No. 17-15719

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellee,

v.

GUAM ELECTION COMMISSION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Guam
Civil Case No. 11-00035
Frances Tydingco-Gatewood

OPENING BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

This case is a wolf in sheep's clothing. Although styled as a reverse discrimination case, this lawsuit has nothing to do with preventing race discrimination or safeguarding civil rights. This case seeks to deny the "native inhabitants of Guam" – a multi-racial, multi-ethnic group of people, namely, the pre-1950 residents of Guam and their descendants – from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States of America. This right has been too long denied.

The decision from which this appeal is taken rests on the flawed premise that *Rice v. Cayetano* forecloses the aforementioned plebiscite. *Rice* held that a state law that premises the right to vote (in a state election to install state officials) upon a racial classification violates the race-neutrality command of the Fifteenth Amendment. It does not follow that *Rice* invalidates a purely symbolic expression of self-determination, by a federally created class of people, in an unincorporated territory, which, by definition, is "not destined for statehood," *Ngiraingas v. Sanchez*, 110 S.Ct. 1737, 1750 (1990), and not bound in permanent union with the United States.

Guam urges this Court not to compound the district court's error by extrapolating from *Rice* a rule that does not in fact exist—i.e., that any recognition of ancestry is equivalent to classifying on the basis of race. To be sure, the rule from that case is that ancestry *can be* a proxy for race, not that it *always* is. *See Rice v.*

Cayetano, 528 U.S. 495, 514 (2000). To find otherwise would effectively foreclose any ancestry-based classification for any purpose. The district court's reading of *Rice*, if taken to its logical conclusion, would prevent any present-day recognition of self-determination rights of colonized peoples because those necessarily depend in part (but not entirely) on the question of whether one's ancestors experienced colonization. Congress recognizes these rights. This Court should not let the district court's decision to stand, as it works an impractical and anomalous result in Guam and portends harm not only for this territory but for all the territories of the United States.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal from the district court's March 8, 2017 decision and order granting summary judgment in favor of the plaintiff pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over plaintiff's federal claims under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting the plaintiff's motion for summary judgment on his constitutional claims because (a) the plaintiff, as the party moving for summary judgment, failed to carry his initial burden of demonstrating that the race-neutral "native inhabitants of Guam" classification was motivated by a racially discriminatory purpose, or (b) the district court improperly weighed conflicting evidence and failed to draw all inferences in the light most favorable to Guam, as the non-moving party, as to those claims.

2. Whether, as a matter of law, the district court erred in granting the plaintiff's motion for summary judgment on his Fifteenth Amendment claim because (a) the non-binding plebiscite is not an election within the meaning of the Amendment, or (b) the race-neutral classification intended to facilitate the self-determination of a federally created class of people is not motivated by a racial purpose and, in any event, is not a denial of the right to vote on account of race.

3. Whether, as a matter of law, the district court erred in granting the plaintiff's motion for summary judgment on his Fourteenth Amendment claim because (a) there is no fundamental right to participate in the non-binding plebiscite guaranteed by the Amendment, or (b) the race-neutral classification intended to facilitate the self-determination of a federally created class of people is not motivated by a racial purpose and, in any event, is necessary to fulfill the government's compelling interest in determining its views.

STATEMENT OF THE CASE

Pursuant to the Guam Decolonization Registry Law, "native inhabitants of Guam" may register to participate in a non-binding plebiscite concerning their desired future political relationship with the United States. "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(b); 3 Guam Code Ann. § 21001(e).

Guam law instructs that the plebiscite be held if and when 70 percent of "native inhabitants of Guam" register to participate in it. *See* 1 Guam Code Ann. §

2110(a). To date no plebiscite has been scheduled, as there is uncertainty within the government of Guam as to when or even how this percentage is to be accounted.

If or when it is held, the plebiscite would ask eligible "native inhabitants of Guam" to choose among three political status options: (1) "Independence," (2) "Free Association with the United States of America" or (3) "Statehood." 1 Guam Code Ann. § 2110(a). The results of the plebiscite, while non-binding, will be transmitted to the President and Congress of the United States, and to the Secretary General of the United Nations. 1 Guam Code Ann. § 2105.

Plaintiff Arnold Davis is a U.S. citizen who did not gain his citizenship through operation of the 1950 Organic Act of Guam. While he resides in Guam, he is not a qualified plebiscite participant under the statutory definition of "native inhabitants of Guam." ER 1, 3, 20. Neither he nor any of his ancestors gained their U.S. citizenship by virtue of Congress's enactment of the Guam Organic Act. Consequently, he falls outside the federally created class of people for whom this is true.

On November 22, 2011, Plaintiff sued the territory of Guam, the Guam Election Commission, and its members in their official capacity in the District Court of Guam, seeking a declaration that limiting registration to vote in a symbolic political status plebiscite to "native inhabitants of Guam" violates the

Fifth, Fourteenth, and Fifteenth Amendments to the Constitution, the Voting Rights Act, and the Guam Organic Act. ER 7, 8.

The plaintiff's chief contention is that because the statutory definition of "native inhabitant of Guam" will produce a plebiscite electorate predominantly comprised of one racial group, i.e., Chamorros, and thereby disproportionately impact other racial groups, it impermissibly infringes his rights under the afore-mentioned constitutional and statutory provisions. To support this assertion, the plaintiff adduced little more than a 1950 census of Guam (and an expert opinion interpreting this census) in order to demonstrate that the vast majority of the group of persons made U.S. citizens by virtue of the enactment of the Guam Organic Act were racially "Chamorros." ER 76.

This alone is insufficient to establish a violation of either the Fifteenth or Fourteenth Amendment in this case. The 1950 census simply confirms the fact supporting Guam in this case, i.e., that more than just "Chamorros" were made U.S. citizens by virtue of Congress's enactment in that year of Guam's Organic Act. ER 76. To be sure, hundreds of non-Chamorro persons were included in the "non-citizen nationals" population that was extended U.S. citizenship via the Organic Act. By Plaintiff's own admission, this is a multi-racial, multi-ethnic class of people. ER 34, 35, 58. For its part, Guam adduced evidence in the form of legislative history, as well as the relevant statutory text itself, demonstrating that

the plebiscite law was intended simply to allow the "native inhabitants of Guam," or the aforementioned federally-created class of people, to express by plebiscite their desires regarding their future political relationship with the United States. The legislative history here revealed no intent on the part of the Guam Legislature to racially discriminate against those who do not meet the definition of "native inhabitants of Guam." *See* Guam Pub. L. No. 25-106, § 1 (2000) (clarifying that the qualifications for participating in the plebiscite are not race-based but rather "based on a clearly defined political class of people resulting from historical acts of political entities in relation to the people of Guam."). ER 423; 3 Guam Code Ann. §§ 21000 ("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 Organic Act of Guam.").

On December 2, 2011, Guam moved to dismiss the complaint on the ground that it failed to present a case or controversy. ER 495. On January 9, 2013, the court granted Guam's motion to dismiss finding that the plaintiff lacked standing and that the case was not ripe for adjudication. *Id.* Plaintiff appealed. On May 8, 2015, the Ninth Circuit issued its decision, finding that the case was ripe and that the plaintiff had standing to pursue his challenge to the plebiscite law. *See Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015).

On October 30, 2015, both parties filed their respective motions for summary judgment as to the merits of this case in the District Court of Guam. ER 495.

