No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

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

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

MICHAEL F. PHILLIPS, ESQ.
Counsel of Record for Applicants

PHILLIPS & BORDALLO, P.C.
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October 28, 2019

APPLICATION FOR EXTENSION OF TIME

To the Honorable Justice Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Guam, The Guam Election Commission, Alice M. Taijeron, Martha C. Ruth, Joseph F. Mesa, Johnny P. Taitano, Joshua F. Tenorio, Donald I. Weakley and Leonardo M. Rapadas (collectively "Applicants") respectfully requests an extension, pursuant to Rule 13.5 of the Rules of Court, of sixty (60) days within which to file a petition for a writ of certiorari up to and including Friday, December 27, 2019.

JUDGMENTS FOR WHICH REVIEW IS SOUGHT

The Judgments for which review is sought are *Arnold Davis v. Guam, Guam Election Commission, et.al.*, No. 17-15719 (July 29, 2019), (attached as Exhibit 1); and *Arnold Davis v. Guam, Guam Election Commission, et.al.*, No. 13-15199 (May 8, 2015), (attached as Exhibit 2).

OPINIONS BELOW

Opinions related to this case and included herein are *Arnold Davis v. Guam, Guam Election Commission, et.al.*, Civil Case No. 11-00035 (District Court of Guam January 9, 2013), (attached as Exhibit 3); *Arnold Davis v. Guam, Guam Election Commission, et.al.*, Civil Case No. 11-00035 (District Court of Guam June 14, 2012), (attached as Exhibit 4); and *Arnold Davis v. Guam, Guam Election Commission, et.al.*, Civil Case No. 11-00035 (District Court of Guam February 1, 2012), (attached as Exhibit 5).

JURISDICTION

28 U.S.C. § 1254(1) vests this Court with jurisdiction over all relevant matters herein.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the decisions of the Ninth Circuit Court of Appeals and District Court of Guam in this case, up to and including December 27, 2019.

1. Governor Lourdes A. Leon Guerrero is the duly elected Governor of the unincorporated territory of Guam. The Governor of Guam is Guam's Chief Executive Officer. Organic Act of Guam (Act of Aug. 1, 1950, as amended through 64 Stat. 384 [48 U.S.C. 1421, et seq.]) (declaring Guam to be "an unincorporated territory of the United States"). The Organic Act vests Governor Leon Guerrero with the executive power over Guam and holds Governor Leon Guerrero responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam. On behalf of Guam, Governor Leon Guerrero respectfully requests an extension of sixty (60) days in which to file a Petition for a Writ of Certiorari.

2. Governor Leon Guerrero makes her request for extension of time in which to file a Petition for a Writ of Certiorari pursuant to Rule 13.5. The Supreme Court Rules authorize Guam to make such a request for an extension under extraordinary circumstances. The *Davis* Opinion from the Ninth Circuit Court of

Appeals reverses and abolishes all of the United States' and Guam's self-determination efforts. The *Davis* ruling renders meaningless the United States and Spain agreeing through treaty to resolve the political status of Guam's native inhabitants, the United States' pledge a half century later while forming the United Nations to effectuate self-determination, and all recent Congressional and local Guam Legislature enactments intended to fulfill the Treaty of Paris, United Nations Charter, Congressional and Presidential commitments.

3. Guam is within her time to file a Petition for a Writ in this case. The Governor of Guam received opinions from her constituency and individuals who have worked on political status and self-determination issues, and after a complete review and consideration of all points of view, the Governor decided it was in the best interest of the people of Guam to file an appeal. Unfortunately, the attorneys representing Guam were not able at that time to continue the representation as directed by the Governor. The Governor asked attorney Michael F. Phillips who has a history of participating in cases with similar causes and constitutional questions if he would take this case. Attorney Phillips agreed to take this case on appeal, represent Guam, and agreed to ask this Court for an extension of time in which to file a Petition for a Writ herein. By the time the Governor was able to ask Attorney Phillips to take this case, the ten (10) day deadline preceding the date to file such a Petition had passed. Neither the Governor nor Attorney Phillips were aware of the past deadline to request an extension at the time the Governor finalized her decision and asked Attorney Phillips to represent Guam. The Governor and

Attorney Phillips have worked diligently to preserve the people of Guam's rights in this case and respectfully ask Justice Elena Kagan to use her discretion and allow Guam to file Guam's intended Petition by granting the Governor of Guam's request for a sixty (60) day extension in which to file a Petition for a Writ of Certiorari in this most serious matter.

4. A present conflict exists between the Sixth and Ninth Circuits. This Court is the only source of resolution for this conflict between circuits and their differing interpretations of law. The split between the two circuits (and other circuit rulings consistent with those of the Sixth Circuit) compels the granting of review of the Ninth Circuit's rulings in *Davis v. Guam*, 785 F. 3d 1311 (9th Cir. 2015) and *Davis v. Guam*, No. 17-15719 (9th Cir. 2019) (striking "Guam's Decolonization Registry" as a violation of the 15th Amendment), both in direct conflict with the Sixth Circuit's Opinion in *Lawson v. Shelby County*, 211 F.3d 331 (6th Cir. 2000) ("The U.S. Constitution protects an individual's right to vote during an election, not the right to register to vote prior to an election."). See *Lawson*, supra, at 336 ("Therefore, the harm to the Lawsons occurred on November 5, 1996 (election day) when they presented themselves at their polling station and were refused the right to vote. ").

5. Spain ceded Guam to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain. Organic Act of Guam, Sec. 1421. "Spain cedes to the United States the ...island of Guam in the

Marianas or Ladrones." *Treaty of Peace between the United States and Spain*; December 10, 1898.

6. Article IX mandates, "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." As recent as 1998, the United States House of Representatives acknowledged Guam's Commission on Decolonization and reaffirmed its commitment to the United States citizens of Guam for increased self-government, consistent with self-determination for the people of Guam. *Davis v. Guam*, 785 F.3d 1311, p. 4, f.n. 3 (9th Cir. 2015).

7. The Ninth Circuit Court of Appeals granted Davis Article III standing to pursue a court challenge to Guam's alleged race based classification. *Davis*, p. 4. The Ninth Circuit framed the issue and controversy as follows:

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

8. The Ninth Circuit subsequently issued its Opinion in *Davis v. Guam, No. 17-15719 (9th Cir. 2019)*, equating Guam's 2000 Plebiscite Law to voting restrictions struck down in *Rice v. Cayetano*, 528 U.S. 495 (2000) and *Davis v. Commonwealth Election Commission*, 844 F.3d 1087 (9th Cir. 2016). *Rice v.*

Cayetano and *Davis v. Commonwealth* involved challenges to **elections** involving governance. Neither case involved challenges to the formation of a native inhabitant registry to be used, if ever, at a later unspecified time all complying with the Treaty of Paris mandate and United Nations required self-determination.

9. There can be no true democratic government without the formal consent of the governed. Self-determination exercised under the supervision of a democratic government can only be exercised through formal election. *Davis* forbids both the United States and the Government of Guam from receiving legitimacy from the native inhabitants of Guam.

10. Respondent Davis is not harmed by Justice Kagan allowing Guam sixty (60) days in which to file the requested Petition. It is undisputed there is no movement on the opposed registry and there is no election planned relating to this contested matter. Appellee Davis no longer resides on Guam. The prejudice to Guam by not being able to petition the Supreme Court is enormous. The Ninth Circuit *Davis* ruling not only conflicts with Sixth Circuit's view and holding regarding the 15th Amendment but also cripples any federal or local attempt to resolve the political status of Guam's native inhabitants through the Government of Guam. Governor Leon Guerrero respectfully requests Justice Kagan grant Guam's request for an additional sixty (60) days to file the required writ application.

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CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant an extension of 60 days, up to and including December 27, 2019, within which to file a petition for writ of certiorari in this case.

Respectfully submitted,

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October 28, 2019

Counsel of Record for Applicants

EXHIBIT 1

FOR PUBLICATION

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; LEONARDO M. RAPADAS, *Defendants-Appellants.*	No. 17-15719 D.C. No. 1:11-cv-00035 OPINION

Appeal from the United States District Court
for the District of Guam
Frances Tydingco-Gatewood, Chief District Judge,
Presiding

Argued and Submitted October 10, 2018
University of Hawaii Manoa

Filed July 29, 2019

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

Opinion by Judge Berzon

EXHIBIT 1

SUMMARY*

Civil Rights / Fifteenth Amendment

The panel affirmed the district court's summary judgment in favor of plaintiff, a Guam resident, who challenged a provision of Guam's 2000 Plebiscite Law that restricted voting to "Native Inhabitants of Guam."

