorro people" from the law that mandated the Plebiscite and replacing it with "Native Inhabitants"—a neutral term on its face, without any reference to a specific race, when the *Rice* decision was issued. Yet, the Guam Legislature used the same definition of "Native Chamorro", as contained in the Chamorro Land Trust Commission Act, for the artfully and newly created term "Native Inhabitants" in the Plebiscite statute. Further, a "Native Chamorro" who has received or has been preapproved for a CLTC lease is automatically registered into the Plebiscite registration roll (the Guam Decolonization Registry). Gleaning from all of these—similar to *Rice*, the very object of the statutory definition in question here is to treat the Chamorro people as "a distinct people". *See Rice*, 528 U.S. at 515. It is clear to the court that the Guam Legislature has used ancestry as a proxy for race.

Defendants attempt to distinguish *Rice* from the present case by arguing that the statute being challenged has no discriminatory purpose.[14] *See* Defs.' Opp'n., ECF No. 112, at 9, 16. Discriminatory purpose is required under the Fifteenth Amendment when a restriction is raceneutral on its face. *Davis*, 844 F.3d at 1094 n.5, citing *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980). Defendants support their argument by pointing to the "Legislative Findings and Intent" contained in Section 1 of Public Law No. 25-106. It states in relevant part the following:

> . . . *I Liheslaturan Guahan's* [Guam Legislature's] intent that the qualifications for voting in the political status plebiscite shall *not* be race-based, but based on a clearly defined political class of people resulting from historical acts of political entities in relation to the people of Guam.

P.L. 25-106, § 1. *See* Defs.' Opp'n., ECF No. 112, at 7. The Guam Legislature further emphasized that "[t]he intent of [the legislation] shall *not* be construed nor implemented by the government officials effectuating its provisions to be race based, but founded upon the classification of persons as defined by the U.S. Congress in the 1950 Organic Act of Guam." 3 Guam Code Ann. § 21000. It further noted that the Guam Decolonization Registry (registry for the Plebiscite) is

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[14] Defendants also seem to infer that "animus" is required in order for the court to find a violation of the Fifteenth Amendment. *See generally* Defs.' Opp'n., ECF No. 112 (Defendants used the term repeatedly throughout their brief.). However, Defendants have not provided any legal authority to support this inference.

a separate registry from the Chamorro Registry and that it is not "one based on race." *Id.*

Defendants contend that "[i]t is firmly established that the carefully chosen words of a statute prevail over the isolated statements of individual lawmakers," providing a string citation to cases regarding review of legislative history to determine legislative intent.[15] *See* Defs.' Opp'n., ECF No. 112, at 7-8. The isolated statements being referred to were made by then-senator Tina Muna Barnes. *Id.* at 6-7. In Plaintiff's Motion, he discussed Ms. Muna Barnes' introduction of Bill No. 151-31, which would have allowed all registered voters to vote in the Plebiscite. *See* Pl.'s Mem., ECF No. 104, at 12.

The following conversation transpired during the Roundtable Meeting on the Political Status Bills (Bill Nos. 151-31, 154-31, and 168-31) on May 20, 2011:

> Sen. Tom Ada: "Chairman, may I speak to best clarify the issue. This (indicating Bill No. 151) does say that all registered voters in

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[15] For example, in *Garcia v United States*, the court found that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation . . . We have eschewed reliance on the passing comments of one Member . . . and casual statements from the floor debates . . . we stated that Committee Reports are more authoritative than comments on the floor[.]" 469 U.S. 70, 76 (1984). This is in line with one of the factors articulated in *Arlington Heights* in determining intent; that is, the court reviews legislative history, including the minutes and committee reports of the legislation, as discussed *infra*.

Guam can vote on this. To include, the outside people, even if they're not Chamorro."

Sen. Muna Barnes: "I apologize that wasn't the intent. This straw poll would not be the determinant factor in what the people want. I support a Chamorro-only vote, and it's up to the people, the Chamorros of Guam . . . [to] determine what their determination should be. Again, I apologize, that wasn't the intent."

. . .

Sen. Respicio: " . . . You just heard Sen. Barnes clarify and this bill would have to be amended because it says by all Guam voters. She just clarified that her intent was only to make those eligible to vote on the plebiscite vote, so bill 151 is kind of closer now to bill 154 that Sen. Guthertz is proposing but only 154 kind of talks about the methodology to which the vote shall take place so you can have some comfort knowing that the author is more in agreement with most of us on this issue . . ."

. . .

Sen. Respicio: "But earlier you said that it wasn't your intent to make all of Guam voters vote and so that you agreed with the position that only people who should be eligible to vote . . ."

Sen. Muna Barnes: "Yes, and I said that the drive for the Chamorro only vote should exist, I've said that over and over and over . . ."

Sen. Respicio: "But first would you want everybody who is a Guam voter to vote on their preferred political status and it's really it's not a Chamorro only vote because it's date-based rather than race-based so people ask that we not call it Chamorro only vote because that's what's been supported . . ."

Sen. Muna Barnes: "As defined by the laws and provisions that are in place today, Mr. Chairman."

Sen. Respicio: "But are you suggesting then, we amend this 'by all of Guam voters' and limit it to those eligible to vote in the plebiscite which is what the original law is."

Sen. Muna Barnes: "Yes."

. . .

Sen. Respicio: "I think what she's saying is that, maybe I'm misunderstanding, but only those who are eligible to vote on the plebiscite should vote for what their preferred status is. Only those who obtained their citizenship through the Organic Act should be the one to vote on the plebiscite, that's most of our positions, and the Senator just clarified that it wasn't her intent to make everybody vote, although the bill reflected that, so this bill will have to be amended, and so the purpose of this roundtable . . . , is that we have three bills with all completing outcomes, and rather than having a public hearing and looking like we were all over the place, we wanted to have a roundtable to kind of focus on what kind of direction we wanted to have."

Portion of Transcript during Roundtable Meeting on the Political Status Bills (May 20, 2011). *See* Pl.'s Ex. I, ECF No. 105-10, at 75-76, 84. The legislative history of Bill No. 151-31 is contained within the legislative committee report of Bill No. 154-31, which became Public Law No. 31-92. Plaintiff notes that Bill No. 151-31 was subsequently withdrawn. Pl.'s Mem., ECF No. 104, at 12.

Defendants argue that Ms. Muna Barnes' isolated statements should carry very little weight, if any, in determining whether there was discriminatory purpose in the Plebiscite. *See* Defs.' Opp'n., ECF No. 112, at 6-7. Defendants' reliance on the cases they cited to on this point is misplaced. *See* Defs.' Opp'n., ECF No. 112, at 7-8. For example, in *Florida v. United States*, the district court noted that the legislator's sole statement "is the only statement to which the defendants point as evidencing a discriminatory purpose on the part of the Florida legislature." 885 F.Supp.2d 299, 354 (D.D.C. Aug. 16, 2012). That is not the case here. Plaintiff does not rely solely on one legislator's statement to demonstrate discriminatory purpose. He relies on the legislative history and the surrounding circumstances of the enactment of the Plebiscite statute.

The Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corp.* articulated the following method in determining discriminatory purpose:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent

> as may be available. . . . The *historical background* of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The *specific sequence of events leading up the challenged decision* also may shed some light on the decisionmaker's purposes. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. . . . The *legislative or administrative history* may be highly relevant, *especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.*

429 U.S. 252, 265-68 (1977) (emphasis added).

The court recognizes that the Guam Legislature articulated its intent in Public Law 25-106, that the Plebiscite not be based on race. However, the court cannot ignore the specific sequence of events leading up to the passage of that particular legislation. As discussed *supra*, the legislation was passed into law immediately after the *Rice* decision. Further, the definition of "Native Inhabitants of Guam" is nearly identical to the definition of "Native Chamorro"—a facially race-based term—used in the Chamorro Land Trust Commission Act. The law also provides that a "Native Chamorro" who has received or is preapproved for a CLTC lease be automatically registered into the Guam Decolonization Registry, a registry maintained for the purposes of the Plebiscite.

Further, aside from Ms. Muna Barnes' reference to the Plebiscite as a "Chamorro-only" vote during the

roundtable meeting, the legislative committee report reveals that there was a common theme from the individuals who spoke at the meeting—that being that the Plebiscite is a Chamorro-only vote and non-Chamorros should not be allowed to have a say in the Chamorro self-determination process. *See* Legislative Committee Report on Bill No. 154-31 (COR) As Substituted, Pl.'s Ex. I, ECF No. 105-10, at 73-100. Although the committee report that contained this information was for Public Law No. 31-92 and not the committee report for Public Law No. 25-106, the court cannot ignore the historical background and legislative history of the Plebiscite as a whole. Public Law No. 31-92 is relevant to the Commission on Decolonization legislation, having provided for the registration method and educational campaign programs for the Plebiscite. *See* Pub. L. No. 31-92; Pl.'s Ex. I, ECF No. 105-10. In fact, the legislative body as a whole referred to the self-determination as "Chamorro" self-determination, when it required that the registration method and educational campaign programs for the Plebiscite were to be developed in consultation with the "Commission on Decolonization for the Implementation and Exercise of *Chamorro* Self Determination." *See id.*, §§ 1-3.

