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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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Mr. Davis misapprehends the core of Guam's argument. His brief is largely devoted to convincing this Court that Guam intended to limit the right to vote in the plebiscite to the class of people whose citizenship is traceable to the Guam Organic Act, a population that happens to be majority-Chamorro and a definition that refers in part to descent. Guam does not contest this. The remainder of his arguments boil down to his insistence that either the reference to descent or the proportion of Chamorro people included in the category convert it into a statute that racially discriminates on its face, or at least a statute that must be motivated by racially discriminatory intent. The case law on which Mr. Davis relies establishes neither.

I. Guam's plebiscite law is not racially discriminatory as defined under the Fourteenth and Fifteenth Amendments because it does not classify people on the basis of race and it is not motivated by racially discriminatory intent

A. The plebiscite law does not employ a facially racial classification

The Guam Decolonization Registry Law creates a non-binding plebiscite and limits eligible voters to those who meet the statutory definition of "Native inhabitants of Guam." 3 Guam Code Ann. §§ 21000, 21003. This category includes "those persons who were made citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." § 21001(e). The Guam Organic Act, which changed Guam's political relationship

with the U.S. from an unorganized to an organized unincorporated territory,[1] extended U.S. citizenship to the following categories of people "and their children born after April 11, 1899"[2]: (1) all inhabitants of Guam on April 11, 1899 who were Spanish subjects, and (2) all persons born on Guam and inhabiting the island on April 11, 1899.[3] Pub. L. No. 81-630, 64 Stat. 384 (1950), § 4(a). The Act also extended citizenship to "all persons born on Guam after 1899." *Id.*

Those people living on Guam in 1950 and not covered by the Act were either born elsewhere in the United States (and therefore citizens already) or born outside of the United States (and therefore ineligible for citizenship). The Guam Organic Act collectively naturalized all former Spanish subjects who were living on Guam when it came under U.S. control, all those born on Guam during the

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[1] *See* 48 U.S.C.A. § 1421a; *see also Gumataotao v. Dir. of Dep't of Revenue & Taxation,* 236 F.3d 1077, 1079 (9th Cir. 2001) ("Congress organized Guam as an unincorporated possession of the United States through the 1950 Organic Act of Guam . . . .").

[2] April 11, 1899 is the effective date of the Treaty of Peace Between the United States and Spain, Dec. 10, 1898, 30 Stat. 1754, pursuant to which Spain ceded its political authority over Guam to the United States. Guam had previously been under Spanish control for three centuries, and was subsequently a possession of the United States for approximately half a century (except for a brief period of Japanese occupation during the second world war) before its inhabitants were granted U.S. citizenship. Of course, this chronology obscures the reality that people lived on Guam long before it became the object of European colonization.

[3] The Act excluded from these first two categories anyone who took certain steps to retain citizenship or nationality from another country, and included anyone who otherwise fit the statutory definitions but was temporarily absent from Guam when the law was enacted as well as anyone who otherwise fit the statutory definition and continued living in a U.S. territory, even if that territory was not Guam. Pub. L. No. 81-630, 64 Stat. 384, § 4(a).

period of U.S. control, and their children who were also born on Guam. These people were colonized by the United States, yet would not be U.S. citizens but for this provision.[4] Their U.S. citizenship is rooted in the Organic Act and depends upon the political relationship between Guam and the United States, which is the subject of the plebiscite law challenged here.

Mr. Davis concedes that this is the category of people eligible to vote in the plebiscite, as he must, because the language of both statutes is clear. Although Mr. Davis refers to the population of Guam in 1950 as "white," "Chamorro," and "Filipino[]," etc., *see* Response Br. at 7, he does not claim that either the Guam Decolonization Registry Law or the Guam Organic Act uses these terms to define the people covered. He cannot make such a claim because the statutes simply refer to and define people according to their political relationship with the United States.