On March 8, 2017, the district court granted the plaintiff's motion for summary judgment, denied Guam's motion for summary judgment as "moot," and permanently enjoined the government of Guam from enforcing the plebiscite law. *See Davis v. Guam*, No. 11-00035, 2017 WL 930825, at **25, 26 (D. Guam Mar. 8, 2017). The court did not reach any of the plaintiff's statutory claims, instead invalidating the plebiscite law under the Fifteenth and Fourteenth Amendments, respectively.

On April 7, 2017, Guam filed its Notice of Appeal. ER 509. As a matter of law, the district court erred by granting the plaintiff's motion for summary judgment as to his constitutional claims. As to those claims, Guam is entitled to summary judgment as a matter of law. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (finding that a grant of summary judgment is inappropriate if there is "any genuine issue of material fact or the district court incorrectly applied the substantive law.").

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *See, e.g.*, *Moore v. Glickman*, 113 F.3d 988, 989 (9th Cir. 1997); *Dietrich v. John Ascuaga's*

Nugget, 548 F.3d 892, 896 (9th Cir. 2008). A district court's decision on cross motions for summary judgment is reviewed *de novo*. *See, e.g.*, *Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

The plaintiff in this case failed to make a showing of racial discrimination under the Fifteenth and Fourteenth Amendments to the United States Constitution. As a matter of law, summary judgment should have been granted in favor of Guam as to the plaintiff's constitutional claims. As the party moving for summary judgment, the plaintiff failed to carry his initial burden of demonstrating that the race-neutral "native inhabitants of Guam" classification was motivated by a racially discriminatory purpose. In contravention of the well-settled law on summary judgment, however, the district court improperly weighed the evidence and failed to draw all inferences in the light most favorable to Guam, as the non-moving party.

The Guam Decolonization Registry Law challenged here was enacted long ago by the Guam Legislature to provide a process whereby "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" – could register for and one day participate in a symbolic decolonization plebiscite. Because the law references descent, the district court found it to be infected by racially discriminatory intent, reasoning that descent implicates ancestry and that

ancestry is axiomatically a proxy for race. The court essentially converted a race-neutral classification into a race-based one in clear contravention of the well-settled constitutional standard for adjudging the former category of classifications.

Despite finding that the classification was "neutral" as to race "on its face," *see Davis v. Guam*, No. 11-00035, 2017 WL 930825, at *14 (D. Guam Mar. 8, 2017), and despite the plaintiff's failure to show that the statute was motivated by a racially discriminatory purpose, the district court nevertheless applied strict scrutiny and invalidated the statute under both the Fifteenth and Fourteenth Amendments. *See Davis*, 2017 WL 930825, at **24, 19. In an overly broad reading of *Rice v. Cayetano*, the district court effectively found that the use of descent in the Guam law was *per se* unconstitutional. In short, the court extrapolated from *Rice* a rule that ancestry "is" a proxy for race, as opposed to the actual rule handed down in that case, i.e., that it "can be" a proxy for race. This is the gestalt of the district court's decision.

The district court was wrong for several reasons. First, in ruling on the plaintiff's motion for summary judgment, the court should have viewed the evidence in the light most favorable to Guam. *See Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008); *Garcetti v. Ceballos*, 547 U.S. 410, 422 n.13 (2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). This it most certainly did not do. Further, the court improperly weighed conflicting evidence and failed to draw all inferences in the light most favorable to Guam, as the non-moving party. *See*

France v. Johnson, 795 F.3d 1170, 1177 (9th Cir. 2015) (citing *Taybron v. City & Cnty. of S.F.*, 341 F.3d 957, 959 n. 2 (9th Cir. 2003)); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008). With respect to the only genuine fact question in this case, i.e., whether the challenged statute was motivated by a racially discriminatory purpose, this move by the district court was fatal to its decision. On this basis alone, reversal is appropriate.

Second, as to the merits of the constitutional claims themselves, the district court erred as a matter of law when it granted the plaintiff's motion for summary judgment motion as to those claims. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (finding that summary judgment is inappropriate where the district court incorrectly applies the substantive law). In a move affecting *both* the plaintiff's Fifteenth and Fourteenth Amendment claims, the court converted a facially race-neutral classification into a racial classification even though the plaintiff had failed to put forth proof of intent sufficient to meet the constitutional standard. Because "native inhabitants of Guam" is a race-neutral classification on its face, the court was required to find that it was motivated by a racially discriminatory purpose and thus a racial classification. Although the definition refers in part to descent, this reference alone does not convert it into a racial classification. An ancestry-related classification in voting is only illegal where it is transparently obvious that the legislature had no reason to rely on ancestry other than as a cover for illegal racial

discrimination. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347, 376-77 (1915). Here, the Guam Legislature classified people according to whether they or their ancestors were present on Guam on the date the island was colonized by the United States. Acting in furtherance of Congress's self-proclaimed obligation under international law to facilitate the self-determination rights of colonized people when it enacted Guam's Organic Act, *see* S. REP. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2848, the Guam Legislature did not utilize ancestry as a cover, or pretext, for illegal racial discrimination when in enacted the Guam Decolonization Registry Law. Rather, to the extent that the Legislature made reference to descent in the definition of "native inhabitants of Guam," it only did so in order to facilitate an important, albeit symbolic, exercise of self-determination by this colonized, federally created class of people. *See* Guam Pub. L. No. 25-106, § 1 (2000) (clarifying that the qualifications for participating in the plebiscite are not race-based but rather "based on a clearly defined political class of people resulting from historical acts of political entities in relation to the people of Guam.").

Other than the aforementioned reference to ancestry, the only other evidence put forward by the plaintiff consisted of isolated statements made by a single lawmaker in contradiction to the expressed intent of the Guam Legislature as a whole, select pieces of legislative history relative to proposed local and federal legislation spanning several decades which only tangentially relates to the Guam law at issue in

the instant case, and, finally, a 1950 census of Guam showing the statistical makeup of those persons made U.S. citizens by virtue of the enactment of the Guam Organic Act, which in any event establishes only that the class of persons granted U.S. citizenship by the federal statute was, in fact, a multi-racial, multi-ethnic one. Taken together, these are insufficient under *Washington v. Davis* and *Arlington Heights* to support a finding that the law in question was motivated by a racially discriminatory purpose in contravention of the Fourteenth Amendment. Because proof of intent is likewise required for a finding of racial discrimination under the Fifteenth Amendment, *see Rogers v. Lodge*, 458 U.S. 613, 617-621 (1982) (finding that demonstration of intent is as necessary under the Fifteenth as under the Fourteenth Amendment), *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 62 (1980) (holding that discriminatory intent is a "necessary ingredient of a Fifteenth Amendment violation"), *Gomillion v. Lightfoot*, 364 U.S. 339, 342-48 (1960) (invalidating under the Fifteenth Amendment an "uncouth twenty-eight-sided" municipal boundary line that could not be explained on grounds other than race), reversal is further appropriate as a matter of law. *See Blankenhorn*, 485 F.3d at 470 (finding that summary judgment is inappropriate where the district court incorrectly applies the substantive law).

The district court further incorrectly held that the Fifteenth Amendment applies at all to the plebiscite here, which is non-binding and little more than a survey of the views of a colonized group. Unlike *Rice v. Cayetano* and related case law involving

state denials of the right to vote in state elections to certain voters on account of their race, the plebiscite is not an election within the meaning of the Fifteenth Amendment – no public official will be elected, nor will any public policy be decided. Rather, the express purpose of the plebiscite is merely to ascertain the desires of the "native inhabitants of Guam" regarding political status, and to transmit the same to the federal government and the international community. *See* 1 Guam Code Ann. § 2110(a).

