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, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF GUAM

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This appeal concerns allegations that a Guam voting law discriminates based on race in violation of the Fourteenth and Fifteenth Amendments; the Civil Rights Act of 1870, as amended (CRA), 52 U.S.C. 10101; Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301; and the Guam Organic Act of 1950, 48 U.S.C. 1421 *et seq.* The Department of Justice has substantial responsibility for the enforcement of the CRA and Section 2 of the VRA, which prohibit racial discrimination in voting. See 52 U.S.C. 10101(c), 10308(d). Because these

statutes ban conduct that may also violate the Fourteenth and Fifteenth Amendments, the United States similarly has an interest in ensuring the proper interpretation of these Amendments.

STATEMENT OF THE ISSUE

The United States addresses the following issue:

Whether a Guam law providing that only "Native Inhabitants of Guam" are eligible to register for or vote in the territory's "Political Status Plebiscite," 1 Guam Code Ann. § 2110 (2017), discriminates on the basis of race in violation of the Fourteenth and Fifteenth Amendments, as extended to Guam through the Guam Organic Act, 48 U.S.C. 1421b(u).

STATEMENT OF THE CASE

1. Guam's Plebiscite Law

Under Guam law, only "Native Inhabitants of Guam" are eligible to vote in a "Political Status Plebiscite." 1 Guam Code Ann. § 2110 (2017). The law directs Guam's Election Commission to hold such a plebiscite to help the Guam Commission on Decolonization "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America." *Id.* §§ 2105, 2110. The law also provides that the Election Commission shall conduct the plebiscite when 70% of eligible "Native Inhabitants" register. *Id.* § 2110.

Voters in the plebiscite may support one of three political status options for Guam: (1) "Independence," (2) "Free Association with the United States," or (3) "Statehood." 1 Guam Code Ann. § 2110. The Commission on Decolonization must transmit the plebiscite's results to the President, Congress, and the United Nations. *Id.* § 2105. Guam has not yet held a plebiscite under this law. *Davis* v. *Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015).

For purposes of this legislation, Guam defines "Native Inhabitants of Guam" as "persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons." 3 Guam Code Ann. § 21001(e) (2016). It also defines "descendant" as "a person who has proceeded by birth * * * from any 'Native Inhabitant of Guam' * * * and who is considered placed in a line of succession from such ancestor where such succession is by virtue of blood relations." *Id.* § 21001(c) (emphasis omitted). The Guam Organic Act conferred U.S. citizenship on (1) all individuals who, as of April 11, 1899, were inhabitants of Guam and either were Spanish subjects or had been born on the island; (2) all individuals born on Guam on or after April 11, 1899, who were subject to the jurisdiction of the United States; and (3) the descendants of those individuals. See 48 U.S.C. 1421*l*; Pub. L. No. 630, ch. 512, § 4(a), 64 Stat. 384 (1950) (repealed 1952). The Organic Act's citizenship provisions were in effect only until 1952, when Congress repealed and replaced

them with the Immigration and Nationality Act of 1952, 8 U.S.C. 1407. See Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 279-280 (1952); Appellee's Br. 6-8.

Nearly all of those individuals who obtained U.S. citizenship under the Organic Act were Chamorros, the indigenous people of Guam. According to the 1950 Census, approximately 98.6% of those who gained U.S. citizenship in 1950 through the Organic Act (25,788 of 26,142 people) were racially Chamorro. 1950 Census, Vol. II, Pt. 54, Table 38; see also Doc. 149, at 11.[1] Although some additional individuals became citizens under the Organic Act after the 1950 Census—specifically, those born on Guam to non-citizen parents before Congress repealed the Organic Act's citizenship provisions in 1952—the number of such individuals was likely quite small. Immigration of non-citizens to Guam between 1950 and 1952 was almost certainly minimal because the U.S. government maintained security restrictions on travel to Guam from 1941 until 1962. See Exec. Order No. 11,045, 27 Fed. Reg. 8511 (Aug. 21, 1962), repealing Exec. Order No. 8683, 6 Fed. Reg. 1015 (Feb. 18, 1941).

2. The Proceedings Below

Plaintiff-appellee Arnold Davis is a Guam resident who attempted to register for the plebiscite. *Davis*, 785 F.3d at 1313-1314. The Decolonization Registry

[1] "Doc. __, at __" refers to documents and pages in the district court record. "Br. __" refers to pages in defendants-appellants' opening brief.

rejected his application because Davis, who is white (Doc. 1, at 6), is undisputedly not a "Native Inhabitant" for purposes of Guam's plebiscite law. *Davis*, 785 F.3d at 1314. Davis brought suit against Guam, the Guam Election Commission, and its members in their official capacity (collectively "Guam"), alleging that the plebiscite law's "Native Inhabitants" classification discriminates on the basis of race in violation of the Fifth, Fourteenth, and Fifteenth Amendments, as well as the CRA, the VRA, and the Guam Organic Act.[2] See *ibid.* He sought a declaratory judgment and injunctive relief. *Ibid.*