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[4] In 1952, Congress amended the Immigration and Naturalization Act ("INA") to include Guam and several other territories in the definition of "United States," subsequently making the U.S. citizenship of these territorial inhabitants dependent on said Act. *See* Immigration and Nationality Act, 8 U.S.C.A. § 1407. The INA includes two provisions relevant to the American citizenship of Guamanians, both of which mirror the Organic Act. Subsection (a) provides that people born on Guam and living there in 1899, as well as anyone living on Guam in 1899 who had been a Spanish subject, "and their children born after April 11, 1899" are citizens of the United States. *Id.* § 1407(a). Subsection (b) provides that anyone born on Guam after April 11, 1899 is also a United States citizen. *Id.* § 1407(b). Contrary to Mr. Davis' argument, *see* Response Br. for Appellee, at 7-8 (Nov. 21, 2017) [hereinafter, Response Br.], the fact that the Organic Act's citizenship provisions were reenacted in another federal statute does not mean the Organic Act is not the original source of their citizenship.

Nevertheless, Mr. Davis insists that the plebiscite law uses a racial classification because of the language "and descendants of those persons." Response Br. at 29. He insists that "many people living on Guam today must examine their ancestry" to determine whether they satisfy the "Native Inhabitants [of Guam] definition." Response Br. at 30. He claims that, because the Guam Organic Act's citizenship provisions were re-enacted as part of the Immigration and Nationality Act of 1952, only people who are over 65 today can trace their citizenship directly to the Organic Act, and therefore "an ancestral inquiry" is required for anyone under 65. *Id.*

He insists that this converts the race-neutral language of the Guam Decolonization Registry Law into a facially racial classification. His sole authority for this proposition is dicta from *Rice v. Cayetano*, 528 U.S. 495 (2000). The *Rice* court held, unremarkably, that ancestry *can be* a proxy for race, and determined that it was such a proxy in that case.

Rice does not convert every mention of ancestry into a racial classification, despite what Mr. Davis wishes. If it did, legacy admissions to college would be illegal unless supported by a compelling interest because they require the college to examine applicants' ancestry to determine whether they qualify for the preference. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., dissenting) (pointing out that university admissions policies allowing for legacy

preferences for lineal descendants of alumni do not run afoul of equal protection); *Rosenstock v. Board of Governors of the Univ. of North Carolina*, 423 F. Supp. 1321, 1327 (M.D.N.C. 1976).[5]

Mr. Davis provides no other authority for his claim that the plebiscite law contains a facially racial classification. Indeed, the district court agreed with Guam's position that the law is facially race-neutral. *See Davis v. Guam*, No. 11-00035, 2017 WL 930825, at *14 (D. Guam Mar. 8, 2017) (finding it to be race-neutral "on its face."). Mr. Davis has given this Court no reason to disturb that finding, which is based on the plain meaning of the statute's text.

Voting classifications that rely in part on ancestry may present a constitutional problem because, in many instances, a person's ancestry is unrelated to his or her political status and therefore irrelevant to voting rights. The Supreme Court has considered the relationship between ancestry and voting in only two cases, *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Guinn v. United States*, 238 U.S. 347 (1915), and in each case the court noted that the ancestry-related classification

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[5] This is but one example of a legal classification that turns on the identity of one's parent or grandparent, thus requiring the kind of "ancestral tracing" that Mr. Davis mistakenly argues is always illegal. *See* 8 U.S.C. §§ 1431, 1433 (children born outside the United States have special rights to acquire U.S. citizenship if they can demonstrate that their parents are U.S. citizens); O.C.G.A. § 27-2-3.1(e)(4) (2010) ("An applicant for [a lifetime hunting] license who is a nonresident shall not be eligible for issuance of such license unless he or she is under 16 years of age and is the grandchild of a resident who holds a valid paid lifetime sportsman's license."); *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015).

did not correspond to any other politically relevant distinction between citizens. *See Rice*, 528 U.S. at 514-15; *Guinn*, 238 U.S. at 363-65.