Defendants also argue that the discriminatory purpose must be the primary or dominant factor in creating the legislation, citing to *Bush v. Vera*, 517 U.S. 952 (1996); and *Miller v. Johnson*, 515 U.S. 900 (1995). *See* Defs.' Opp'n., ECF No. 112, at 11. These cases are inapposite. Both *Vera* and *Miller* deal with the constitutionality of redistricting legislations. The Supreme Court explicitly recognized the complexity of electoral districting and thus placed a burden on the

plaintiff to show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 913-16.

In this case, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the Fourteenth and the Fifteenth Amendments to occur." *Velasquez v. City of Abilene,* 725 F.2d 1017, 1022 (5th Cir. 1984) (citing *Arlington Heights*, 429 U.S. at 265).

Based on the foregoing, the court finds that the Plebiscite law violates the Fifteenth Amendment.

iii. The Plebiscite is an election within the meaning of the Fifteenth Amendment.

Defendants contend that the Plebiscite is not an election within the meaning of the Fifteenth Amendment because "no public official will be elected, nor will any issue of state law or policy be decided." *See* Defs.' Opp'n., ECF No. 112, at 13-14. Defendants argue that the Plebiscite's purpose is merely to ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States. *Id.* at 14. The court finds Defendants' argument to be without merit.

The U.S. Supreme Court has held that the Fifteenth Amendment includes "any election in which *public issues are decided* or public officials selected." *Terry v. Adams*, 345 U.S. 461, 468 (1953) (emphasis added). In this case, ascertaining the future political relationship of Guam to the United States is a public issue that affects not just the Native Inhabitants of Guam but rather, the entire people of Guam. Every

Guam resident otherwise qualified to vote can claim a profound interest in the outcome of the Plebiscite. The result of the Plebiscite will be transmitted to the President and Congress, as well as to the United Nations. *See* 1 Guam Code Ann. §2105. It is also very likely that the government of Guam and its political leaders will use the Plebiscite result as the starting point in working towards achieving the "Native Inhabitants of Guam's" desired political relationship with the United States. The Ninth Circuit recognized the important implications of the Plebiscite and noted that "[i]f the plebiscite is held, this would make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome, rather than one of the other options presented in the plebiscite, or remaining a territory." *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015).

Accordingly, this court finds that the Plebiscite is an election that falls within the meaning of the Fifteenth Amendment.

B. Guam law on voter qualification for the Plebiscite violates the Fourteenth Amendment's Equal Protection Clause.

The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment applies to Guam. *See* 48 U.S.C. §1421b(u) ("The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . 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[.]").

"[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2419 (2013) (citations omitted). *See also Korematsu v. United States*, 323 U.S. 214, 216 (1944).

The law is well established that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Any racial classification will only be allowed if the government proves "that the reasons . . . are clearly identified and unquestionably legitimate." *Fisher*, 133 S.Ct. at 2419 (internal quotes and brackets omitted). In other words, racial classifications must be narrowly tailored to further compelling governmental interests. *Grutter v. Bollinger*, 123 S.Ct. 2325, 326 (2003).

In this case, Plaintiff's arguments are straight forward. First, Plaintiff alleges that Guam "has never come close to articulating a compelling state interest to justify its discriminatory voting scheme." Pl.'s Mem., ECF No. 104, at 22. Plaintiff contends that Guam's only reason for the Plebiscite is that "only Chamorros should have the right to vote in the Plebiscite and determine Guam's future political status." *Id.* at 23. Second, Plaintiff alleges that the classification cannot survive strict scrutiny because

"its method of achieving its goal is not narrowly tailored." *Id.* at 24. Guam has not "explained why no race-neutral alternative to invoking the election machinery of the state could achieve its asserted goals." *Id.* (emphasis in original omitted).

Defendants, on the other hand, argue that the law is facially neutral, *i.e.*, the term "Chamorro" is not even used in the Plebiscite law defining Native Inhabitants of Guam. *See* Defs.' Opp'n., ECF No. 112 at 5-6. Therefore, Defendants argue that Plaintiff must prove discriminatory purpose in order for strict scrutiny to apply. *Id.* at 5, 12-13. Defendants urge the court to apply rational basis standard instead. *Id.* at 12-13, 19, 22-23. When reviewing statutes that deny some residents the right to vote, rational basis does not apply. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627-28 (1969). However, even assuming that discriminatory purpose is necessary under the Fourteenth Amendment in cases such as this—where others are excluded and denied the right to register to vote—this court has already made a finding that discriminatory purpose exists under the Fifteenth Amendment and therefore finds it unnecessary to further discuss it under the Fourteenth Amendment.

In applying strict scrutiny, the court must carefully scrutinize whether each otherwise qualified voter "has, as far as is possible, an equal voice" in the Plebiscite. *Kramer*, 395 U.S. at 627. In *Cipriano v. City of Houma,* the Supreme Court explained that "whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded *depends*

on whether all those excluded are in fact substantially less interested or affected than those the statute includes." 395 U.S. 701, 704 (1969) (internal quotes omitted) (emphasis added). Put simply, the racial classification must be narrowly tailored so that the exclusion of otherwise qualified voters is necessary to achieve the articulated state goal. *Kramer*, 395 U.S. at 632.

The Plebiscite statute "contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote." *Cipriano*, 395 U.S. at 706. All Guam voters have a direct interest and will be substantially affected by any change to the island's political status—whether it be for statehood, wherein Guam will petition the United States to be admitted into statehood; or for independence, wherein Guam will sever its ties with the United States; or for free association, wherein Guam will be freely associated with the United States. As discussed *supra*, "[i]f the plebiscite is held, this would make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome[.]" *Davis*, 785 F.3d at 1315. This change will affect not just the "Native Inhabitants of Guam," but every single person residing on this island. There is no evidence that all those excluded (the non-Native Inhabitants of Guam) are in fact substantially *less* interested or affected than those the statute includes. *See Cipriano*, 395 U.S. at 704. Defendants have not shown that the exclusion of others is necessary to promote a compelling state interest.

Defendants maintain that the Plebiscite should only be for the Native Inhabitants of Guam because they are colonized people who have the right to self-determination. *See* Defs.' Opp'n., ECF No. 112, at 17-18. Defendants quoted *Akina v. Hawaii*, 141 F.Supp.3d 1106, 1132 (D. Haw. 2015), wherein in discussing strict scrutiny, the district court noted that the state of Hawaii has "a compelling interest in bettering the conditions of its indigenous people and, in doing so, providing dignity in simply allowing a starting point for a process of self-determination." *Id.* at 18-19. *Akina* involves an election organized by a non-profit corporation, whose purpose was to support efforts to achieve Native Hawaiian self-determination. 141 F.Supp.3d at 1111-18. Qualified voters for said election must be a "qualified Native Hawaiian." *Id.* at 1111-12. Despite the district court making a finding that strict scrutiny would be met because of the Hawaiian history and Hawaii's trust relationship with Native Hawaiians, the court found that the election did not violate the Equal Protection Clause, because there was no "state action." *Id.* at 1127-28, 1131.

This court will not entertain the strict scrutiny analysis provided in *Akina*, because *Akina* is a district court decision that has not been reviewed by an appellate court and is non-binding to this court. In addition, the instant case is distinguishable in that the Plebiscite statute was created by the Guam Legislature, and the election is going to be conducted by the Guam Election Commission (a Government of Guam entity) in an island-wide general election. *See* Pub. Law Nos. 25-106 and 27-106. Unlike *Akina*, the Plebiscite is a government-sanctioned election.

Next, Defendants maintain that limiting the Plebiscite to the "Native Inhabitants of Guam" would allow for the United States to uphold its "international obligations" to the native inhabitants as colonized people.[16] *See* Defs.' Opp'n., ECF No. 112, at 17, 21. Defendants, however, failed to provide this court with any legal authority—whether it be international law or a binding international treaty or agreement—that allows for this court to disregard or circumvent the U.S. Constitution and the laws of the United States, so that the Plebiscite can proceed despite the racial classification.

The racial classification must fail strict scrutiny, because Defendants also have not shown that the government's method of achieving its goal is narrowly tailored. There are other alternatives for the government to determine the desires of the colonized people, who have the right to self-determination. For example, as discussed at the hearing, the government can consider less restrictive means, such as conducting a poll with the assistance of the University of Guam.