Guam's 2000 Plebiscite Law provided for a "political status plebiscite" to determine the official preference of the "Native Inhabitants of Guam" regarding Guam's political relationship with the United States. Plaintiff alleged, among other things, that the provision of that law restricting voting to "Native Inhabitants of Guam" constituted an impermissible racial classification in violation of the Fifteenth Amendment, which provides that the right of a United States citizen to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

The panel first rejected Guam's contention that the Fifteenth Amendment was inapplicable to the plebiscite because that vote will not decide a public issue but rather requires Guam to transmit the results of the plebiscite to Congress, the President and the United Nations. The panel held that despite its limited immediate impact, the results of the planned plebiscite commit the Guam government to take specified actions and thereby constitute a decision on a public issue for Fifteenth Amendment purposes.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel applied *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016), which respectively invalidated laws in Hawaii and the Commonwealth of the Northern Mariana Islands limiting voting in certain elections to descendants of particular indigenous groups because those provisions employed ancestry as a proxy for race in violation of the Fifteenth Amendment. The panel held that Guam's 2000 Plebiscite Law suffered from the same constitutional flaw. The panel determined that history and context confirmed that the "Native Inhabitants of Guam" voter eligibility restriction so closely paralleled a racial classification as to be a proxy for race. The panel therefore concluded that its use as a voting qualification violated the Fifteenth Amendment as extended by Congress to Guam.

COUNSEL

Julian Aguon (argued), Special Assistant Attorney General; Kenneth Orcutt, Deputy Attorney General; Office of the Attorney General, Tamuning, Guam; for Defendants-Appellants.

Lucas C. Townsend (argued); Douglas R. Cox, Gibson Dunn & Crutcher LLP, Washington, D.C.; J. Christian Adams, Election Law Center PLLC, Alexandria, Virginia; Michael E. Rosman, Center for Individual Rights, Washington, D.C.; Mun Su Park, Law Offices of Park & Associates, Tamuning, Guam; for Plaintiff-Appellee.

Dayna J. Zolle, Attorney; Civil Rights Division, United States Department of Justice, Washington, D.C.; for Amicus Curiae United States.

OPINION

BERZON, Circuit Judge:

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

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

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

I

The factual background of this case is intertwined with the history of Guam (the "Territory"), of its indigenous people, and of its colonization. We recognize that this history, like history in general, is subject to contestation both as to exactly what happened in the past and as to the interpretation of even well-established facts. We do not attempt to settle those debates. "Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue." *Rice*, 528 U.S. at 500.

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

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

limited Bill of Rights modeled after portions of the Bill of Rights in the Federal Constitution, *id.* § 1421b;[2] and (3) extended U.S. citizenship to three categories of people:

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

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

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

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

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

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

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

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

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

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

Registry Act § 20001(a).

for Commonwealth, of the identity of the indigenous Chamorro people of Guam, and of the role that Chamorros and succeeding generations play in the island's cultural survival and in Guam's political evolution towards self-government." *Id.*

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

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

Id. § 10. Voting in the plebiscite was to be limited to "Chamorro People," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality." *Id.* §§ 2(b), 10. The Commission on Decolonization was then directed to "transmit [the results of the plebiscite] to the President and Congress of the United States and the Secretary General of the United Nations." *Id.* § 5.

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

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

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

> (a) '*Chamorro*' shall mean:
>
> > (1) all inhabitants of the Island of Guam on April 11, 1899, including those temporarily absent from the Island on that date and who were Spanish subjects; *and*

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

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

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

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> (2) all persons born on the Island of Guam *prior* to 1800, and their *descendants*, who resided on Guam on April 11, 1899, including those temporarily absent from the Island on that date, and their descendants;
>
> > (i) '*descendant*' means a person who has proceeded by birth, such as a child or grandchild, to the remotest degree, from any '*Chamorro*' as defined above, and who is considered placed in a line of succession from such ancestor where such succession is by virtue of blood relations.

2000 Plebiscite Law § 12.

> the United States of America, and to the Secretary General of the United Nations.

Id. § 2105.

Finally, the 2000 Plebiscite Law states that "[t]he intent of [the law] shall *not* be construed nor implemented by the government officials effectuating its provisions to be race based, but founded upon the classifications of persons as defined by the U.S. Congress in the 1950 Organic Act of Guam." 3 Guam Code Ann. § 21000. Rather, the intent of the law is "to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America," as that "right has never been afforded." *Id.*

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

Arnold Davis, a non-Chamorro resident of Guam, sought to register for the Guam Decolonization Registry and thereby to qualify as a voter in the plebiscite. He was denied registration because he did not meet the definition of "Native Inhabitant of Guam." Davis filed suit in 2011, challenging the 2000 Plebiscite Law on grounds that it violated the Fourteenth and Fifteenth Amendments of the Constitution, the Voting Rights Act of 1965, and the Organic Act.

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

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

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

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

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

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

II

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

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

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

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

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

The Supreme Court acknowledged this foundational principle in *Terry v. Adams*, which addressed a related question—whether an election held by a private organization constituted state action for purposes of the Fifteenth Amendment. *Terry* held that the Jaybird Democratic Association's primary elections, which functionally determined the Democratic Party's candidates for public office in a Texas county, violated the Fifteenth Amendment by excluding black voters. 345 U.S. at 470 (plurality opinion). The Court concluded that although the Jaybird primaries were private in the sense that they were conducted by a private entity, they served a public function because they chose candidates for public office. The Jaybird primaries were therefore covered by the Fifteenth Amendment. *Id.* at 469–70.

A plurality of the Court explained this conclusion as follows: "Clearly the [Fifteenth] Amendment includes any

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

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

Second, the election called for by the 2000 Plebiscite Law commits Guam to a particular course of action: A governmental commission with prescribed duties would be bound to transmit the result of the plebiscite to the federal government and to the United Nations. By requiring the transmission of the plebiscite results, the 2000 Plebiscite Law mandates that the Commission on Decolonization take a public stance in support of the result. 3 Guam Ann. Code § 21000 ("It is the purpose of this legislation to seek the desires to those peoples who were given citizenship in 1950

and to use this knowledge to further petition Congress and other entities to achieve the stated goals."). So, regardless of whether the result of the plebiscite ultimately affects the political status of Guam, the plebiscite will "decide" a public issue—what position a governmental entity will advocate before domestic and international bodies.

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

Were this plebiscite not covered by the Fifteenth Amendment, the scope of the Amendment's prohibition on race-based voting restrictions in elections would be significantly narrowed. Elections regularly require a governmental body to take a stance on issues even though there may be no on-the-ground changes in policy. For example, state initiatives sometimes authorize permission to make a policy change, but the actual policy change is contingent on future occurrences. *See, e.g.*, Proposition 7, Assemb. B. 807, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (allowing the state legislature to vote to change daylight savings time, if the change is allowed by the federal government).[5] Moreover, in presidential elections, political

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

parties in several states employ nonbinding primaries, in which primary voters may express their preference for a candidate but the delegates to a party's national convention are not, technically, bound by that preference. *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2219 n.127 (2001).[6] Concluding that the Fifteenth Amendment only applies to elections triggering an immediate substantive action would exempt a broad category of elections from Fifteenth Amendment protection.

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

III

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

Constitution). Those limits are distinct from the question of whether the Fifteenth Amendment applies if an initiative or referendum *is* held.

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

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

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

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

Determining whether a law discriminates "on account of race" is not, however, always straightforward. Voting qualifications that, by their very terms, draw distinctions based on racial characteristics are of course prohibited. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (collecting cases).

But "[t]he (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). So, in addition to facial racial distinctions, classifications that are race neutral on their face but racial by design or application violate the Fifteenth Amendment.

The well-established hallmarks of such discrimination for constitutional purposes are discriminatory intent, *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481–82 (1997); *City of Mobile v. Bolden*, 446 U.S. 55, 62–63 (1980) (plurality opinion), and discriminatory implementation, *see Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53 (1959) ("Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.").

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

> Ancestry can be a proxy for race. It is that proxy here. . . . For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

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

To confirm its conclusion, *Rice* looked to the history of the "Hawaiian" definition at issue and determined that previously proposed versions of the qualification had expressly referred to "Hawaiians" as a race. *Id.* at 515–516. The Court concluded that removal of the "race" reference

did not change the classification of individuals allowed to vote in the election. The voter qualification therefore remained race-based although it no longer proclaimed as such. *Id.* at 516. *Rice* provides key guidance for determining whether the 2000 Plebiscite Law's restriction of the vote to "Native Inhabitants of Guam" is race-based.

A

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

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

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

such a classification. And it concluded that the ancestral classification at issue was problematic because it operated as a race-based voting restriction. If the Court had meant to suggest that *all* classifications based on ancestry were impermissible, it would have had no need to examine the unique history of the descendants allowed to vote under the challenged law.

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

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

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. [Section] 1981, at a minimum, reaches

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

B

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

Racial categories were once thought to be grounded in biological fact, but shifting understandings of which groups constitute distinct races throughout history reveal such categories to be "social construct[s]," the boundaries of which are subject to contestation and revision. *Ho ex rel. Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 863 (9th Cir. 1998);

> discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*. It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection.

