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

Defendants-Appellants.

On Appeal from the District Court of Guam

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INTRODUCTION

The defendants-appellants (collectively, "Guam") want to do something unconstitutional: enforce a race-based voting restriction against citizens of the United States. They have engaged in definitional games to achieve this goal, using ancestral tracing as a substitute for naming a particular race. This maneuver was tried, and rejected, in *Rice v. Cayetano*, 528 U.S. 495 (2000), and in *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1089 (9th Cir. 2016), *cert. denied*, — S. Ct. —, 2017 WL 2405597 (2017). The district court rightly rejected it here under the Fourteenth and Fifteenth Amendments of the U.S. Constitution, and this Court should do the same.

Under Guamanian law, only "Native Inhabitants of Guam" may register to vote in a taxpayer-funded plebiscite concerning Guam's political relationship with the United States. The term "Native Inhabitants of Guam" is expressly defined by statute with reference to bloodline, and consists almost exclusively of persons belonging to a single racial group, the Chamorros. Otherwise-qualified voters who are not "Native Inhabitants" are denied the right to vote, even though Guam's political relationship with the United States is an issue of immense importance to all residents of the island.

Plaintiff Arnold Davis—a former Air Force officer and otherwise qualified voter and resident of Guam—attempted to register to vote in the plebiscite. But the

Guam Election Commission marked his form "VOID" because he is a white, non-Chamorro man, and thus was unable to attest that he is a "Native Inhabitant of Guam" under the statutory definition. Mr. Davis filed this suit challenging Guam's race-based voting restriction in 2011—a suit that Guam describes as a "wolf in sheep's clothing," Guam Br. 1, evidently because it threatens to give all registered voters of Guam a voice in Guam's political future.

Guam's race-based voting restriction is the danger here. The "Native Inhabitants of Guam" classification is facially race-based, and was also enacted with a discriminatory intent. Until the Supreme Court decided *Rice*, Guam's legislature was transparent about its intent to limit participation in the plebiscite to persons of the Chamorro race. Immediately after *Rice* was decided, the legislature amended the plebiscite law in an effort to mask its discriminatory purpose, replacing the word "Chamorro" with the term "Native Inhabitants of Guam." These two statutory terms were defined in practically identical ways, and little else about the plebiscite law changed. Not surprisingly, the record is replete with instances in which laws, lawmakers, and members of the public use the words "Chamorro" and "Native Inhabitants of Guam" interchangeably, and refer to the plebiscite law as securing a "Chamorro-only vote." Guam's efforts to characterize the term "Native Inhabitants of Guam" as race-neutral ignore the text of the definition and much of this undisputed evidence.

Guam's race-based voting restriction violates the Fifteenth Amendment. The Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," and it "hits onerous procedural requirements which effectively handicap exercise of the franchise," even when "the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Both the Supreme Court and this Court have held that electoral qualifications virtually identical to Guam's "Native Inhabitants" classification were straightforward violations of the Fifteenth Amendment. *Rice*, 528 U.S. at 499; *Davis*, 844 F.3d at 1089; *Arakaki v. Hawaii*, 314 F.3d 1091, 1092 (9th Cir. 2002). Those decisions control here.

Guam's raced-based restriction on the right to vote similarly violates the Fourteenth Amendment's Equal Protection Clause. Strict scrutiny is doubly applicable, as Guam's law is both race-based and a categorical denial of voting rights to an entire class of people. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The plebiscite law cannot survive strict scrutiny.

Finally, the plebiscite law violates several federal statutes, including provisions of the Voting Rights Act and Guam's Organic Act that are broader than their constitutional counterparts. Those statutes provide an additional basis for affirming the district court.

This Court should affirm the district court's judgment to ensure that all qualified voters of Guam—not just those with a privileged bloodline—will have a voice in Guam's future.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this civil rights case pursuant to 28 U.S.C. §§ 1331, 1343, and 48 U.S.C. § 1424(b). It granted summary judgment in favor of Mr. Davis and entered final judgment. *See* E.R. 492, 518. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court's judgment was entered on March 8, 2017, E.R. 518, and Guam filed a timely notice of appeal, *see* E.R. 519; Fed. R. App. P. 4(a)(1)(A). This Court is the proper venue for the appeal because the action arose on Guam. 28 U.S.C. § 1294(4).

STATEMENT OF THE ISSUE

Guam has limited the right to vote in an island-wide plebiscite to "Native Inhabitants of Guam"—a race-based term defined with respect to ancestral ties and excluding nearly every person outside of the Chamorro racial group. Does this voting restriction violate rights protected by the Fourteenth and Fifteenth Amendments of the U.S. Constitution and by federal statutory law?

STATEMENT OF FACTS

A. Guam's Political History

A group of people known as the Chamorros have long inhabited the island of Guam. The parties agree that the term "Chamorro" refers to "a racial group that is usually defined by connections to and lineage with the groups of native peoples that inhabited Guam prior to the influx of people from Western Europe and the United States." E.R. 3-4, 12; *see also* E.R. 58, 448 (agreeing that the U.S. Census Bureau recognizes "Chamorro" as a distinct racial category); U.S. Bureau of the Census, Bulletin, *Fourteenth Census of the United States: 1920: Census of Guam* 2 (1920) ("1920 Census") (describing Chamorro as "a hybrid race, with the Malayan strain predominating)."[1]

In 1521, Spanish explorer Ferdinand Magellan reached the island of Guam and encountered the Chamorros. *See* Amanda Smith Barusch & Marc L. Spaulding, *The Impact of Americanization on Intergenerational Relations: An Exploratory Study on the U.S. Territory of Guam*, 16 J. Soc. & Soc. Welfare 61, 63 (1989). Spain thereafter exerted control over the island until it ceded the island to the United States in 1898 pursuant to the Treaty of Paris. *Id.* Guam has since been

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[1] http://www2.census.gov/prod2/decennial/documents/41084506no553.zip (last visited Nov. 16, 2017). The "Census of Guam" begins at page 75 of the document titled "41084506no553ch6.pdf" in this .zip file.

a possession of the United States, except for a three-year period of Japanese control between 1941 and 1944. *See id.*

In 1950, Congress passed the Organic Act of Guam, declaring Guam to be an unincorporated territory of the United States. *See* Pub. L. No. 81-630, 64 Stat. 384 (1950) (the "1950 Organic Act") (codified at 48 U.S.C. § 1421 *et seq.*). Section 4 of the Act also amended the Nationality Act of 1940 to extend U.S. citizenship to three classes of persons: (1) Spanish subjects who were inhabitants of Guam on the date the Treaty of Paris took effect, April 11, 1899, along with their children; (2) all persons who had been born on Guam and were residing there on April 11, 1899, along with their children; and (3) all persons born on Guam after April 11, 1899. *Id.* sec. 4, § 206(a)-(b).[2]

These three citizenship provisions are significant to this litigation because Guam has repeatedly relied on them to define who qualifies as "Chamorro" or as a "Native Inhabitant of Guam." The effect of the 1950 Organic Act was to extend citizenship almost exclusively to people of the Chamorro race. *See* E.R. 74 (expert report explaining 1950 census statistics); *see also* U.S. Bureau of the Census,

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[2] For each of these three classes of persons, U.S. citizenship was conferred only upon people who took no affirmative steps to preserve or acquire foreign citizenship.

Census of Population: 1950, Vol. II (1953) ("1950 Census");[3] E.R. 450 (agreeing with Mr. Davis (at E.R. 60) that the 1950 census data is authentic and accurate). Chamorro persons were the largest single racial group on the island at that time, *see* 1950 Census, at 54-46 tbl. 36 (45.6% of the population was Chamorro), and virtually all non-Chamorro persons were either citizens of the United States already (including 99.4% of all white people, the second-largest racial group on the island in 1950), *id.* at 54-49 tbl. 38, or were born outside of the jurisdiction of the United States and thus ineligible for citizenship under the 1950 Organic Act (including 94.4% of Filipinos, the third-largest racial group on the island), *id.* at 54-46 tbl. 36. *See generally* E.R. 74. Thus, it is undisputed that of the 26,142 non-citizen nationals living on Guam in 1950 who could be vested with citizenship by the Organic Act, all but 354 of them (1.4%) were of the Chamorro race. *Id.* at 54-49 tbl. 38; *see* E.R. 58, 76, 448-49.

The citizenship provisions of the Organic Act were in force for less than two years. In June 1952, Congress repealed the Nationality Act of 1940 "and all amendments thereto," and replaced it with the Immigration and Nationality Act of 1952 (the "INA"). Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280. This had

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[3] http://www2.census.gov/prod2/decennial/documents/41601749v2p51-54.zip. The report on Guam begins at page 54-37 of the document titled "41601749v2p51-54ch8.pdf" in this .zip file, which is page 35 of the file.

the effect of repealing the citizenship provisions of the Organic Act. The INA retained the substance of these citizenship provisions, *see id.* § 307, 66 Stat. at 237 (codified at 8 U.S.C. § 1407), while also including Guam in the definition of "United States," meaning that persons born in Guam thereafter would receive citizenship pursuant to section 301(a)(1) of the INA. *See id.* §§ 101(a)(38), 301(a)(1), 66 Stat. at 171, 235 (codified at 8 U.S.C. §§ 1101(a)(38), 1401(a)).

The Guam legislature has recognized the near-perfect correspondence between conferral of citizenship under the 1950 Organic Act and the Chamorro race in many ways and on many occasions. For example, Guamanian law uses receipt of citizenship under the 1950 Organic Act as a means of identifying Chamorro people in a land-trust statute. *See* 21 Guam Code Ann. § 75101(d) (defining "Native Chamorro" to mean "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").