In *Guinn*, the pre-Fifteenth Amendment voter status of one's grandfather was related *only* to the question of whether the person was black and therefore would have been precluded from voting on racial grounds before states were forbidden under the Fifteenth Amendment from limiting the right to vote on account of race. *Id.* at 363-65. Oklahoma made no argument that those whose grandfathers could vote had any unique political interests or that ancestry was related to any politically significant status. *Id.* at 359-61. The problem with Oklahoma's statute was not that it invoked ancestry; the problem was that it was a transparent effort to circumvent federal law for no other purpose than resisting the impact of the Fifteenth Amendment. *Id.* at 365 ("[W]e are unable to discover how, unless the prohibitions of the . . . Amendment were considered, the slightest reason . . . for basing the classification upon a period of time prior to the . . . Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the . . .Amendment was in view."); *Accord Shaw v. Reno*, 509 U.S. 630, 644 (1993). The mere fact that the law in question referred to a person's ancestry was not especially important to the *Guinn* Court. The opinion does not focus on ancestry or descent and it most certainly does

not stand for the proposition that reference to ancestry or descent alone converts something into a racial classification. *See Guinn*, 238 U.S. at 363-365.

Rice is a closer analogue because the Court expressed concern about the State of Hawai'i's attempt to treat pre-contact Hawaiians "as a distinct people, commanding their own recognition and respect," *Rice*, 528 U.S. at 515, but that case involved an election to install state officers in a state agency. The Court did not address the legality of other federal or state programs relating to indigenous Hawaiians, but focused on the state-official context. *Id.* at 520. The Court's holding simply recognized that statehood ensured that everyone in Hawai'i enjoyed equal status, unless and until Congress recognized Native Hawaiians as a distinct political group within the state, finding the classification's invocation of pre-contact ancestry irrelevant to any important present-day rights.

In contrast, those people made U.S. citizens by the Guam Organic Act have never enjoyed equal U.S. citizenship rights, *see generally Att'y Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984); *Besinga v. United States*, 14 F.3d 1356 (9th Cir. 1994); *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980); this inequality explains, at least in part, why the same people have the right of self-determination and can express their views regarding decolonization. The "native inhabitants of Guam" definition can be distinguished from the definition invalidated in *Rice* because only the former directly

corresponds with a politically recognized group.[6] This is not to say that other people would not be affected by any change in the political relationship between Guam and the United States. However, the interests of the native inhabitants on this question are distinct, and the plebiscite is specifically intended to determine the views of this political subclass.[7]

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[6] In this sense, the native inhabitants of Guam are far more analogous to members of American Indian tribes, whose unique political status is similarly based in part on the United States' recognition of their continuing right to self-determination and in part on the federal government's acceptance of responsibility for their current domestic dependent state. In fact, the reasoning underpinning the *Mancari* and other federal Indian law cases, would seem to apply with equally cogent force in the context of the federal government's relationship with its territorial possessions. *See Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977). The status of the territories is no less political or unique, despite the fact that the source of constitutional exceptionalism for the territories is a separate clause (the Territorial as opposed to the Indian Commerce) of the Constitution. *Accord Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (acknowledging that the Territories Clause permits classifications which coincide with race or national origin so long as they rest upon a rational basis).

[7] The Court in *Rice* obscured these distinctions, opening the door for Mr. Davis to argue, as he does here, that *Rice* is a sweeping invalidation of any government effort to identify colonized or indigenous peoples, or recognize their rights, outside of the narrow confines of federal Indian law. Because native peoples living in U.S. territories are not generally recognized as Indian tribes until after the colonies achieve statehood, this makes the residents of Guam and other territories particularly vulnerable to such attacks. *Rice*, however, was not so broad, and subsequent courts have properly confined its holding to its facts, declining to invalidate every classification involving native Hawaiians. *See, e.g., Doe v. Kamehameha*, 470 F.3d 827, 846-49 (9th Cir. 2004); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004); *accord Carroll v. Nakatani*, 342 F.3d 934, 938 (9th Cir. 2003) (describing *Rice* as "a narrow ruling"). Here, Mr. Davis invokes *Rice* for its sweeping, and in some ways imprecise, dicta. This reading of *Rice* is improper and dangerous and should be rejected.