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[16] Defendants rely on authorities such as (1) the congressional reports surrounding the enactment of Guam's Organic Act, 1950 U.S.C.C.A.N. 2840, 2841; (2) the United Nations Resolution on "Plan of the Action for the Full Implementation of the Declaration of the Granting of Independence on Colonial Countries and Peoples," G.A. Res. 35/118, U.N. GAOR, 35th Sess., Supp. No. 48, at 21, U.N. Doc. AIRES/35/118 (1980); (3) *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); and (4) the Restatement (Third) of Foreign Relations Law §114 (1987). *See* Defs.' Opp'n., ECF No. 112, at 12-21.

Accordingly, based on the discussion above, the court finds that the Plebiscite law violates the Equal Protection Clause of the Fourteenth Amendment.

C. The *Insular Cases* Doctrine is not applicable in this case.

Defendants argue that "Plaintiff's attempt to characterize his ability to vote in the plebiscite as a 'fundamental' right is misguided from the start because the 'right to vote' does not necessarily mean the same thing in an unincorporated territory as it does in a state, or other integral part of the 'United States,'" citing to the *Insular Cases*. Defs.' Opp'n., ECF No. 112, at 19-23. The court finds Defendants' argument to have no merit.

"The *Insular Cases* held that United States Constitution applies in full to incorporated territories, but that elsewhere, absent congressional extension, only fundamental constitutional rights apply in the territory." *Davis*, 844 F.3d at 1095, citing *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990), and *Boumediene v. Bush*, 553 U.S. 723, 756-57 (2008) (internal quotation marks and brackets omitted). Congress has explicitly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam when it enacted the Organic Act of Guam. *See* 48 U.S.C. §1421b(u). Accordingly, Defendants' use of the *Insular Cases* doctrine to support their argument in this case fails.

V. CONCLUSION

The court recognizes the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-determination. However, the court must also

recognize the right of others who have made Guam their home. The U.S. Constitution does not permit for the government to exclude otherwise qualified voters in participating in an election where public issues are decided simply because those otherwise qualified voters do not have the correct ancestry or bloodline. Having found that the classification is racial, this court finds that the Plebiscite statute impermissibly imposes race-based restrictions on the voting rights of non- Native Inhabitants of Guam, in violation of the Fifteenth Amendment.

Further, the court also finds that the Plebiscite statute violates the Fourteenth Amendment.

Because the Fifteenth and Fourteenth Amendments are clearly violated in this case, the court need not address the statutory arguments (Voting Rights Act and Organic Act of Guam) that were raised by Plaintiff.

The court hereby **ORDERS** the following:

(1) Plaintiff's Motion for Summary Judgment (ECF No. 103 and 104) is hereby **GRANTED**.[17]

(2) Defendant's Motion for Summary Judgment (ECF No. 106) is hereby **DENIED** as **MOOT**.[18]

(3) The court **PERMANENTLY ENJOINS** the Government of Guam and its officers, employees, agents, and political subdivisions from enforcing the Political Status Plebiscite (1 Guam Code Ann. § 2110)

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[17] All other pending motions in this case are hereby **MOOT**.

[18] Because Plaintiff's Motion Summary Judgment is granted, the court need not discuss Defendants' Motion for Summary Judgment.

that specifically limits the voters to "Native Inhabitants of Guam" as defined in 3 Guam Code Ann. §21001(e), and any laws and regulations designed to enforce the Plebiscite law, insofar as such enforcement would prevent or hinder Plaintiff and other qualified voters who are not Native Inhabitants of Guam from registering for and voting in the Political Status Plebiscite.

(4) The Clerk is directed to enter judgment for Plaintiff.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Mar 08, 2017

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15199

ARNOLD DAVIS, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. RENORIO; DONALD I. WEAKLEY; LEONARDO M. RAPADAS,

Defendants-Appellees.

Argued and Submitted: Aug. 27, 2014
Hagatna, Guam
Filed: May 8, 2015

Before: Mary M. Schroeder, Alex Kozinski, and N. Randy Smith, Circuit Judges.

OPINION

KOZINSKI, Circuit Judge:

Pursuant to a law passed by the Guam legislature, eligible "Native Inhabitants of Guam" may register to vote in a plebiscite concerning Guam's

future political relationship with the United States. Guam will conduct the plebiscite if and when 70 percent of eligible Native Inhabitants register. Plaintiff Arnold Davis is a Guam resident who isn't eligible to register because he is not a Native Inhabitant. He alleges that Guam's Native Inhabitant classification is an unlawful proxy for race. At this stage, we must determine only whether Davis has standing to challenge the classification and whether his claims are ripe.

I. BACKGROUND

Guam law directs the territory's Commission on Decolonization to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America." 1 Guam Code Ann. § 2105. The same law also provides for a "Political Status Plebiscite." *Id.* § 2110. The plebiscite would ask eligible Native Inhabitants to choose among three options: (1) "Independence," (2) "Free Association with the United States of America" or (3) "Statehood." *Id.* It would be conducted by Guam's Election Commission on the same day as a general election. *Id.* The Commission on Decolonization would then be required to transmit the plebiscite's results to the President, Congress and the United Nations as reflecting "the intent of the Native Inhabitants of Guam as to their future political relationship with the United States." *Id.* § 2105.

Guam will hold the plebiscite if and when 70 percent of all eligible Native Inhabitants[1] register

[1] Guam law defines "Native Inhabitants" as persons who became U.S. citizens by virtue of the Guam Organic Act of 1950 and their descendants. 1 Guam Code Ann. § 2102. The Organic

with the Guam Decolonization Registry. 1 Guam Code Ann. § 2110; 3 Guam Code Ann. §§ 21000, 21003. Native Inhabitants aren't required to register, although some will be registered automatically unless they submit a written request not to be registered. 3 Guam Code Ann. § 21002.1. Guam reports that the 70 percent threshold isn't close to being met. Thus, Guam hasn't set a date for the plebiscite and perhaps never will.

Davis tried to register with the Decolonization Registry, but the application was rejected because Davis isn't a Native Inhabitant. Davis agrees he's not a Native Inhabitant but claims that the Native Inhabitant classification violates the Fifth, Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act and the Guam Organic Act[2] because it is a "proxy for race." Davis seeks a declaration that limiting registration to Native Inhabitants is

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Act granted citizenship to three classes of persons: (1) Spanish subjects who inhabited Guam on April 11, 1899, when Spain ceded Guam to the United States in the Treaty of Paris (and their children); (2) persons who were born on Guam and resided there on April 11, 1899 (and their children); and (3) persons born on Guam on or after April 11, 1899, when Guam was subject to U.S. jurisdiction. *See* Organic Act of Guam, Pub. L. No. 630, 64 Stat. 384, 384 (Aug. 1, 1950).

[2] The Organic Act extends the rights afforded by several constitutional provisions to Guam, including the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment. 48 U.S.C. § 1421b(u); *Guam* v. *Guerrero*, 290 F.3d 1210, 1214-15 (9th Cir. 2002). The Organic Act also contains its own anti-discrimination provisions. *See, e.g.*, 48 U.S.C. § 1421b(n). The Voting Rights Act applies to Guam, a U.S. territory. 52 U.S.C. § 10101(a)(1) (formerly 42 U.S.C. § 1971(a)(1)).

unlawful, and an injunction against using any registry other than Guam's general voter registry in determining who's eligible to register for, and vote in, the plebiscite.

The district court held that Davis lacks standing and his claims are unripe. According to the district court, Davis hasn't been injured because "there is no discernible future election in sight." "To suffer a real discernible injury," the district court held, Guam's restriction on voter registration to Native Inhabitants "would have to be, by necessity, related to an election that is actually scheduled." We have jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo. *Bova* v. *City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009).

II. STANDING AND RIPENESS

To "satisfy the standing requirements imposed by the 'case' or 'controversy' provision of Article III," Davis must show that he has suffered, or will imminently suffer, a "concrete and particularized" injury to a "judicially cognizable interest." *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997); *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). That injury must be "fairly traceable to the challenged action of the defendant[s]," and it must appear likely that the injury would be prevented or redressed by a favorable decision. *Bennett*, 520 U.S. at 167; *see also Allen* v. *Wright*, 468 U.S. 737, 751 (1984). When determining Article III standing we "accept as true all material allegations of the complaint" and "construe the complaint in favor of the complaining party." *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)).

Guam law gives some of its voters the right to participate in a registration process that will determine whether a plebiscite will be held. Davis alleges that the law forbids him from participating on the basis of his race. Davis's allegation—that Guam law provides a benefit to a class of persons that it denies him—is "a type of personal injury [the Supreme Court has] long recognized as judicially cognizable." *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984). The plaintiff in *Mathews* challenged a provision of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits. *Id.* at 731-35. The statute, however, "prevent[ed] a court from redressing this inequality by increasing the benefits payable to" the male workers. *Id.* at 739. Thus, the lawsuit couldn't have resulted in any tangible benefit to Mathews. The Supreme Court nevertheless held that Mathews had standing to challenge the provision because he sought to vindicate the "right to equal treatment," which isn't necessarily "coextensive with any substantive rights to the benefits denied the party discriminated against." *Id.*; *see also Allen*, 468 U.S. at 762; 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* §§ 3531.4 at 215-16, 3531.6 at 454-56 (3d ed. 2008). We read *Mathews* as holding that equal treatment under law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it. Guam's alleged denial of equal treatment to Davis is thus a judicially cognizable injury.