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

see also Saint Francis Coll., 481 U.S. at 610 n.4; *United States v. Nelson*, 277 F.3d 164, 176 n.12 (2d Cir. 2002).[9] Still, as a legal concept, a racial category is generally understood as a group, designated by itself or others, as socially distinct based on perceived common physical, ethnic, or cultural characteristics. So, for example, *Abdullahi v. Prada USA Corp.* stated that "[a] racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits," 520 F.3d 710, 712 (7th Cir. 2008), a definition also reflected in a federal statute outlawing genocide. *See* 18 U.S.C. § 1093(6) ("[T]he term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."). *Saint Francis Coll.* held that racial discrimination includes discrimination based on "ethnic characteristics," 481 U.S. at 612–613, and *Rice* emphasized that the "unique culture of the ancient Hawaiians," combined with their common ancestry—that is, biological descent—distinguished them as a race. 528 U.S.

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

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

Just as race is a difficult concept to define, so is ancestry's precise relationship to race. Ancestry identifies individuals by biological descent. *See Ancestry*, *Black's Law Dictionary* (10th ed. 2014) ("A line of descent; collectively, a person's forebears; lineage."); *Ancestor*, *Oxford English Dictionary* (2d ed. 1989) ("One from whom a person is descended, either by the father or mother; a progenitor, a forefather."). Racial categories often *incorporate* biological descent, as the mechanism through which present day individuals viewed as a distinct group are thought to be connected to an earlier set of individuals with identifiable physical, ethnic, or cultural characteristics. For example, state laws mandating the enslavement and later segregation and subjugation of African Americans identified them by the percentage of blood they possessed from African American ancestors. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"*

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

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

But ancestry and race are not identical legal concepts. State and federal laws are replete with provisions that target individuals based on biological descent without reflecting racial classifications. These include laws of intestate succession, *see, e.g.*, Ariz. Rev. Stat. § 14-2103 (requiring passing of property based on lineage in the absence of a surviving spouse); Cal. Prob. Code §§ 240, 6402 (same); Unif. Prob. Code § 2-103 (Nat'l Conference of Comm'rs on Unif. State Laws 2010) (same); *see also Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."); citizenship, *see, e.g.*, 8 U.S.C. §§ 1431, 1433 (conferring citizenship on children born outside the United States if at least one parent is a U.S. citizen); *id.* § 1153 (immigrant visa preferences for children of U.S. citizens and lawful permanent residents); and child custody laws, *see, e.g.*, Haw. Rev. Stat. § 571-46(7) (providing visitation

privileges for "parents, grandparents, and siblings" of child). As Justice Stevens observed in his dissent in *Rice*, "There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees." 528 U.S. at 545 & n.16.[11]

Moreover, the Supreme Court has squarely rejected any categorical equivalence between ancestry and racial categorization. *Morton v. Mancari*, 417 U.S. 535 (1974), upheld a Bureau of Indian Affairs hiring preference for "Indians," defined as an individual possessing "one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe." 417 U.S. at 553 n.24. Although the hiring preference classified individuals based on biological ancestry, the Supreme Court concluded that the classification was "political rather than racial in nature." *Id.* *Mancari* determined that the hiring preference treated "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," stressing the "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551, 554.

Since *Mancari*, the Supreme Court and our court have reaffirmed ancestral classifications related to American Indians without suggesting that they constitute racial classifications. *See Del. Tribal Bus. Comm. v. Weeks*,

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

430 U.S. 73, 79 n.13, 89 (1977); *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc); *see also Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 851–52 (9th Cir. 2006) (en banc) (Fletcher, J., concurring) (listing federal laws concerning Indians that rely on ancestry); Krakoff, *supra*, at 501 (explaining that American Indian tribal status "assumes ancestral ties to peoples who preceded European (and then American) arrival"). This well-settled law regarding classifications of American Indians confirms that not all ancestral classifications are racial ones.

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

C

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

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

> Proxy discrimination is a form of facial discrimination. It arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group. For example, discriminating against individuals with gray hair is a proxy for age discrimination because "the 'fit' between age

> and gray hair is sufficiently close." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The Supreme Court has recognized that "[a]ncestry can be a proxy for race" in the Fifteenth Amendment context. *Rice*, 528 U.S. at 514; *see Commonwealth Election Comm'n*, 844 F.3d at 1092. *Guinn v. United States*, for example, held that although an exemption to a voting literacy test did not expressly classify by race, "the standard itself inherently brings that result into existence." 238 U.S. 347, 364–65 (1915).[12] Although proxy discrimination does not involve express racial classifications, the fit between the classification at issue and the racial group it covers is so close that a classification on the basis of race can be inferred without more.[13] For that reason, proxy discrimination is "a form of facial discrimination." *Pac. Shores Props.*, 730 F.3d at 1160 n.23.

Notably, proxy discrimination does not require an exact match between the proxy category and the racial classification for which it is a proxy. "Simply because a class . . . does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516–17. In *Rice* the classification at issue—though not explicitly racial—was so closely intertwined with race, given the characteristics of Hawaii's population in 1778, that

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

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

the law was readily understood to be discriminatory in "purpose and operation." *Id.* at 516. At its core, *Rice* inferred the racial purpose of the Hawaii law from the terms of the classification combined with historical facts, concluding that Hawaii's racial voter qualification was "neither subtle nor indirect." *Id.* at 514.

Relying on *Rice*, we held in *Davis v. Commonwealth Election Comm'n* that an ancestry-based voting restriction in the Commonwealth of the Northern Mariana Islands ("CNMI") was a proxy for race discrimination in violation of the Fifteenth Amendment. 844 F.3d at 1093. *Commonwealth Election Commission* concerned a provision of the CNMI Constitution limiting voting in certain CNMI elections to U.S. citizens or nationals "who [are] of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood," a classification defined as someone who was "born or domiciled in the Northern Mariana Islands by 1950 and . . . a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth." *Id.* at 1090 (quoting N. Mar. I. Const. art XII, § 4). We concluded that "the *stated* intent of the provision [was] to make ethnic distinctions," even though the provision was technically tethered to an ancestor's residence in 1950, and even though there was "historical evidence that some persons who were not of Chamorro or Carolinian ancestry lived on the islands in 1950." *Id.* at 1093 (emphasis added). We reasoned that the voter qualification at issue "tie[d] voter eligibility to descent from an ethnic group;" the qualification "referenced blood quantum to determine descent" much like the Hawaiian law invalidated in *Rice*; and the statute implementing the classification referenced race. *Id.* As in *Rice*, the CNMI law left no reasonable explanation for the voting qualifications except that voter eligibility was race-based.

D

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

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

8 U.S.C. § 1407 (1952). This definition is so closely associated with the express racial classification "Chamorro" used in previously enacted statutes that it can only be

sensibly understood as a proxy for that same racial classification.[14]

The 2000 Plebiscite Law's immediate predecessors were not shy about using an express racial classification. The Registry Act established an official list of "Chamorro" people, defined according to the Organic Act, as inhabitants of Guam in 1899 who were Spanish subjects or were born in Guam before 1899, and the descendants of those individuals. Registry Act § 20001(a). In its legislative findings and statement of intent, the Registry Act provided: "The Guam Legislature recognizes that the indigenous people of Guam, the Chamorros, have endured as a population with a distinct language and culture despite suffering over three hundred years of colonial occupation by Spain, the United States of America, and Japan." *Id.* § 1. It further stated: "The Guam Legislature . . . endeavors to memorialize the indigenous Chamorro people . . . who continue to develop as one Chamorro people on their homeland, Guam." *Id.* Finally, the Registry Act recognized that "[t]he Legislature intends for this registry to assist in the process of heightening local awareness among the people of Guam of the current struggle for Commonwealth, of the identity of the indigenous Chamorro people of Guam, and of the role that Chamorros and succeeding generations play in the island's cultural survival and in Guam's political evolution towards self-government." *Id.* As part of those purposes, the law recognized that the registry may be used "for the future

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

exercise of self-determination by the indigenous Chamorro people of Guam." *Id.*

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

The 1997 Plebiscite Law, which the 2000 Plebiscite Law built directly upon, similarly employed express racial classifications. The 1997 law called for a plebiscite limited to the "Chamorro people of Guam," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality." 1997 Plebiscite Law § 2(b). Like the Registry Act, the 1997 Plebiscite Law repeatedly employed the term "Chamorro" to note a distinct group and described that group as facing "colonial discrimination" and "long-standing injustice." *Id.* § 1.

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

preapproved for one through the CLTC are automatically registered in the Guam Decolonization Registry, thereby qualifying them to vote in the plebiscite. 3 Guam Code Ann. § 21002.1.