Further still, the district court incorrectly assumed that the plaintiff had a fundamental right to participate in the plebiscite. While the right to vote is certainly of central importance in American democracy, it has not always been held to be "fundamental" such that denial of the franchise to anyone under any circumstances is unconstitutional. Beyond the fact that the U.S. Supreme Court on occasion applies a lower level of scrutiny to challenged electoral laws, *see, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008), the district court's fundamental rights analysis was more acutely flawed because it wholly ignored Guam's constitutional status as an unincorporated territory. This Court's decision in *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), instructs that the court should have gone farther in its constitutional analysis than the banal question of whether the Fourteenth Amendment applies in Guam in order to reach the more important question of whether it would work an impractical and anomalous result in the unincorporated territory to interpose the strictures of equal protection to invalidate a plebiscite meant

only to fulfill, albeit only partly and only symbolically, the United States' international obligations to the colonized people of Guam. To be sure, the challenged classification is rationally related to Guam's legitimate need to determine the views of the "native inhabitants of Guam" regarding their right of self-determination under international law. Moreover, even if this Court were to determine that strict scrutiny applies, Guam's interest in facilitating the self-determination of its colonized population is compelling, and a vote that distinguishes "native inhabitants" from other residents of Guam is the only way to determine the views of the former.

ARGUMENT

I. AS A MATTER OF LAW, THE DISTRICT COURT ERRED IN FINDING THAT THE GUAM DECOLONIZATION REGISTRY LAW VIOLATES THE FIFTEENTH AMENDMENT.

A. "Native Inhabitants of Guam" is a facially race-neutral classification.

Guam law envisions the holding of a future non-binding political status plebiscite where the "native inhabitants of Guam" will be able to express their desires regarding Guam's future political relationship with the United States. *See* 3 Guam Code Ann. § 21000 (2005); *see also* 1 Guam Code Ann. §§ 2105, 2110(a). Specifically, these plebiscite voters will be asked to express their desires by choosing between three possible political status options, namely, independence, free association, and statehood. *See* 1 Guam Code Ann. § 2110(a). Once ascertained, said

desires will eventually be transmitted to the U.S. President, the U.S. Congress, and the United Nations. *Id.*

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." 3 Guam Code Ann. § 21001(e).

This language is plain. On its face, anyone who became a U.S. citizen by operation of the 1950 Organic Act (and that person's descendants) qualifies as a "native inhabitant of Guam." By its plain terms, the statutory definition of "native inhabitants of Guam" has nothing whatsoever to do with race. It features no blood quantum requirement. It does not restrict the pool of eligible plebiscite voters to those persons who might be identified, or identify themselves, as being racially Chamorro. It does not preclude non-Chamorros from participating in the plebiscite. Rather, the qualification turns only on whether a person, or his or her ancestor, gained their U.S. citizenship through the operation of the Organic Act. Thus, it is facially race-neutral.

The district court acknowledged that "native inhabitants of Guam" is a facially race-neutral classification. *See Davis*, 2017 WL 930825, at *14 (describing the term as "neutral on its face, without any reference to race"). Yet it nevertheless treated the classification as racial and held that it violated the Fifteenth Amendment. Thus, the court either converted a non-racial classification into a racial one, or determined that

the law was motivated by a racially discriminatory purpose. For the reasons explained below, the evidence supports neither conclusion.

B. The reference to descent in the definition of "native inhabitants of Guam" does not automatically convert it into a race-based classification.

The district court relied primarily on *Rice v. Cayetano* to hold that the Guam legislature "used ancestry as a racial definition and for a racial purpose." *Davis*, 2017 WL 930825, at *13. To support this assertion, the court pointed to the reference to descent in the definition of "native inhabitants of Guam." *Id* at *10. (noting that "[b]loodline/ancestry is required" by the definition).

While the court is correct that ancestry can be a proxy for race, *see Rice v. Cayetano*, 528 U.S. 495, 514 (2000), and that the Fifteenth Amendment prohibits ancestry-based classifications when used as a cover for prohibited racial discrimination, *see Guinn v. United States*, 238 U.S. 347, 376-77 (1915), the court over-read *Rice*. The Supreme Court in *Rice* did not, as the district court incorrectly suggests, "invalidate[] the use of ancestry as a voting requirement, because it was determined to be a proxy for race" in all cases. *Davis*, 2017 WL 930825, at *13. The *Rice* Court held only that, in light of many factors, a law that limited voting rights in an election for state officers to "Hawaiians" violated the Fifteenth Amendment. *See Rice*, 528 U.S. at 499, 514. Neither *Rice* nor the other cases cited by the district court establish a rule that any reference to ancestry automatically converts a non-racial

classification into a racial one.

The Fifteenth Amendment forbids denying the right to vote "on account of race." U.S. Const., amend. XV. In other words, it forbids voting discrimination that "singles out identifiable classes of persons . . . *solely* because of their ancestry or ethnic characteristics." *Rice*, 528 U.S. at 515 (citing *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (emphasis added)). Likewise, as the district court noted, the Fifteenth Amendment strictly limits all "[d]istinctions between citizens *solely* because of their ancestry." *Davis*, 2017 WL 930825, at *9 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The court cited these cases, but omitted the word "solely" from its actual analysis, assuming incorrectly that *Rice* forbids any reference to ancestry or descent in voting, regardless of the purpose and function of the classification. Operating under such a broad reading of *Rice*, the court needed to do little more than point to the statutory definition of "native inhabitants of Guam" before reformulating the race-neutral classification as a racial one.

The district court's approach relies on a dangerous over-reading of *Rice*. Although rare, there are situations in which a reference to ancestry is required to facilitate a non-racial classification. This is one such situation. If a court interprets *Rice* as holding that ancestry is always a proxy for race, there is no room for the context-specific inquiry that is required to determine whether ancestry is being used as a cover for racial discrimination. The district court thus ignored the many ways in

which this case is different from *Rice* and other ancestry cases. Instead of asking whether ancestry was being used to further an illegal purpose, the court simply looked for any reference to ancestry in the statute.

One can best understand the meaning of *Rice* by closely examining the cases upon which it relies. *Guinn v. United States*, 238 U.S. 347 (1915), involved an Oklahoma law that imposed a literacy test for voting, but exempted only lineal descendants of persons who were entitled to vote on or before January 1, 1866. The 1866 date had no significance in Oklahoma other than the fact that it was the year before Congress passed the Fifteenth Amendment. Oklahoma's old voting laws allowed only white people to vote. Such a facially discriminatory law was illegal after passage of the Fifteenth Amendment. Nevertheless, through use of the literacy test and grandfather clause, the state sought to erect insurmountable barriers to voting and then to exempt only white people (the only people whose ancestors would have been able to vote in 1866) from them. Ancestry served no conceivable purpose under the Oklahoma law than to preserve the pre-Fifteenth Amendment status quo. *Id.* at 363-64. In addition to the law's transparent purpose, the Court noted Oklahoma's history of denying blacks the right to vote, *see id.* at 355, and the fact that it employed a literacy test, a device linked to racial discrimination in voting. *See id.* at 361-64. The Court invalidated the law not simply because it mentioned ancestry, but because the reference to ancestry served no conceivable purpose other than as a cover for illegal

racial discrimination and because the legislature's purpose of perpetuating the old racially exclusionary laws was readily apparent from all the surrounding circumstances. *Id.* at 363-65. It did not hold that ancestry-based classifications are *per se* unconstitutional, and the fact that the statute mentioned ancestry was not even the most important factor. *See Shaw v. Reno*, 509 U.S. 630, 644 (1993) ("The determinative consideration for the [*Guinn*] Court was that the law, though ostensibly race neutral, on its face embod[ied] no exercise of judgment and rest[ed] upon no discernible reason other than to circumvent the prohibitions of the Fifteenth Amendment.") (internal quotation marks omitted).