Guam concedes that its law excludes Davis from the registration process because he's not a Native Inhabitant. It argues, however, that the Native Inhabitant classification can't injure Davis because the plebiscite is "not self executing and effects no change in political status, right, benefit or privilege for any individual." But this contradicts *Mathews*, which held that unequal treatment is an injury even if curing the inequality has no tangible consequences. 465 U.S. at 739. Moreover, Guam understates the effect of any plebiscite that would be held if the registration threshold were triggered. After the plebiscite, the Commission on Decolonization would be required to transmit the results to the President, Congress and the United Nations, 1 Guam Code Ann. § 2105, thereby taking a public stance in favor of whatever outcome is favored by those voting in the plebiscite.[3] If the plebiscite is held, this would make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome, rather than one of the other options presented in the plebiscite, or remaining a territory. This change will affect Davis, who doubtless has views as to whether a change is appropriate and, if so, what that change should be. Guam law thus does provide a tangible benefit to Native Inhabitants that Davis alleges he is unlawfully denied: the right to help determine

[3] The U.S. House of Representatives, for one, has indicated that it has open ears. In a 1998 resolution, it acknowledged the Commission on Decolonization and "reaffirm[ed] its commitment to the United States citizens of Guam for increased self-government, consistent with self-determination for the people of Guam." H.R. Res. 494, 105th Cong., 144 Cong. Rec. 25922, 25922-23 (1998).

whether a plebiscite is held. This is not unlike the right to participate in jury service, which may not be denied on a constitutionally unequal basis. *See Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986) (citing *Carter* v. *Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 329-30 (1970)).[4]

Davis's challenge to the Native Inhabitant classification is also ripe because he alleges he's currently being denied equal treatment under Guam law. The registration process is ongoing and Guam must hold the plebiscite if 70 percent of eligible Native Inhabitants register. By being excluded from the registration process, Davis claims he is unlawfully denied a right currently enjoyed by others: to help determine whether a plebiscite will be held. The ripeness question thus "coincides squarely with standing's injury in fact prong." *Bova*, 564 F.3d at 1096 (quoting *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)); *see also* 13B *Federal Practice & Procedure* § 3531.12 at 163.

Guam maintains that its plebiscite law does not, in fact, violate Equal Protection, the Fifteenth

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[4] Although *Batson* involved a criminal defendant's challenge to his conviction, the Court reiterated its holding in *Carter* that when a state "den[ies] a person participation in jury service on account of his race, the [s]tate unconstitutionally discriminate[s] against the excluded juror." *Batson*, 476 U.S. at 87; *see also Carter*, 396 U.S. at 329 ("People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."). Whether participation in Guam's registration process is "deemed a right, a privilege, or a duty," Guam must "hew to federal constitutional criteria" when determining who is eligible to register. *Id.* at 330.

Amendment or the Voting Rights Act. But we need not resolve these issues to determine whether Davis's claims satisfy the case or controversy requirement of Article III. These are merits questions, and standing doesn't "depend[] on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500.

CONCLUSION

Davis's challenge to Guam's registration restriction asserts a judicially cognizable injury that would be prevented or redressed if the district court were to grant his requested relief. Davis therefore has Article III standing to pursue his challenge to Guam's alleged race-based registration classification. The claim is ripe because Davis alleges he is currently subject to unlawful unequal treatment in the ongoing registration process. Therefore, we need not decide whether any of the other injuries Davis alleges follow from Guam's Native Inhabitant restriction would be sufficient to confer standing independently. In particular, we express no view as to whether the challenged law resulted in the type of "stigmatizing" harm that we've held may be a judicially cognizable injury in the Establishment Clause context. *See Catholic League* v. *City & Cnty. of S.F.*, 624 F.3d 1043, 1052-53 (9th Cir. 2010) (en banc). Nor do we decide whether an alleged violation of the Voting Rights Act is itself a judicially cognizable injury.

In the district court, Davis also sought to enjoin Leonardo Rapadas, the Attorney General of Guam, from enforcing a provision of Guam's criminal law that makes it a crime for a person who knows he's not a Native Inhabitant to register for the plebiscite. *See* 3

Guam Code Ann. § 21009. The district court held that Davis lacked standing to seek this injunction because he had not "shown that he is subject to a genuine threat of imminent prosecution." While Rapadas is still listed as a nominal defendant on appeal, Davis doesn't argue that the district court erred in dismissing this claim. Therefore, any claim of error is waived. *See Wagner* v. *Cnty. of Maricopa*, 747 F.3d 1048, 1059 (9th Cir. 2013).

We decline Davis's suggestion that we reach the merits of his claims in the event we find his claims to be justiciable. Instead we leave it to the district court to consider the merits of Davis's non-waived claims in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED.

Appellees other than Rapadas shall pay costs on appeal. Rapadas shall recover his costs, if any, from Davis.

N.R. SMITH, Circuit Judge, dissenting:

The majority holds that federal courts have jurisdiction in this case based on precedent not applicable to its decision. For that reason, I must dissent.

Currently Guam is an unincorporated, organized territory of the United States.[1] Guam's legislature found that the native inhabitants of Guam "have been subjected to incessant control by external colonial powers" and have never been afforded the right to self-determination as to their political relationship with the United States. 1 Guam Code. Ann. § 2101. Therefore, in 2004, Guam's legislature enacted 1 Guam Code. Ann. § 2110. It provides:

> (a) The Guam Election Commission shall conduct a "Political Status Plebiscite", at which the following question, which shall be printed in both English and Chamorro, shall be asked of the eligible voters:
>
> In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):
>
> 1. Independence ( )

[1] Guam became an "organized" territory after Congress enacted the Guam Organic Act in 1950, which granted the people of Guam United States citizenship and established institutions of local government. Guam is "unincorporated," because not all provisions of the U.S. Constitution apply to the territory. DOI Dep't of Insular Aff., Report on the State of the Islands (1997), http://www.doi.gov/oia/reports/Chapter-4-Guam.cfm (last visited Apr. 15, 2015).

> 2. Free Association with the United States of America ( )
>
> 3. Statehood ( ).
>
> Person eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within this Chapter of the Guam Code Annotated, who are eighteen (18) years of age or older on the date of the "Political Status Plebiscite" and are registered voters on Guam.
>
> The "Political Status Plebiscite" mandated in Subsection (a) of this Section shall be held on a date of the General Election at which seventy percent (70%) of the eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission.

From the plain language of the statute, it is apparent that (1) the Guam legislature wants to gather the opinion of the Native Inhabitants of Guam regarding political status options; (2) to gather that opinion, the legislature scheduled a future plebiscite (poll) asking for an indication of what political status option is favored by such Native Inhabitants; and (3) the poll will not occur unless seventy percent of the Native Inhabitants of Guam register to be polled.

It is a fundamental principle that federal courts are courts of limited jurisdiction, limited to deciding "cases" and "controversies." U.S. Const. art. III, § 2. The Supreme Court has repeatedly insisted that a case or controversy does not exist, unless the plaintiff shows that "he has *sustained or is immediately in danger of sustaining* some direct injury as the result

of the challenged official conduct." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted) (emphasis added). The Court admonished that the "injury or threat of injury must be *both real and immediate*, not *conjectural or hypothetical*." *Id.* (internal quotation marks omitted) (emphasis added). "[R]ipeness is peculiarly a question of timing," and ripeness is particularly at issue when a party seeks pre-enforcement review of a statute or regulation. *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). A "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The Supreme Court has consistently held that the ripeness doctrine aims "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation marks omitted). "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (internal quotation marks and citations omitted).

The district court found Davis's alleged injury was not ripe. "Although a district court's determination of federal subject matter jurisdiction is reviewed de novo, the district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989)

(internal citations omitted). The district court conducted a hearing and then made certain factual findings as to the ripeness of Davis's claim. The district court found that: (1) there is no date currently set for the plebiscite; (2) "there is no discernible future election in sight"; (3) there is no "real threat of the election occurring any time soon"; (4) there is "little likelihood that the plebiscite will be scheduled any time in the near future"; (5) Davis's own statements actually support the conclusion that the "plebiscite is not likely to occur any time soon, or if at all"; (6) Davis had not "successfully argued [or] shown that he is presently threatened with or has already suffered any irreparable damage or injury because he cannot register for a plebiscite that is *more than likely not to occur*." The district court concluded that "until the plebiscite [Davis] seeks to register for is "certainly impending," that Davis had no claim.