Several similarities between the 2000 Plebiscite Law and its predecessors reveal that "Native Inhabitants of Guam" is a proxy for "Chamorro," and therefore for a racial classification. First, the 2000 Plebiscite Law's definition of "Native Inhabitants of Guam" is nearly indistinguishable from the definitions of "Chamorro" in the Registry Act, the 1997 Plebiscite Law, and the CLTC. "Native Inhabitants of Guam" incorporates all the citizenship provisions of the Organic Act, as does the definition of "Native Chamorro" in the CLTC; the Registry Act and the 1997 Plebiscite Law mirror the first two sections of those provisions. *Compare* 2000 Plebiscite Law § 21001(e); 21 Guam Code Ann. § 75101(d); Registry Act § 20001(a); 1997 Plebiscite Law § 2(b), *with* 8 U.S.C. § 1407 (1952).[15] That Guam applies

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

nearly identical definitions to the terms "Chamorro," a racial category, and "Native Inhabitants of Guam" indicates that these terms are interchangeable. The closeness of the association is sufficient to conclude that the term "Native Inhabitants of Guam" is a proxy for the "Chamorro" classification.

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

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

The 2000 Plebiscite Law also amends the 1997 Plebiscite Law to eliminate references to "Chamorro" people, but otherwise retains the same features. *See* 2000 Plebiscite Law §§ 7, 9–11. Both statutes establish non-binding elections on

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

Guam's future political status relationship with the United States, the results of which will be transmitted to the federal government and to the United Nations. *Compare* 2000 Plebiscite Law §§ 10–11, *with* 1997 Plebiscite Law §§ 5, 10. Given the similarity in the substantive provisions and in the definitions of "Chamorro" and of "Native Inhabitants of Guam," the substitution of terms does not erase the 1997 Plebiscite Law's premise for the voting restriction—to treat the Chamorro as a "distinct people." *Rice*, 528 U.S. at 515.

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

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

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

Nor is Guam's argument that the classification here is political supported by the Supreme Court's recognition that classifications based on American Indian ancestry are political in nature. Laws employing the American Indian classification targeted individuals "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Mancari*, 417 U.S. at 554; *see also Rice*, 528 U.S.

at 518–20; *United States v. Antelope*, 430 U.S. 641 (1977).[17] Both the Supreme Court and we have rejected the application of *Mancari* for Fifteenth Amendment purposes with respect to non-Indian indigenous groups, namely those in Hawaii and the CNMI respectively. *See Rice*, 528 U.S. at 518–20; *Commonwealth Election Comm'n*, 844 F.3d at 1094.[18] Nothing counsels a different result in this case.

Here, the parallels between the 2000 Plebiscite Law and previously enacted statutes expressly employing racial classifications are too glaring to brush aside. The near identity of the definitions for "Native Inhabitants of Guam" and "Chamorro," the lack of other substantive changes, and

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

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

the timing of the 2000 Plebiscite Law's enactment all indicate that the Law rests on a disguised but evident racial classification.

* * * *

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

IV

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

EXHIBIT 2

No. 13-15199
United States Court of Appeals, Ninth Circuit.

Davis v. Guam

785 F.3d 1311 (9th Cir. 2015)
Decided May 8, 2015

KOZINSKI, Circuit Judge

1312*1312 Douglas R. Cox, Scott P. Martin (argued) and 1313Marisa C. Maleck, Gibson, Dunn *1313 & Crutcher LLP, Washington, D.C., Michael E. Rosman, Center for Individual Rights, Washington, D.C., Mun Su Park, Law Offices of Park and Associates, Tamuning, GU, and J. Christian Adams, Election Law Center, PLLC, Alexandria, VA, for Plaintiff–Appellant.

Leonardo M. Rapadas, Attorney General, and Robert M. Weinberg, Assistant Attorney General (argued), Office of the Attorney General of Guam, Tamuning, GU, for Defendants–Appellees.

Meriem L. Hubbard, Joshua P. Thompson and Jonathan Wood, Pacific Legal Foundation, Sacramento, CA, for Amicus Curiae Pacific Legal Foundation.

Julian Aguon, Law Office of Julian Aguon, Hagatna, GU, for Amicus Curiae Anne Perez Hattori.

Appeal from the United States District Court for the District of Guam, Frances Tydingco–Gatewood, Chief District Judge, Presiding. D.C. No. 1:11–cv–00035.

Before: MARY M. SCHROEDER, ALEX KOZINSKI, and N. RANDY SMITH, Circuit Judges.

Opinion by Judge KOZINSKI ; Dissent by Judge N.R. SMITH.

OPINION

KOZINSKI, Circuit Judge:

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

I. BACKGROUND

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

casetext

EXHIBIT 2

Guam will hold the plebiscite if and when 70 percent of all eligible Native Inhabitants[1] register 1314with the Guam Decolonization *1314Registry. 1 Guam Code Ann. § 2110 ; 3 Guam Code Ann. §§ 21000, 21003. Native Inhabitants aren't required to register, although some will be registered automatically unless they submit a written request not to be registered. 3 Guam Code Ann. § 21002.1. Guam reports that the 70 percent threshold isn't close to being met. Thus, Guam hasn't set a date for the plebiscite and perhaps never will.

[1] Guam law defines "Native Inhabitants" as persons who became U.S. citizens by virtue of the Guam Organic Act of 1950 and their descendants. 1 Guam Code Ann. § 2102. The Organic Act granted citizenship to three classes of persons: (1) Spanish subjects who inhabited Guam on April 11, 1899, when Spain ceded Guam to the United States in the Treaty of Paris (and their children); (2) persons who were born on Guam and resided there on April 11, 1899 (and their children); and (3) persons born on Guam on or after April 11, 1899, when Guam was subject to U.S. jurisdiction. *See* Organic Act of Guam, Pub.L. No. 630, 64 Stat. 384, 384 (Aug. 1, 1950).

Davis tried to register with the Decolonization Registry, but the application was rejected because Davis isn't a Native Inhabitant. Davis agrees he's not a Native Inhabitant but claims that the Native Inhabitant classification violates the Fifth, Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act and the Guam Organic Act[2] because it is a "proxy for race." Davis seeks a declaration that limiting registration to Native Inhabitants is unlawful, and an injunction against using any registry other than Guam's general voter registry in determining who's eligible to register for, and vote in, the plebiscite.

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

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

II. STANDING AND RIPENESS

To "satisfy the standing requirements imposed by the 'case' or 'controversy' provision of Article III," Davis must show that he has suffered, or will imminently suffer, a "concrete and particularized" injury to a "judicially cognizable interest." *Bennett v. Spear,* 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ; *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). That injury must be "fairly traceable to the challenged action of the defendant[s]," and it must appear likely that the injury would be prevented or redressed by a favorable decision. *Bennett,* 520 U.S. at 167, 117 S.Ct. 1154 ; *see also Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). When determining Article III standing we "accept

as true all material allegations of the complaint" and "construe the complaint in favor of the complaining party." *Maya v. Centex Corp.,* 658 F.3d 1060, 1068 (9th Cir.2011) (quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Guam law gives some of its voters the right to participate in a registration process that will determine whether a plebiscite will be held. Davis alleges that the law forbids him from participating on the basis of his race. Davis's allegation—that Guam law provides a benefit to a class of persons that it denies him—is "a type of personal injury [the Supreme Court has] long recognized as judicially cognizable." *Heckler v. Mathews,* 465 U.S. 728, 738, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). The plaintiff in *Mathews* challenged a 1315 provision *1315 of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits. *Id.* at 731–35, 104 S.Ct. 1387. The statute, however, "prevent[ed] a court from redressing this inequality by increasing the benefits payable to" the male workers. *Id.* at 739, 104 S.Ct. 1387. Thus, the lawsuit couldn't have resulted in any tangible benefit to Mathews. The Supreme Court nevertheless held that Mathews had standing to challenge the provision because he sought to vindicate the "right to equal treatment," which isn't necessarily "coextensive with any substantive rights to the benefits denied the party discriminated against." *Id.; see also Allen,* 468 U.S. at 762, 104 S.Ct. 3315 ; 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* §§ 3531.4 at 215–16, 3531.6 at 454–56 (3d ed.2008). We read *Mathews* as holding that equal treatment under law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it. Guam's alleged denial of equal treatment to Davis is thus a judicially cognizable injury.