Nor does this Court's more recent decision in the *Davis* case arising out of the Commonwealth of the Northern Marians Islands (CNMI) compel a contrary conclusion. *Cf. Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016). There, this Court invalidated a facially racial provision in the CNMI Constitution restricting voting in certain CNMI elections to individuals of "Northern Marianas Descent" under both the Fifteenth and Fourteenth Amendments. The CNMI district court decision from which the appeal in *Davis*, 2017 WL 930825 was taken, also contained starkly different findings. *See Davis v. Commonwealth Election Comm'n*, 2014 WL 2111065, *15-16 (D.N.M. May 20, 2014) (noting that the drafters of the CNMI Constitution deliberately chose to tie "Northern Marianas Descent" status to a blood relationship to two ethnicities, and aspired to minimize the number of persons not of Northern Marianas Chamorro or Carolinian blood who would gain fee-ownership rights to CNMI land).

Guam's plebiscite law does not employ a facially racial classification. The district court agreed. *See Davis*, 2017 WL 930825, at *14. This distinction dispenses with any significance Mr. Davis would have this Court ascribe to the CNMI *Davis* case.[8] Here, the standard for adjudging the constitutionality of a facially race-neutral classification is firmly established: Mr. Davis had to have

[8] *See Davis*, 844 F.3d at 1094, n.5 ("We do not reach the Commonwealth's argument that a lack of discriminatory intent should save the restriction. *We analyze discriminatory intent when a restriction is race-neutral on its face; the restriction here is not.*") (emphasis added).

established below that the Guam Legislature intended to racially discriminate against him in order to have the race-neutral "native inhabitants of Guam" classification invalidated.

B. The plebiscite law is not motivated by a racially discriminatory intent, but rather by an intent to determine the views of a particular political subgroup regarding a question germane to their political status

Facially race-neutral laws can still violate the Constitution if they are motivated by discriminatory intent. *See City of Mobile v. Bolden*, 446 U.S. 55, 65 (1982); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266 (1977); *Washington v. Davis*, 426 U.S. 229, 239-241 (1976). Racially discriminatory intent is not easy to prove, but it may be established by circumstantial evidence, such as (1) whether the classification has a disparate impact on people of a particular racial group, (2) the historical background of the classification, (3) the sequence of events leading up to enactment, (4) procedural or substantive departures from normal decision-making, and (5) legislative and administrative statements regarding the purpose of the classifications. *Arlington Heights*, 429 U.S. at 266-68. Evidence that a law "bears more heavily on one race than another" may indicate invidious discrimination in the rare case where "the discrimination is very difficult to explain on nonracial grounds." *Davis*, 426 U.S. at 242; *Arlington Heights*, 429 U.S. at 266. "Nevertheless," the Supreme Court explains, "we have not held that a law, neutral on its face and serving ends

otherwise within the power of government to pursue, is invalid . . . simply because it may affect a greater proportion of one race than of another." *Davis*, 426 U.S. at 242.

The district court held that the plebiscite law had a discriminatory purpose for two main reasons. First, relying primarily on the 1950 census for Guam, the court found that the date corresponded to a time when the island was overwhelmingly populated by Chamorros, with non-Chamorros representing a "diminutive number," or 1.4 percent of the total number of non-citizen nationals then living on Guam. *Davis*, 2017 WL 930825, at *11. Second, the fact that Guam amended its statute immediately after the Supreme Court handed down its *Rice* decision (specifically, by substituting "native inhabitant of Guam" for "Chamorro" as a descriptor and by articulating its intention that the plebiscite not be race-based), *see id.* at **13-14, 18, appeared to the court to demonstrate racially discriminatory intent. *See id.* at *18.

The district court was wrong to glean the requisite racially discriminatory purpose. First, the record before it did not support such a finding. Mr. Davis did not carry his constitutional burden to prove racially discriminatory intent. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979); *McCleskey v. Kemp*, 481 U.S. 279, 297-98 (1987). Second, Guam provided a bona fide non-racial reason for using the 1950 date: 1950 is the date that Congress

enacted the Guam Organic Act, cementing Guam's political relationship with the United States as an organized unincorporated territory and extending citizenship to the aforementioned class.