Immediately after the Court invalidated its grandfather clause, Oklahoma again employed historical dates for a transparently discriminatory purpose. The state's new laws required all citizens who were qualified to vote in the 1916 election, but had not voted in the 1914 election, to register between April 30 and May 11, 1916; anyone who attempted to register beyond the 12-day registration period was to be perpetually disenfranchised. *See Lane v. Wilson*, 307 U.S. 268, 276 (1939). Because the 1914 election was governed by the literacy test and grandfather clause later invalidated in *Guinn*, Oklahoma used the historical date of 1914 to ensure that only blacks (those who could not vote in 1914) would be subjected to the 12-day registration requirement. The Court made short work of the new law, finding that its intended practical effect was to accord to blacks a mere 12 days to reassert the rights the *Guinn*

Court meant to vouchsafe. *Id.* Such onerous registration provisions, the Court concluded, "leave no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked." *Id.* at 277. As in *Guinn*, the operative date had no historical significance whatsoever other than as a time when state voting law was facially racially discriminatory.

Rice presents a closer factual analogue to the case at hand, but salient differences remain. *Rice* involved a challenge by a white resident of Hawai'i to a state law permitting only people of native Hawaiian ancestry to vote for trustees of the Office of Hawaiian Affairs ("OHA"), a state agency charged with administering trust resources for the benefit of Native Hawaiians. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "native Hawaiians" and "Hawaiians." State law defines "native Hawaiians" as "descendant[s] of not less than one-half part of the races inhabiting the islands previous to 1778," and "Hawaiians" – a larger class that includes "native Hawaiians" – as "descendant[s] 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 (citations omitted).

Rice challenged a state law permitting only "Hawaiians" (the second subclass) to vote for the state office of OHA trustee. By conditioning voting rights on Hawaiian ancestry, Rice argued, the statute impermissibly premised the right to vote for a state official upon a racial classification. The Supreme Court agreed, and struck down the statute. The Court found that the statutory definition of "Hawaiians" was "neither subtle nor indirect," *id.* at 514, but rather, "explicit[ly] tie[d] to race." *Id.* at 516.

As in *Guinn* and *Lane*, the *Rice* Court was acutely troubled by the operative date in the challenged statute, i.e. 1778, deducing that *no motivation other than race* could explain the choice of date used to demarcate the class of persons eligible to vote for OHA trustees:

> For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics . . . The very object of the statutory definition here is to treat the early Hawaiians as a distinct people.

Id. at 514-15. In addition, *Rice* involved an attempt by the state to limit the right to vote for state officials to a category of people (descendants of pre-contact residents of Hawaii) that did not correspond to a group with any special status under federal law.

Here, the class of persons known as "native inhabitants of Guam" is not only a multi-racial, multi-ethnic class; it is a federally created one. Critical for purposes of the Fifteenth Amendment, this class does not turn "solely . . . on ancestry or ethnic

characteristics." *Saint Francis College*, 481 U.S. at 613. The chief criterion upon which one's inclusion or exclusion from the franchise turns is simply whether one's citizenship was effectuated by the enactment of Guam's Organic Act.[1] The classification can be explained on multiple legitimate, non-racial grounds, including an express acknowledgement by Congress, in the relevant congressional reports surrounding the enactment of Guam's Organic Act, of its "international obligations" to usher the territory of Guam toward a fuller measure of self-government. *See* S. REP. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2841. This ground alone militates in favor of upholding the law's constitutionality. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Restatement (Third) of Foreign Relations Law § 114 (1987)

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[1] The district court also relied on its finding that the definition of "Native inhabitants of Guam" is "nearly identical to the definition of "Native Chamorro" used in the Chamorro Land Trust Commission Act." *Davis*, 2017 WL 930825, at *18. The court was correct that the definitions are near identical. *See* 21 Guam Code Ann. § 75101(d) ("When used in this title . . . the term *Native Chamorro* means 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."). That fact alone does not make the definition of "native inhabitants of Guam" any less political or any more racial. To be sure, the court was wrong to find that the definition of "Native Chamorro" was racial. Given their near identical definitions, the court could not find the definition of "native inhabitants of Guam" to be race-neutral "on its face" on the one hand, *Davis*, 2017 WL 930825, at *14, and also find the definition of "Native Chamorro" to be "a facially race-based term" on the other hand. *Id.* at *18. Thus it would seem that the district court, like the plaintiff, has taken great liberties with the term "Chamorro," ascribing a racialized meaning to the term where none exists at law.

Rice does not support the plaintiff's chief contention in this case that any recognition of ancestry or descent is equivalent to classifying on the basis of race. *See Rice*, 528 U.S. at 514 ("Ancestry *can be* a proxy for race. It is that proxy here.") (emphasis added). Despite this far-reaching language, *Rice* stands only for the rule that ancestry cannot be used to classify voters where the Court can find no legitimate reason for its use other than to identify people as a racial group.[2]

C. The use of ancestry in this context denotes the existence of a colonized people with a unique political relationship to the United States because their U.S. citizenship was granted by the Guam Organic Act.

Unlike the 1778 date at issue in *Rice*, the 1950 date used here refers to the passage of a specific law that changed the citizenship status of a defined class of people. *See* Organic Act of Guam, 48 U.S.C.A. §§ 1421–1424 (West Supp. 2009). The Guam Decolonization Registry Law identifies the same class of people as eligible to vote in a symbolic plebiscite to express their views respecting political status. In the Guam Decolonization Registry Law, the Guam Legislature explained at length that the purpose of the statute was to implement the process of decolonization taken up in

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[2] This rule is not new but rather has a longer history in the jurisprudence of the Supreme Court; iterations of it can be seen in the redistricting cases. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In those cases, the Court struck down facially race-neutral laws utterly "unexplainable on grounds other than race." *Shaw*, 509 U.S. at 643-49.

the first instance by Congress in Guam's Organic Act. In the pertinent "Legislative Findings and Intent" section, the legislature explained its intent was only to "permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America." 3 Guam Code Ann. § 21000 (2005). The Legislature found that self-government "has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam." *Id.* The Legislature went on to incorporate by reference Congress's independent findings – contained in the Senate and House reports accompanying the legislation that would later become Guam's Organic Act – that the "native inhabitants" remain due their right of self-determination by operation not only of the Organic Act, but also the 1898 Treaty of Paris, the U.N. Charter, several U.N. resolutions concerning non-self-governing territories, and other multilateral treaties signed by the United States. *Id.* (citing S. REP. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2841).[3]

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[3] The House of Representatives issued a similar report that "repeat[ed] in substance in the Senate Report." H.R. REP. NO. 81-1677 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 1950 WL 1716. The Guam Legislature found in these reports acknowledgments by federal government officials in both the executive and legislative branches of the need to facilitate self-government for the "native

Finally, quelling any doubt as to its non-racially-discriminatory intent, the Legislature declared, "[t]he 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 Organic Act of Guam." *Id.* Put plainly, the use of ancestry in the statute – far from being a cover for illegal racial discrimination – seeks simply to ensure that the appropriate federally created class of people exercise the self-determination rights due them.