Guam concedes that its law excludes Davis from the registration process because he's not a Native Inhabitant. It argues, however, that the Native Inhabitant classification can't injure Davis because the plebiscite is "not self executing and effects no change in political status, right, benefit or privilege for any individual." But this contradicts *Mathews,* which held that unequal treatment is an injury even if curing the inequality has no tangible consequences. 465 U.S. at 739, 104 S.Ct. 1387. Moreover, Guam understates the effect of any plebiscite that would be held if the registration threshold were triggered. After the plebiscite, the Commission on Decolonization would be required to transmit the results to the President, Congress and the United Nations, 1 Guam Code Ann. § 2105, thereby taking a public stance in favor of whatever outcome is favored by those voting in the plebiscite.[3] If the plebiscite is held, this would make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome, rather than one of the other options presented in the plebiscite, or remaining a territory. This change will affect Davis, who doubtless has views as to whether a change is appropriate and, if so, what that change should be. Guam law thus does provide a tangible benefit to Native Inhabitants that Davis alleges he is unlawfully denied: the right to help determine whether a plebiscite is held. This is not unlike the right to participate in jury service, which may not be denied on a constitutionally unequal basis. *See Batson v. Kentucky,* 476 U.S. 79, 87, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (citing *Carter v. Jury Comm'n of Greene Cnty.,* 396 U.S. 320, 329–30, 1316 90 S.Ct. 518, 24 L.Ed.2d 549 (1970)).[4] *1316 Davis's challenge to the Native Inhabitant classification is also ripe because he alleges he's currently being denied equal treatment under Guam law. The registration process is ongoing and Guam must hold the plebiscite if 70 percent of eligible Native Inhabitants register. By being excluded from the registration process, Davis claims he is unlawfully denied a right currently enjoyed by others: to help determine whether a

plebiscite will be held. The ripeness question thus "coincides squarely with standing's injury in fact prong." *Bova,* 564 F.3d at 1096 (quoting *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir.2000) (en banc)); *see also* 13B *Federal Practice & Procedure* § 3531.12 at 163.

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

[4] Although *Batson* involved a criminal defendant's challenge to his conviction, the Court reiterated its holding in *Carter* that when a state "den[ies] a person participation in jury service on account of his race, the [s]tate unconstitutionally discriminate[s] against the excluded juror." *Batson,* 476 U.S. at 87, 106 S.Ct. 1712 ; *see also Carter,* 396 U.S. at 329, 90 S.Ct. 518 ("People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."). Whether participation in Guam's registration process is "deemed a right, a privilege, or a duty," Guam must "hew to federal constitutional criteria" when determining who is eligible to register. *Id.* at 330, 90 S.Ct. 518.

Guam maintains that its plebiscite law does not, in fact, violate Equal Protection, the Fifteenth Amendment or the Voting Rights Act. But we need not resolve these issues to determine whether Davis's claims satisfy the case or controversy requirement of Article III. These are merits questions, and standing doesn't "depend[ ] on the merits of the plaintiff's contention that particular conduct is illegal." *Warth,* 422 U.S. at 500, 95 S.Ct. 2197.

CONCLUSION

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

In the district court, Davis also sought to enjoin Leonardo Rapadas, the Attorney General of Guam, from enforcing a provision of Guam's criminal law that makes it a crime for a person who knows he's not a Native Inhabitant to register for the plebiscite. *See* 3 Guam Code Ann. § 21009. The district court held that Davis lacked standing to seek this injunction because he had not "shown that he is subject to a genuine threat of imminent prosecution." While Rapadas is still listed as a nominal defendant on appeal, Davis doesn't argue that the district court erred in dismissing this claim. Therefore, any claim of error is waived. *See Wagner v. Cnty. of Maricopa,* 747 F.3d 1048, 1059 (9th Cir.2013).

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

AFFIRMED in part, REVERSED in part, and REMANDED.

Appellees other than Rapadas shall pay costs on appeal. Rapadas shall recover his costs, if 1317**any, from Davis.** *1317N.R. SMITH, Circuit Judge, dissenting:

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

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

> (a) The Guam Election Commission shall conduct a "Political Status Plebiscite", at which the following question, which shall be printed in both English and Chamorro, shall be asked of the eligible voters:
>
> In recognition of your right to self-determination, which of the following political status options do you favor? (Mark ONLY ONE):
>
> 1. Independence ( )
>
> 2. Free Association with the United States of America ( )
>
> 3. Statehood ( ).
>
> Person eligible to vote shall include those persons designated as Native Inhabitants of Guam, as defined within this Chapter of the Guam Code Annotated, who are eighteen (18) years of age or older on the date of the "Political Status Plebiscite" and are registered voters on Guam.
>
> The "Political Status Plebiscite" mandated in Subsection (a) of this Section shall be held on a date of the General Election at which seventy percent (70%) of the eligible voters, pursuant to this Chapter, have been registered as determined by the Guam Election Commission.

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

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

It is a fundamental principle that federal courts are courts of limited jurisdiction, limited to deciding "cases" and "controversies." U.S. Const. art. III, § 2. The Supreme Court has repeatedly insisted that a case or controversy does not exist, unless the plaintiff shows that "he has *sustained or is immediately in danger of sustaining* some direct injury as the result of the challenged official conduct." *City of L.A. v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted) (emphasis added). The Court admonished that the "injury or threat of injury must be *both real and immediate,* not *conjectural or hypothetical.* " *Id.* (internal quotation marks omitted) (emphasis added). "[R]ipeness is peculiarly a question of timing," and ripeness is particularly at issue when a party
1318 seeks pre-enforcement review of a statute or *1318
regulation. *Thomas v. Anchorage Equal Rights Com'n,* 220 F.3d 1134, 1138 (9th Cir.2000). A "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford,* 564 F.3d 1093, 1096 (9th Cir.2009) (quoting *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). The Supreme Court has consistently held that the ripeness doctrine aims "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (internal quotation marks omitted). "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy." *In re Coleman,* 560 F.3d 1000, 1005 (9th Cir.2009) (internal quotation marks and citations omitted).

The district court found Davis's alleged injury was not ripe. "Although a district court's determination of federal subject matter jurisdiction is reviewed de novo, the district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1225 (9th Cir.1989) (internal citations omitted). The district court conducted a hearing and then made certain factual findings as to the ripeness of Davis's claim. The district court found that: (1) there is no date currently set for the plebiscite; (2) "there is no discernible future election in sight"; (3) there is no "real threat of the election occurring any time soon"; (4) there is "little likelihood that the plebiscite will be scheduled any time in the near future"; (5) Davis's own statements actually support the conclusion that the "plebiscite is not likely to occur any time soon, or if at all"; (6) Davis had not "successfully argued [or] shown that he is presently threatened with or has already suffered any irreparable damage or injury because he cannot register for a plebiscite that is *more than likely not to occur.* " The district court concluded that "until the plebiscite [Davis] seeks to register for is "certainly impending," that Davis had no claim.

The district court's factual findings are supported by the record. Davis does not challenge the findings as clearly erroneous. The majority does not hold the findings to be clearly erroneous. Applying the ripeness precedent to these findings, this controversy fails for ripeness. The inability to register for an opinion poll, that is not currently scheduled and unlikely to ever occur, is not a matter of "sufficient ripeness to establish a concrete case or controversy." *Thomas,* 473 U.S. at 579, 105 S.Ct. 3325. Whether the plebiscite occurs is contingent on a series of events that have not yet occurred and may never occur. Thus, at this point, there is not a "realistic danger" that the plebiscite will occur. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). Our court's role is "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir.2000). Davis's allegations of future injury are too speculative to be "of sufficient immediacy and

reality" to satisfy the constitutional requirement of ripeness. *See In re Coleman,* 560 F.3d at 1005.[2] *1319 Thus, the *1319 matter is not ripe and our court has no jurisdiction.

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

In its decision, the majority instead concludes that Davis has standing to challenge the plebiscite, not based on voting rights cases, but based on one's ability to seek Social Security benefits.[3] In fact, the majority cites no precedent suggesting that forbidding Davis from registering for this plebiscite implicates the voting rights protected under the Constitution. The Fifteenth Amendment only applies to an "*election* in which public issues are *decided* or public officials *selected.* " *Terry v. Adams,* 345 U.S. 461, 468, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (emphasis added). Davis does not allege that he is being denied the right to register for an *election.* Davis does not allege the plebiscite will select "candidates for public or party office." *See* 52 U.S.C. § 10310(c). Davis does not allege the plebiscite will change Guam's Constitution. Davis does not allege the plebiscite will enact, amend, or repeal any statute. Despite the language in the majority's opinion to the contrary, Davis does not allege the plebiscite will change the rights of Guam's citizens or that the plebiscite itself will *change* or *decide* Guam's political status in relationship with the United States. Rather, the injury alleged by Davis is merely being denied the right to register to participate in an opinion poll that will likely never occur. Clearly, the inability to register for this opinion poll is not equivalent to being denied the right to register to vote in the type of vote contemplated and protected by the Constitution.

[3] I note the majority also cites *Batson v. Kentucky,* 476 U.S. 79, 85–86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) to support its position. Op. 1315. However, in *Batson,* the United States Supreme Court held that a prosecutor's use of peremptory challenges based on race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson,* 476 U.S. at 85–86, 106 S.Ct. 1712. The Court's focus was protecting the defendant's *constitutional right to a trial by jury. Id.* The Court found that the jury must be "indifferently chosen to secure the *defendant's right* under the Fourteenth Amendment." *Id.* at 87, 106 S.Ct. 1712 (internal quotation marks omitted) (emphasis added). It is difficult to understand how the majority extrapolated the holding in this case to its conclusion that Davis's right to register for the plebiscite "is not unlike the right to participate in jury service, which may not be denied on a constitutionally unequal basis." Op. 1315.