The district court's factual findings are supported by the record. Davis does not challenge the findings as clearly erroneous. The majority does not hold the findings to be clearly erroneous. Applying the ripeness precedent to these findings, this controversy fails for ripeness. The inability to register for an opinion poll, that is not currently scheduled and unlikely to ever occur, is not a matter of "sufficient ripeness to establish a concrete case or controversy." *Thomas*, 473 U.S. at 579. Whether the plebiscite occurs is contingent on a series of events that have not yet occurred and may never occur. Thus, at this point, there is not a "realistic danger" that the plebiscite will occur. *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298 (1979). Our court's role is "neither to issue advisory opinions nor to declare rights in

hypothetical cases, but to adjudicate live cases or controversies." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Davis's allegations of future injury are too speculative to be "of sufficient immediacy and reality" to satisfy the constitutional requirement of ripeness. *See In re Coleman*, 560 F.3d at 1005.[2] Thus, the matter is not ripe and our court has no jurisdiction.

In its decision, the majority instead concludes that Davis has standing to challenge the plebiscite, not based on voting rights cases, but based on one's ability to seek Social Security benefits.[3] In fact, the

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[2] The Sixth Circuit appears to be the only Circuit that has directly addressed the question of when an alleged deprivation of voting rights is ripe. The court found the Constitution protects an individual's "fundamental right to vote *not the right to register to vote*." *Lawson v. Shelby Cnty.*, 211 F.3d 331, 336 (6th Cir. 2000) (emphasis added). Accordingly, the court found that the cause of action accrued on election day, "when [the plaintiffs] presented themselves at their polling station and were refused the right to vote," not when they were "notified that their registrations had been rejected" for refusing to provide social security numbers. *Id.* Unlike this case, the "vote" at issue in *Lawson* involved an actual election.

[3] I note the majority also cites *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986) to support its position. Op. 8. However, in *Batson*, the United States Supreme Court held that a prosecutor's use of peremptory challenges based on race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 85-86. The Court's focus was protecting the defendant's *constitutional right to a trial by jury*. *Id.* The Court found that the jury must be "indifferently chosen to secure the *defendant's right* under the Fourteenth Amendment." *Id.* at 87 (internal quotation marks omitted) (emphasis added). It is difficult to understand how the majority extrapolated the holding in this case to its conclusion that Davis's right to register for the plebiscite "is not unlike the right to participate in jury service,

majority cites no precedent suggesting that forbidding Davis from registering for this plebiscite implicates the voting rights protected under the Constitution. The Fifteenth Amendment only applies to an "*election* in which public issues are *decided* or public officials *selected*." *Terry v. Adams*, 345 U.S. 461, 468 (1953) (emphasis added). Davis does not allege that he is being denied the right to register for an *election*. Davis does not allege the plebiscite will select "candidates for public or party office." *See* 52 U.S.C. § 10310(c). Davis does not allege the plebiscite will change Guam's Constitution. Davis does not allege the plebiscite will enact, amend, or repeal any statute. Despite the language in the majority's opinion to the contrary, Davis does not allege the plebiscite will change the rights of Guam's citizens or that the plebiscite itself will *change* or *decide* Guam's political status in relationship with the United States. Rather, the injury alleged by Davis is merely being denied the right to register to participate in an opinion poll that will likely never occur. Clearly, the inability to register for this opinion poll is not equivalent to being denied the right to register to vote in the type of vote contemplated and protected by the Constitution.

Even if prohibiting Davis from registering for the plebiscite were a violation of his voting rights, this case "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Texas v. United States*, 523 U.S. 296, 300 (1998). The plebiscite is not currently scheduled and as the district court found, it is not likely to *ever occur*! The condition

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which may not be denied on a constitutionally unequal basis." Op. 8.

precedent to even scheduling the opinion poll is obtaining the registration of seventy percent of the eligible voters. Failing to satisfy this requirement (an event that even Davis describes as a "mirage"), the poll will not take place. Yet, amazingly, the majority finds these circumstances present a case ripe for resolution.

The majority mistakenly suggests that *Heckler v. Mathews*, 465 U.S. 728 (1984) would apply.[4] However, in *Mathews*, there was no question that Social Security pension benefits *would be paid*. There was no uncertainty as to application of the allegedly unconstitutional pension offset provision. Thus, there was no question the issue was ripe. Indeed, the Court was not asked to determine ripeness and the Court did not address ripeness. Rather, the issue before the Court was determining the plaintiff's standing. The Court was asked to answer the question of whether the plaintiff's standing was dependant on his ability to receive additional benefits if he prevailed. *See Mathews*, 465 U.S. at 735-38.

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[4] The plaintiff in *Mathews* claimed that he was subjected to unequal treatment as to Social Security benefits "solely because of his gender." *Mathews*, 465 U.S. at 738. Specifically, the plaintiff alleged that "as a nondependent man, he receiv[ed] fewer benefits than he would if he were a similarly situated woman." *Id.* The Court focused on two factors when determining the plaintiff had standing (1) his injury was concrete as "there was no doubt about the direct causal relationship between the government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender"; (2) that he was denied equal treatment solely because of gender (a protected class). *Id.* at 739-40 & n.9. The court concluded that the plaintiff's standing did not depend on his ability to obtain increased Social Security benefits if he prevailed. *Id.* at 737.

Thus, the majority's conclusion that this case is ripe is without precedent and ignores the district court's extensive factual findings as to ripeness. Can you imagine the hours the district court will now have to spend resolving Davis's many alleged claims, including claims of alleged unequal treatment under the Fourteenth Amendment, alleged stigmatizing harm under the Establishment Clause, alleged violations of the Voting Rights Act, even though this plebiscite will never occur?

Given the speculative and remote course of events that stands between Davis and his contemplated injury, this matter is not ripe for adjudication, and the district court correctly dismissed Davis's complaint.

Appendix D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF GUAM

No. 11-00035

ARNOLD DAVIS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. RENORIO; DONALD I. WEAKLEY; LEONARDO M. RAPADAS,

Defendants.

Filed: Jan. 9, 2013

ORDER

The court accepts and adopts the Magistrate Judge's Report and Recommendation dated June 14, 2012 (ECF No. 44), and **GRANTS** the Defendants' Motion to Dismiss.

I. CASE OVERVIEW

This is a civil rights action which deals with the topic of self-determination of the political status of the island and who should have the right to vote on a referendum concerning such. The Plaintiff claims that

he is prohibited from registering to vote on the referendum, which is a violation of his Fourteenth and Fifteen Amendment rights as well as a violation of the Organic Act and the Voting Rights Act.

A. Factual Background

The following facts are taken as established for the purpose of this motion.[1] On November 22, 2011, Plaintiff filed his complaint for declaratory and injunctive relief. *See* Compl., ECF No. 1. In the complaint, he alleges discrimination in the voting process by Guam and the Defendants. *Id.* Plaintiff alleges that under Guam law, a 'Political Status Plebiscite' is to be held concerning Guam's future relationship with the United States.[2] *Id.*, ¶8. Plaintiff,

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[1] For purposes of the motion to dismiss, the court recounts the facts as alleged in the Plaintiff's Complaint and assumes their veracity for the limited purposes of deciding the motion. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

[2] **Plebiscite Date and Voting Ballot.**

(a) The Guam Election Commission shall conduct a "Political Status Plebiscite", at which the following question, which shall be printed in both English and Chamorro, shall be asked of the eligible voters:

> In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):
>
> 1. Independence ( )
>
> 2. Free Association with the United States of America ( )
>
> 3. Statehood ( ).

Person eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within

a white, non-Chamorro, male and resident of Guam, states that he applied to vote for the plebiscite but was not permitted to do so because he did not meet the definition of "Native Inhabitant of Guam." "Native Inhabitants of Guam" are defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 1 Guam Code Ann. § 2102, *id.*, ¶¶ 20 and 21.

The Guam Legislature established a "Guam Decolonization Registry" for the "purpose of registering and recording the names of the Native Inhabitants of Guam." 3 Guam Code Ann. § 21001(d); *see* Compl., ECF No. 1, ¶ 17. The law further provides "[a]ny person who willfully causes, procures or allows that person, or any person, to be registered with the Guam Decolonization Registry, while knowing that the person, or other person, is not entitled to register with the Guam Decolonization Registry, shall be guilty of perjury as a misdemeanor." 3 Guam Code. Ann. § 21009. The plebiscite would ask native inhabitants which of the three political status options they preferred. The three choices are Independence,

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this Chapter of the Guam Code Annotated, who are eighteen (18) years of age or older on the date of the "Political Status Plebiscite" and are registered voters on Guam.

The "Political Status Plebiscite" mandated in Subsection (a) of this Section shall be held on a date of the General Election at which seventy percent (70%) of eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission.

1 Guam Code. Ann. § 2110.

Free Association with the United States, and Statehood. *See* Compl., ECF No. 1, ¶ 8.