D. Plaintiff failed to adduce evidence sufficient to show that the law is motivated by a racial purpose, and the district court misapplied the summary judgment standard on this question.

Nevertheless, the district court invalidated Guam's race-neutral classification after it found it to be infected by racial animus – even though the plaintiff failed below to make the required showing of the same. In short, the court simply supplied the plaintiff with an essential element of his claim, i.e., discriminatory intent, even though he failed to make a showing of racial discrimination under the Fifteenth Amendment.

Throughout the proceedings below, the plaintiff's chief contention was that because "native inhabitants of Guam" may operate to constitute a plebiscite electorate largely comprised of one racial group, i.e. "Chamorros," it is necessarily

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inhabitants" of the island. *Id.* Thus, the Guam Legislature further explained, "[i]t is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950 and to use this knowledge to further petition Congress and other entities to achieve the stated goals." *Id.*

constitutionally infirm. From this single observation, he argues that "native inhabitants of Guam" is an impermissible race-based classification. The plaintiff was wrong in several respects, but his most acute error lie in a misstatement of the law governing constitutional challenges to facially race-neutral classifications.

That the Guam law may have a disproportionate racial impact is insufficient for a finding of racial discrimination under the Fifteenth Amendment. A voting law that is facially race-neutral violates that Amendment *only* where there is proof of a discriminatory purpose. The Supreme Court has clarified that this rule applies to claims of racial discrimination in the context of voting just as in other contexts. *See Washington v. Davis*, 426 U.S. 229, 240 (1976) (favorably citing *Wright v. Rockefeller*, 376 U.S. 52 (1964), a case that upheld a New York statute against claims of racial gerrymandering because challengers failed to prove that the New York Legislature was motivated by racial considerations); *See also Bolden*, 446 U.S. at 66; *Lodge*, 458 U.S. at 617-19. To be sure, the Court has imported into its Fifteenth Amendment jurisprudence the rule from the *Washington v. Davis* line of Fourteenth Amendment cases holding that proof of discriminatory intent is required for a finding of racial discrimination. *See Rogers v. Lodge*, 458 U.S. 613, 616-22 (1982) (confirming that the proper legal standard under both the Fifteenth and Fourteenth Amendments is that proof of discriminatory intent is requisite to a finding of racial discrimination).

Under *Washington v. Davis* and *Arlington Heights*, an ostensibly race-neutral classification is deemed racial and thereby unconstitutional only if enacted with discriminatory intent. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). *Washington v. Davis* is the seminal case articulating this requirement of proof of discriminatory intent. There, applicants for the police force in Washington, D.C., were required to take a test, and statistics revealed that blacks failed the examination much more often than whites. *See Washington v. Davis*, 426 U.S. 229, 234-35 (1976). The Court, however, explained that proof of a discriminatory impact is insufficient, by itself, to show the existence of a racial classification. *Id.* at 239. Justice White, writing for the majority, said the Court never had held that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Id.* The Court explained that discriminatory impact, "[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (citation omitted).

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

The Supreme Court has held that showing such a purpose requires a conspicuously high level of proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

Turning to the case at bar, fatal to the plaintiff's Fifteenth Amendment claim is that Guam produced evidence demonstrating that the Guam Decolonization Registry Law was not racially motivated. As explained in Subsection I(C) *supra*, the Guam Legislature very clearly explained that the purpose of the law was to implement the process of decolonization taken up in the first instance by Congress in Guam's Organic Act. *See* Guam Pub. L. No. 25-106, § 1 (2000). Crystallizing its non-discriminatory intent, the Legislature declared, "[t]he 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 Organic Act of Guam." *Id.* The district court should have rejected the plaintiff's Fifteenth Amendment claim as void of any proof that the Guam Legislature intended to engage in racial discrimination.

After effectively conceding that "native inhabitants of Guam" was a facially race-neutral classification, the plaintiff argued most strenuously below that the Guam Legislature intended to target Chamorros as a racial group but surreptitiously changed the statutory language to mask their intent. To support his claim that the law was infected by racial animus, the plaintiff relied primarily on the isolated statements of individual lawmakers, including extemporaneous ones made incident to the introduction of bills that never became law, committee reports accompanying legislation that only tangentially related to the statute challenged here, and informal

reports compiled by members of the public for political candidates transitioning into gubernatorial office. *see* ER 35-36.

The plaintiff placed great stress, for instance, upon isolated statements of individual lawmakers over the years who rather imprecisely described the plebiscite electorate as a "Chamorro-only" vote. *See* ER 36. As the plaintiff well knows, such statements are far "too slim a reed upon which to rest a determination regarding the legislature as a whole." *Florida v. United States*, 885 F.Supp.2d 299, 354 (D.D.C. 2012); *See also Castaneda–Gonzalez v. Immigration & Naturalization Serv.*, 564 F.2d 417, 424 (D.C. Cir. 1977) ("Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body."). The subjective intent of individual legislators is irrelevant in establishing the motivation of the entire legislature. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984); *See also Cano v. Davis*, 211 F.Supp.2d 1208, 1217, n.8, 1228 (C.D. Cal. 2002) (noting that evidence of isolated statements of individual legislators is insufficient to raise a triable question of fact regarding that subject). Moreover, depictions of the electorate as "Chamorro-only" is irrelevant in light of the clearly expressed intention of the Legislature as a whole at the time it enacted the underlying statute. *See* Guam Pub. L. No. 25-106, § 1 (2000). It is firmly established that the carefully chosen words of a statute prevail over the isolated statements of individual lawmakers. *See Garcia v. United States*, 469 U.S. 70, 76-78 (1984); *Weinberger v. Rossi,* 456 U.S. 25, 35

(1982); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). Thus, the district court should not have relied upon the isolated comments of individual lawmakers as evidence of legislative intent.

On this score, the district court only compounded the plaintiff's error, relying heavily on a 2011 conversation between two Guam lawmakers at a "roundtable" on several pieces of proposed legislation introduced in the 31st Guam Legislature – a conversation that occurred a full decade after the enactment of the law actually being challenged in this case. *See Davis*, 2017 WL 930825, at **15-17. The specific bill that was the subject of the lawmakers' discussion never became law. *Id.* at *17. Moreover, the plaintiff's reliance on other sources, including the personal observations of non-legislators, are even more powerless to dislodge the words of a statute whose meaning is clear. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (testimony from persons interested in the legislation is irrelevant for the purpose of determining legislative intent).[4]

More problematic still is the district court's preoccupation with the sequence of events surrounding the passage of Guam Public Law No. 25-106, which again is the

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[4] Where the plaintiff did rely on legitimate sources of legislative history, such as committee reports, those reports concern legislation that is not, in fact, Guam Pub. L. No. 25-106 (2000), which became the Guam Decolonization Registry Law, or the statute challenged here. *See* ER 32-33.

bill that became the Guam Decolonization Registry Law now codified at 3 Guam Code Ann. § 21001(e). *See Davis*, 2017 WL 930825, at *18 ("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."). Without more, the district court had no basis to read racial animus into the record on this ground. A legislature's good-faith attempt not only to clarify by statute its non-racial intent but to also abide by Supreme Court case law is simply is not a basis upon which to draw an inference of discriminatory intent. The court should not, at the summary judgment stage, have weighed the evidence in the manner it did and drawn an inference of discriminatory intent in favor of the plaintiff, the moving party here.