Even if prohibiting Davis from registering for the plebiscite were a violation of his voting rights, this case "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). The plebiscite is not currently scheduled and as the district court found, it is not likely to *ever occur* ! The condition precedent to even scheduling the opinion poll is obtaining the registration of

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

The majority mistakenly suggests that *Heckler v. Mathews,* 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) would apply.[4] However, in *Mathews,* there was *1320 no question that Social Security pension benefits *would be paid.* There was no uncertainty as to application of the allegedly unconstitutional pension offset provision. Thus, there was no question the issue was ripe. Indeed, the Court was not asked to determine ripeness and the Court did not address ripeness. Rather, the issue before the Court was determining the plaintiff's standing. The Court was asked to answer the question of whether the plaintiff's standing was dependant on his ability to receive additional benefits if he prevailed. *See Mathews,* 465 U.S. at 735–38, 104 S.Ct. 1387.

[4] The plaintiff in *Mathews* claimed that he was subjected to unequal treatment as to Social Security benefits "solely because of his gender." *Mathews,* 465 U.S. at 738, 104 S.Ct. 1387. Specifically, the plaintiff alleged that "as a nondependent man, he receiv[ed] fewer benefits than he would if he were a similarly situated woman." *Id.* The Court focused on two factors when determining the plaintiff had standing (1) his injury was concrete as "there was no doubt about the direct causal relationship between the government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender"; (2) that he was denied equal treatment solely because of gender (a protected class). *Id.* at 739–40 & n. 9, 104 S.Ct. 1387. The court concluded that the plaintiff's standing did not depend on his ability to obtain increased Social Security benefits if he prevailed. *Id.* at 737, 104 S.Ct. 1387.

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

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

casetext

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

Arnold Davis, on behalf of himself and all others similarly situated, Plaintiff, vs. 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.	CIVIL CASE NO. 11-00035 **ORDER**

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

I. CASE OVERVIEW

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

A. Factual Background

EXHIBIT 3

The following facts are taken as established for the purpose of this motion.[1] On November 22, 2011, Plaintiff filed his complaint for declaratory and injunctive relief. *See* Compl., ECF No. 1. In the complaint, he alleges discrimination in the voting process by Guam and the Defendants. *Id.* Plaintiff alleges that under Guam law, a 'Political Status Plebiscite' is to be held concerning Guam's future relationship with the United States.[2] *Id.*, ¶8. Plaintiff, a white, non-Chamorro, male and resident of Guam, states that he applied to vote for the plebiscite but was not permitted to do so because he did not meet the definition of "Native Inhabitant of Guam." "Native Inhabitants of Guam" are defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 1 Guam Code Ann. § 2102, *id.*, ¶¶ 20 and 21.

The Guam Legislature established a "Guam Decolonization Registry" for the "purpose of registering and recording the names of the Native Inhabitants of Guam." 3 Guam Code Ann. §

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

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

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

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

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

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

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

1 Guam Code. Ann. § 2110.

21001(d); *see* Compl., ECF No. 1, ¶ 17. The law further provides "[a]ny person who willfully causes, procures or allows that person, or any person, to be registered with the Guam Decolonization Registry, while knowing that the person, or other person, is not entitled to register with the Guam Decolonization Registry, shall be guilty of perjury as a misdemeanor." 3 Guam Code. Ann. § 21009. The plebiscite would ask native inhabitants which of the three political status options they preferred. The three choices are Independence, Free Association with the United States, and Statehood. *See* Compl., ECF No. 1, ¶ 8.

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

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

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

In his Prayer for Relief, Plaintiff seeks a judgment: enjoining Defendants from preventing Plaintiff and those similarly situated from registering for and voting in the Political Status

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

B. Statutory History of the Plebiscite Vote

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

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

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

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

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

C. Procedural History

On November 22, 2011, Plaintiff filed his complaint herein. *See* Compl., ECF No. 1. On December 2, 2011, the Attorney General of Guam, Leonardo M. Rapadas, a named Defendant, on behalf of himself and all named defendants, moved to dismiss the complaint on the ground that it failed to present a case or controversy. *See* Def.s' Mot., ECF No. 17.

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

On January 3, 2012, Plaintiff filed his opposition to Defendant's Motion to Dismiss and

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

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

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

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

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

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

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

II. JURISDICTION AND VENUE

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

Venue is proper in this judicial district, the District of Guam, because Plaintiff and Defendants reside on Guam, and because all of the events or omissions giving rise to Plaintiff's

claims occurred here. *See* 28 U.S.C. § 1391.

III. STANDARD OF REVIEW

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

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

IV. APPLICABLE STANDARD FOR MOTION TO DISMISS

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

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

V. DISCUSSION

The Defendants moved to dismiss the Plaintiff's complaint arguing that there was no case or controversy before the court. In the *amicus curiae* brief Ms. Hatorri argued that there was no standing and the case was not ripe. The Magistrate Judge agreed with Ms. Hattori and found the Plaintiff's claims were not ripe for adjudication. He recommended dismissal of the Plaintiff's Complaint for the following reasons:

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

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

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

A. No Opportunity to be heard on ripeness issue.

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

On the last day for the filing of the Plaintiff's opposition to the motion– December 30, 2011, a Motion for Leave to File an *amicus curiae* brief was filed by Ms. Hattori supporting

dismissal based upon a ripeness argument. *See* Mot., ECF No. 20. On April 6, 2012, the Magistrate Judge granted leave to the amicus to file the brief containing the ripeness arguments. However, there was no provision in the Magistrate Judge's order permitting the Plaintiff to file an opposition, nor was a hearing scheduled to hear argument on the matter.

The Government argues that the Plaintiff should not be found wanting in this regard. "First, 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' Moreover, courts ... have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002); also citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

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

B. Article III

Article III of the United States Constitution requires that those who seek to invoke the power of the federal courts must allege an actual case or controversy. *See* U.S. CONST. art. III; *see also Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (*citing Flast v. Cohen*, 392 U.S. 83, 94–101 (1968)). Subsumed within this restriction are two components. *Colwell v. Dep't of Health*

& Human Servs., 558 F.3d 1112, 1121-23 (9th Cir. 2009). "Standing and ripeness present the threshold jurisdictional question of whether a court may consider the merits of a dispute." *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). "Both standing and ripeness originate from the Constitution's Article III requirement that the jurisdiction of federal courts be limited to actual cases and controversies." *Id.* at 1204-05.

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

1. Standing

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

> [A] plaintiff must show that he [or she] is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

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

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

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

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

In order to establish an injury in fact necessary to a claim for injunctive relief, the moving party must demonstrate that a defendant's conduct is causing irreparable harm. *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992). This requirement cannot be met absent a showing of a real or immediate threat that the plaintiff will be wronged again. *Lyon*, 461 U.S. at 101. While past wrongs consist of evidence bearing on whether there is a real and immediate threat of repeated injury, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse

effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Thus, "there must be sufficient immediacy, reality and causality between defendants' conduct and plaintiffs' allegations of future injury" to warrant injunctive relief. *Weiser v. Koch*, 632 F.Supp. 1369, 1373 (S.D.N.Y. 1986).

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

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

The Plaintiff "must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him." *Stoianof v. State of Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983). "A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite to

preliminary injunctive relief." *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

The Magistrate Judge found the Plaintiff had not been charged with a misdemeanor, nor had he shown that he is subject to a genuine threat of imminent prosecution. *See Wolfson v. Brammer*, 616 F. 3d 1045, 1058 (9th Cir. 2010), quoting *San Diego Cnty. Gun rights Comm. v. Reno*, 98 F. 3d 1121, 1126 (9th Cir. 1996). In evaluating threats of imminent prosecution, the court considers: (1) whether plaintiff has articulated a concrete plan to violate the law in question; (2) whether prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) whether the past history of past prosecution or enforcement under the challenged statute suggests that prosecution may, in fact, be imminent. *Id.* While the Plaintiff may believe there is a possibility of prosecution, that remains speculative at best. A general threat of prosecution is not enough to confer standing. *See e.g. Poe v. Ullman*, 367 U.S. 497, 501 (1961) (mere allegation that state attorney intended to prosecute any offense against the local law held insufficient to confer standing).