On appeal, Mr. Davis asserts that the holding was based on "evidence bearing on each of the *Arlington Heights* factors." Response Br. at 43. Yet, most of his evidence is directed at establishing only one factor – the first one. He presented no evidence relevant to the fourth factor. To the extent that his evidence addresses the second, third, and fifth factors, it does so only to show that the Guam Legislature intended to focus on the subgroup of people whose citizenship is traceable to the Guam Organic Act, or that the Legislature was aware that this subgroup is composed mainly of Chamorro people.

Before this Court, Mr. Davis has made a renewed effort to document racially motivated intent. While comprehensive, his effort succeeds only in documenting that Guam intended to target the colonized group *for the purpose of determining their views regarding possible future decolonization efforts.* It is true that the Legislature intended to target this subgroup of citizens, but that is not evidence of racially motivated intent.

To the extent that his evidence suggests that the Legislature was aware that the law would affect mostly Chamorros, his argument again hinges on the first factor. He focuses on his assertion that most of the people granted citizenship by

the Guam Organic Act were Chamorro.[9] What the district court and Mr. Davis fail to comprehend is that a legislative intent to focus on a particular sub-group with a unique political status – here, those colonized by the United States and deriving their citizenship from the law that formally recognized Guam as an unincorporated territory of the United States –is not equivalent to an intent to racially discriminate simply because the political sub-group is composed mainly of people of a particular race.[10] Certainly, Mr. Davis would not claim that the Guam Organic

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[9] He also makes the absurd claim that, because the U.S. Census Bureau "recognizes 'Chamorro' as a distinct racial category," Response Br. at 5, any law that refers to, or has an effect on, Chamorro people is a racially motivated law. Race is widely acknowledged to be a socially-constructed category. *Ho by Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, 863 (9th Cir. 1998). The census in particular changes its listing of racial categories regularly, and even changes which groups will be listed as options for racial self-identification at all; indeed, the 2010 census defines "Chamorro or Guamanian" not as a racial category but as a subset of the "Native Hawaiian or Pacific Islander" racial category. *See* Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOYOLA UNIV. OF CHICAGO L. REV. 693, 696 (2016); Sharon M. Lee, *Racial Classifications in the U.S. Census*, 1890-1990, 16 ETHNIC AND RACIAL STUDIES 75 (2010). The census represents the federal government's clumsy and evolving attempts to document how the invented idea of race corresponds to particular groups for the purpose of counting and documenting the situation of those groups. It is circular to claim that the census categories somehow reveal the true existence of racial groups, when racial categories themselves are a fiction.

[10] Guam does not assert that the legal framework of federal Indian law should govern this case. Rather, federal Indian law is one of the rare instances in which a classification that depends in part on ancestry corresponds with both a racial group and a political group (though racial Indians are not co-extensive with political Indians), and federal law recognizes that racially disparate impact does not invalidate the political classification. *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 U.C.L.A L. REV. 1335, 1358-59 (1997). The situation of colonized people in the territories is another. In contrast,

Act's extension of U.S. citizenship to a majority-Chamorro population was itself illegal simply because most of the white and Filipino people living on Guam at the time were already U.S. citizens.

II. Guam's plebiscite law does not violate the Fifteenth Amendment because it does not deny the right to vote "on account of race"

For the reasons discussed in Part I, the plebiscite law does not deny Mr. Davis the right to vote "on account of" his race. Mr. Davis cannot vote in a plebiscite intended only to determine the views of the colonized population of Guam regarding decolonization because he is not a member of this political subgroup. That is, his U.S. citizenship is not traceable to the Guam Organic Act. He is not excluded because he is white, but because his citizenship does not depend on Guam's political relationship to the United States. He would be a U.S. citizen even if Guam were never colonized or continually held as a colonial possession,

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courts are occasionally willing to infer racially motivated intent based in part on the racially disparate impact of a law when they can find no other plausible reason to support the classification other than an intent to racially discriminate. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 340-42 (1960) (holding that Alabama's attempt to redraw the municipal boundaries of Tuskegee "from a square to an uncouth twenty-eight-side figure" that excluded "all save four or five" of the city's black residents violated the Fifteenth Amendment where "respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630, 647-49 (1993). That is not the case here.