The district court misapplied the summary judgment standard in ruling on the plaintiff's Fifteenth Amendment claim. At the summary judgment stage, the court "do[es] not weigh the evidence" or determine the truth of the matter. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006); *See also France v. Johnson*, 795 F.3d 1170, 1172 (9th Cir. 2015) ("In deciding a motion for summary judgment, a court should not weigh the evidence or determine the truth of the matter; it should only determine whether there is a genuine dispute of fact for trial."); *Lam v. Univ. of Hawai`i*, 40 F.3d 1551, 1562 n.18 (9th Cir. 1994) ("[T]he district court is barred from weighing conflicting evidence in ruling on a motion for summary

judgment[.]"). As this Court has recognized, the issue of intent is particularly inappropriate for summary judgment because "the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the fact finder, upon a full record." *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1111 (9th Cir. 1991) (internal citations omitted). Thus, summary judgment is inappropriate if a trier of fact viewing the record could reasonably find for either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-57 (1986). Here, the district court wrongly weighed the evidence adduced by the plaintiff to draw an inference of racial animus in his favor. This is fatal to its decision, as the question of whether the challenged statute was motivated by a racially discriminatory purpose is the only genuine fact question in this case.

E. A non-binding plebiscite is not an election within the meaning of the Fifteenth Amendment.

Nowhere does the Guam Decolonization Registry Law actually suggest that the results of the plebiscite will have the effect, immediate or otherwise, of actually altering Guam's future political relationship with the United States, only that the desires of the "native inhabitants of Guam" will eventually be *transmitted* to the U.S. President and Congress, and the United Nations. The Fifteenth Amendment places no constraint on such a plebiscite. *See Terry v. Adams*, 345 U.S. 461, 467 (1953); *see also Reed v. Spencer*, No. 90-1295, 1990 WL 72104, at *2 (E.D. La. 1990) (dismissing Fifteenth Amendment and Voting Rights Act challenges to elections for

Orleans Parish Democratic Executive Committee because "this Committee is not comprised of public officials."). Moreover, the challenged statute mandates only that the political status desires of the native inhabitants of Guam be *transmitted.* As this Court has recognized, what Congress does with that transmission – and it may well be nothing – is an entirely separate matter. *See, e.g.*, *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998) ("No matter what it says or how much it says, the report [mandated by the Compact of Free Association between the U.S. and its Freely Associated States] is simply a document submitted to Congress that Congress has no obligation to consider, let alone act upon."). Similarly, whatever the results, the plebiscite here will in no way affect any right protected by the Fifteenth Amendment. *Accord Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 833 (D.P.R. 1967) (finding that a political status plebiscite held in Puerto Rico would not actually affect "the legal status, rights or American citizenship" of anyone in that territory).

The Fifteenth Amendment precludes "discriminat[ion] against . . . voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry*, 345 U.S. at 467. The plebiscite here is most certainly not a state election – no public official will be elected, nor will any issue of state law or policy be decided. The plaintiff in this case cited no authority to support his assertion that a restriction on the electorate in such a plebiscite implicates the Fifteenth Amendment. Instead, the plaintiff did little more than to cite *Rice v.*

Cayetano. As explained above, *Rice* involved state elections for state officers of a state agency. The fact that the election there was for public officials was crucial to the Court's decision. As the *Rice* Court noted, "[a]ll citizens, regardless of race, have an interest in selecting officials who make policies on their behalf." *Id.* at 523 *The facts in this case are distinguishable from Rice in precisely that respect*: the plebiscite here is not being held for the purpose of electing public officials. Rather, the express purpose of the plebiscite is merely to ascertain the desires of the "native inhabitants of Guam" and to transmit the same to the federal government and the international community:

> 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 Code Ann. § 2105. The district court below, taking its cue from the plaintiff, missed several critical distinctions that make *Rice* inapposite here.

This is also what distinguishes this Court's decision in *Davis v. Commonwealth Election Commission*, 844 F.3d 1087 (9th Cir. 2016). There, the vote at issue was certainly an election within the meaning of the Fifteenth Amendment, held "to determine public governmental policies or to select public officials, national, state, or local." *Terry*, 345 U.S. at 467. It would have had binding consequence on provisions in CNMI law restricting fee-simple ownership in land to persons of Northern

Marianas descent. In contrast, the Guam plebiscite is decidedly not an election within the meaning of the Fifteenth Amendment because no public official will be elected, and no issue of state law or policy will be decided. It would "in no way change the juridical or political status of the plaintiff[] or anyone else," *Barbosa*, 293 F.Supp. at 833, and "[i]ts approval would be nothing more than a request that the federal government respect certain rights." *New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon*, 779 F.Supp. 646, 655 (D. P.R. 1991). Therefore, apart from *Rice*, even the other cases upon which the plaintiff heavily relied below, such as *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), involved registration for elections for either public office or self-executing initiatives in states—not advisory plebiscites like the one envisaged by the challenged Guam law.

II. AS A MATTER OF LAW, THE DISTRICT COURT ERRED IN FINDING THAT THE GUAM DECOLONIZATION REGISTRY LAW VIOLATES THE FOURTEENTH AMENDMENT.[5]

A. Plaintiff failed to adduce evidence sufficient to show that the law is motivated by a racial purpose, and the district court misapplied the summary judgment standard on this question.

Having a disproportionate racial impact is insufficient for a finding of racial discrimination under the Fourteenth Amendment. As discussed in Subsection I(D) *supra*, because the "native inhabitants of Guam" classification is facially race-neutral, it should have received more than rational basis review *only* if the plaintiff had put forward proof of a racially discriminatory purpose. This he did not do. Rational basis is therefore the proper level of review.

As with the plaintiff's Fifteenth Amendment claim, the district court misapplied the summary judgment standard in ruling on his Fourteenth Amendment claim. Again, at the summary judgment stage, the court "do[es] not weigh the evidence" or

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[5] In the instant case, the district court was also incorrect to dispose of the plaintiff's constitutional claims before reaching his statutory claims. *See Davis*, 2017 WL 930825, at *25 ("Because the Fifteenth and Fourteenth Amendments are clearly violated in this case, the court need not address the statutory arguments [] that were raised by Plaintiff."). The canon of constitutional avoidance, however, instructs federal courts to do the opposite, that is, dispose of non-constitutional claims before reaching constitutional ones. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

determine the truth of the matter. *Cornwell*, 439 F.3d at 1027; *See also France v. Johnson*, 795 F.3d at 1172; *Lam*, 40 F.3d at 1562 n.18. As this Court has recognized, the issue of intent is particularly inappropriate for summary judgment because "the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the fact finder, upon a full record." *Sischo-Nownejad*, 934 F.2d at 1111. Thus, summary judgment is inappropriate if a trier of fact viewing the record could reasonably find for either party. *See Anderson.*, 477 U.S. at 250-57. Here, the district court wrongly weighed the evidence adduced by the plaintiff to draw an inference of racial animus in his favor.