The district court initially dismissed Davis's complaint on the grounds that Davis lacked standing and his claims were unripe, but this Court reversed. See *Davis*, 785 F.3d at 1314-1316. This Court held that Davis had standing because the Guam law "does provide a tangible benefit to Native Inhabitants that Davis alleges he is unlawfully denied: the right to help determine whether a plebiscite is held." *Id.* at 1315. For similar reasons, this Court also concluded that Davis's challenge was ripe: "By being excluded from the registration process, Davis claims he is unlawfully denied a right currently enjoyed by others." *Id.* at 1316. The Court did not reach the merits of Davis's claims. *Ibid.*

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[2] Davis alleged in his complaint that the Guam law violates 52 U.S.C. 10101 (formerly 42 U.S.C. 1971) (see Doc. 1, at 8), which is part of the CRA.

On remand, the parties filed cross-motions for summary judgment. See Doc. 149, at 1. Davis sought summary judgment on multiple bases, including his claims under the Fourteenth and Fifteenth Amendments, as applied to Guam by the Mink Amendment to the Organic Act, 48 U.S.C. 1421b(u).[3] Doc. 104, at 9, 14, 17.

The district court granted Davis's summary judgment motion on Fourteenth and Fifteenth Amendment grounds under 48 U.S.C. 1421b(u) and denied Guam's motion as moot. Doc. 149, at 2. In concluding that the plebiscite law violates the Fifteenth Amendment, the district court determined that the law impermissibly relies on ancestry as a proxy for race. See Doc. 149, at 7, 10 (citing *Rice* v. *Cayetano*, 528 U.S. 495 (2000)). It examined the law's historical context and concluded that the Guam legislature enacted the "Native Inhabitants" distinction for a racially discriminatory purpose. See Doc. 149, at 11-19. The court rejected

[3] Davis also sought summary judgment under two provisions of the CRA, 52 U.S.C. 10101(a)(1) (providing that anyone otherwise qualified to vote shall be allowed to vote "without distinction of race"), and 52 U.S.C. 10101(a)(2) (prohibiting application of a different "standard, practice, or procedure" for different people in a jurisdiction to determine voter eligibility); Section 2 of the VRA, 52 U.S.C. 10301(a) (prohibiting voting qualifications that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); and two additional provisions of the Guam Organic Act, 48 U.S.C. 1421b(m) ("No qualification with respect to * * * any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter."), and 48 U.S.C. 1421b(n) ("No discrimination shall be made in Guam against any person on account of race, * * * nor shall the equal protection of the laws be denied."). See Doc. 104, at 19; Doc. 115, at 1-2. Davis did not seek summary judgment on his Fifth Amendment claim. See Doc. 104, at 1.

Guam's argument that the plebiscite is not an election within the meaning of the Fifteenth Amendment. See Doc. 149, at 19-20. The district court also concluded that Guam's plebiscite law violates the Equal Protection Clause of the Fourteenth Amendment because the law's racial classification does not survive strict scrutiny. See Doc. 149, at 20-24.

The district court also rejected Guam's contention that, under the *Insular Cases*,[4] these Amendments do not apply to Guam. See Doc. 149, at 24-25. The court recognized that "Congress has explicitly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam." Doc. 149, at 25 (citing 48 U.S.C. 1421b(u)).

Upon finding these constitutional violations under 48 U.S.C. 1421b(u), the district court declined to address Davis's other statutory claims. Doc. 149, at 25. It permanently enjoined Guam from enforcing the plebiscite law. Doc. 149, at 26. Guam brought this appeal. Doc. 163.

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[4] The *Insular Cases* are a line of decisions that the Supreme Court issued in the early 1900s concerning the relationship between the United States and its territories and possessions: *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); and *Dorr* v. *United States*, 195 U.S. 138 (1904).

SUMMARY OF ARGUMENT

This Court should affirm the decision of the district court that Guam's plebiscite law violates the Fifteenth and Fourteenth Amendments, as applied to Guam through the Guam Organic Act, 48 U.S.C. 1421b(u).

1. Guam's plebiscite law intentionally discriminates based on race against non-Chamorros. The term "Chamorro" is generally understood to refer to a racial or ethnic group consisting of the indigenous people of Guam and their descendants. Although the challenged law does not mention the Chamorro race by name, it purposefully uses ancestry as a proxy for race. The plebiscite law's definition of "Native Inhabitants of Guam" is essentially identical to the Guam legislature's definition of "Native Chamorros" in other legislation. Moreover, the context of the plebiscite law's enactment demonstrates that the law purposefully establishes a race-based voting qualification, as an earlier version of the law expressly limited plebiscite registration to Chamorros only. Guam enacted the current version of the law shortly after the Supreme Court decided *Rice* v. *Cayetano*, 528 U.S. 495 (2000), which held that a Hawaii law limiting voting registration to people of a particular ancestry was racially discriminatory in violation of the Fifteenth Amendment. Thus, although Guam's plebiscite law states that it does not intend to discriminate based on race, the district court correctly concluded that it does just that.