and he will continue to be a U.S. citizen even if Guam were to one day become independent. The clear intent of the plebiscite law is to discern the views on decolonization of this uniquely situated political subgroup of the population. Because it neither facially classifies on the basis of race nor is motivated by an intent to racially discriminate, the law does not violate the Fifteenth Amendment.[11]

III. Guam's plebiscite law does not violate the Fourteenth Amendment because even if strict scrutiny were to apply, the classification is necessary to serve a compelling government interest in determining the views of colonized people regarding decolonization, and it is narrowly tailored to that interest

As explained, the plebiscite law does not classify voters on the basis of race, nor is it motivated by racially discriminatory intent. Additionally, the law does not burden a fundamental right. *See Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984); *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1992). The district court should have applied rational basis review to determine that the law does not violate the Fourteenth Amendment.

Even if this Court were to determine that the plebiscite law illegally classifies Guam voters on the basis of race, this case would properly be resolved by

[11] Moreover, it is an open question whether the Fifteenth Amendment reaches a symbolic plebiscite at all. Not only will no public official be elected nor any policy decided, even if the plebiscite were to occur, it would "in no way change the juridical or political status of the plaintiff[] or anyone else," *Barbosa v. Sanchez Vilella*, 293 F.Supp. 831, 833 (D.P.R. 1967).

application of the Fifteenth Amendment,[12] making it unnecessary to reach the Fourteenth Amendment question. To be sure, although the plaintiff in *Rice* brought claims under both the Fourteenth and Fifteenth Amendments, the Supreme Court, after determining that the Hawai'i law violated the Fifteenth Amendment, declined to reach the Fourteenth Amendment question.[13]

If this Court deems it necessary to reach the Fourteenth Amendment claim, and decides to apply strict scrutiny, it should still uphold the law because it is narrowly tailored to advance a compelling governmental interest. The government of a colony certainly has a compelling interest in determining the views of its colonized population with regard to some desired future relationship with the colonizer. Although a legitimate interest is all that is required, this would also qualify as a compelling government interest.

To accomplish this goal, it is necessary for the government of Guam to distinguish between those who were colonized from those who moved to Guam as representatives of the colonizer country, or who moved there after it became a possession of the United States. While the latter category of Guamanians will no

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[12] This Court has recognized the doctrine of constitutional avoidance requiring that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. *See Artichoke Joe's Cal. Grand Casino* v. *Norton*, 353 F.3d 712, 730-31 (9th Cir. 2003); *American Federation of Gov't Employees v. United States*, 104 F.Supp.2d 58, 74 (9th Cir. 2000).

[13] This Court has recognized as much. *See, e.g.*, *Kamehameha*, 470 F.3d at 846-49; *see id.* at 853; *Kahawaiolaa*, 386 F.3d at 1282.

doubt be affected by any change in Guam's status, their interest is not the same and Guam must therefore find a way to distinguish between the two classes and define them, even if it means referring to descent in order to do so.

Mr. Davis asserts that Guam does not address the issue of any less restrictive means. In fact, the plebiscite law employs the least restrictive means. It is simply a poll of the colonized population. *See Davis v. Guam*, 785 F.3d 1311, 1317 (9th Cir. 2015) (Smith, J., dissenting).

Mr. Davis' primary concern seems to be that people who live on Guam but do not satisfy the statutory definition of "native inhabitants of Guam" deserve a voice in any determination of Guam's future political relationship with the United States. On this point, he is correct. But the Guam Decolonization Registry Law does not prevent them from having a voice. Nothing in the plebiscite law prevents additional plebiscites in which residents who do not qualify as "native inhabitants of Guam" could vote. The law is clear that the non-binding plebiscite will not result in any action other than communicating its symbolic results to the United States and United Nations, and it is clear from the statute's text that those results represent the desires of only the native inhabitants of Guam, and not of the entire island population. 3 Guam Code Ann. § 2100. Again, should the native inhabitants of Guam wish to pursue a status change, such as by becoming a state or becoming

an independent country, much more would be required to do so, and the process would undoubtedly take into account the desires of Guam's entire population.