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

2. Ripeness

The question of timing turns on the jurisdictional doctrine of ripeness. "The 'basic rationale' for the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements' over policy with other branches of the federal government." *Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990), citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

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

The Defendants argue that the Plaintiff, himself, admits that the controversy as presented is not ripe. The Defendants rely on an article written by the Plaintiff which was published in the *Marianas Variety* titled, "Getting Out the Vote." *See* Defs' Resp., ECF No. 47, Attachment. In the article, the Plaintiff states:

> With regard to the actual goal involved – the plebiscite itself, the end of the self-determination rainbow, as it were – near-term optimism has given way to financial and other realities. Hope for a plebiscite as early as 2012 has now faded to 2016 or beyond. Funding isn't the only problem, either. Guam law requires registration of "70% of eligible voters" before a political status plebiscite can occur. Of course nobody knows what that figure actually is, as it changes daily. Senator Pangelinan is responsible for that particular bit of whimsical fluff.
>
> A while ago I compared the growth rate of signatures on the Decolonization Registry to the timeline since the Registry was created. Even with a newly-enacted law that automatically adds everyone who qualifies for a CLTC lease it looks like they have a tough row to hoe. I suspect that most of those automatically registered are blissfully unaware they were signed up by proxy.
>
> I compute a high probability of reaching the 70% level sometime early in the 25th century. Even that may be a bit optimistic however, because it's become apparent that virtually all the eligibles who wished to sign – or were signed up automatically by their friends at the Guam Election Commission – have already done so.
>
> Meanwhile, due at least partly to Guam's standing as the undisputed champion in national birth rate statistics (with Utah a distant second) the number of 'Native Inhabitants' reaching voting age annually exceeds the number signing up to vote. It looks like they're actually losing ground in the struggle to reach that magical 70%.
>
> It's time to regroup, I suppose, or the plebiscite will forever be an alluring mirage out there on the horizon. I believe we can expect a change to eliminate the 70% requirement or reduce it to something like, say, 10%, which is approximately where they stand at the moment. They should probably do it soon, because that number gets smaller every day.

Id.

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

Because of the similarities of facts and issues, the court asked the parties to consider the applicability of the Commonwealth of the Northern Marianas Islands ("CNMI") case, *John Davis, Jr. v. Commonwealth Election Commission*, Case No. 1-12-CV-00001, 2012 WL

2411252 (D.N.M.I. June 26, 2012). In *Davis,* the plaintiff, sought judicial relief to permanently enjoin the chairperson and the executive director of the Commonwealth Election Commission ("CEC" or "the Commission") from denying him the right to vote on any initiative to amend or repeal Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI"). Article XII restricts ownership of permanent and long-term interests in real property within the Commonwealth to persons of Northern Marianas descent ("NMD"). In 1999, Article XVIII of the Commonwealth Constitution was amended to prohibit non-NMDs who otherwise are qualified voters from voting on initiatives to change Article XII.

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

> A claim is "not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all[,]" or if it is "too speculative whether the problem [plaintiff] presents will ever need solving." *Texas v. United States*, 523 U.S. 296, 300, 302 (U.S. 1998) (internal citation omitted). However, "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Reg'l Rail*, 419 U.S. at 143.

Davis, 2012 WL 2411252 at *6.

Chief Judge Manglona found that John Davis' claims were not ripe because no initiative was scheduled for the next election. The court held, "While [John] Davis may find it distressing to contemplate that under Commonwealth law, if an Article XII initiative gets on the ballot he

will not be permitted to vote on it, he suffers no hardship until an initiative is 'certainly impending.' " *Id.*, at *7. The same rationale is true of the Plaintiff's claims challenging a plebiscite in Guam. Until the plebiscite he seeks to register for is "certainly impending," he has no claim.

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

VI. CONCLUSION

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

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

SO ORDERED.

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

EXHIBIT 4

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ARNOLD DAVIS, on behalf of himself and all others similarly situated, Plaintiff, vs. GUAM, GUAM ELECTION COMMISSION, ALICE M. TAIJERON, MARTHA C. RUTH, JOSEPH F. MESA, JOHNNY P. TAITANO, JOSHUA F. TENORIO, DONALD I. WEAKLEY, and LEONARDO M. RAPADAS, Defendants.	CIVIL CASE NO. 11-00035 **REPORT AND RECOMMENDATION** RE MOTION TO DISMISS

This matter comes before the court for a Report and Recommendation on the motion to dismiss Plaintiff's complaint. The Attorney General of Guam on behalf of himself and all the other named defendants filed the motion to dismiss.

On November 22, 2011, Plaintiff, Arnold Davis, filed a complaint in this court. Therein, he sought to enjoin Guam and officials of the government of Guam from all action which would prevent him from registering and voting in Guam's 'Political Status Plebiscite'. On December 2, 2011, Defendants, represented by Assistant Attorney General Robert M. Weinberg, filed a motion to dismiss the complaint. Plaintiff filed an opposition to the motion on January 3, 2012. Defendants filed a reply to the opposition on January 10, 2012.

On December 30, 2011, Anne Perez Hattori, represented by Julian Aguon, Esq., filed a motion for leave to file an *Amicus Curiae* brief. On January 7, 2012, Plaintiff filed an opposition to Hattori's motion.

EXHIBIT 4

On February 1, 2012, the motion to dismiss was referred by the Chief Judge to the undersigned for a Report and Recommendation.

Having reviewed the memoranda in support and in opposition to the motion, as well as the *amicus curiae* brief, the undersigned submits his Report and Recommendation.

BACKGROUND

On November 22, 2011, Plaintiff filed his complaint herein. In the complaint, he alleges discrimination in the voting process by Guam and the Defendants in violation of Section Two of the Voting Rights Act of 1965. Plaintiff alleges that under Guam law, a 'Political Status Plebiscite' is to be held concerning Guam's future relationship with the United States. Plaintiff, a resident of Guam, states that he applied to vote for the plebiscite but was not permitted to do so because he did not meet the definition of "Native Inhabitant of Guam." Under Guam law, only Native Inhabitants of Guam are permitted to vote in the Political Status Plebiscite. The plebiscite would ask native inhabitants which of the three political status options they preferred. The three choices are Independence, Free Association with the United States, and Statehood.

Plaintiff states three causes of action. In his first cause of action, he alleges that by limiting the right to vote in the Political Status Plebiscite to Native Inhabitants of Guam, the purpose and effect of the act was to exclude him and most non-Chamorros from voting therein, thereby resulting in a denial or abridgment of the rights of citizens of the United States to vote on account of race, color, or national origin, a violation of Section 2 of the Voting Rights Act of 1965. In his second cause of action, Plaintiff alleges that Defendants are preventing him from registering to vote in the Political Status Plebiscite because he is not a native inhabitant of Guam. Thus, Defendants are engaged in discrimination on the basis of race, color, and/or national origin in violation of various laws of the United States. Plaintiff's third cause of action alleges that he is being discriminated in relation to his fundamental right to vote in the plebiscite in violation of the Organic Act of Guam, the U.S. Constitution and other laws of the United States for the reason that he is not a native inhabitant of Guam.

Plaintiff seeks relief enjoining Defendants from preventing Plaintiff and those similarly situated from registering for and voting in the Political Status Plebiscite; enjoining the Defendants

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

On December 2, 2011, the Attorney General of Guam, Leonardo M. Rapadas, a named Defendant, on behalf of himself and all named defendants, moved to dismiss the complaint on the ground that it failed to present a case or controversy.

On December 30, 2011, Anne Perez Hattori, filed a Motion for Leave to file a brief, as *Amicus Curiae*, in support of Defendant's Motion to Dismiss.

On January 3, 2012, Plaintiff filed his opposition to Defendant's Motion to Dismiss and on January 7, 2012, he filed an opposition to Hattori's Motion for Leave to file an *Amicus Curiae* brief.

On February 11, Defendant's Motion to Dismiss was referred by the Chief Judge to the undersigned for a Report and Recommendation.

On April 6, 2012, the court granted Anne Perez Hattori's motion for leave to file a brief, as *Amicus Curiae.*

Statutory History of the Plebiscite Vote

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

1998) during which qualified voters would be asked to choose among three political status options. The status options were Independence, Free Association, and Statehood. The results of the plebiscite were to be transmitted to the President and Congress of the United States and the Secretary General of the United Nations.

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

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

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

DISCUSSION

The Attorney General argues that Plaintiff's complaint be dismissed because it fails to present a justiciable case or controversy. Even if Plaintiff were denied the right to vote in the plebiscite, Plaintiff would not have suffered any justiciable injury because his rights as a United States citizen, a registered voter, and stakeholder in Guam's future political relationship with the United States remains unaffected[2]. In footnote 1 of his memorandum, he questions whether the plebiscite vote is imminent or within the foreseeable future and further points out that there is no

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[1]This Act became law on March 24, 2000.

[2]See pages seven to eight of Attorney General's motion.

indication "nor any suggestion that the 70% threshold of eligible voters, however calculated, is close to being met".

Anne Hattori in her *amicus curiae* brief suggests that Plaintiff's complaint should be dismissed based upon the constitutional doctrine of ripeness. She argues that Plaintiff presents no case or controversy before the court because his case is not ripe for review. Wright-Miller-Cooper's Federal Practice and Procedure discusses the ripeness doctrine as follows:

> Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision. The determination is rested both on Article III concepts and on discretionary reasons of policy. The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. One of the famous formulations of ripeness principles is an abstract statement frequently quoted in declaratory judgment cases:
> The test to be applied * * * is the familiar one *** :Basically the question in each case is whether ...there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.
> §3532, Volume 13B, pages 365-369.