2. Congress has not authorized the Guam legislature to enact voting preferences for Chamorros or "Native Inhabitants of Guam." Under the special-relationship doctrine of *Morton* v. *Mancari*, 417 U.S. 535, 551-555 (1974), Congress may authorize a State or territory to provide certain preferences for members of Indian tribes, and those preferences are subject only to rational-basis review. Yet Congress has taken no action recognizing the Chamorro people as a tribe or nation. Nor has Congress, through the Organic Act or any other legislation or action, authorized Guam to provide preferential treatment for Chamorros in elections. Absent such congressional authorization, Guam's plebiscite law violates the Fifteenth Amendment and is subject to strict scrutiny under the Fourteenth Amendment.

3. The Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment apply with full force to Guam, and binding precedent forecloses Guam's argument otherwise. This Court has already recognized in this case and others that the Mink Amendment to the Guam Organic Act expressly extends the Fifteenth Amendment and portions of the Fourteenth Amendment (including the Equal Protection Clause) to Guam and provides that they "shall have the same force and effect there as in the United States or in any State." 48 U.S.C. 1421b(u).

4. Contrary to Guam's argument, the challenged plebiscite is an election within the meaning of the Fifteenth Amendment. Although Guam attempts to support its argument by minimizing the significance of the plebiscite, this Court has already rejected Guam's attempts to downplay the plebiscite's impact. The Fifteenth Amendment governs "any election in which public issues are decided or public officials selected." *Terry* v. *Adams*, 345 U.S. 461, 468 (1953). Guam's plebiscite falls well within this sphere. Thus, Guam's plebiscite law violates the Fifteenth Amendment by excluding individuals based on race from registering for and ultimately voting in the election.

5. Guam has failed to show that the plebiscite law's racial classification survives strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Guam provides almost no explanation for how the voting restriction furthers a compelling government interest, and it points to nothing that would establish that the restriction is narrowly tailored to achieve such an interest. Accordingly, Guam's plebiscite law violates the Fourteenth Amendment.

ARGUMENT

GUAM'S PLEBISCITE LAW VIOLATES THE FIFTEENTH AND FOURTEENTH AMENDMENTS

A. The Plebiscite Law Intentionally Discriminates Based On Race

Guam's plebiscite law purposefully discriminates against non-Chamorros based on race in violation of the Fifteenth and Fourteenth Amendments. The

Fifteenth Amendment guarantees that the "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. This Amendment proscribes the "purposefully discriminatory denial or abridgement by government of the freedom to vote." *Mobile* v. *Bolden*, 446 U.S. 55, 64 (1980) (plurality opinion). Similarly, the Equal Protection Clause of the Fourteenth Amendment prohibits laws that deliberately discriminate based on race. See *Washington* v. *Davis*, 426 U.S. 229, 240 (1976). Guam's plebiscite law creates an intentionally race-based voting qualification that violates both of these Amendments.

1. "Chamorro" Is Generally Understood To Describe A Race Or Ethnicity

The term "Chamorro" describes the "indigenous inhabitants of Guam" and is generally understood to refer to a distinct racial or ethnic group.[5] Indeed, Guam has admitted in this case that "'Chamorro' is a racial group" (Doc. 1, at 3-4). See

[5] See Anthony (T.J.) F. Quan, Comment, *"Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 Asian-Pac. L. & Pol'y J. 3, 59 (2002); see also *id.* at 61 ("Based on anthropological evidence, Chamorros are descendants of peoples from the Southeast Asian region who had migrated to the western Pacific."); Nicole Manglona Torres, Comment, *Self-Determination Challenges to Voter Classifications in the Marianas After* Rice *v.* Cayetano*: A Call for a Congressional Declaration of Territorial Principles*, 14 Asian-Pac. L. & Pol'y J. 152, 159 (2012) (describing the Chamorro people as the indigenous people of the Mariana Islands, including Guam).

Doc. 92, at 2. Guam itself has used the term "Chamorro" to refer to the "indigenous" people of the island who, according to Guam's legislature, have maintained a distinct language and culture for hundreds of years. See Guam Pub. L. 23-130 § 1 (1996) ("[T]he Guam Legislature recognizes that the indigenous people of Guam, the Chamorros, have endured as a population with a distinct language and culture despite suffering over three hundred years of colonial occupation."). Consistent with this common understanding of the term, the U.S. Census—both before and after Guam's enactment of the plebiscite law—has listed "Guamanian or Chamorro" as a "race" along with "White," "Filipino," "Chinese," and others for self-identification purposes. See 1950 Census, Vol. II, Pt. 54, Table 38; Lindsay Hixson et al., *The Native Hawaiian and Other Pacific Islander Population: 2010*, U.S. Census Bureau, 2010 Census Briefs 2 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf.