B. Guam's Plebiscite Law

The plebiscite law at issue here is part of a decades-long effort by Guamanian officials to afford a racially-defined subset of Guam's inhabitants the power to speak for the entire island's population as to its political status. Until 2000—the year the Supreme Court decided *Rice*—Guam was transparent in this aim, enacting laws that explicitly limited the vote to the "Chamorro people."

Immediately after *Rice* was decided, however, Guamanian officials changed the law, replacing the word "Chamorro" with the term "Native Inhabitants of Guam," which it defined by reference to the citizenship conferred by the 1950 Organic Act. In this way, the government restricted the vote almost exclusively to the Chamorro people, but did so without pointedly mentioning any specific race.

1. Pre-*Rice* Background

Guam held a political-status plebiscite in 1982 to determine its future relationship with the United States. *See* Political Status and External Affairs Subcommittee Transition Report, at 10 (2011) ("Transition Report").[4] All registered voters of Guam were permitted to vote in this plebiscite, without regard to their race, ethnicity, ancestry, or other extraneous characteristics. *See id.* at 7. In a run-off election, the voters expressed a preference for increased territorial autonomy as a U.S. "commonwealth" over full statehood. *Id.*

After the election, Guam began to draft federal legislation ostensibly designed to implement the voters' choice. *See* Transition Report 7. But this bill contained the seeds of the current Chamorro-only plebiscite law. While the bill provided that all voters could participate in ratifying any commonwealth

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[4] http://pacificnewscenter.com/wp-content/uploads/2011/02/politicalstatusandexternalaffairs.pdf.

legislation, it also contemplated that "the indigenous Chamorro people of Guam, defined as all those born on Guam before August 1, 1950, and their descendants," would be permitted to exercise their own "inalienable right of self-determination" in the future, potentially overriding the results of the 1982 plebiscite. Guam Commonwealth Bill, H.R. 98, 101st Cong., § 102(a)-(b) (1989) ("Commonwealth Bill"); *see* Transition Report 7 (report prepared by Guam officials noting that the Commonwealth Bill "reveal[s] that Commonwealth status was never considered a permanent political status but rather a transitional mechanism through which the final status would be resolved and established"). U.S. officials voiced "[m]ajor disagreements" with several provisions of the bill, including this provision "limit[ing] the final vote on self-determination to indigenous Chamorros," which presented serious "Constitutional [i]ssues." *See* Transition Report 8. But Guam was unwilling to yield, and negotiations broke down. *See id.* at 8, 11.

Despite awareness of these constitutional problems, Guam's legislature pressed forward in its effort to secure a Chamorro-only political-status vote. In 1996, the legislature enacted "An Act to Establish the Chamorro Registry," which established a registry of "Chamorro individuals, families, and their descendants."

Guam Pub. L. No. 23-130 § 1 (1996) (the "1996 Chamorro Registry Law").[5] The Governor of Guam described the legislation as a "cornerstone of the Commonwealth Draft Act," and—notwithstanding the 1982 plebiscite—stated that "Guam's people" had not yet participated in an act of "Self-Determination." Letter from Madeleine Z. Bordallo, Acting Governor of Guam, to Don Parkinson, Speaker, Twenty-Third Guam Legislature, at 1 (Dec. 30, 1996) (E.R. 94).[6] The 1996 legislation further stated that the registry could be used "for the future exercise of self-determination by the indigenous Chamorro people of Guam," and also "for historical, ethnological, and genealogical purposes." 1996 Chamorro Registry Law § 1.

The 1996 Chamorro Registry Law relied on the citizenship provisions of the 1950 Organic Act to define who qualified as "Chamorro." Specifically, the definition of the term "Chamorro" mirrored the 1950 Organic Act's first two citizenship provisions, limiting the term to Guam-born persons and Spanish subjects who were "resid[ing] in Guam on April 11, 1899," and their descendants. 1996 Chamorro Registry Law § 2. The 1996 Chamorro Registry Law was

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5 http://www.guamlegislature.com/Public_Laws_23rd/P.L.%2023-130%20(SB%20673%20(LS).pdf.

6 http://www.guamlegislature.com/Public_Laws_23rd/P.L.%2023-130%20(SB%20673%20(LS).pdf.

originally codified in Chapter 20 of Title 3 of the Guam Code Annotated, and now is codified in Chapter 18 of that Title.

In 1997, Guam's legislature approved a Chamorro-only plebiscite by adopting "An Act to Create the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination." *See* Guam Pub. L. No. 23-147 (1997) (the "1997 Plebiscite Law").[7] As the title makes clear, this act was passed for the express purpose of "ascertain[ing] the desire of the Chamorro people of Guam as to their future political relationship with the United States." *Id.* § 5; *see id.* § 1 (stating that the legislature had "recognized and approved the inalienable right of the Chamorro people to self-determination"). To this end, the legislature included a provision stating that only the "Chamorro people" could vote in the political status plebiscite. *Id.* § 10.

Like the 1996 Chamorro Registry Law, the 1997 Plebiscite Law defined the "Chamorro people of Guam" in a way that closely corresponded with the 1950 Organic Act's citizenship provisions: The "Chamorro" people were the "inhabitants of Guam in 1898 and their descendants." 1997 Plebiscite Law § 2(b). The legislative history for the 1997 Plebiscite Law confirms that the plebiscite

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[7] http://www.guamlegislature.com/Public_Laws_23rd/P.L.%2023-147%20(SB%20765%20(LS).pdf.

would be for Chamorros only. The committee report accompanying the legislation, for example, included findings that (1) "[t]he exercise of Chamorro self-determination should begin as soon as possible"; (2) "[u]nity of the Chamorro people is vital in the implementation and exercise of Chamorro self-determination"; (3) "[t]he Chamorro people must stop the complacency to American Colonialism on Guam"; (4) "[t]he Church has a duty and obligation to help rid Guam of colonialism because colonialism is evil and takes away Chamorro peoplehood"; and (5) the law "provides a timely redress to a long injustice suffered by the Chamorro people." 23d Guam Legislature, Committee on Federal and Foreign Affairs, Report on Bill No. 765, Committee Findings (E.R. 203).[8]

At a public hearing on the bill, several people explained that they believed it was important to limit the right to vote in the plebiscite to Chamorros. One stated, for example, that the bill "corrects the mistake that was made by the Government of Guam in allowing non-Chamorros to vote on the last plebiscite in 1982." 23d Guam Legislature, Committee on Federal and Foreign Affairs, Report on Bill No. 765, Written and Oral Testimony and Input on Bill No. 765 (statement of William

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[8] http://www.guamlegislature.com/Public_Laws_23rd/P.L.%2023-147%20(SB%20765%20(LS).pdf.

L. Hernandez) (E.R. 202). Another person supported passage because "real freedom is Chamorro self-determination," and if Chamorros do not have this freedom then "the Chamorro people are doomed." *Id.* (statement of Ben Garrido) (E.R. 201). Another speaker suggested that the Chamorro people "take control of our lives" and stop letting "outsiders have control of our livelihood." *Id.* (statement of David Munoz) (E.R. 201). Similarly, another explained that the bill was needed "to fight for our Chamorro rights, identity, and dignity." *Id.* (statement of Ed Benavente) (E.R. 202). The 1997 Plebiscite Law was codified in Chapter 21 of Title 1 of the Guam Code Annotated.

2. *Rice* And The Current Plebiscite Law

Before Guam could hold the Chamorro-only plebiscite contemplated by the 1997 Plebiscite Law, the Supreme Court held in February 2000 that a Hawaii law restricting the right to vote in a state election to "Hawaiians"—defined as descendants of the people inhabiting the Hawaiian islands in 1778—was a "clear violation of the Fifteenth Amendment." *Rice*, 528 U.S. at 499. Guam's legislature responded to *Rice* by passing the law at issue here 15 days later. *See* Guam Pub. L. No. 25-106 (2000) (referred to herein, together with the as-amended 1997

Plebiscite Law, as the "2000 Plebiscite Law" or "current plebiscite law").[9] Four sets of provisions are particularly relevant.

First, the current plebiscite law creates a new registry called the "Guam Decolonization Registry" in order to "specifically delineate the list of qualified voters for the political status plebiscite." 2000 Plebiscite Law sec. 2, § 21000 (codified at 3 Guam Code Ann. § 21000). This new registry is nearly identical to the 1996 Chamorro Registry in all respects, except that it employs the term "Native Inhabitant[s] of Guam" rather than "Chamorro." *See id.* sec. 2, § 21003 (codified at 3 Guam Code Ann. § 21003). The definitions of these two terms are nearly identical, as both definitions incorporate the first two citizenship categories from the 1950 Organic Act. Specifically, the term "Chamorro" in the 1996 Chamorro Registry essentially reproduces the first two citizenship provisions of the 1950 Organic Act. *See supra* 11. The term "Native Inhabitants of Guam" incorporates them by reference: Native Inhabitants are "persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam," along with their "descendants." 2000 Plebiscite Law sec. 2, § 21001(e) (codified at 3 Guam Code Ann. § 21001(e)).

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[9] The bill became law without the Governor's signature roughly one month after *Rice* was decided. *See* 48 U.S.C. § 1423i.

The 1950 Organic Act granted citizenship to a third category of people who are also considered "Native Inhabitants of Guam"—*i.e.*, all people born on Guam after April 11, 1899. *See* 1950 Organic Act sec. 4, § 206(b). But this category of people includes few, if any, non-Chamorros as defined by the 1996 Chamorro Registry Law. The "Native Inhabitants" definition extends to people who received citizenship exclusively through the 1950 Organic Act, and that Act was repealed in June 1952. Thus, the only people not included in the 1996 definition of "Chamorro" who could satisfy the "Native Inhabitants" definition are people who were born on Guam between 1899 and 1952 to non-citizen parents who were neither residents of the island in 1899, nor descended from such persons. As of 1950, that category of people was, at most, extremely small: 98.6% of the non-citizen nationals on Guam were of the Chamorro race, and thus were likely descended from people who were living on the island in 1899. *See supra* 5-8. Thus, substituting the phrase "Native Inhabitants of Guam" for "Chamorro" made little, if any, difference in specifying who could register for the Decolonization Registry.