Because the Plaintiff was denied the right to register for the plebiscite, the Plaintiff filed the instant complaint, stating three causes of action. In his first cause of action, he alleges that by limiting the right to vote in the Political Status Plebiscite to only Native Inhabitants of Guam, the purpose and effect of the act was to exclude him and most non-Chamorros from voting therein, thereby resulting in a denial or abridgment of the rights of citizens of the United States to vote on account of race, color, or national origin, a violation of Section 2 of the Voting Rights Act of 1965.

In his second cause of action, Plaintiff alleges that Defendants are preventing him from registering to vote in the Political Status Plebiscite because he is not a Native Inhabitant of Guam. Thus, Defendants are engaged in discrimination on the basis of race, color, and/or national origin in violation of various laws of the United States.

Lastly, the Plaintiff's third cause of action alleges that he is being discriminated in relation to his fundamental right to vote in the plebiscite in violation of the Organic Act of Guam, the U.S. Constitution and other laws of the United States for the reason that he is not a native inhabitant of Guam.

In his Prayer for Relief, Plaintiff seeks a judgment: enjoining Defendants from preventing Plaintiff and those similarly situated from registering for and voting in the Political Status Plebiscite; enjoining the Defendants from using the Guam Decolonization Registry in determining who is eligible

to vote in the plebiscite; enjoining enforcement of the criminal law provisions of the Act that make it a crime to register or allow a person to vote in the plebiscite who is not a Native Inhabitant of Guam; and a declaration that Defendants' conduct has been and would be, if continued, a violation of law.

B. Statutory History of the Plebiscite Vote

The Magistrate Judge's recitation of the statutory history of the plebiscite is set forth herein since there is no objection to his representations of fact.

The current plebiscite law traces its beginnings to P.L. 23-130, which became law on December 30, 1996. Therein, the Guam Legislature established a Chamorro Registry for the purpose of establishing an index of names by the Guam Election Commission for registering Chamorros and recording their names. The Registry was to serve as a tool to educate Chamorros about their status as an indigenous people and their inalienable right to self-determination. A week after the passage of the above referenced law, the Guam Legislature passed P.L. 23-147. This new law created the Commission on Decolonization for the implementation and Exercise of Chamorro Self-Determination ("Commission on Decolonization"). The purpose of the Commission was to ascertain the desires of the Chamorro people of Guam as it pertained to their future political relationship with the United States. The law required the Guam Election Commission to conduct a Political Status Plebiscite at the next Primary Election (September, 1998) during which qualified voters would be asked to choose among three political status options. The status options were Independence, Free Association,

and Statehood. The results of the plebiscite were to be transmitted to the President and Congress of the United States and the Secretary General of the United Nations.

Seeing that no plebiscite vote occurred during the primary election in 1998, the Guam Legislature passed P.L. 25-106 to have the plebiscite vote take place on July 1, 2000. The Act more importantly changed those persons entitled to vote during the Political Status Plebiscite from "Chamorros" to "Native Inhabitants of Guam". A native inhabitant was defined as a person who became a citizen by virtue of the 1950 Organic Act of Guam and a descendant of such person.

P.L. 25-106 also created a Guam Decolonization Registry. It was a registry separate and apart from the Chamorro registry. The Decolonization Registry was to create a list of qualified voters for the plebiscite. Thus, every person who was a native inhabitant of Guam as defined in the Act was entitled to register with the Decolonization Registry.

Four years after passage of the Guam Decolonization Registry and seeing that a plebiscite vote had still not taken place, the Guam Legislature passed P.L. 27-106 on September 30, 2004. This Act provided that the Political Status Plebiscite shall be held on a general election at which seventy percent (70%) of eligible voters have been registered as determined by the Guam Election Commission.

C. Procedural History

On November 22, 2011, Plaintiff filed his complaint herein. *See* Compl., ECF No. 1. On December 2, 2011, the Attorney General of Guam,

Leonardo M. Rapadas, a named Defendant, on behalf of himself and all named defendants, moved to dismiss the complaint on the ground that it failed to present a case or controversy. *See* Def.s' Mot., ECF No. 17.

On December 30, 2011, Anne Perez Hattori ("Ms. Hattori"), filed a Motion for Leave to file a brief, as *Amicus Curiae,* in support of Defendants' Motion to Dismiss. *See* Mot., ECF No. 20.

On January 3, 2012, Plaintiff filed his opposition to Defendant's Motion to Dismiss and on January 7, 2012, he filed an opposition to Ms. Hattori's Motion for Leave to file an *Amicus Curiae* brief. *See* Pl.'s Opp'n, ECF No. 21 and Pl.'s Opp'n, ECF No. 23.

On February 1, 2012, Defendants' Motion to Dismiss was referred by the undersigned to the Magistrate Judge for a Report and Recommendation. *See* Order, ECF No. 25.

On April 6, 2012, the court granted Ms. Hattori's motion for leave to file a brief, as *Amicus Curiae. See* Order, ECF No. 41.

On June 14, 2012, the Magistrate Judge issued his Report and Recommendation ("Report"). *See* Rpt. and Rec., ECF No. 44. Therein, the Magistrate Judge recommended the Plaintiff's Complaint be dismissed because the Plaintiff lacks standing and the case is not ripe for adjudication.

The Plaintiff filed his objections to the United States Magistrate's Report and Recommendation on July 1, 2012. *See* Pl.'s Obj., ECF No. 46. The Defendants filed their Response to the Plaintiff's objections to the Report on July 16, 2012. *See* Def.s' Response. ECF No. 47.

On September 21, 2012, the court ordered the Defendants to file a responsive pleading, specifically addressing the applicability of *John Davis, Jr. v. Commonwealth Election Committee*, Case No. 12-CV-00001, 2012 WL 2411252 (D.N.M.I. June 26, 2012). *See* Order, ECF No. 69.

A hearing on the Plaintiff's objections to the Report was held on November 15, 2012.

II. JURISDICTION AND VENUE

The court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331 for Plaintiff's claims under 28 U.S.C. § 1343 and 48 U.S.C. § 1424(b).

Venue is proper in this judicial district, the District of Guam, because Plaintiff and Defendants reside on Guam, and because all of the events or omissions giving rise to Plaintiff's claims occurred here. *See* 28 U.S.C. § 1391.

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, "[a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *see also* Fed. R. Civ. P. 72(b)(3) (stating "[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to"). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b)(3) (stating

a district judge "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions").

A district court's obligation to make a *de novo* determination of properly contested portions of a magistrate judge's report and recommendation does not require that the judge conduct a de novo hearing on the matter. *United States v. Raddatz*, 447 U.S. 667, 676 (1980). Accordingly, the court makes a *de novo* review to those portions of the Report and Recommendation in which the Plaintiff has lodged objections.

IV. APPLICABLE STANDARD FOR MOTION TO DISMISS

The Defendants argue that this court has no jurisdiction to hear this action under Rule 12(b)(1) because the Plaintiff lacks standing and the matter is not ripe for review.[3] Standing and ripeness are legal issues subject to *de novo* review. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

V. DISCUSSION

The Defendants moved to dismiss the Plaintiff's complaint arguing that there was no case or controversy before the court. In the *amicus curiae* brief Ms. Hatorri argued that there was no standing and the case was not ripe. The Magistrate Judge agreed with Ms. Hattori and found the Plaintiff's

[3] The Defendants also move for dismissal under Civil Procedure Rule 12(b)(6). However, the court need not address that particular argument, in light of this court's ruling concerning its lack of subject matter jurisdiction.

claims were not ripe for adjudication. He recommended dismissal of the Plaintiff's Complaint for the following reasons:

> 1. Plaintiff's complaint which seeks to enjoin Defendants from preventing him from registering and voting in the 'Political Status Plebiscite' on a general election presents no case or controversy since the matter is not ripe for adjudication. There is no plebiscite vote set in the 2012 general election and no plebiscite vote to date is in sight. Plaintiff's allegations present no sufficient immediacy and reality to warrant intervention by the court.
>
> 2. Plaintiff has no standing to bring an action to enjoin the Attorney General from enforcing the provisions of the plebiscite law that makes it a misdemeanor to register or allow anyone to register with the Guam Decolonization Registry if the person were not a Native Inhabitant of Guam. Plaintiff has not alleged that he has been charged with any crime in relation to the Political Status Plebiscite act nor has he shown that he is subject to a genuine threat of imminent prosecution in relation to the said act.

See Rpt. and Rec., ECF No. 44, at 9:20-10:4.

The Plaintiff objects to the Magistrate Judge's findings and conclusions which are now before this court for consideration.