2. The Plebiscite Law Purposefully Uses Ancestry As A Proxy For Race

The challenged law limits participation in the territory-wide plebiscite to "Native Inhabitants of Guam," which it defines as "persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons," where "descendants" are those who have "proceeded by birth * * * by virtue of blood relations." 3 Guam Code Ann. § 21001(c), (e). Approximately 98.6% of those who gained citizenship in 1950

through the Organic Act were racially Chamorro. See 1950 Census, Vol. II, Pt. 54, Table 38; Doc. 149, at 11.

Although Guam's plebiscite law does not mention the Chamorro race by name, the Supreme Court has held that "[a]ncestry can be a proxy for race." *Rice* v. *Cayetano*, 528 U.S. 495, 514 (2000). Thus, in *Rice* the Supreme Court held that a Hawaii constitutional provision violated the Fifteenth Amendment by limiting registration to vote for trustees for the Office of Hawaiian Affairs to "Hawaiians," or "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands * * * in 1778." *Id.* at 498-499, 508-509 (citation omitted). The Court explained that "racial discrimination" includes singling out identifiable classes of people "because of their ancestry or ethnic characteristics." *Id.* at 515 (quoting *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987)). It concluded that "[t]he Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise." *Id.* at 513. In rejecting Hawaii's argument that the law was not racial and that it merely distinguished based on the date of an ancestor's residence in Hawaii, the Court explained that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516-517.

Recognizing *Rice* as controlling, this Court has also determined that an ancestral voting qualification is in fact race-based in violation of the Fifteenth Amendment. *Davis* v. *Commonwealth Election Comm'n*, 844 F.3d 1087, 1089, 1091 (9th Cir. 2016), cert. denied, 2017 WL 2405597. In *Davis*, this Court struck down a provision of the Commonwealth of Northern Mariana Islands (CNMI) constitution that restricted voting in certain elections to individuals of "Northern Marianas descent," defined as people "of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood." *Id.* at 1090 (citation omitted). The CNMI constitution defined a "full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian" as a person who "was born or domiciled in the Northern Mariana Islands by 1950." *Ibid.* (citation omitted). Although the constitutional provision did not use the word race, and some people who were not of Chamorro or Carolinian ancestry lived on the islands in 1950, the Court determined that the provision's ancestral distinction was a proxy for race. *Id.* at 1092-1093. The Court also explained that *Rice* foreclosed the argument that the constitution's definition was not race-based merely because it relied on "race-neutral criteria." *Id.* at 1093. It concluded that the constitutional provision "relie[d] on ancestral distinctions to limit voting in a territory-wide election in the Commonwealth" and "therefore violate[d] the Fifteenth Amendment." *Id.* at 1090.

As in *Rice* and *Davis*, the ancestral distinction at issue here establishes an intentionally race-based voting qualification. It is particularly telling that the plebiscite law's definition of "Native Inhabitants of Guam" is essentially identical to that of "Native Chamorros" in the Chamorro Land Trust Act (CLTA), a Guam law that leases public land on generous terms to "[N]ative Chamorros" only. 21 Guam Code Ann. § 75107(a) (2017). The CLTA defines "Native Chamorro" as "any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such people," *id.* § 75101(d) (emphasis omitted), covering the same group of people as the plebiscite law. Moreover, beneficiaries of the CLTA are automatically registered to vote in Guam's plebiscite unless they submit a written request otherwise. 3 Guam Code Ann. § 21002.1 (2016). The use of virtually identical definitions for "Native Inhabitants of Guam" and "Native Chamorros" is especially significant given Guam's admission in this case that "Chamorro" is a racial group (see Doc. 1, at 3-4; Doc. 92, at 2) and its concession in previous litigation that the CLTA preference is unconstitutional because it "creates a class of preferred citizens based upon race and national origin." Mem. of Points & Authorities in Supp. of Mot. to Dismiss Pet. for Writ of Mandamus/In the Alternative Mot. for Summ. J. at 19, *Santos* v. *Ada*, No. SP0083-92 (Guam Superior Ct.) (filed May 15, 1992); see *id.* at 30.[6]

[6] Guam is now defending the CLTA preference in a lawsuit in which the (continued . . .)

Indeed, it is unsurprising that the Guam legislature interchangeably uses the terms "Native Inhabitants of Guam" and "Native Chamorros" to describe those who gained U.S. citizenship under the 1950 Guam Organic Act, given that nearly 99% of those who obtained citizenship under the statute in 1950 were racially Chamorro. Thus, although the plebiscite law is not explicitly racial, the Guam legislature's description of the same group that is eligible to register for the plebiscite as "Native Chamorros" in other legislation confirms that the plebiscite law intentionally uses ancestry as a proxy for race.

