No. 13-15199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the District Court of Guam

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INTRODUCTION

Guam has imposed an explicit racial restriction on the rights of U.S. citizens to register to vote in a taxpayer-funded plebiscite concerning Guam's future relationship with the United States. Under Guamanian law, only "Native Inhabitants of Guam"—almost exclusively members of the Chamorro racial group—may vote in that election. Appellant Arnold Davis—a former U.S. Air Force officer and longtime resident, citizen, taxpayer, and otherwise qualified voter of Guam—was denied the right to register to vote in the plebiscite solely because he does not meet the Territory's racial definition of "Native Inhabitant." This racial restriction on Mr. Davis's voting rights violates the Fourteenth and Fifteenth Amendments of the United States Constitution, as well as federal statutory law.

Despite the discrimination already suffered by Mr. Davis, the district court dismissed his complaint on the ground that the plebiscite election has yet to be scheduled. But that ruling ignores Supreme Court and Ninth Circuit authority holding that the denial of the right to register to vote is *itself* a sufficiently ripe injury under Article III. Mr. Davis has standing to challenge the decision to exclude him from the political process: Not only are his claims ripe for adjudication now, but his injuries are compounded every day.

While the district court did not address the merits of Mr. Davis's constitutional claims, there is no need to remand for further proceedings. Indeed, a

remand would only prolong Mr. Davis's treatment as a second-class citizen. In its briefing below, Guam acknowledged that the plebiscite is designed to solicit the views of only a racially defined subset of the Guamanian population. Yet the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court's decision in *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), and numerous other cases confirm that such a race-based voting qualification is an affront to the United States Constitution. This Court should strike the impermissible voting requirement so that all otherwise eligible Guamanians can fully participate in the process of determining their Territory's future without being subjected to racial discrimination.

STATEMENT OF JURISDICTION

On November 22, 2011, Arnold Davis commenced this civil rights action against Guam; the Guam Election Commission and its members (Alice M. Taijeron, Martha C. Ruth, Joseph F. Mesa, Johnny P. Taitano, Joshua F. Renorio, and Donald I. Weakley); and the Attorney General of Guam (Leonardo M. Rapadas). D.E. 1 (E.R. 141-50). The District Court of Guam had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 48 U.S.C. § 1424(b). On January 9, 2013, the district court issued a final order dismissing the action. D.E. 78 (E.R. 2-18), 79 (E.R. 1). Mr. Davis filed a timely notice of appeal on January 31, 2013. D.E. 81 (E.R. 29-30). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

This Court is the proper venue for the appeal because the action arose on Guam. 28 U.S.C. § 1294(4).

STATEMENT OF THE ISSUES

1. The right to participate in the political process cannot be denied based on a person's race or ancestry. The Guam Election Commission refused to allow Mr. Davis to register to vote in the plebiscite because he is not a "Native Inhabitant of Guam"—a term defined with respect to ancestral ties and excluding nearly every person outside of the Chamorro racial group. Does Mr. Davis have standing to pursue his claims?

2. To evaluate ripeness, this Court must consider the fitness of the issues for judicial resolution and the hardship to the parties of withholding judicial consideration. The merits of this case turn upon strictly legal issues, and Mr. Davis has already suffered direct and immediate injuries as a result of Guam's imposition of its racial voting qualification. Are Mr. Davis's claims ripe for adjudication?

3. Guam limits the right to vote in the plebiscite to "Native Inhabitants of Guam." Does that qualification violate rights protected by the Fourteenth and Fifteenth Amendments and federal statutory law?

STATEMENT OF THE CASE

Guamanian law requires the Territory to hold a plebiscite concerning its relationship with the United States, which would include as options independence,

free association, and statehood. D.E. 1 ¶ 8 (E.R. 143). The plebiscite will be taxpayer-funded and administered by government officials who are paid by taxpayers on Guam. *See* Commission on Decolonization, Quarterly Report (Apr. 30, 2009).[1] Guamanian government officials have refused to register any voter for the plebiscite unless the voter is a "Native Inhabitant of Guam," a term defined under Guamanian law to include persons of defined ancestry and to exclude nearly every person outside the Chamorro racial group. D.E. 1 ¶¶ 1, 11, 15 (E.R. 142, 144-45).

Arnold Davis, a longtime resident of Guam, attempted to register to vote in the plebiscite but was not permitted to do so because he does not qualify, on ancestral or racial grounds, as a "Native Inhabitant of Guam." D.E. 1 ¶¶ 20-21 (E.R. 146); *see also* D.E. 76 (E.R. 130). In November 2011, Mr. Davis filed a complaint to vindicate constitutional and statutory rights against discrimination on the basis of race and ancestry by enjoining Guam, along with its election commission and various government officials, from preventing him and similarly

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[1] The report is available online at http://www.guamlegislature.com/Mess_Comms_30th/Doc.%2030GL-09-0564%20From%20the%20Commission%20on%20Decolonization%20submitting%20its%20FY%202009%202nd%20Quarter%20financial%20report%20and%20staffing%20pattern.%20.pdf.

situated individuals from registering for and voting in the plebiscite on the ground that they are not "Native Inhabitants of Guam." D.E. 1 (E.R. 141-50).