Although the 2000 Plebiscite Law did not expressly eliminate the 1996 Chamorro Registry, it did effectively replace it with the Decolonization Registry. Specifically, the law directed the board that had been administering the Chamorro Registry to "stay its further operations," 2000 Plebiscite Law § 4, while

simultaneously vesting in that same board all of the powers and functions of the newly created Decolonization Registry Board until the new board's members were determined, *id.* § 13. In practical effect, the Decolonization Registry replaced the Chamorro Registry and was structured in a virtually identical manner, using the term "Native Inhabitants of Guam" rather than "Chamorro."

Second, the 2000 Plebiscite Law repealed and reenacted all sections of the 1997 Plebiscite Law that mentioned the word "Chamorro," replacing the word "Chamorro" with "Native Inhabitants of Guam." *See* 2000 Plebiscite Law §§ 7, 9-11. The word "Chamorro" was also removed from the title of the 1997 Plebiscite Law, *id.* § 5, and from the name of the commission administering the plebiscite, *id.* § 9 (codified as renumbered and amended at 1 Guam Code Ann. § 2104). The 2000 Plebiscite Law also rewrote the 1997 law's statement of legislative findings, this time avoiding express racial references. *See id.* § 6 (codified as renumbered at 1 Guam Code Ann. § 2101). And the 2000 Plebiscite Law repealed a section of the 1997 law that set out the "moral and legal basis" for "Chamorro Self-Determination." 1997 Plebiscite Law § 3; *see* 2000 Plebiscite Law § 8 (codified as renumbered at 1 Guam Code Ann. § 2103).

As with the 1996 Chamorro Registry, replacing the word "Chamorro" in the 1997 Plebiscite Law with "Native Inhabitants of Guam" made little practical difference. The 1997 Plebiscite Law's definition of "Chamorro" hewed closely to

the first two categories of citizenship granted by the 1950 Organic Act, encompassing only those people who were living in Guam in 1898 and their descendants. *See* 1997 Plebiscite Law § 2(b). The 2000 Plebiscite Law used the same definition for "Native Inhabitant of Guam" as was used for the Decolonization Registry—persons who received citizenship through the 1950 Organic Act, and their descendants. *See* 2000 Plebiscite Law § 7 (codified as renumbered at 1 Guam Code Ann. § 2102(b)). As noted above, the Native Inhabitants definition is a near-perfect overlap with the first two categories of citizenship granted by the 1950 Organic Act.

Third, the 2000 Plebiscite Law directs that a plebiscite be held to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America," and provides that the results of the plebiscite "shall" be "promptly transmit[ted]" to the President, Congress, and the United Nations. 2000 Plebiscite Law §§ 10, 11 (codified as renumbered and amended at 1 Guam Code Ann. §§ 2105, 2110). Voters in the plebiscite are limited to "Native Inhabitants of Guam." *See id.* § 11; *see also id.* sec. 2, § 21003 (providing that only Native Inhabitants of Guam and their descendants are eligible to be registered on the Decolonization Registry) (codified at 3 Guam Code Ann. § 21003). Any person seeking to vote must attest to being a "Native Inhabitan[t] of Guam," under

penalty of perjury. E.R. 72; *see id.* sec. 2, §§ 21002, 21009 (codified at 3 Guam Code Ann. §§ 21002, 21009).

Fourth, the 2000 Plebiscite Law denies that it is race-based, and purports to instruct courts to construe it to not be race-based. *See* 2000 Plebiscite Law § 1 (asserting that the supposedly "separate" Decolonization Registry is "*not* [to] be one based on race," and that the qualifications for voting in the plebiscite "shall *not* be race-based"); *id.* sec. 2, § 21000 (stating that the Decolonization Registry "shall *not* be construed nor implemented by the government officials effectuating its provisions to be race based"). Notwithstanding this language, the 2000 Plebiscite Law's definition of "Native Inhabitants of Guam" closely aligns with the prior definitions of "Chamorro," and thus defines voter eligibility by reference to criteria that exclude nearly all U.S. citizens on Guam who are not Chamorro. *See supra* 6-8, 15-16 (explaining that 98.6% of the people eligible for citizenship from the enactment of the 1950 Organic Act were of the Chamorro race).

In 2004, the Guam legislature amended the 2000 Plebiscite Law to require the Guam Election Commission to conduct the plebiscite in a general election year in which 70% of eligible voters—that is, "Native Inhabitants of Guam"—were registered to vote. Guam Pub. L. No. 27-106 ch. IV, § 23 (2004) (codified as

renumbered and amended at 1 Guam Code Ann. § 2110).[10] The legislature retained the "Native Inhabitants" eligibility restriction. *Id.*

In 2010, Guam adopted a law providing that individuals who have received or been pre-approved for "a Chamorro Land Trust Commission property lease" will be automatically "included on the registration roll of the Guam Decolonization Registry" unless they opt out. Guam Pub. L. No. 30-102, sec. 3, § 21002.1 (2010).[11] This provision was made retroactive to 1993. *Id.* § 6. Persons eligible to receive these leases are "Native Chamorros," defined in the same way as the 2000 Plebiscite Law defines "Native Inhabitant of Guam." *See* 21 Guam Code Ann. §§ 75101(d); 75107(a).

In 2011, Guam enacted a law pertaining to the times and locations in which persons could register for the plebiscite. *See* Guam Pub. L. No. 31-92 (2011).[12] The law referred to the Commission on Decolonization by its 1997 name, the "Commission on Decolonization for the Implementation and Exercise of *Chamorro* Self-Determination," rather than by its name under the 2000 Plebiscite

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10 http://www.guamlegislature.com/Public_Laws_27th/P.L.%2027-106.pdf.

11 http://www.guamlegislature.com/Public_Laws_30th/P.L.%2030-102%20Bill%20No.%20184-30%20COR).pdf.

12 http://www.guamlegislature.com/Public_Laws_31st/P.L.%2031-92%20SBill%20No.%20154-31.pdf.

Law, which had substituted the word "Guam" for "Chamorro." Guam Pub. L. No. 31-92 §§ 1-3 (2011) (adding Sections 3104(a), 3105(a), 20007(a) (now 18007(a)), and 21007(a) to Title 3 of the Guam Code Annotated); *compare* 1997 Plebiscite Law § 4, *with* 2000 Plebiscite Law § 9 (codified as amended at 1 Guam Code Ann. § 2104).

C. Mr. Davis's Lawsuit

Mr. Davis is a former U.S. Air Force officer and non-Chamorro resident of Guam. *See* E.R. 64. He completed a form to register to vote in the plebiscite and submitted the form to the appropriate official. E.R. 64, 72. Although Mr. Davis was an otherwise qualified voter, Guam election officials refused to allow Mr. Davis to register solely because he did not meet the definition of a "Native Inhabitant of Guam," and marked the word "VOID" across his registration form. *See* E.R. 64, 72. Guam admits that Mr. Davis was "not permitted" to "register for the plebiscite" "because he does not meet the definition of 'Native Inhabitants of Guam.'" E.R. 412; *see also* E.R. 6, 13.

In November 2011, Mr. Davis filed this suit challenging Guam's race-based voter-qualification scheme on behalf of himself and others similarly situated. Mr. Davis alleged that Guam's voting scheme violates rights guaranteed by the Constitution, including the Fourteenth and Fifteenth Amendments; various provisions of the bill of rights contained within or added to the Organic Act; and

similar civil rights statutes, including 52 U.S.C. § 10101 (formerly 42 U.S.C. § 1971). E.R. 7-9.

Guam moved to dismiss the complaint on the ground that it failed to present a justiciable case or controversy, and the district court granted that motion, holding that Mr. Davis lacked standing and that the case was not ripe because the plebiscite had not yet taken place and, in the court's view, may never be held. Mr. Davis appealed, and this Court reversed. *See Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015). The Court explained that unequal treatment was a sufficient harm to establish standing, and also held that Guam "understate[d] the effect of any plebiscite," which would "requir[e]" officials to "transmit the results to the President, Congress and the United Nations, thereby taking a public stance" and "mak[ing] it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome." *Id.* at 1315. The Court further held that Mr. Davis's claim was ripe because he adequately alleged that he was "currently being denied equal treatment under Guam law." *Id.* at 1316.

On remand, the parties cross-moved for summary judgment. On March 8, 2017, the district court granted Mr. Davis's motion and denied Guam's. *See* E.R. 492-93. Beginning with the Fifteenth Amendment, the court applied *Rice* and concluded that Guam's voting restriction used ancestry as a proxy for race, in part "because it excludes nearly all persons whose ancestors are not of a particular

race." E.R. 501. The court rejected Guam's argument that the voting restriction is date-based rather than race-based, recounting the history of the plebiscite law and concluding that the "specific sequence of events" leading to the 2000 Plebiscite Law made clear that the restriction is race-based. E.R. 501-05. The court determined that the statute has a discriminatory purpose, citing the history of the statute as well as statements made by lawmakers and members of the public confirming that the plebiscite law secures a "Chamorro-only vote." E.R. 509; *see* E.R. 505-09. The court rejected Guam's argument that the plebiscite did not fall within the ambit of the Fifteenth Amendment because no "election" was taking place, explaining that the plebiscite easily qualified. E.R. 510-11.