3. The Context Of The Plebiscite Law's Passage Demonstrates That It Purposefully Establishes A Race-Based Voting Qualification

The history of the plebiscite law further confirms that the law intentionally discriminates based on race. In an earlier version of the plebiscite law, entitled "An Act to Create the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination," the Guam legislature explicitly limited participation in the plebiscite to the "Chamorro people." Guam Pub. L. 23-147 § 10 (1997). But a month after the Supreme Court decided *Rice*, Guam amended the plebiscite law by replacing the words "Chamorro people of Guam" with

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(. . . continued)
United States is alleging that the statute discriminates based on race or national origin in violation of the Fair Housing Act. See Compl. at 2, *United States* v. *Guam*, No. 17-00113 (D. Guam) (filed Sept. 29, 2017). That case is in the early stages of litigation.

"Native Inhabitants of Guam." See Guam Pub. L. 25-106 §§ 11, 21001(e) (2000); Doc. 149, at 12-13.

Despite the deletion of the word "Chamorro," the substance of the law remained largely unchanged: the current version still restricts plebiscite access to nearly the same group of people as the earlier, expressly race-based version. In particular, the pre-*Rice* version limited eligibility to "[a]ll inhabitants of Guam in 1898 and their descendants." Guam Pub. L. 23-147 § 2(b). Similarly, the post-*Rice* version limits eligibility to those who became U.S. citizens under "the 1950 Guam Organic Act and descendants of those persons." Guam Pub. L. 25-106 § 21001(e). The categories of persons who became U.S. citizens under the Organic Act are (1) all individuals who, as of 1899, were inhabitants of Guam and either were Spanish subjects or had been born on the island; (2) all individuals born on Guam between 1899 and 1952 who were subject to the jurisdiction of the United States; and (3) the descendants of those individuals. See pp. 3-4, *supra*; 48 U.S.C. 1421*l*; Pub. L. No. 630, ch. 512, § 4(a), 64 Stat. 384 (1950) (repealed and replaced by the Immigration and Nationality Act of 1952, 8 U.S.C. 1407). Thus, the only differences between the definitions are that the post-*Rice* version (1) omits individuals who lived on Guam in 1898 but not 1899 (a group likely to be miniscule), plus those individuals' descendants, and (2) includes individuals born

on Guam to non-citizens between 1899 and 1952 and their descendants. See pp. 3-4, *supra*.

But these differences in legal definitions make no more than a negligible difference in the racial composition of the groups covered by the pre- and post-*Rice* versions of the plebiscite law—and, thus, fall far short of transforming the plebiscite law into a race-neutral law. Indeed, nearly 99% of individuals who became U.S. citizens in 1950 under the Organic Act—*including individuals born on Guam to non-citizens between 1899 and 1950*—were racially Chamorro. See 1950 Census, Vol. II, Pt. 54, Table 38; Doc. 149, at 11. Although some individuals born on Guam to non-citizen parents between 1950 and 1952 also became U.S. citizens under the Organic Act, that group was likely quite small, given the tight restrictions on migration of non-citizens to Guam during that period, see p. 4, *supra*. Their inclusion almost certainly does not change the racial composition of the covered group in any meaningful way. Therefore, the post-*Rice* alterations to the statute's text did not make the law any less racial, let alone race-neutral. Cf. *Davis*, 844 F.3d at 1093 ("Substituting 'peoples' for 'race' did not make the ancestral voting restriction in *Rice* constitutional under the Fifteenth Amendment. Neither can it here.").

To be sure, the current, post-*Rice* plebiscite law states that it "shall not be construed * * * to be race based." 3 Guam Code Ann. § 21000 (2016); see also

ibid. (stating that the legislature intends that the new registry created by the law "not be one based on race"). But merely asserting that a law is race-neutral does not make it so, particularly given the Guam legislature's incentive to insert that language to try to insulate the law from attack under *Rice*, which the Supreme Court had issued the previous month. Indeed, even after the post-*Rice* amendments, Guam legislators have referred to the plebiscite as a "Chamorro-only vote" and expressed disapproval of a draft bill that would have abandoned this restriction. See Doc. 149, at 15-17 (citing Tr. Roundtable Meeting on the Political Status Bills (May 20, 2011)).