IV. Guam's plebiscite law does not violate Section 2 of the Voting Rights Act, if it applies at all

Although certain sections of the Voting Rights Act (VRA) reach the territories, *see* 52 U.S.C.A. § 10101(a)(1), it is not clear that Section 2 does. *See id.* at § 10301 (expressly limiting its reach to "States and political subdivisions"). Guam is neither a state nor a political subdivision, and so is outside the reach of Section 2. *Accord Gardner v. Ute Tribal Court Chief Judge*, 2002 WL 99539, at *2 (10th Cir. 2002) (unpublished opinion) ("[S]ection 2 of the Voting Rights Act, by its terms, does not apply" because its provisions pertain only to elections of "States and their political subdivisions."). Because other sections of the Act explicitly reach the territories, *see, e.g.*, 52 U.S.C.A. § 10303(e)(2), it may be inferred that Section 2 does not. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Even if this Court determines that Section 2 applies, Mr. Davis alleges nothing more than bare statistical disparities in this case. *See* Pl's Mtn. at 3, 6-7. This is fatal to his statutory claim because a bare statistical showing of disproportionate racial impact is insufficient to satisfy the requirements of the statute. *See Farrakhan v. Washington,* 338 F.3d 1009, 1019 (9th Cir. 2003); *See also Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th

Cir. 1997). Here, Mr. Davis moved for summary judgment without making the threshold showings required of a Section 2 plaintiff: He did not satisfy the "necessary preconditions" prescribed in *Thornburg v. Gingles*, 478 U.S. 30 (1986). He did not demonstrate that statistical disparities here interact with other factors in any legally significant way for purposes of Section 2 analysis. *See Gingles*, 478 U.S. at 47 (the "essence" of a Section 2 claim is that "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed [by voters] . . . to elect their preferred representatives").

Under Section 2's totality of the circumstances test, the Supreme Court emphasizes the importance of maintaining a practical perspective when evaluating the challenged voting scheme, and courts have followed this directive in considering, e.g., the lower socio-economic status of American Indians, *see Old Person v. Brown*, 312 F.3d 1036, 1042 (9th Cir. 2002), the disproportionate number of blacks living in poverty, *see Johnson v. Halifax County*, 594 F.Supp. 161, 169–70 (E.D.N.C. 1984), and unemployment and illiteracy among Hispanic citizens, *see Salas v. S.W. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1555-56 (5th Cir. 1992). Here, Mr. Davis alleged, and the district court relied on, one operative fact: That the statutory definition of "native inhabitants of Guam" functions to produce a plebiscite electorate mostly comprised of one racial group, i.e. "Chamorros."

Without more, this falls short of a prima facie case under Section 2. Moreover, because Section 2 prohibits intentional racial discrimination to the same extent as the Fifteenth Amendment, Guam has not violated the VRA for the reasons described above.

V. Guam's plebiscite law does not violate the Guam Organic Act

Mr. Davis suggests his claim that the plebiscite law violates the Guam Organic Act, 48 U.S.C. §§ 1421b(n), (m), and (u), is separate and discrete from his other claims. He is mistaken. This Court has instructed that the test for establishing a violation of the Organic Act is the same as under federal law. *See Guam v. Guerrero*, 290 F.3d 1210, 1216-18 (9th Cir. 2002). Because Mr. Davis failed to establish a violation of federal anti-discrimination law, he *ipso facto* failed to establish a violation of the anti-discrimination provisions of the Organic Act.[14]

In the end, Mr. Davis' zealous attempt to mine the *Rice* Court's dicta to foreclose the use of any ancestry-based classification for any purpose 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. Such an attack is all the more

[14] Mr. Davis presses the argument that this Court's ruling in *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015) foreclose Guam's arguments on the merits in this case. He is wrong. The Court ruled only on standing and ripeness grounds, not the merits. *See id.* at 1316.

repugnant when done in the name of civil rights.

For all these reasons, Guam asks that this Court reverse the district court's grant of summary judgment in favor of Mr. Davis, and grant Guam's motion for summary judgment as to all of his claims.

STATEMENT OF RELATED CASES

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

Date: December 21, 2017.

By: /s/ Kenneth Orcutt
Kenneth Orcutt
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

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

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By: /s/ Kenneth Orcutt
Kenneth Orcutt
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