The court next turned to the Fourteenth Amendment, and held that Guam's racial restriction fails strict scrutiny. *See* E.R. 511-15. The court explained that "[a]ll Guam voters have a direct interest [in] and will be substantially affected by any change to the island's political status," yet the plebiscite law prevented people from participating by using a racially-discriminatory voting prohibition. E.R. 513. The court explained that Guam failed to show that its "method of achieving its goal is narrowly tailored," and noted that "other alternatives" for determining the desires of the "colonized people" included "conducting a poll with the assistance of the University of Guam." E.R. 515. The court finally rejected Guam's argument that the relevant constitutional guarantees do not apply in full force to

Guam, explaining that the *Insular Cases'* selective-incorporation doctrine does not apply where, as here, "Congress has explicitly extended the Fifteenth Amendment and the Equal Protection Clause … to Guam." E.R. 515-16.

The court concluded that because the Fifteenth and Fourteenth Amendments were "clearly violated in this case," it did not need to reach Mr. Davis's statutory arguments. E.R. 516. It dismissed all other pending motions as moot, E.R. 516 n.17, and entered judgment in Mr. Davis's favor. E.R. 518. This appeal followed.

SUMMARY OF ARGUMENT

Guam limits eligibility to vote in its political-status plebiscite to "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." 1 Guam Code Ann. § 2102(b). This classification is race-based, and thus violates the Fifteenth Amendment, the Fourteenth Amendment, and several federal civil-rights statutes. In addition, the classification has a racially discriminatory intent and effect, and thus is impermissible even if Guam were correct that the classification is facially race-neutral.

I.A. The Native Inhabitants classification is facially race-based because it defines people's right to vote by reference to their ancestry. Racial discrimination occurs when a law singles out identifiable classes of persons solely because of their ancestry or ethnic characteristics. *Rice v. Cayetano*, 528 U.S. 495, 515 (2000).

The Native Inhabitants definition does this on its face by granting voting rights to people based on whether they are descendants of other people. Laws that require this type of ancestral tracing employ the same mechanisms, and cause the same injuries, as laws that mention a particular race by name. *Id.* at 517. The Native Inhabitants definition undeniably calls for this type of ancestral tracing and thus is race-based.

I.B. The Native Inhabitants classification also reflects a discriminatory purpose. 98.6% of the people living on Guam in 1950 who were eligible to receive citizenship under the Organic Act were of the Chamorro race. *See* E.R. 58, 448-49. Moreover, the history of Guam's plebiscite and voter-registry laws demonstrates that Guam has long attempted to secure a Chamorro-only vote, and uses the terms "Chamorro" and "Native Inhabitants of Guam" interchangeably to refer to essentially the same group of people. Further, during a 2011 roundtable on a bill, lawmakers repeatedly referred to the current law as securing a "Chamorro-only vote," and the overarching sentiment was that the plebiscite should be limited to Chamorros. The sequence of events leading to the current plebiscite law confirms that Guam's revisions to the plebiscite law were purely aesthetic: Before *Rice* was decided, Guam was explicit in its aim of seeking Chamorro self-determination; immediately after *Rice*, Guam changed the terminology it used, but not the substance of the relevant laws. Thus, Guam's use of the term "Native

Inhabitants of Guam" instead of "Chamorro" is merely cosmetic. This evidence together reflects a clear discriminatory purpose.

II.A. The Fifteenth Amendment categorically forbids denial of voting rights on account of race. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Yet the plebiscite law provides that only "Native Inhabitants of Guam" may vote in the plebiscite. Because the term "Native Inhabitants of Guam" draws a racial voting classification on its face, it is *per se* unconstitutional under the Fifteenth Amendment. The voter restriction also has the purpose and effect of discriminating based on race, and is invalid on that ground as well. *See Rice*, 528 U.S. at 514-17. Indeed, Mr. Davis has presented powerful, uncontroverted evidence pertaining to each of the discriminatory-intent factors identified in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977). Guam's contrary position simply ignores much of the evidence in the record. Guam argues that the plebiscite does not implicate the Fifteenth Amendment at all because it is not an "election," but there is no such requirement in the Fifteenth Amendment, and, in any event, this Court already has held that the plebiscite will chart the political course for the territory in a significant way. The plebiscite law thus violates the Fifteenth Amendment.

II.B. Guam's race-based exclusion cannot survive under the Fourteenth Amendment either, as Guam cannot articulate a compelling governmental interest

in limiting participation in the plebiscite to "Native Inhabitants." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The results of the plebiscite will be transmitted to the President, Congress, and the United Nations, and could have significant consequences for the entire island and its relationship with the United States and other nations. *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015). Guam can identify no legitimate compelling interest that justifies preventing the many non-Chamorro residents on Guam who will be affected by this significant decision from voting on it. Nor does Guam explain why more narrowly-tailored solutions are unavailable or insufficient to understand Chamorro views on Guam's political status. Guam's argument that strict scrutiny is inapplicable here is meritless: The Native Inhabitants classification implicates race and effectuates a complete denial of the fundamental right to vote.

III. Finally, Guam's racial classification violates the Voting Rights Act and the 1950 Organic Act's bill of rights. These statutes provide additional anti-discrimination protections, and thus additional grounds on which to affirm the district court.

STANDARD OF REVIEW

A district court's decision to grant or deny summary judgment is reviewed de novo. *Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004). The Court considers whether, viewing the evidence in the light most favorable to the nonmoving party,

there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *Id.* This Court may affirm on any ground with support in the record properly raised in the court below. *Downs v. Hoyt*, 232 F.3d 1031, 1036 (9th Cir. 2000).

ARGUMENT

Guam wants a racially defined subset of its population to chart a political course for the territory that could have a profound impact on *all* of its residents, including those who are not Chamorro. The Constitution and federal law forbid Guam from doing this. The district court's decision properly applies this foundational principle and should be affirmed.

I. Guam's Voting Restriction Distinguishes Between U.S. Citizens Based On Their Race.

Guam has created a registration and voting qualification based on race. In its early briefing before the district court, Guam admitted that the Decolonization Registry is "a registry that identifies qualified voters by race," and argued that there was "nothing constitutionally wrong with compiling" such a registry. Reply to Opp. to Mot. to Dismiss, ECF No. 24, at 1 (D. Guam Jan. 10, 2012) (No. 11-cv-35). Guam also reiterated this position on appeal before this Court in *Davis v. Guam*, characterizing the "Native Inhabitants" as "a colonized people whose racial identity happens to coincide with their political identity." Appellees' Answering Br. at 2, 26-27, 785 F.3d 1311 (9th Cir. 2015) (No. 13-15199).

Guam now resists this characterization, arguing that the Native Inhabitants designation is race-neutral and was not motivated by a racially discriminatory purpose. *See* Guam Br. 15-33. Guam errs.

A. The "Native Inhabitants Of Guam" Classification Is Facially Race-Based.

"Native Inhabitants of Guam" is a race-based classification. Like the statute at issue in *Rice v. Cayetano*, the Native Inhabitants classification expressly limits the right to vote "to persons of defined ancestry and to no others." 528 U.S. 495, 514 (2000). That alone makes it a racial classification under *Rice*.

Guam's plebiscite law defines "Native Inhabitants of Guam" by reference to blood relations: "'Native Inhabitants of Guam' shall mean 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) (emphasis added). Setting aside the fact that the group of people who received citizenship through the 1950 Organic Act consisted almost exclusively of a *single* race, the statute undeniably and expressly "singles out 'identifiable classes of persons *solely because of their ancestry or ethnic characteristics*,'" making it a racial classification. *Rice*, 528 U.S. at 515 (quoting *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)) (alteration omitted; emphasis added).

The plebiscite law expressly provides that if a person is "descend[ed]" from someone who received citizenship through the 1950 Organic Act, that person is a

"Native Inhabitant of Guam" and is eligible to vote. 1 Guam Code Ann. § 2102(b). If the person has no such ancestor, and did not directly receive citizenship through the 1950 Organic Act, that person is ineligible to vote—even if the person was adopted by a Native Inhabitant. Under the plebiscite law, it is "blood relations" that matter. 2000 Plebiscite Law sec. 2, § 21001(c) (codified at 3 Guam Code Ann. § 21001(c)).

Notably, many people living on Guam today *must* examine their ancestry to determine whether they satisfy the Native Inhabitants definition. Although the 1950 Organic Act extended citizenship to all people who were born on the island after 1899, 1950 Organic Act sec. 4, § 206(b), that provision was repealed and replaced in 1952, making it applicable only to persons born between 1899 and 1952. *See* INA § 403(a)(42), 66 Stat. at 280. As of 2017, then, no one younger than age 65 can claim that they *directly* "became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam." 1 Guam Code Ann. § 2102(b). An ancestral inquiry is necessary to determine whether younger residents are "descendants" of such persons. *Id.*[13]

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[13] Moreover, even people who were alive when the 1950 Organic Act was passed may have received citizenship by reference to their ancestry: The Act extended citizenship to certain persons who were living on the island in 1899 and "their children." 1950 Organic Act sec. 4, § 206(a)(1)-(2).