Accordingly, the district court correctly concluded that the plebiscite law establishes a racial classification. To recap, several factors in combination confirm the racial nature of the statute's preference: (1) the law restricts registration to those who became U.S. citizens under the 1950 Organic Act and their descendants (a group that is overwhelmingly Chamorro given that nearly 99% of those who obtained citizenship under that law in 1950 were Chamorro); (2) the Guam legislature used virtually the same definition for "Native Inhabitants of Guam" as it used for "Native Chamorros" in other legislation, and Guam admitted in this case that "Chamorro" is a racial group and conceded in earlier litigation that the preference for "Native Chamorros" was an unlawful classification based on race and national origin; (3) Guam amended the plebiscite law to remove express

references to "Chamorros" only one month after the Supreme Court struck down a similar race-based voting qualification in Hawaii; and (4) Guam legislators have since described the plebiscite as "Chamorro-only." See *Rice*, 528 U.S. at 517 ("[T]he State's argument is undermined by its express racial purpose and by its actual effects."). These factors compel the conclusion that the plebiscite law intentionally establishes a racial classification.

B. Congress Has Not Authorized The Guam Legislature To Enact Voting Preferences For Chamorros Or "Native Inhabitants Of Guam"

Guam incorrectly asserts that Congress has authorized the Guam legislature to pass the plebiscite law limiting eligibility to "Native Inhabitants." See, *e.g.*, Br. 45. Guam appears to rely (see Br. 48-50) on the special-relationship doctrine of *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), which established that Congress can legislate—and, by extension, authorize States and territories to legislate—special treatment for Indian tribes. See *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (*Yakima*). Where Congress legislates a preference for members of an Indian tribe under its Indian Commerce Clause and Treaty Clause powers, courts generally view that preference as a political classification subject to rational-basis review rather than a racial classification triggering strict scrutiny. See *Mancari*, 417 U.S. at 551-555. A State or territory needs congressional authorization, however, to provide its own preference for an Indian tribe under *Mancari*; absent such authorization, the State

or territory must show that the preference survives strict scrutiny. See *Rice*, 528 U.S. at 518 ("If Hawaii's restriction were to be sustained under *Mancari*, * * * it would be necessary to conclude that Congress * * * has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status.").

Here, Congress has taken no action recognizing the Chamorro people as an Indian tribe or determining that they have a similar status. Nor has Congress, through the Organic Act or any other legislation or action, authorized Guam to provide preferential treatment for Chamorros in elections. To the contrary, the Organic Act itself contains a Bill of Rights with nondiscrimination provisions proscribing such disparate treatment, see 48 U.S.C. 1421b(n), and a provision extending the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's voter protections to Guam, see 48 U.S.C. 1421b(u).

Further, early changes to the text of the Organic Act underscore Congress's intent not to authorize Guam to provide special treatment for Chamorros. An original draft of the Organic Act would have allowed the Guam legislature to pass laws "to protect the lands and business enterprises of persons of Guamanian ancestry"—a provision that itself would not have authorized Guam to pass the plebiscite law. But Congress deleted that provision prior to passing the Organic Act after legislators perceived this language as authorizing discriminatory

legislation. See Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 104 (1989) (citing H.R. Rep. No. 7273, 81st Cong., 2d Sess. § 5(n) (1950); 96 Cong. Rec. 7574 (1950)). This action suggests that Congress did not intend to authorize Guam to provide special treatment for Chamorros regarding land or business interests, let alone authorize preferential treatment in *voting*. See *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of a provision by a conference committee "militates against a judgment that Congress intended a result that it expressly declined to enact").

Likewise, in 1968—decades before Guam enacted the plebiscite law—Congress amended the Organic Act to remove a provision that had afforded "persons of Guamanian ancestry" a preference in higher education appointments and the use of service training facilities. See Guam Elective Governor Act, Pub. L. No. 90-497, § 4, 82 Stat. 842, 845. The current version of this provision contains no preference for individuals of Guamanian ancestry. See 48 U.S.C. 1422c(a). This amendment suggests that any limited preferences Congress intended to authorize for Chamorros in the Organic Act were intentionally short-lived. More to the point, even these early preferences never included preferential or exclusive voting rights for native Guamanians. Thus, although the Organic Act granted Guam a measure of self-government and conferred U.S. citizenship upon certain

Guamanians, it did not authorize the Guam legislature to establish a plebiscite exclusive to those Guamanians.

While Guam relies on *Yakima*, 439 U.S. 463, for its assertion that it permissibly enacted the plebiscite law in response to the Organic Act, that decision only demonstrates Guam's error. See Br. 48-50. In *Yakima*, the Supreme Court upheld a Washington State law that extended the State's jurisdiction to Indians within the Yakima Reservation. 439 U.S. at 465. In reaching its conclusion, the Court determined that "Washington was legislating under *explicit* authority granted by Congress." *Id.* at 501 (emphasis added). The Court emphasized that the state law at issue was "not simply another state law. It was enacted in response to a federal measure *explicitly* designed to readjust the allocation of jurisdiction over Indians." *Ibid.* (emphasis added). The Court also determined that the challenged law was "within the scope" of that federal authorization. *Ibid.* Accordingly, the Court applied rational-basis review under the *Mancari* doctrine and held that the law complied with the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 501-502.