A. No Opportunity to be heard on ripeness issue.

First, the Plaintiff objects to the fact that he was not given an opportunity to be heard on the ripeness arguments, which were raised for the first time in the amicus brief. As noted above, the Defendants filed their Motion to Dismiss on December 2, 2011. *See* Mot., ECF No. 17. Therein, they did not raise the issue of ripeness. *Id.*

On the last day for the filing of the Plaintiff's opposition to the motion—December 30, 2011, a Motion for Leave to File an *amicus curiae* brief was filed by Ms. Hattori supporting dismissal based upon a ripeness argument. *See* Mot., ECF No. 20. On April 6, 2012, the Magistrate Judge granted leave to the amicus to file the brief containing the ripeness arguments. However, there was no provision in the Magistrate Judge's order permitting the Plaintiff to file an opposition, nor was a hearing scheduled to hear argument on the matter.

The Government argues that the Plaintiff should not be found wanting in this regard. "First, 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' Moreover, courts ... have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002); also citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant,

principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

It is probably true that the Plaintiff should have been given an opportunity to be heard at the time the matter was before the Magistrate Judge. Yet, because the Plaintiff actually addresses the issue of ripeness in his objections to the Report, he has now been given an opportunity, such that, this court can rule on the matter without need for additional briefing.

B. Article III

Article III of the United States Constitution requires that those who seek to invoke the power of the federal courts must allege an actual case or controversy. *See* U.S. Const. art. III; *see also Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (*citing Flast v. Cohen*, 392 U.S. 83, 94-101 (1968)). Subsumed within this restriction are two components. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121-23 (9th Cir. 2009). "Standing and ripeness present the threshold jurisdictional question of whether a court may consider the merits of a dispute." *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). "Both standing and ripeness originate from the Constitution's Article III requirement that the jurisdiction of federal courts be limited to actual cases and controversies." *Id.* at 1204-05.

"The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, *inter alia*, that plaintiffs have standing and that claims be 'ripe' for adjudication . . . Standing

addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication. The related doctrine of ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiff's purported injury is too speculative and may never occur." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010) (citations omitted). "The standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction. The ripeness question is whether the harm asserted has matured sufficiently to warrant judicial intervention. Both questions bear close affinity to one another." *Immigrant Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 859 (9th Cir. 2002) (quotation marks, editorial brackets and citations omitted). *See also, City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 n.6 (9th Cir. 2001) (noting that standing "overlaps substantially" with ripeness and that in that case, both were "inextricably linked").

1. Standing

The standing dispute in this case is entirely over whether the Plaintiff is in-fact injured because he cannot *register* to vote in a plebiscite that may, in fact, never be held. In order for a plaintiff to demonstrate standing for injunctive and declaratory relief:

> [A] plaintiff must show that he [or she] is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to

> the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Institute, 129 S. Ct. 1142, 1149 (2009) (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

A plaintiff must demonstrate "a real and immediate threat that he would again" suffer the injury to have standing for prospective equitable relief. *Lyons*, 461 U.S. at 105. The "mere physical or theoretical possibility" of a challenged action again affecting a plaintiff is not sufficient. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). It is necessary that there be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the plaintiff. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

> To establish Article III standing, a plaintiff must show *inter-alia* that he faces imminent injury on account of the defendant's conduct. Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. Nor does speculation or "subjective apprehension" about future harm support standing. Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a "real or immediate threat . . . that he will again be wronged in a similar way."

Mayfield v. United States, 599 F.3d 964, 970 (9th Cir. 2010) (citations omitted).

In order to establish an injury in fact necessary to a claim for injunctive relief, the moving party must demonstrate that a defendant's conduct is causing irreparable harm. *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992). This requirement cannot be met absent a showing of a real or immediate threat that the plaintiff will be wronged again. *Lyon*, 461 U.S. at 101. While past wrongs consist of evidence bearing on whether there is a real and immediate threat of repeated injury, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Thus, "there must be sufficient immediacy, reality and causality between defendants' conduct and plaintiffs' allegations of future injury" to warrant injunctive relief. *Weiser v. Koch*, 632 F.Supp. 1369, 1373 (S.D.N.Y. 1986).

Examining the facts of the case it is clear there is no on-going, real and immediate threat of repeated injury sufficient to confer standing for injunctive relief. Plaintiff has not successfully argued nor has he shown that he is presently threatened with or has already suffered any irreparable damage or injury because he cannot register for a plebiscite that is more likely than not to occur. *See Benoit v. Gardner*, 345 F.2d 792, 793 (1965) ("There must, at the least, be a strong showing of a likelihood of success and of irreparable harm."). A purely hypothetical threat to federally protected rights does not afford a basis for injunctive relief nor does it raise before the court a justiciable controversy. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 90 (1947).

The Magistrate Judge also found the Plaintiff lacked standing to challenge the enforcement of 3 GCA § 20009 which makes it a crime to register or allow a person to register with the Guam Decolonization Registry, who is not a Native Inhabitant of Guam. That section of the Guam code makes it a misdemeanor for anyone who "willfully causes, procures or allows" any person "to be registered with the Guam Decolonization Registry, while knowing that the person . . . is not entitled to register" with the Decolonization Registry. 3 Guam Code. Ann. § 21009.

The Plaintiff "must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him." *Stoianof v. State of Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983). "A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

The Magistrate Judge found the Plaintiff had not been charged with a misdemeanor, nor had he shown that he is subject to a genuine threat of imminent prosecution. *See Wolfson v. Brammer*, 616 F. 3d 1045, 1058 (9th Cir. 2010), quoting *San Diego Cnty. Gun rights Comm. v. Reno*, 98 F. 3d 1121, 1126 (9th Cir. 1996). In evaluating threats of imminent prosecution, the court considers: (1) whether plaintiff has articulated a concrete plan to violate the law in question; (2) whether prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) whether the past history of past

prosecution or enforcement under the challenged statute suggests that prosecution may, in fact, be imminent. *Id.* While the Plaintiff may believe there is a possibility of prosecution, that remains speculative at best. A general threat of prosecution is not enough to confer standing. *See e.g. Poe v. Ullman*, 367 U.S. 497, 501 (1961) (mere allegation that state attorney intended to prosecute any offense against the local law held insufficient to confer standing).

In addition, the Plaintiff's inability to point to any history of prosecutions undercuts his argument that he faces a genuine threat of prosecution. *See Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 4 (9th Cir. 1974) (no standing where the record did not reveal there had been a history of prosecution under the county ordinance); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (no standing where plaintiffs failed to allege that the challenged statute had ever been applied or threatened to apply). At most, the Plaintiff speculates that there is the possibility of prosecution. Because the Plaintiff has not sufficiently alleged how the Defendants will immediately harm him, this court hereby overrules the Plaintiff's objection and affirms the Magistrate Judge's report and recommendation on this issue.

2. Ripeness

The question of timing turns on the jurisdictional doctrine of ripeness. "The 'basic rationale' for the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements' over policy with other branches of the federal government." *Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir.

1990), citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Ripeness often overlaps with standing, "most notably in the shared requirement that the injury be imminent rather than conjectural or hypothetical." *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir. 2006). As is often the case "sorting out where standing ends and ripeness begins is not an easy task." *See Thomas v. Anchorage Equal Rights Comm'n,*, 220 F.3d 1134, 1138-39 (9th Cir. 2000). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted). "Two considerations predominate the ripeness analysis: (1) "the hardship to the parties of withholding court consideration" and (2) "the fitness of the issues for judicial decision." *Abbott Labs.*, 387 U.S. at 149. "To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss." *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992). The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds. *See Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2717 (2010).

The Defendants argue that the Plaintiff, himself, admits that the controversy as presented is not ripe. The Defendants rely on an article written by the Plaintiff which was published in the *Marianas Variety*

titled, "Getting Out the Vote." *See* Defs' Resp., ECF No. 47, Attachment. In the article, the Plaintiff states:

> With regard to the actual goal involved—the plebiscite itself, the end of the self-determination rainbow, as it were—near-term optimism has given way to financial and other realities. Hope for a plebiscite as early as 2012 has now faded to 2016 or beyond. Funding isn't the only problem, either. Guam law requires registration of "70% of eligible voters" before a political status plebiscite can occur. Of course nobody knows what that figure actually is, as it changes daily. Senator Pangelinan is responsible for that particular bit of whimsical fluff.
>
> A while ago I compared the growth rate of signatures on the Decolonization Registry to the timeline since the Registry was created. Even with a newly-enacted law that automatically adds everyone who qualifies for a CLTC lease it looks like they have a tough row to hoe. I suspect that most of those automatically registered are blissfully unaware they were signed up by proxy.
>
> I compute a high probability of reaching the 70% level sometime early in the 25th century. Even that may be a bit optimistic however, because it's become apparent that virtually all the eligibles who wished to sign—or were signed up automatically by their friends at the Guam Election Commission—have already done so.

> Meanwhile, due at least partly to Guam's standing as the undisputed champion in national birth rate statistics (with Utah a distant second) the number of 'Native Inhabitants' reaching voting age annually exceeds the number signing up to vote. It looks like they're actually losing ground in the struggle to reach that magical 70%.
>
> It's time to regroup, I suppose, or the plebiscite will forever be an alluring mirage out there on the horizon. I believe we can expect a change to eliminate the 70% requirement or reduce it to something like, say, 10%, which is approximately where they stand at the moment. They should probably do it soon, because that number gets smaller every day.