B. There is no fundamental right to participate in a purely symbolic plebiscite.

The plaintiff urged the district court below to review the Guam Decolonization Registry Law under the strict scrutiny standard because, according to him, it classifies on the basis of race. Having failed to establish that the law involves a facial racial classification, and having also failed to establish that the law is motivated by racially discriminatory purpose, the plaintiff then tried to invoke the exacting demands of strict scrutiny by arguing below that he has a fundamental right to vote in the plebiscite here. *See Davis*, 2017 WL 930825, at *3. He is wrong. The district court was not required to apply strict scrutiny to the Guam law just because it purported to limit participation in the plebiscite.

The right to vote, while certainly of central importance in our democracy, has

not always been held to be "fundamental" in this context such that denial of the franchise to anyone would be unconstitutional. The U.S. Supreme Court has sometimes applied a lower level of scrutiny to challenged electoral laws. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (finding that a state law's burden on an individual voter, or a discrete class of voters, "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation"); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (upholding challenged electoral law under lower level of review by describing the required state interest as "legitimate and valid" as opposed to "compelling"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). The Court does not in fact consider the right to vote to be fundamental *per se*, such that it triggers strict scrutiny as a matter of course. On the contrary, denial of the voting franchise to certain collectivities, such as convicted felons and the residents of unincorporated territories, are routinely upheld. *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 26 (1974); *Att'y Gen. of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). Moreover, the inconsistency as to the appropriate standard of review to apply in every case touching and concerning the right to vote has not gone unnoticed by the Circuits. *See, e.g.*, *Hall v. Simcox*, 766 F.2d 1171, 1173 (7th Cir.

1985) (noting that the Supreme Court has not settled on the standard to be applied in ruling on right to vote challenges); *Rainbow Coalition of Okla. v. Oklahoma Election Bd.*, 844 F.2d 740, 742-43 (10th Cir. 1988) (electing not to apply strict scrutiny to challenged voting law absent a clear standard by the Supreme Court).

Moreover, even were the right to vote deemed fundamental in the several states, it does not necessarily follow that it is so in the territories. *See, e.g.*, *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1992). As the district court knew – but refused to address – what is (or is not) a fundamental right in the territorial context is, and always has been, the subject of enormous controversy in this country. For instance, in *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Puerto Rico*, 258 U.S. 298 (1922), the Supreme Court held that the right to a trial by jury was inapplicable to the unincorporated territories. *Balzac*, 258 U.S. at 313; *Dorr*, 195 U.S. at 149. Nearly fifty years after *Balzac*, the Supreme Court held in *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968), that the right to trial by jury was "fundamental" and applicable to the several states via the Fourteenth Amendment. In *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984), a resident of the territory of the Northern Mariana Islands, relying on *Duncan*, challenged a local law denying him the right to trial by jury. The CNMI court held that *Duncan* was controlling and that the right to trial by jury, as a fundamental right, was applicable to the territories. *Id.* at 689. This Court reversed, holding that the right

was not necessarily fundamental in the territories just because it was so in the several states. *Id.* This Court went to great length to distinguish fundamental rights in the context of territorial incorporation, noting that *Duncan* only expanded the definition of "fundamental rights" for the purpose of applying the Bill of Rights to the several states. *Id.* As this Court explained:

> [H]istory reveals that the [Supreme] Court proceeded cautiously with [the] incorporation [of the Bill of Rights under the Due Process Clause]. Through this gradual process in the century following ratification of the Fourteenth Amendment, nearly all the rights guaranteed in the Bill of Rights have been found applicable to the states. We believe that a cautious approach is also appropriate in restricting the power of Congress to administer overseas territories. Were we to apply sweepingly *Duncan's* definition of "fundamental rights" to unincorporated territories, the effect would be immediately to extend almost the entire Bill of Rights to such territories. This would repudiate the *Insular Cases*. We are not prepared to do so nor do we think we are required to do so.

Id. at 690. In *Wabol*, this Court expounded upon this dual meaning of "fundamental rights," noting "[i]n the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, [an] asserted constitutional guarantee . . . applies only if [it] is fundamental in this *international* sense." *Id.* at 1460 (emphasis in original).

On this delicate question, courts are called upon to engage in a searching "inquiry into the situation of the territory and its relations to the United States." *Downes v. Bidwell*, 182 U.S. 244, 292 (1901). Here, it is significant that unlike some of the other unincorporated territories, Guam's territorial government remains entirely

a creature of Congress. *Cf. United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) ("Under the [1952] compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.") (citation omitted), with *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) (describing Guam's government as "in essence an instrumentality of the federal government."). Although the Organic Act provided Guam the beginnings of self-government with a basic structure for a local government, it did not confer autonomy to the island, or control of its own laws. The Act requires the Governor of Guam to report all laws enacted in the territory to the Secretary of the Interior. *See* 48 U.S.C. § 1423i. Congress also reserved the power to annul any law that Guam adopts. *Id.* Just as pre-1952 Puerto Rico, *Quinones*, 758 F.2d at 42, the Ninth Circuit today regards Guam's government as nothing more than an instrumentality of the federal government. *Sakamoto*, 764 F.2d at 1286; *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002).

The plaintiff's attempt to characterize his ability to participate in the plebiscite as "fundamental" is misguided because the right to vote does not necessarily mean the same thing in an unincorporated territory as it does in a state. *See Att'y Gen. of Guam*, 738 F.2d at 1019 (rejecting the argument that Guam voters have a right to vote in U.S. presidential elections). This Court has determined that "fundamental" has a distinct

meaning in the context of territorial rights. It is not enough that a right be considered fundamentally important in a colloquial sense, or even that a right be "necessary to an Anglo-American regime of ordered liberty." *Wabol*, 958 F.2d at 1460; *See also Balzac*, 258 U.S. at 312 (constitutional right to a jury trial does not extend to unincorporated territories as a fundamental right); *Dorr*, 195 U.S. at 149 (same). In fact, that "fundamental" has an abridged meaning in the territories was confirmed just this year in the context of the federal government's continued denial of birthright citizenship to residents born in the unincorporated territory of American Samoa. *See Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015) ("We are unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a *sine qua non* for free government or otherwise fundamental under the Insular Cases' constricted understanding of the term."); *See also Atalig*, 723 F.2d at 689 ("To focus on the label 'fundamental rights,' overlooks the fact that the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one."). Thus, the district court should have rejected the plaintiff's argument that participation in the plebiscite is a "fundamental" right. There is simply no basis in law for that argument.

Were this Court to approve the conclusion drawn by the district court that the "native inhabitants of Guam" may not express by plebiscite their desires regarding

their future political relationship with the United States, it would surely work an impractical and anomalous result in the unincorporated territory of Guam. The territorial incorporation doctrine announced in the *Insular Cases* "distinguishes between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories, which are not intended for statehood and in which only fundamental constitutional rights apply by their own force." *Atalig*, 723 F.2d at 688; *See also Tuaua*, 788 F.3d at 307 ("Although some aspects of the Insular Cases' analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."); *See id.* ("The Constitution . . . contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases [is] . . . which [] of [the Constitution's] provisions [a]re applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements" arising in the territorial context) (quoting *Balzac*, 258 U.S. at 312).

Moreover, to approve such a conclusion would all but obliterate this Court's decision in *Wabol*. There, this Court held that interposing the equal protection clause of the Fourteenth Amendment to invalidate an ancestry-based land alienation provision would work an impractical and anomalous result in the CNMI. "It would

truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures . . . Its bold purpose was to protect minority rights, not to enforce homogeneity . . . We cannot say that this particular aspect of equality is fundamental in the international sense." *Id.* at 1462 (footnotes and citations omitted).