By its terms, then, the "Native Inhabitants" definition distinguishes between people's voting rights based on their ancestry. Nothing more is needed to show a facially race-based classification. The Supreme Court has recognized that racial discrimination "is that which singles out 'identifiable classes of persons solely because of their ancestry or ethnic characteristics.'" *Rice*, 528 U.S. at 515 (quoting *St. Francis Coll.*, 481 U.S. at 613) (alteration omitted). "Ancestral tracing" of this sort "achieves its purpose by creating a legal category which employs the *same mechanisms*, and causes the *same injuries*, as laws or statutes that use race by name." *Id.* at 517 (emphases added). It thus "implicates the same grave concerns as a classification specifying a particular race by name." *Id.* Regardless of whether a law names a race or instead relies on ancestral tracing, it is "corruptive of the whole legal order democratic elections seek to preserve," and serves to "demea[n] the dignity and worth of a person." *Id.* The "Native Inhabitants" definition fits that description and thus is "a race-based voting qualification." *Id.*; *see also Arakaki v. Hawaii*, 314 F.3d 1091, 1095 (9th Cir. 2002) (concluding that the Fifteenth Amendment prohibited an ancestry-based restriction that expressly excluded all non-Hawaiians from qualifying as candidates for a state agency's trustee position).

The facts of *Rice* confirm that the "Native Inhabitants" classification is a facially racial one. At issue in *Rice* was a statute that defined the term "Hawaiian"

to mean "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Rice*, 528 U.S. at 509 (quoting Haw. Rev. Stat. § 10-2). Like Guam, Hawaii argued that its definition was not a racial classification "but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race." *Id.* at 514. The Supreme Court rejected that argument, explaining that ancestry was "a proxy for race." *Id.* The "Native Inhabitants" classification at issue here is the same: It draws distinctions between people based on their ancestry, and thus serves as a proxy for race. It therefore violates the Fifteenth Amendment.

B. The "Native Inhabitants Of Guam" Classification Has A Racial Purpose And Effect.

In addition to being facially race-based, the "Native Inhabitants" classification has the "purpose" and "effec[t]" of identifying a *single* race: the Chamorro people. *Rice*, 528 U.S. at 517.

1. The current plebiscite law has the undeniable effect of restricting the plebiscite vote almost exclusively to people of the Chamorro race. Guam does not dispute that 98.6% of the people living on Guam in 1950 who were eligible to receive citizenship pursuant to the Organic Act were of the Chamorro race. *See* E.R. 448-49 (agreeing with Mr. Davis (at E.R. 58) that of the 26,142 non-native nationals living in Guam in 1950, only 354 of them (1.4%) were non-Chamorro,

and agreeing that the 1950 Census data is accurate and authoritative, E.R. 60); *see also* E.R. 76 (expert report); 1950 Census at 54-49 tbl. 38 (providing the relevant census data).

Nor is there any dispute that the term "Chamorro" refers to "a racial group that is usually defined by connections to and lineage with the groups of native peoples that inhabited Guam prior to the influx of people from Western Europe and the United States." E.R. 3-4, 12; *see also* E.R. 58, 448-49; 1920 Census at 2. Guam thus engages in unpersuasive understatement when it states that the current plebiscite law "may have a disproportionate racial impact." Guam Br. 26. The record shows that when the 1950 Organic Act was passed, 98.6% of people who were potentially eligible for citizenship through the Organic Act were Chamorro.

2. Guamanian law uses the terms "Native Inhabitants of Guam" and "Chamorro" interchangeably, reflecting the near-perfect correspondence between the two terms. Specifically, the definition of "Native Inhabitants of Guam" is virtually *identical* to the definition of "Native Chamorro" used in the Chamorro land-trust law. *Compare* 1 Guam Code Ann. § 2102(b), *with* 21 Guam Code Ann. § 75101(d). In fact, the current plebiscite law requires the Guam Decolonization Commission to register *automatically* those individuals who have received or who have been approved to receive a Chamorro Land Trust Commission lease. *See* 3 Guam Code Ann. § 21002.1.

Similarly, the three definitional provisions most directly relevant here—*i.e.*, the 1996 Chamorro Registry's definition of "Chamorro," *see* 1996 Chamorro Registry Law § 2; the 1997 Plebiscite Law's definition of "Chamorro," *see* 1997 Plebiscite Law § 2(b); and the current plebiscite law's definition of "Native Inhabitants of Guam," *see* 1 Guam Code § 2102(b)—*all* rely on the citizenship provisions of the 1950 Organic Act to give them substance, either by mirroring its provisions or incorporating those provisions by reference. Indeed, as explained above, each definition closely corresponds with the first two classes of citizenship bestowed by the 1950 Organic Act. *See supra* 10-12, 15-16. That Guam applies nearly identical definitions to the terms "Chamorro" and "Native Inhabitants of Guam" confirms that these terms are interchangeable, and thus that the Native Inhabitants classification is a racial term.

The close correspondence between Guam's Chamorro population and the population that satisfies the definition of "Native Inhabitants of Guam" has led Guam's legislators and citizens to refer to the 2000 Plebiscite Law as securing a "Chamorro-only" vote. During a 2011 roundtable discussion of a proposed political-status straw poll, for example, a member of the Guam legislature pointed out that the bill apparently would allow "all registered voters in Guam [to] vote … includ[ing], the outside people, even if they're not Chamorro." Transcript of Roundtable Meeting on the Political Status Bills, at 3 (May 20, 2011) (statement of

Sen. Ada) (E.R. 343).[14] The sponsor of the bill immediately "apologize[d]," stating, "[T]hat wasn't the intent," and then clarified that she "*support[ed] a Chamorro-only vote*, and it's up to the people, the Chamorros of Guam *as defined by the law*" to "vote and determine what their determination should be." *Id.* (statement of Sen. Muña Barnes) (emphases added) (E.R. 343). Another senator agreed that the "bill would have to be amended" to implement the sponsor's "intent [that] only … *those eligible to vote on the plebiscite* [would] vote" in the straw poll, bringing the sponsor "more in agreement *with most of us* on this issue." *Id.* at 4 (statement of Sen. Respicio) (emphases added) (E.R. 344).

As testimony opposing the straw-poll bill's expansive franchise mounted—including attacks accusing the sponsor of making a "political move" "to solidify … your career" at the "cost of the Chamorro people," Roundtable Meeting on the Political Status Bills, at 10 (statement of David Sablan) (E.R. 350)—the sponsor again stated that while she wanted to learn the views of non-Chamorro people through the straw poll, she "didn't say that [she] was going to change what *already exists in law today*, where in order for us to decide our political status this status would be through a *Chamorro only vote*." *Id.* at 11 (statement of Sen. Muña

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[14] http://www.guamlegislature.com/Public_Laws_31st/P.L.%2031-92%20SBill%20No.%20154-31.pdf (transcript begins at PDF p.73).

Barnes) (emphasis added) (E.R. 351). The sponsor reiterated that she "supported a Chamorro-only vote," *id.* (E.R. 351), and another legislator noted that the sponsor had agreed to amend the eligibility provision for the straw poll to "limit it to those eligible to vote in the plebiscite," aligning her with "most of our positions." *Id.* at 12 (statements of Sen. Respicio) (E.R. 352). These excerpts represent only a small sample of comments from the discussion indicating that the 2000 Plebiscite Law is widely understood to secure a "Chamorro-only vote."

Contrary to Guam's contention, Mr. Davis is not leaning on the "isolated statements of individual lawmakers" to demonstrate a discriminatory purpose. Guam Br. 30. The entire tenor of the debate, viewed alongside the other evidence of discriminatory intent, confirms that the plebiscite law was widely understood to have been enacted with the purpose of limiting the vote to Chamorro people, as the district court recognized. *See* E.R. 506-10. Guam misapprehends the difference between using a legislator's comments to interpret an ambiguous text, and using a legislator's comments to understand the historical purpose of a law. Thus, in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), the Supreme Court said that in considering whether a zoning decision was made for racial reasons, "[t]he legislative or administrative history may be *highly relevant*, especially where there are contemporary statements by members of the decision making body, minutes of its meetings or reports." *Id.* at 268 (emphasis

added); *see also Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam) (relying on campaign statements to show discriminatory intent). And in *Rice*, the Supreme Court relied on legislative history to show that a change from the word "'races'" to "'peoples'" was purely "cosmetic." 528 U.S. at 516. Here, the roundtable shows that the Native Inhabitants qualification did precisely what legislators and members of the public understood it to do: establish a "Chamorro only" vote.

Guam argues that the "specific bill" that prompted the roundtable discussion did not become law. Guam Br. 31. That is true, but the roundtable discussion is relevant because it offers a candid appraisal of *existing* law, showing that the current plebiscite law is widely understood to secure a Chamorro-only vote notwithstanding the term "Native Inhabitants of Guam," and that "most" of the legislature wanted to keep that feature in place. Roundtable Meeting on the Political Status Bills, at 12 (E.R. 352). Guam also argues that statements by "non-legislators" are "even more powerless to dislodge the words of a statute whose meaning is clear." Guam Br. 31. But again, Mr. Davis is not attempting to interpret ambiguity in a statute: He is showing that legislators and informed Guamanian residents understood the plebiscite law to limit the vote to Chamorros. That the conversation took place "a full decade after the enactment of the law

actually being challenged in this case" (*id.*) merely confirms that the persons who spoke about the law were informed about its purpose and effect.

In any event, Guam has no objection to "committee reports," Guam Br. 31 n.4, and the committee report for the 1997 Plebiscite Law made clear that the plebiscite was designed to secure "Chamorro self-determination," called for the "[u]nity of the Chamorro people," decried actions that "tak[e] away Chamorro peoplehood," and described the law as providing "timely redress to a long injustice suffered by the Chamorro people." 23d Guam Legislature, Committee on Federal and Foreign Affairs, Report on Bill No. 765, Committee Findings (E.R. 203). Moreover, the entire legislature (not just one member) passed another bill discussed at the 2011 roundtable, which repeatedly referred to the commission tasked with educating the electorate for the plebiscite as the "Guam Commission on Decolonization for the Implementation and Exercise of *Chamorro* Self-Determination." Guam Pub. L. No. 31-92 §§ 1-3 (2011) (adding Sections 3104(a), 3105(a), 20007(a) (now 18007(a)), and 21007(a) to Title 3 of the Guam Code Annotated) (emphasis in original); *id.* § 7 (effective date, making a similar reference). "Chamorro," of course, is a specific racial group, and the fact that the legislature used it when referring to the plebiscite is telling.