Here, by contrast, Congress provided no authorization, let alone explicit authorization, for Guam to legislate voting preferences for Chamorros. Accordingly, to the extent Guam designed the plebiscite law's voting classification in response to the Organic Act, this action was unauthorized. Absent

congressional authorization, Guam's plebiscite law violates the Fifteenth Amendment, see *Rice*, 528 U.S. at 522, and is subject to strict scrutiny under the Fourteenth Amendment, see *Artichoke Joe's Cal. Grand Casino* v. *Norton*, 353 F.3d 712, 731 (9th Cir. 2003) (citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995)).

C. The Fifteenth Amendment And The Equal Protection Clause Of The Fourteenth Amendment Apply With Full Force To Guam

Guam's argument that the equal rights guarantees of the Fifteenth and Fourteenth Amendments do not apply to Guam[7] is foreclosed by binding precedent. This Court has already recognized in this case that "[t]he Organic Act extends the rights afforded by several constitutional provisions to Guam, including the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment." *Davis*, 785 F.3d 1311, 1314 n.2 (9th Cir. 2015). This determination is binding. See *Rainbow Magazine, Inc.* v. *Unified Capital Corp.* (*In re Rainbow Magazine, Inc.*), 77 F.3d 278, 281 (9th Cir. 1996) ("[T]he decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.") (citation omitted).

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[7] See, *e.g.*, Br. 40-42 (suggesting that the right to vote is not necessarily "fundamental" in the territories and therefore may not apply to Guam or may not trigger strict scrutiny); Br. 46 (asserting that the *Insular Cases* established "constitutional flexibility in the territories").

In any event, there is no reason to disturb this determination, as this Court has consistently reached the same conclusion in other cases. This Court has previously recognized the clear statutory basis for application of the Fourteenth Amendment's Equal Protection Clause to Guam. See *Paeste* v. *Government of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015), cert. denied sub nom. *Territory of Guam* v. *Paeste*, 136 S. Ct. 2508 (2016). Similarly, this Court has held that the Due Process Clause of the Fourteenth Amendment applies with full force to Guam, declaring that it "can scarcely imagine * * * any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments 'have the same force and effect' in Guam as in a state of the United States." *Guam Soc. of Obstetricians & Gynecologists* v. *Ada*, 962 F.2d 1366, 1370 (9th Cir.), as amended (June 8, 1992) (referring to 48 U.S.C. 1421b(u)). Consistent with this binding precedent, the district court correctly ruled that the Guam Organic Act extends the Fifteenth Amendment and portions of the Fourteenth Amendment (including the Due Process Clause and the Equal Protection Clause) to Guam, where they apply with full force. See Doc. 149, at 25 (citing 48 U.S.C. 1421b(u)).

D. The Challenged Plebiscite Is An Election Within The Meaning Of The Fifteenth Amendment

Guam incorrectly asserts that the challenged plebiscite is not an election for purposes of the Fifteenth Amendment. Although Guam attempts to support its argument by minimizing the significance of the plebiscite, this Court has already

rejected Guam's efforts to downplay the plebiscite's impact. In its brief, Guam repeatedly calls the plebiscite "non-binding," "symbolic," and "advisory" (see, *e.g.*, Br. 4, 36) and asserts that the plebiscite would have no effect except that the results would be transmitted to the U.S. government and the United Nations (see Br. 33). As this Court has already explained, however, "Guam understates the effect of any plebiscite that would be held if the registration threshold were triggered." *Davis*, 785 F.3d at 1315. This Court has also recognized that the plebiscite "would make it more likely that Guam's relationship to the United States would be altered" and that "[t]his change will affect Davis." *Ibid.* Accordingly, Guam's renewed efforts to diminish the plebiscite's impact must fail.

Consistent with this Court's earlier observations, the plebiscite is an election for purposes of the Fifteenth Amendment. The Supreme Court has held that the Fifteenth Amendment governs "any election in which *public issues are decided* or public officials selected," *Terry* v. *Adams*, 345 U.S. 461, 468 (1953) (emphasis added), and Guam's plebiscite falls well within this sphere. Under Guam law, the Election Commission would conduct the plebiscite on the same day as a general election, 1 Guam Code Ann. § 2110, to resolve a public issue—that is, to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States," *id.* § 2105. Thus, Guam's plebiscite is an election for purposes of the Fifteenth Amendment, and the plebiscite law violates

that Amendment by excluding individuals based on race from registering for and ultimately voting in the election.