To hold that the "native inhabitants of Guam" may not express by plebiscite their political status desires would obfuscate what Congress saw fit to do in Guam's Organic Act, that is, uphold its "international obligations" vis-à-vis the island's "native inhabitants," guaranteeing them a limited measure of self-government, with the understanding that the ultimate expression of self-determination had yet to occur. *See* S. REP. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2848 ("[Guam's Organic Act] contribute[s] toward fulfillment of the obligation assumed by the United States under article 73 of the United Nations Charter."). Thus, this Court, like others, ought not approve such an anomalous result. *See Tuaua*, 788 F.3d at 306 (taking account concern among American Samoans that extension of birthright citizenship could undermine their self-governance, and holding it "anomalous to impose citizenship over the objections of the American Samoan people themselves").

To resolve the legal challenge presented here, this Court ought to privilege practical considerations over formalism, and uphold the ability of the "native inhabitants of Guam" to engage in this symbolic expression of self-determination as entirely consonant with the normative baseline established by the *Insular Cases*, which in every case is oriented toward preserving constitutional flexibility in the territories. As the Supreme Court emphasized in *Boumediene v. Bush*, 553 U.S. 723 (2008), the "common thread uniting the Insular Cases . . . [is that] questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. While "fundamental limitations in favor of personal rights" remain guaranteed to persons born in the unincorporated territories, *id.* at 758 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)), the Insular framework recognizes the difficulties that frequently inure when "determin[ing] [whether a] particular provision of the Constitution is applicable." *Id.*; *see also Downes*, 182 U.S. at 292 (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States."). In short, it would be impractical and anomalous for this Court to subject the "native inhabitants of Guam" classification to heightened scrutiny.

C. The classification is rationally related to Guam's legitimate need to determine the views of its colonized citizens regarding their right of self-determination under international law.

The Guam Decolonization Registry Law neither classifies on the basis of race nor burdens a right that has uniformly been held to be fundamental. This Court, therefore, can uphold the law as long as it is rationally tied to a legitimate government interest. *See generally Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980); *Besinga v. United States*, 14 F.3d 1356 (9th Cir. 1994); *Quiban v. Veterans Admin.*, 928 F.2d 1154 (D.C. Cir. 1991). Under that standard, "[a] single rational factor will sustain the [challenged] statute." *Besinga*, 14 F.3d at 1362. As Guam has shown, the law challenged here handily survives rational basis review.[6]

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[6] As an aside, the plaintiff suggested below that "native inhabitants of Guam" would need to be officially recognized as an Indian tribe, or delegated the right to create a membership roll by a particular federal statute, before it can come within the ambit of Congress's special protection. This suggestion is incorrect and evinces a profound misunderstanding of both indigenous self-governance and the extent of Congressional power with respect to native peoples living under U.S. rule. "Congress possesses the broad power of legislating for the protection of Indians wherever they may be within the territory of the United States," *United States v. McGowan*, 302 U.S. 535, 539 (1938), "whether within its original territory *or territory subsequently acquired*." *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (emphasis added). Congress's power in this field is *exceedingly* broad. *See, e.g.*, *Sandoval*, 231 U.S. at 45 (recognizing that Congress's plenary power over native peoples has been exercised time and again to implement a federal duty to provide native peoples with special care and protection); *United States v. Kagama*, 118 U.S. 375, 383-85 (1886) (same); *United States v. John*, 437 U.S. 634, 653 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that

D. Even if this Court were to determine that strict scrutiny applies, Guam's interest in facilitating the self-determination rights of the "native inhabitants of Guam" is compelling, and distinguishing them from others is the only way to determine their views.

If it had to, the "native inhabitants of Guam" classification could survive strict scrutiny because it is narrowly tailored to achieve the compelling governmental interest of "providing dignity in simply allowing a starting point for a process of self-determination," *Akina v. Hawaii*, 2015 WL 6560634, at *20—and a purely symbolic one at that. But it need not. Article IV of the United States Constitution, and over a century of case law preserving constitutional flexibility in the unincorporated territories, confirm that rational basis review applies in this case.

Moreover, though the challenged statute is a territorial, not federal, law, because it was "enacted in response to a federal measure," it should similarly be subject only to rational basis review. The Supreme Court's decision in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), is instructive here. There, the State of Washington enacted Chapter 36, a state statute, in response to a congressional enactment authorizing the State to assume civil and criminal jurisdiction over Indians and Indian territory within its jurisdiction. Yakima Nation challenged the validity of the state statute's partial assertion of jurisdiction in

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federal supervision over them has not been continuous, destroys the federal power to deal with them.").

its Reservation. Specifically, the tribe contended that the state law, even if authorized by Congress, violated the equal protection and due process guarantees of the Fourteenth Amendment. The Supreme Court disagreed. Finding that the "unique legal status of Indian tribes under federal law" permitted Congress "to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive," *Yakima*, 439 U.S. at 501, the Court upheld the state law. While acknowledging that "States do not enjoy this same unique relationship with Indians," *id.*, the Court nevertheless found that Chapter 36 was "*not simply another state law*," *id.*, but rather, "[*i*]*t was enacted in response to a federal measure* explicitly designed to readjust the allocation of jurisdiction over Indians." *Id.* (emphasis added). As such, the tribe's claim that Chapter 36 was "suspect" was untenable because, "[i]t is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes." *Id.* (citation omitted). Similarly here, Congress, in exercising its separate and discrete *but no less plenary* power over the unincorporated territory of Guam, identified a pool of persons therein to whom it extended citizenship and a limited measure of self-government, with the understanding that a fuller measure would one day follow. Like the State of Washington in *Yakima*, Guam here merely enacted a territorial law (the Guam Decolonization Registry Law) in response to a federal one (the Organic Act). As in *Yakima*, the plaintiff's assertion here that the Guam law is "suspect" is equally

"untenable" in light of the "unique legal status of [unincorporated territories] under federal law," pursuant to which Congress may "enact legislation that might otherwise be constitutionally offensive." To be sure, the *Insular Cases* stand for exactly that proposition.[7]

CONCLUSION

For the foregoing reasons, Guam requests that this Court reverse the district court's grant of the plaintiff's motion for summary judgment, and grant Guam's motion for summary judgment.[8]

Date: August 31, 2017.

OFFICE OF THE ATTORNEY GENERAL

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[7] The plaintiff's assertion below that the Guam law is suspect is especially untenable in light of the Ninth Circuit's decisions in *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), and *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988), in which the Court likens Guam to nothing more than "*an instrumentality of the federal government.*" 764 F.2d at 1286. Thus, in this case, unlike in *Yakima*, conspicuously absent are any federalism concerns that might otherwise counsel against judicial deference.

[8] Because the district court was wrong to grant the plaintiff's motion for summary judgment, Guam's cross motion for summary judgment is not "moot." *See Davis*, 2017 WL 930825, at *2, 26 (finding Guam's summary judgment moot). Moreover, because Guam is entitled to summary judgment on the plaintiff's constitutional claims as a matter of law, Guam requests that this Court reverse the district court's grant of the plaintiff's motion for summary judgment, and grant Guam's motion for summary judgment.

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STATEMENT OF RELATED CASES

There are no known related cases which are presently pending before this Court.

Date: August 31, 2017.

By: /s/ Kenneth Orcutt
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OFFICE OF THE ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: August 31, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: August 31, 2017.

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