3. The history and context of the current plebiscite law confirm that it is intended to be race-based. *See Rice*, 528 U.S. at 514-15 (considering similar

history to confirm that the term "Hawaiian" was race-based); *Guinn v. United States*, 238 U.S. 347, 355 (1915) (considering history of discrimination to confirm that Oklahoma exception to literacy requirement for any "lineal descendants" of persons entitled to vote in 1866 was race-based).

Before *Rice* was decided, Guam was more explicit about its racial purpose in proposing and enacting laws pertaining to the plebiscite. Section 102(a) of the Commonwealth Bill, for example, included a Chamorro-only self-determination provision. The Guam legislature created the 1996 Chamorro Registry "for the future exercise of self-determination by the indigenous Chamorro people of Guam." 1996 Chamorro Registry Law § 1. And the 1997 Plebiscite Law expressly provided that only the "Chamorro people" could vote in the political-status plebiscite. 1997 Plebiscite Law § 10.

The 1997 Plebiscite Law was amended just two weeks after *Rice* was decided in February 2000 to create the current plebiscite law. Guam contends that "[w]ithout more," the district court should not have used this sequence of events to "read racial animus into the record." Guam Br. 32. But there is much "more." The amendments did not change the *substance* of the law; they simply changed its *terminology*. Like the change from "'races'" to "'peoples'" in *Rice*, Guam's changes were "at most cosmetic," amounting to little more than swapping out terms. 528 U.S. at 516; *see supra* 8-19. The change from "Chamorro" to "Native

Inhabitants of Guam" made almost no practical difference; it was simply designed, in the wake of *Rice*, to remove explicit references to a particular racial group from the plebiscite statute, without changing its substance or operation.

* * *

For all these reasons, the term "Native Inhabitants of Guam" is a race-based classification, both on its face and in its purpose and effect.

II. Guam's Voting Restriction Is Unconstitutional.

A. Guam's Voting Restriction Violates The Fifteenth Amendment.

The Fifteenth Amendment of the U.S. Constitution provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race." U.S. Const. amend. XV, § 1. As its text makes clear, the amendment "secures freedom from discrimination on account of race in matters affecting the franchise." *Lane v. Wilson*, 307 U.S. 268, 274 (1939). It "nullifies sophisticated as well as simple-minded modes of discrimination," and it "hits onerous procedural requirements which effectively handicap exercise of the franchise," even when "the abstract right to vote may remain unrestricted as to race." *Id.* at 275. The Fifteenth Amendment applies to Guam, *see* 48 U.S.C. § 1421b(u), and protects Mr. Davis, who is a U.S. citizen, *see* E.R. 64.

The district court correctly held that Guam's race-based voting restriction violates the Fifteenth Amendment. There is no dispute that the only persons who

are "eligible to vote" in the plebiscite are those persons who qualify as "Native Inhabitants of Guam." 1 Guam Code Ann. § 2110. Guam has repeatedly "admit[ted] that only 'native inhabitants of Guam' who meet the statutory definition thereof will be permitted to vote in the proposed election at issue." E.R. 12; *see* E.R. 411-12. Guam's Election Commission has undisputedly "refused to register those who do not meet the definition of Native Inhabitants of Guam for the Decolonization Registry, and it will not permit those not on the Decolonization Registry and/or who do not meet the definition of 'Native Inhabitants of Guam' to vote in the plebiscite." E.R. 5, 13; *see also* E.R. 5-6, 13 (agreeing with Mr. Davis's complaint that Guam law criminalizes registration of those who are not eligible). As explained above, the term "Native Inhabitants of Guam" is race-based on its face, *see supra* Part I.A, and also was enacted with a discriminatory intent to prevent qualified non-Chamorro voters from participating in the plebiscite, *see supra* Part I.B. Guam's voting restriction therefore violates the Fifteenth Amendment.

Aside from arguments disputing the significance of Mr. Davis's evidence that the voting restriction is race-based, *see supra* Part I, Guam makes only a handful of arguments to resist application of the Fifteenth Amendment here. None of them has merit.

1. Guam first argues that the current plebiscite law is "facially race-neutral," and thus does not violate the Fifteenth Amendment unless "there is proof of a discriminatory purpose." Guam Br. 26; *see id.* at 25-28. While Guam does not deny that the current plebiscite law produces an "electorate largely comprised of one racial group, i.e., 'Chamorros,'" it nevertheless claims that Mr. Davis failed to show that the Guam legislature had a "discriminatory intent" in enacting the law. *Id.* at 25. This argument misapprehends the law and mischaracterizes the record, which contains ample undisputed evidence showing discriminatory intent.

As an initial matter, Mr. Davis need not establish evidence of discriminatory intent to support his Fifteenth Amendment claim. It is true that this Court "analyze[s] discriminatory intent *when a restriction is race-neutral on its face*," but "the restriction here is not" race-neutral on its face. *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1094 n.5 (9th Cir. 2016) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.)) (emphasis added), *cert. denied*, — S. Ct. —, 2017 WL 2405597 (2017); *see supra* Part I.A (explaining that the restriction here is facially race-based). Such voter restrictions are *per se* unconstitutional: The Fifteenth Amendment "will not tolerate a voter restriction 'which singles out identifiable classes of persons solely because of their ancestry or ethnic characteristics.'" *Davis*, 844 F.3d at 1093 (quoting *Rice*, 528 U.S. at 515) (alteration omitted). Moreover, the Fifteenth Amendment is "quite sufficient to

invalidate a scheme which d[oes] not mention race but instead use[s] ancestry in an attempt to confine and restrict the voting franchise." *Rice*, 528 U.S. at 513.

Even if a showing of discriminatory intent were required, the record is replete with undisputed evidence of such intent. Under *Arlington Heights*, unconstitutional racial intent may be established through various circumstances, including (1) whether the impact of official action bears more heavily on one race than another; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) procedural or substantive departures from normal decision-making; and (5) statements, including legislative or administrative history, reflecting on the purpose of the decision. 429 U.S. at 265-68. Mr. Davis provided evidence bearing on each of the *Arlington Heights* factors, conclusively showing that Guam's voter restriction is race-based. *See supra* Part I.B; *see also supra* 8-21. The district court considered these factors, *see* E.R. 508-10, and agreed that Guam's voter restriction has a discriminatory purpose as a matter of law. That decision was correct.

Undisputed U.S. census data show that Guam's voter restriction not only bears "'more heavily on one race than another,'" 429 U.S. at 266, but in fact produces an electorate that is comprised almost *exclusively* of a *single* race. *See supra* 6-8, 15-16, 32-33; E.R. 76. The Commonwealth Bill, the 1996 Chamorro Registry Law, and the 1997 Plebiscite Law all form a race-conscious "historical

background" (429 U.S. at 267) to the current plebiscite law, especially since each statute utilized a definition of "Chamorro" that tracked or approximated the citizenship criteria now used to define "Native Inhabitants of Guam." *See supra* 8-19. The "sequence of events" (429 U.S. at 267) relevant to the plebiscite law is particularly revealing: Guam enacted a series of purely aesthetic changes to its existing statutes immediately after *Rice* was decided, primarily to replace explicit racial terms with the term "Native Inhabitants of Guam." *See supra* 8-19, 38-40. Moreover, there is no denying that the plebiscite works a procedural and substantive "departure" (429 U.S. at 267) from ordinary voting laws: The process for affirming one's ancestry under penalty of perjury is unique to this plebiscite, *see* 3 Guam Code Ann. §§ 21002, 21009; E.R. 72, and so too is the fact that "Native Chamorros" are *automatically registered* for the plebiscite, *see* 3 Guam Code Ann. § 21002.1. Finally, the "legislative ... history" (429 U.S. at 268), including statements and comments by legislators and others, crystallizes that the current plebiscite law is intended to produce a "Chamorro-only vote." *See supra* 8-21, 33-40.

At bottom, Guam's contention that discriminatory intent is lacking assumes that the legislature's window-dressing is entitled to controlling weight. Guam asserts, for example, that it is "fatal to [Mr. Davis's] Fifteenth Amendment claim" that the Guam legislature "declared" that the law should not be deemed "race

based." Guam Br. 29 (quoting 2000 Plebiscite Law § 1). But such conclusory statements are manifestly insufficient to outweigh the extensive evidence of discriminatory intent marshalled here; indeed, this statement *itself* was part of an effort to mask the 1997 Plebiscite Law's racialized statement of legislative purpose. *See* 1997 Plebiscite Law § 1 (stating that the legislature had "recognized and approved the inalienable right of the Chamorro people to self-determination"). Giving controlling effect to statements like these would give legislators the power to immunize other racially-motivated legislation from constitutional scrutiny.

2. Guam asserts that the district court "wrongly weighed the evidence adduced by [Mr. Davis] to draw an inference of racial animus in his favor." Guam Br. 33. Guam provides no citations or examples of this supposed weighing because the district court did no such thing. All of the facts that the district court relied upon were undisputed, and nothing about the summary-judgment standard bars a court from drawing a *legal conclusion* from the undisputed evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). That is one of the central purposes of the summary-judgment mechanism. Notably, *Rice* itself was resolved at the summary-judgment stage in the lower court, *see* 528 U.S. at 510-11, and that did not prevent the Supreme Court from rejecting as a matter of law Hawaii's argument that the voter restriction was race-neutral.