E. Guam Has Failed To Show That The Plebiscite Law's Racial Classification Survives Strict Scrutiny Under The Equal Protection Clause Of The Fourteenth Amendment

Because Guam's plebiscite law violates the Fifteenth Amendment, this Court need not decide whether it also violates the Fourteenth Amendment. In any event, the plebiscite law violates the Equal Protection Clause of the Fourteenth Amendment because Guam has failed to show that its racial classification satisfies strict scrutiny. Guam has the burden of proving that the race-based voting restriction is narrowly tailored to further a compelling government interest. See *Johnson* v. *California*, 543 U.S. 499, 505 (2005); see also *Harrington* v. *Scribner*, 785 F.3d 1299, 1307 (9th Cir. 2015) ("We put the burden on state actors to demonstrate that their race-based policies are justified." (quoting *Johnson*, 543 U.S. at 506 n.1)). Guam has not met this burden.

As an initial matter, Guam waived its argument by failing to address it adequately in its opening brief. Guam's argument that the plebiscite law survives strict scrutiny consists, in its entirety, of only three conclusory statements. See Br. 14, 48.[8] Such conclusory assertions, unsupported by legal analysis, do not suffice

[8] The three statements are (1) a sentence in the Summary of the Argument stating that "even if this Court were to determine that strict scrutiny applies,

(continued . . .)

to preserve an issue for appellate review. See *Nevada Dep't of Corr*. v. *Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011) (deeming issues waived for lack of argument), cert. denied, 566 U.S. 911 (2012); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("[A] bare assertion does not preserve a claim."); *ibid.* (finding issues waived due to "failure to present a specific, cogent argument for our consideration").

At any rate, Guam's argument is meritless. The only case Guam cites in support of its assertion is the district court's decision in *Akina* v. *Hawaii*, 141 F. Supp. 3d 1106, 1132 (D. Haw. 2015), appeal dismissed as moot, 835 F.3d 1003 (9th Cir. 2016). See Br. 48. It is true that the district court in *Akina* indicated in dicta that the State of Hawaii had a compelling interest in "bettering the conditions of its indigenous people." [9] 141 F. Supp. 3d at 1132. In making this

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(. . . continued)
Guam's interest in facilitating the self-determination of its colonized population is compelling, and a vote that distinguishes 'native inhabitants' from other residents of Guam is the only way to determine the views of the former" (Br. 14); (2) an argument heading repeating the previous statement almost verbatim (Br. 48); and (3) a single sentence asserting that "[i]f it had to, the 'native inhabitants of Guam' classification could survive strict scrutiny because it is narrowly tailored to achieve the compelling governmental interest of 'providing dignity in simply allowing a starting point for a process of self-determination,' *Akina* v. *Hawaii*, [141 F. Supp. 3d 1106, 1132 (D. Haw. 2015), appeal dismissed as moot, 835 F.3d 1003 (9th Cir. 2016)]—and a purely symbolic one at that" (Br. 48).

[9] The district court in *Akina* concluded that the challenged election, which was organized by a nonprofit corporation, was a private election and therefore did
(continued . . .)

determination, however, the court emphasized that the measure at issue in that case needed to be viewed "in context of Hawaiian history and the State's trust relationship with Native Hawaiians." *Id.* at 1131.

Even assuming the district court's reasoning in *Akina* was correct as to Native Hawaiians, Guam has failed to show that it has a compelling interest in granting race-based voting preferences to its own indigenous population in an election concerning the entire territory's future. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003). It is therefore insufficient for Guam simply to reference another sovereign's interest in benefiting a distinct group of people with its own unique history without attempting to explain how Guam shares that interest with respect to "Native Inhabitants of Guam" in this particular context. See *ibid.* ("[S]trict scrutiny is designed to provide a framework for carefully examining * * * the use of race in that particular context.").

(. . . continued)
not involve state action. 141 F. Supp. 3d at 1127. As an alternative basis for its decision, however, the court assumed for the sake of argument that the Fourteenth Amendment applied. *Id.* at 1131.

After the *Akina* district court denied the plaintiffs' request for a preliminary injunction, the Supreme Court granted an injunction pending appellate review, barring the counting of ballots and certifying of winners in the challenged election. *Akina* v. *Hawaii*, 136 S. Ct. 581 (2015) (mem.). The nonprofit corporation subsequently cancelled the election, and the Ninth Circuit dismissed the appeal as moot. *Akina*, 835 F.3d at 1010-1011.

In any event, Guam has not pointed to anything that would establish that its voting restriction is narrowly tailored to achieve a compelling interest. See Br. 48. Although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does "require serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339; accord *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 993 (9th Cir. 2005); see also *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (concluding that a state actor had not shown narrow tailoring where it "failed to present any evidence that it considered alternatives"). Guam has not presented any evidence that it considered alternatives to its Chamorro-only voting restriction, nor does it explain why such alternatives would be unworkable. Thus, Guam's plebiscite law fails strict scrutiny and violates the Fourteenth Amendment.

CONCLUSION

This Court should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32-1(a) because it contains 6987 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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s/ Dayna J. Zolle
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Date: November 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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