Id.

Ordinarily, the court should pay little attention to an editorial in a periodical. However, the court considers the opinion voiced by the Plaintiff, in that the historical facts support the conclusion that the plebiscite is not likely to occur any time soon, or if at all. There is little likelihood that the plebiscite will be scheduled any time in the near future.

Because of the similarities of facts and issues, the court asked the parties to consider the applicability of the Commonwealth of the Northern Marianas Islands ("CNMI") case, *John Davis, Jr. v. Commonwealth Election Commission*, Case No. 1-12-CV-00001, 2012 WL 2411252 (D.N.M.I. June 26, 2012). In *Davis,* the plaintiff, sought judicial relief to permanently enjoin the chairperson and the executive director of the

Commonwealth Election Commission ("CEC" or "the Commission") from denying him the right to vote on any initiative to amend or repeal Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI"). Article XII restricts ownership of permanent and long-term interests in real property within the Commonwealth to persons of Northern Marianas descent ("NMD"). In 1999, Article XVIII of the Commonwealth Constitution was amended to prohibit non-NMDs who otherwise are qualified voters from voting on initiatives to change Article XII.

Mr. John Davis, a person of non-NMD descent, who is otherwise qualified to vote in the Commonwealth, argued that the restriction to his right to vote violated his civil rights as guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution. Chief Judge Ramona Manglona dismissed without prejudice a legally similar attack on registration and election procedures in the CNMI to those presented by the plaintiff here in Guam. Addressing whether the claims in Mr. John Davis' complaint were ripe for judicial review the court noted,

> A claim is "not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all[,]" or if it is "too speculative whether the problem [plaintiff] presents will ever need solving." *Texas v. United States*, 523 U.S. 296, 300, 302 (U.S. 1998) (internal citation omitted). However, "[w]here the inevitability of the operation of a statute against certain

> individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Reg'l Rail*, 419 U.S. at 143.

Davis, 2012 WL 2411252 at *6.

Chief Judge Manglona found that John Davis' claims were not ripe because no initiative was scheduled for the next election. The court held, "While [John] Davis may find it distressing to contemplate that under Commonwealth law, if an Article XII initiative gets on the ballot he will not be permitted to vote on it, he suffers no hardship until an initiative is 'certainly impending.'" *Id.*, at *7. The same rationale is true of the Plaintiff's claims challenging a plebiscite in Guam. Until the plebiscite he seeks to register for is "certainly impending," he has no claim.

Here, just as in the CNMI case, there is no discernible future election in sight. Indeed, while Mr. Davis cites the fact that the plebiscite has been set and reset repeatedly as proof of hardship, what it actually demonstrates is just how uncertain it is as to exactly when a plebiscite will ever be held. To suffer a real discernible injury, any registration would have to be, by necessity, related to an election that is actually scheduled. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 301 n.12 (1979) (The ripeness of an election law claim "depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election."). Because the Plaintiff has not demonstrated that there is a real threat of the election occurring any time soon, the court hereby overrules the Plaintiff's objection and

affirms the Magistrate Judge's report and recommendation.

VI. CONCLUSION

Based on the discussion above, the court hereby accepts and adopts the Magistrate Judge's report and recommendation on this matter, and **GRANTS** the Defendant's Motion to Dismiss. Said dismissal is without prejudice.

The Plaintiff may bring this suit again before this court for consideration if and when the Plaintiff is able to demonstrate that the plebiscite will occur for certain any time soon.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jan 09, 2013

Appendix E

RELEVANT STATUTORY PROVISIONS

48 U.S.C. § 1421b(u)

(u) 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: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950)

AN ACT

To provide a civil government for Guam and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Organic Act of Guam".

Sec. 2. The territory ceded to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain, signed at Paris,

December 10, 1898, and proclaimed April 11, 1899, and known as the island of Guam in the Marianas Islands, shall continue to be known as Guam.

Sec. 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.

CITIZENSHIP

Sec. 4. (a) Chapter II of the Nationality Act of 1940, as amended, is hereby further amended by adding at the end thereof the following new section:

"SEC. 206. (a) The following persons, and their children born after April 11, 1899, are hereby declared to be citizens of the United States, if they are residing on the date of enactment of this section on the island of Guam or other territory over which the United States exercises rights of sovereignty:

"(1) All inhabitants of the island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who

have taken no affirmative steps to preserve or acquire foreign nationality.

"(2) All persons born in the island of Guam who resided in Guam on April 11, 1899, including those temporarily absent from the island on that date, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality.

"(b) All persons born in the island of Guam on or after April 11, 1899 (whether before or after the date of enactment of this section), subject to the jurisdiction of the United States, are hereby declared to be citizens of the United States: *Provided,* That in the case of any person born before the date of enactment of this section, he has taken no affirmative steps to preserve or acquire foreign nationality.

"(c) Any person hereinbefore described who is a citizen or national of a country other than the United States and desires to retain his present political status shall make, within two years of the date of enactment of this section, a declaration under oath of such desire, said declaration to be in form and executed in the manner prescribed by regulations. From and after the making of such a declaration any such person shall be held not to be a national of the United States by virtue of this Act.

"(d) The Commissioner of Immigration and Naturalization, with the approval of the Attorney General, is hereby authorized and empowered to

make and prescribe such rules and regulations not in conflict with this Act as he may deem necessary and proper.

"(e) Section 404 (c) of this Act shall not apply to persons who acquired citizenship under this section."

(b) Subsection (a) of section 303 of the Nationality Act of 1940, as amended (8 U. S. C., sec. 703), is hereby amended by adding the following new subparagraph:

"(5) Guamanian persons and persons of Guamanian descent."

* * *

1 Guam Ann. Code § 2102

(a) *Self-Determination.* Freedom of a people to determine the way in which they shall be governed and whether or not they shall be self-governed.

(b) '*Native Inhabitants of Guam*' shall mean those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons.

1 Guam Ann. Code § 2105

The general purpose of the Commission on Decolonization shall be to ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America. Once the intent of the Native Inhabitants of Guam is ascertained, the Commission shall promptly transmit that desire to the President and the Congress of the United States of America, and to the Secretary General of the United Nations.

1 Guam Ann. Code § 2110

(a) The Guam Election Commission shall conduct a "Political Status Plebiscite", at which the following question, which shall be printed in both English and *Chamorro*, shall be asked of the eligible voters:

In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):

1. Independence ( )
2. Free Association with the United States of America ( )
3. Statehood ( ).

Persons eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within this Chapter of the Guam Code Annotated, who are eighteen (18) years of age or older on the date of the "Political Status Plebiscite" and are registered voters on Guam.

The "Political Status Plebiscite" mandated in Subsection (a) of this Section shall be held on a date of the General Election at which seventy percent (70%) of eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission.

3 Guam Ann. Code § 21000

In furtherance of Public Law Number 23-147, now codified as Chapter 21 of Title 1 of the Guam Code Annotated, wherein the Commission on Decolonization was established and given the mandate to conduct a plebiscite on the political status wishes of the people of Guam, *I Liheslaturan*

Guåhan finds there is a need for a Registry, separate and apart from the Chamorro Registry authorized by Public Law Number 23-130, now codified as Chapter 20 of Title 3 of the Guam Code Annotated, which will specifically delineate the list of qualified voters for the political status plebiscite, and intends that this separate Registry not be one based on race.

It is the intent of *I Liheslaturan Guåhan* to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Guam Organic Act to exercise the inalienable right to self-determination of their political relationship with the United States of America.

I Liheslaturan Guåhan finds that the right has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam.

This inalienable right is founded upon the 1898 Treaty of Peace between the United States and Spain; Chapter XI of the United Nations Charter; the United States' yearly reports to the United Nations on the Non Self-governing Territory of Guam; 1950 Organic Act of Guam; United Nations Resolution Number 1541 (XV); United Nations Resolution 1514 (XV); § 307 (a) of the United States Immigration and Nationality Act; and Part I, Article 1, Paragraphs 1 and 3 of the International Covenant on Civil and Political Rights.

I Liheslaturan Guåhan notes that the 1950 Congress acknowledged its United Nations' responsibilities:

In addition to its obligation under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self-governing Territory. Under Chapter XI of the Charter of the United Nations, ratified by the Senate June 26, 1945 (59 Stat. at p. 1048), we undertook, with respect to the people of such Territories, to insure political advancement, to develop self-government, and taking "due account of the political aspirations of the peoples; * * * to assist them in the progressive development of their free political institutions * * *." Organic Act of Guam, Sen. Rep. 2109, 1950 *U.S. Code & Admin. Report* p. 2841.

It is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950 and to use this knowledge to further petition Congress and other entities to achieve the stated goals.

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