3. Guam also contends that the Fifteenth Amendment "places no constraint on [the] plebiscite" *at all* because the plebiscite law "is not an election within the meaning of the Fifteenth Amendment." Guam Br. 33; *see id.* at 33-36. According to Guam, the plebiscite provides "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." *Id.* Because Congress "may well [do] nothing" with that transmission, *id.* at 34, Guam argues that *Rice* and similar cases are distinguishable because the laws at issue in those cases pertained either to "public office" or "self-executing initiatives" rather than "advisory plebiscites," *see id.* at 35-36.

Guam's anemic view of the Fifteenth Amendment has no basis in its text or the precedents applying it. The Fifteenth Amendment by its terms applies broadly to "[t]he right … to vote"; contrary to Guam's suggestion, the word "election" appears nowhere in the Amendment's text. U.S. Const. amend. XV, § 1. The Supreme Court has described the Fifteenth Amendment as protecting "the franchise," *Lane*, 307 U.S. at 274, and as applying to *all* "elections to determine public governmental policies," *Terry v. Adams*, 345 U.S. 461, 467 (1953) (op. of Black, J.). *Rice* emphasizes that the language of the Fifteenth Amendment is "as simple in command as it [is] comprehensive in reach," and specifically holds that the Amendment "prohibits *all* provisions denying or abridging the voting franchise

of any citizen or class of citizens on the basis of race." 528 U.S. at 512 (emphasis added).

As against these precedents, Guam cites no authority for the proposition that the Fifteenth Amendment is irrelevant anytime the government claims that an election will not have "binding consequence[s]." Guam Br. 35. The cases that Guam does cite make the obvious point that reports and plebiscites may not necessarily change the legal relations of a territory to the United States or create legally binding obligations. *See* Guam Br. 34, 36 (citing *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998); *Barbosa v. Sanchez Vilella*, 293 F. Supp. 831, 833 (D.P.R. 1967); *New Progressive Party (Partido Neuvo Progresista) v. Hernandez Colon*, 779 F. Supp. 646, 655 (D.P.R. 1991)). These cases do not hold that a plebiscite has no consequences *at all*, or that the Fifteenth Amendment is inapplicable unless the plebiscite is self-executing. Indeed, if Guam's position were the law, many presidential primaries (so-called "beauty contests" in which no convention delegates are selected) would not be subject to the Amendment.

Moreover, this Court already has recognized that the plebiscite *does* have binding consequences. Earlier in this same litigation, the Court held that Guam "understates" the effect of the plebiscite: Once the plebiscite takes place, the "Commission on Decolonization would be *required* to transmit the results to the President, Congress, and the United Nations, thereby *taking a public stance* in

favor of whatever outcome is favored by those voting in the plebiscite." *Davis*, 785 F.3d at 1315 (emphases added) (citing 1 Guam Code Ann. § 2105); *see also* 1 Guam Code Ann. § 2105 (providing that the Commission "shall" transmit the results). This public posture would "make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome," a change that "will affect [Mr.] Davis, who doubtless has views as to whether a change is appropriate and, if so, what that change should be." *Davis*, 785 F.3d at 1315. Indeed, in direct contrast to Guam's assertion that the plebiscite will not decide "any issue of state law or policy," Guam Br. 34, the plebiscite law *expressly states* that its purpose is to allow the "native inhabitants" to "exercise their collective self-determination through a decolonization process," and it defines self-determination as the "[f]reedom of a people to *determine* the way in which they *shall* be governed and whether or not they *shall* be self-governed." 1 Guam Code Ann. §§ 2101, 2102(a) (emphases added). Historical practice on Guam confirms that a plebiscite can have real-world consequences. *See supra* 9-10 (explaining that the 1982 plebiscite resulted in draft legislation and extensive dialogue with federal officials).

* * *

In arguing that the plebiscite law is facially race-based and was enacted with discriminatory intent, Mr. Davis does not contend (and need not contend) that the

legislators who enacted it necessarily harbor racial animus. Rather, it is clear that many Chamorro-only plebiscite advocates believe that restricting the plebiscite to the Chamorro people is justified by the political and cultural situation of those with generations of ancestors on Guam. The Supreme Court has recognized such opinions, but nonetheless has held that they cannot justify restriction of the franchise:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose.

Rice, 528 U.S. at 524. "There is no room under the [Fifteenth] Amendment" or any other federal law "for the concept that the right to vote in a particular election can be allocated based on race." *Id.* at 523. Simply put, "[r]ace cannot qualify some and disqualify others from full participation in our democracy." *Id.*

B. Guam's Voting Restriction Violates The Fourteenth Amendment.

Guam's racial voting restriction also violates the Equal Protection Clause of the Fourteenth Amendment. Like the Fifteenth Amendment, this clause applies with full force in Guam. *See* 48 U.S.C. § 1421b(u).

The Equal Protection Clause requires strict judicial scrutiny of all government-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *See Gratz v. Bollinger*,

539 U.S. 244, 270 (2003). Moreover, "[i]n decision after decision, th[e] [Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). If a challenged statute, therefore, "grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (per curiam) (quotation marks omitted). Strict scrutiny "is not dependent on the race of those burdened or benefited by a particular classification," so "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Gratz*, 539 U.S. at 270 (quotation marks omitted).

Guam makes no meaningful effort to satisfy the strict-scrutiny standard or to show that the district court erred in concluding that Guam's voter restriction fails strict scrutiny. Devoting only a single sentence to the subject, Guam cites a district-court case for the proposition that its voting restriction "is narrowly tailored to achieve the compelling governmental interest of 'providing dignity in simply allowing a starting point for a process of self-determination.'" Guam Br. 48 (quoting *Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1132 (D. Haw. 2015)). Guam

neglects to mention that the Supreme Court stepped in to *directly enjoin* the election addressed by this decision, *see* 136 S. Ct. 581 (Mem.) (2016)—indicating that the plaintiffs were likely to prevail on the merits, *see Winter v. NRDC*, 555 U.S. 7, 20 (2008)—and that the appeal was then dismissed as moot, *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016). Guam does not elaborate on this point or otherwise develop any argument that its voting restriction satisfies strict scrutiny.

In any event, very few compelling state interests may justify racial discrimination, and none of them is implicated here. Guam's brief justifies its racial voting qualification on the ground that only Native Inhabitants of Guam should be able to "express by plebiscite their political status desires." Guam Br. 45. Neither the Supreme Court nor this Court has ever recognized this type of interest as compelling. At most, in *Cipriano*, the Supreme Court assumed, for the sake of argument, that a statute "might, in some circumstances, constitutionally limit the franchise to qualified voters who are … 'specially interested' in the election." 395 U.S. at 704. Nevertheless, the Court explained that "whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Id.* (quotation marks omitted). To Mr. Davis's knowledge, no court has ever determined that a voter can be more or less interested in an election because

of the time at which, or the way in which, his or her ancestors became U.S. citizens—much less because of race.

All of Guam's residents have an interest in and are affected by the results of the plebiscite. Indeed, Guam's contrary position would require this Court to hold that a longtime Guamanian resident who nonetheless is not a "Native Inhabitant" is somehow "substantially less interested [in] or affected [by]" the possibility of Guamanian statehood or independence than a Native Inhabitant who has rarely set foot on Guam, but whose grandfather received U.S. citizenship through the Organic Act. *Cipriano*, 395 U.S. at 704 (quotation marks omitted). That is nonsense, especially given that durational residency requirements themselves cannot further a sufficiently substantial state interest. *See Dunn*, 405 U.S. at 336.

Guam's classification also cannot survive strict scrutiny because its method of achieving its goal is not narrowly tailored. As the Supreme Court has explained, the government bears the burden of demonstrating that "available, workable race-neutral alternatives do not suffice," and the "reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce [the government's compelling goals]." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013). Guam has never explained why no race-neutral alternative to the plebiscite could achieve its goal. Guam's voting qualification must therefore fail under the Fourteenth Amendment.

Guam offers four arguments in support of its position, and none is persuasive.

1. First, Guam re-hashes its argument that the district court erred in resolving this claim at the summary-judgment stage. *See* Guam Br. 37-38. As already explained, this argument is meritless. *See supra* 45.

2. Guam next argues that strict scrutiny is not applicable to its race-based voting restriction. Guam Br. 38-40. To reach this result, Guam assumes that its voting qualification is neither a facial race-based classification nor motivated by a racially discriminatory purpose. *Id.* at 38. That assumption is wrong twice over. *See supra* Part I. Guam then argues that even though this classification affects the right to vote, the district court "was not required to apply strict scrutiny" because "[t]he right to vote … has not always been held to be 'fundamental' in this context such that denial of the franchise to anyone would be unconstitutional." Guam Br. 38-39. Noting that a "lower level of scrutiny" has sometimes been applied to state electoral laws, *id.* at 39 (citing, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)), Guam suggests that the plebiscite law warrants less than strict scrutiny. *See id.* at 47 (arguing that a rational-basis test should be applied).

This argument is meritless. While it may be true that not *all* laws touching on the right to vote in state elections receive strict scrutiny, the Supreme Court has been clear that when the law at issue imposes "'severe' restrictions" on voting

rights, strict scrutiny is applicable. *Burdick*, 504 U.S. at 434. Complete denial of the franchise for reasons entirely beyond one's control is the most severe voting restriction possible, and it is subject to strict scrutiny.

3. Guam relies on the *Insular Cases* to argue that the right to vote in this plebiscite has not been shown to be so fundamental as to warrant extending it to an unincorporated territory. *See* Guam Br. 40-46. It claims that "constitutional flexibility" and "practical considerations" should govern the validity of the plebiscite, rather than the strict scrutiny required by the Fourteenth Amendment (or the categorical requirements of the Fifteenth). *Id.* at 46.