The authors state that a more practical formula is that ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration". See *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, (1977). The party asserting the claim bears the burden of establishing ripeness. *Colwell v. Dep't of Health & Human Services*, 558 F. 3d 1112, 1121 (9th Cir. 2009)(citing *Reene v. Geary*, 501 U.S. 312, 316 (1991). Ripeness decisions have generally resolved matters dealing with premature issues.

Is the matter before the court one that is premature for decision making, i.e., one that is not ripe for review because the alleged controversy between the parties is not of sufficient immediacy and reality to warrant a decision from the court? For guidance, the court looks at the plebiscite law that controls the alleged dispute between the parties. It is contained in 3 GCA Chapter 21, §21110 and provides as follows:

> **§21110. Plebiscite Date and Voting Ballot**. (a) **The Guam Election Commission shall conduct a "Political Status Plebiscite"**, at which the following question, which shall be printed in both English and Chamorro, shall be asked of the eligible voters:

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

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

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

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

In her *amicus curiae* brief, Hattori points out that the plebiscite vote will only take place some time in the future on a General Election date when the Guam Election Commission determines that 70% of eligible 'Native Inhabitant of Guam' voters have been registered. The Attorney General points out that there is no indication that **this threshold is close to being met.** More importantly, the Attorney General points out that there is "no indication in the law by what census data or other criteria 70% of eligible voters is to be determined". Hattori echoes the same argument and points out that the Guam Election Commission has not even determined what number is necessary to meet the 70% of eligible voters requirement. Thus, Hattori suggests that the plebiscite election may never take place.

When will the plebiscite election take place? At this point in time, it appears that it is an issue that cannot yet be determined. One thing that is certain, however, is that the plebiscite[3] will not take place in the 2012 General Election. It will take place when the Guam Election

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[3]On April 15, 2011, Bill No. 31-154 was introduced in the 31st Guam Legislature which would have required that the plebiscite vote take place during the 2014 primary election.

Commission determines that the 70% threshold of native inhabitant voters have been registered. It is interesting to note that in the twelve (12) years since the establishment of the Guam Decolonization Registry, only 5,310 persons have registered as native inhabitants of Guam. This is the number of native inhabitants registered as of May 24, 2012[4] as reported in the home page of the Guam Election Commission. In contrast, the Commission reports that as of May 23, 2012, there were currently 47,272 registered voters in Guam. Assuming these native inhabitants are also registered voters of Guam, they represent approximately 11.2% of the voting population. As the Defendants and the *amicus curiae* have pointed out in their brief, there is no indication in the law how the 70% criteria is to be determined. But, assuming hypothetically however, that the 70% criteria were to be determined in relation to total registered voters, it may take a further while for the threshold to be met.

As noted above, the Guam Decolonization Registry became law on March 24, 2000. In the twelve years that have passed, it has registered only 5,310 Guam native inhabitants. In its original enactment, the plebiscite vote was supposed to have taken place in the primary election in 1998. Almost 14 years have passed and still no plebiscite vote has taken place. Clearly, the elements of ripeness are placed at issue herein.

Should the court engage in an academic debate to determine whether the aforesaid "Act" unconstitutionally discriminates against Plaintiff's right to vote in the Political Status Plebiscite when no general election date has been set for the plebiscite? Such an event may not take place at all. Or, it may take place at some time in the future. However, until such a date is set and established by the Guam Election Commission, Plaintiff's complaint has set forth no case or controversy. It is quite clear that at the present time, Plaintiff is not being denied the right to vote in the 'Political Status Plebiscite' for the simple reason that no such plebiscite date is in sight. The plebiscite vote may or may not occur. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*

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[4]A search of the Guam Election Commission's web site on June 14, 2012 revealed this number of registered native inhabitants as of the May 23, 2012.

v. United States, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). A denial of one's right to register to vote in such an election would be justiciable only if such election was imminent. That the plebiscite vote does not present an imminent controversy is further buttressed by the fact that Plaintiff did not file his complaint until more than 11 years after creation of the Decolonization Registry. More importantly, Plaintiff waited more than 11 years since the plebiscite vote was restricted solely to native inhabitants before filing his complaint even though he has reportedly been living in Guam since 1977[5]. In contrast, he has stated that he is a registered voter in Guam and "has voted in the past in many Guam general elections".[6]

As a final point, the court must address Plaintiff's request which (1) seeks to enjoin the Attorney General from enforcing the provisions of the plebiscite act which makes it a crime to register or allow a person to register for the plebiscite with the Guam Decolonization Registry who is not a Native Inhabitant of Guam and (2) seeks a determination from the court that Defendants' conduct has been, and would be if continued, a violation of law.

§21009 of 3 GCA, Chapter 21, provides as follows:

> Any person who willfully causes, procures or allows that person, or any person, to be registered with the Guam Decolonization Registry, while knowing that the person, or other person, is not entitled to register with the Guam Decolonization Registry, shall be guilty of perjury as a misdemeanor. The Guam Decolonization Registry shall have such false affidavit of registration automatically stricken from the Registry.

Section 21009 makes it a misdemeanor for anyone who "wilfully causes, procures or allows" any person "to be registered with the Guam Decolonization Registry, while knowing that the person... is not entitled to register" with the Decolonization Registry. Again, the court finds that Plaintiff has presented no case or controversy to invoke judicial review from the court.

In the first instance, his complaint does not allege that he has been charged with a misdemeanor for attempting to register with the Decolonization Registry[7]. Thus, he has not been

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[5]See page seven, last paragraph of *amicus curiae* brief.

[6]See Paragraph 20 of Plaintiff's complaint.

[7]Plaintiff applied to register for the plebiscite but was not permitted to do so because he did not meet the definition of a "Native inhabitant of Guam". See Paragraph 21 of the complaint.

harmed and has suffered no injury therefrom. The Act does not make an attempt to register with the Decolonization Registry and a denial thereof a criminal act.

In the second instance, if Plaintiff has not been charged with a misdemeanor offense, for his complaint to be ripe for the court's review, he must show that he is subject to a 'genuine threat of **imminent prosecution**'. See *Wolfson v. Brammer*, 616 F. 3d 1045, (9th Cir.2010), quoting *San Diego Cnty. Gun rights Comm. V. Reno*, 98 F. 3d 1121, 1126 (9th Cir. 1996). In evaluating threats of imminent prosecution, the court considers: (1) whether plaintiff has articulated a concrete plan to violate the law in question; (2) whether prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) whether the past history of past prosecution or enforcement under the challenged statute suggests that prosecution may, in fact, be imminent. Again, in reviewing Plaintiff's complaint, the court finds that his pleadings do not allege the necessary elements. All that Plaintiff has alleged is that he applied to register for the plebiscite but was not permitted to do so because he did not meet the definition of a native inhabitant of Guam.

Finally, Plaintiff asks the court to declare Defendants' conduct in attempting to enforce the provisions of the plebiscite vote to be a violation of law. In the absence of a case or controversy, the court will decline to do so.

CONCLUSION

Based upon the reasons stated herein above, the court recommends that Defendants' motion to dismiss, supported herein by the *Amicus Curiae* brief, be granted for the following reasons:

1. Plaintiff's complaint which seeks to enjoin Defendants from preventing him from registering and voting in the 'Political Status Plebiscite' on a general election presents no case or controversy since the matter is not ripe for adjudication. There is no plebiscite vote set in the 2012 general election and no plebiscite vote date is in sight. Plaintiff's allegations present no sufficient immediacy and reality to warrant intervention by the court.

2. Plaintiff has no standing to bring an action to enjoin the Attorney General from enforcing the provisions of the plebiscite law that makes it a misdemeanor to register or allow

anyone to register with the Guam Decolonization Registry if the person were not a Native Inhabitant of Guam. Plaintiff has not alleged that he has been charged with any crime in relation to the Political Status Plebiscite act nor has he shown that he is subject to a genuine threat of imminent prosecution in relation to the said act.

Dated this 14th day of June, 2012.

/s/ Joaquin V.E. Manibusan, Jr.
U.S. Magistrate Judge

NOTICE: THE PARTIES HAVE FOURTEEN (14) DAYS TO FILE OBJECTIONS TO THE REPORT AND RECOMMENDATION.

EXHIBIT 5

IN THE DISTRICT COURT OF GUAM

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

Plaintiff,

vs.

GUAM, GUAM ELECTION COMMISSION, ALICE M. TAIJERON, MARTHA C. RUTH, JOSEPH F. TENORIO, DONALD I. WEAKLEY, AND LEONARDO M. RAPADAS,

Defendants.

CIVIL CASE NO. 11-00035

ORDER

The Attorney General of Guam's Motion to Dismiss for all Defendants is before this court. Defs.' Mot., ECF No. 17. Pursuant to 28 U.S.C. § 636(b)(1)(B), this motion is hereby referred to Magistrate Judge Joaquin V.E. Manibusan, Jr. to determine and to issue his report and recommendation as to the appropriate disposition.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Feb 01, 2012

EXHIBIT 5