The *Insular Cases* hold that when Congress has not "exten[ded]" constitutional rights to an unincorporated territory, "only fundamental constitutional rights apply" of their own force. *Davis*, 844 F.3d at 1095 (emphasis added) (brackets and quotation marks omitted). Thus, in *Northern Mariana Islands v. Atalig*, the Court addressed whether "the Sixth Amendment right to jury trial" was sufficiently fundamental that it applies to the Northern Mariana Islands "*independent* of any action by Congress." 723 F.2d 682, 688 (9th Cir. 1984) (emphasis added).

This case differs from *Atalig* and is similar to *Davis* in that Congress has already extended the relevant constitutional provision—*i.e.*, the Equal Protection Clause—to cover the territory by virtue of a congressional enactment, *see* 48

U.S.C. § 1421b(u), making the Clause "fully applicable" to Guam without any need to examine whether it would apply independent of congressional action. *Davis*, 844 F.3d at 1095. Thus, the application of Equal Protection Clause principles here is not "in any way limited by [Guam's] status as an unincorporated territory." *Id.* Mr. Davis simply is asking that the Court apply that Clause to an existing plebiscite law.

Nor does *Wabol v. Villacrusis* apply. *See* 958 F.2d 1450 (9th Cir. 1990). In that case, the plaintiff attempted to use the Fourteenth Amendment to override a provision of the United States' covenant with the Northern Mariana Islands that expressly *limited* the application of the Constitution and other federal laws to a particular subject-matter area. *Id.* at 1452 & n.1. Here, by contrast, federal law expressly and fully *extends* the Equal Protection Clause and other constitutional provisions to Guam. 48 U.S.C. § 1421b(u). Indeed, Guam's bill of rights contains its own equal protection clause, *see id.* § 1421b(n), and further ensures equality in voting by providing that the only voter qualifications applicable on Guam shall be "citizenship, civil capacity, and residence," *id.* § 1421b(m).

Mr. Davis does not argue that Guam *must* hold a plebiscite as a matter of fundamental constitutional law. He argues only that Guam must comply with the Fourteenth Amendment in administering the plebiscite.

4. Guam finally argues that the current plebiscite law is subject only to rational-basis review because, like the statute at issue in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), it was "enacted in response to a federal measure." Guam Br. 48; *see id.* at 48-50. This argument grossly mischaracterizes both the Supreme Court's decision in *Yakima* and Congress's actions with respect to Guam.

In *Yakima*, the federal government ceded to the States jurisdiction over criminal and civil matters in certain Indian reservations. 439 U.S. at 472-74. Acting pursuant to this grant of authority, the State of Washington provided that it would exercise the full measure of its newly obtained jurisdiction over certain lands, but would exercise more limited jurisdiction on "allotted and trust lands," unless the affected tribe requested increased state involvement. *Id.* at 475-76. A tribe sued, arguing that Washington's "'checkerboard' pattern of jurisdiction applicable on the reservations of nonconsenting tribes is invalid on its face under the Equal Protection Clause." *Id.* at 499. The Supreme Court disagreed, holding that the classifications used by Washington were non-racial classifications that inhered in the Court's own decisions, and thus were not "suspect." *Id.* at 499, 501. Moreover, Washington did not abridge any "'fundamental right'" because it was "legislating under explicit authority granted by Congress in the exercise of" Congress's "plenary power over Indian affairs." *Id.* at 501. Applying rational-

basis scrutiny, the Court had "no difficulty" concluding that Washington's statute complied with the Equal Protection Clause, because it was "fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands." *Id.* at 502.

Yakima stands for the unremarkable principle that when a state statute draws classifications that are *not* suspect and that do *not* implicate fundamental rights—the opposite of Guam's race-based voting restriction—rational-basis scrutiny is the appropriate standard. 439 U.S. at 501-02. *Yakima* in no way stands for the sweeping proposition that any territorial law "'enacted in response to a federal measure'" should "be subject only to rational basis review." Guam Br. 48. And even if *Yakima* stood for that illogical proposition, Guam cannot credibly claim that when it adopted its Native Inhabitants voting restriction, it was "legislating under explicit authority granted by Congress in the exercise of [its] federal power" over Guam. *Yakima*, 439 U.S. at 501. Congress did not authorize Guam to adopt the current plebiscite law when it passed the Organic Act fifty years earlier; quite the contrary, a Chamorro-only plebiscite was among the "[m]ajor disagreements" that derailed the Commonwealth Bill. Transition Report 8.

III. Guam's Voting Restriction Violates Federal Statutes.

Guam's race-based voting restriction also violates several federal statutes, including the Voting Rights Act and the 1950 Organic Act. As noted above, although the district court did not address these statutes, this Court may affirm on any ground with support in the record. *See supra* 24, 28.

A. Guam's Voting Restriction Violates The Voting Rights Act.

1. Section 2 of the Voting Rights Act prohibits any voter qualification that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (formerly codified at 42 U.S.C. § 1973(a)). For the reasons discussed above, *see supra* Part II.A, Guam's Native Inhabitants voting restriction denied Mr. Davis the right to register "on account of race," 52 U.S.C. § 10301(a), and thus the current plebiscite law is inconsistent with Voting Rights Act.

2. 52 U.S.C. § 10101 (formerly codified at 42 U.S.C. § 1971) contains a broad anti-discrimination provision designed to ensure that duly qualified voters are not excluded from their right to vote on account of their race. Under Section 10101(a), "[a]ll citizens of the United States who are otherwise qualified by law to vote at any election by the people in any ... Territory ... shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude," notwithstanding "any constitution, law, custom, usage, or

regulation" to the contrary. The statute defines the term "vote" to "includ[e] all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(e) (incorporated by reference in 52 U.S.C. § 10101(a)(3)(A)).

Mr. Davis is a registered voter in Guam, E.R. 64, so he is "otherwise qualified by law to vote at any election." 52 U.S.C. § 10101(a). He is nonetheless denied the ability to vote in the plebiscite on account of his race. The racially discriminatory plebiscite law is squarely foreclosed by 52 U.S.C. § 10101.

3. Guam's restrictions on registration and voting in the plebiscite violate 52 U.S.C. § 10101(a)(2), which prohibits the creation of separate classes of voters for any reason: voter qualification laws may not "apply *any* standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same … political subdivision who have been found by state officials to be qualified to vote." 52 U.S.C. § 10101(a)(2) (emphasis added).

This prohibits using two different standards for voter registration within a given jurisdiction. In "any" election, no "standard, practice or procedure," such as voting eligibility, may be used to assess Mr. Davis's eligibility to vote if they are "different from" the registration qualifications used for other voters—including,

here, Chamorros or other "Native Inhabitants" of Guam. Because the plebiscite law creates registration qualifications for Mr. Davis that differ from the registration qualifications applied to others, it cannot be sustained under 52 U.S.C. § 10101(a)(2).

B. Guam's Voting Restriction Violates The Organic Act.

The plebiscite law cannot be reconciled with Guam's bill of rights. That bill of rights, which is part of the 1950 Organic Act as amended, provides that "[n]o discrimination shall be made in Guam against any person on account of race, nor shall the equal protection of the laws be denied," 48 U.S.C. § 1421b(n), and that "[n]o qualification with respect to … any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter," *id.* § 1421b(m).

The Organic Act provides a broader protection against discrimination than other provisions.

First, because "discrimination" in Section 1421b(n) cannot mean the same thing as "equal protection," or else the two clauses in that same subsection would be redundant, the 1950 Organic Act must sweep broader than the Equal Protection Clause. Thus, the fact that the current plebiscite law violates the Equal Protection Clause, *see supra* Part II.B, means *a fortiori* that it violates the Organic Act.

Second, the current plebiscite law adopts an impermissible voter "qualification" on a basis other than "citizenship, civil capacity, and residence." 48 U.S.C. § 1421b(m).

Qualifications based on "citizenship" are universally understood to mean requiring a registrant to be an American citizen in order to participate in an American election. *See, e.g.*, 52 U.S.C. § 20508(b) (prescribing voter registration form that requires attestation of citizenship eligibility); 18 U.S.C. § 1015(f) (criminalizing false claims of citizenship when registering to vote); 18 U.S.C. § 611 (criminalizing voting by noncitizens.).

"Civil capacity" is understood to refer to cognitive impairments that might permit the government to exclude from the franchise otherwise-eligible voters with such impairments. This, too, has no relation to Guam's "Native Inhabitants" qualification. "Residency" is also unrelated to the "Native Inhabitants" requirement because it pertains to what someone considers to be their permanent place of abode when registering. *See generally Hill v. Stone*, 421 U.S. 289, 295-97 (1975) (discussing a voting qualification unrelated to residence).

Thus, the definition of "Native Inhabitants" has nothing to do with the only bases on which voter qualification can be restricted in Guam. It is therefore unlawful under the Organic Act.

CONCLUSION

The "voting structure" that Guam has adopted for its plebiscite is "neither subtle nor indirect" in "granting the vote to persons of defined ancestry." *Rice*, 528 U.S. at 514. This "implicates the same grave concerns as a classification specifying a particular race by name," and is "'by [its] very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 517. For the reasons stated above, this Court should affirm the judgment of the district court.

STATEMENT OF RELATED CASES

Mr. Davis is aware of no related cases now pending before this Court.

Dated: November 21, 2017

Respectfully submitted,

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Subject: 17-15719 Arnold Davis v. Guam, et al "Brief on the Merits (Opening, Answering, Reply, Supplemental, etc)"

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United States Court of Appeals for the Ninth Circuit

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Notice will be electronically mailed to:

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