On January 9, 2013, the district court granted the defendants' motion to dismiss, concluding that there was no case or controversy before the court because Guam has not yet scheduled the plebiscite at issue. D.E. 78, at 17 (E.R. 18). Mr. Davis filed a timely appeal. D.E. 81 (E.R. 29-30).

STATEMENT OF FACTS

A. The Chamorros

A people known as Chamorros have long inhabited Guam. *See* Pedro C. Sanchez, *Guahan Guam: The History of Our Island* 5 (Sanchez Publishing House, 1987). The Chamorros were originally seafaring people of Malayo-Polyesian descent. *See id*. In its first census of Guam, the United States recognized that the Chamorros constitute a distinct racial group. *See* Fourteenth Census of the United States: 1920 Census of Guam at 3 tbl. 4.

Foreign nations have governed Guam ever since Ferdinand Magellan reached the island and encountered the Chamorros in 1521. *See* Amanda Smith Barusch & Marc L. Spaulding, *The Impact of Americanization on Intergenerational Relations: An Exploratory Study on the U.S. Territory of Guam*, 16 J. Soc. & Soc. Welfare 61, 63 (1989). After Magellan, Spain controlled Guam until it ceded the island to the United States in 1898; the United States then

possessed Guam as a Territory until Japan conquered the island in 1941. *See id*. The United States regained control of Guam after expelling the Japanese military in 1944. *See id*. Throughout this period, the Chamorro group constituted an overwhelming majority of the population residing on Guam. *See Issues in Guam's Political Development: The Chamorro Perspective* 105 (The Political Status Education Coordinating Commission, 1996) (in 1901, 99.5% of the population was Chamorro; in 1910, 97.2% of the population was Chamorro; in 1920, 92% of the population was Chamorro; in 1930, 88.6% of the population was Chamorro; in 1940, 90.5% of the population was Chamorro).

In 1950, the United States Congress passed the Organic Act of Guam. *See* Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421 *et seq*.). The Organic Act declared Guam to be an unincorporated Territory and amended Chapter II of the Nationality Act of 1940 to extend United States citizenship to three classes of persons: (1) Spanish subjects who were inhabitants of the island of Guam on April 11, 1899, and their children born after April 11, 1899; (2) persons born on the island of Guam who resided on Guam on April 11, 1899, and their children born after April 11, 1899; and (3) all persons born on the island of Guam on or after April 11, 1899, subject to the jurisdiction of the United States. *Id*.

(previously codified at 8 U.S.C. §§ 601-605 (1950)).[2] On June 27, 1952, Congress repealed the Nationality Act of 1940 (including the parts added by the 1950 Organic Act). *See* Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163-280.

The Guam legislature has, at different times, defined the Chamorros to either completely or substantially overlap with the three classes of persons who derived their citizenship from the Organic Act. A current Guamanian land trust law defines "Native Chamorro" to mean "any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such person." 21 Guam Code Ann. § 75101(d). Similarly, in 1983, the Governor of Guam initiated efforts to develop a Draft Commonwealth Act, which included a provision that limited the right to vote in a final plebiscite concerning Guam's political status to "Chamorros"—defined as "person[s] (or descendant[s] thereof) who [were] in Guam on August 1, 1950 when the Organic Act went into effect." *The Chamorro Perspective*, *supra*, at 168; *see also* Political Status and External Affairs Subcommittee Transition Report at 7, *available at* http://www.guampdn.com/assets/pdf/M016999926.PDF. United States officials

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

voiced serious disagreements with this definition, noting that it posed constitutional concerns. *See* Transition Report, *supra*, at 8, 11.

B. Guam's Plebiscite Law

In 1980, Guam's legislature established a Commission on Self-Determination to consider different political status options for Guam. *See* Transition Report, *supra*, at 10. After a series of public meetings, Guam officials conducted a plebiscite in 1982, in which all registered voters of Guam were permitted to vote. *Id*. at 7. In a run-off election, the majority of voters elected for Guam to become a commonwealth. *Id*.

In response to the election, the Governor of Guam initiated efforts to develop a Draft Commonwealth Act, which was presented to the United States Senate and House of Representatives. *See* Transition Report, *supra*, at 7. The first hearing on the Commonwealth Act was held in 1989. As discussed above, United States officials raised concerns with provisions of the Commonwealth Act, including the provision that limited the final vote on self-determination to Chamorros. *See id.* at 8. Negotiations broke down soon after. *See id*. at 8, 11.

Despite these constitutional concerns, the Guam legislature pressed forward and enacted a law to authorize the creation of a registry of Chamorros in 1996. That law—"An Act to Establish the Chamorro Registry"—established a registry of "the names of those Chamorro individuals, families, and their descendants who

have survived over three hundred years of colonial occupation and who continue to develop as one Chamorro people on their homeland, Guam." Guam Pub. L. No. 23-130 § 1 (1996). The Guam legislature employed Section 4 of the Organic Act to define "Chamorro" to include the first two classes of citizens who derived their citizenship through the Act—*i.e.*, "[a]ll inhabitants of the Island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects . . . and [a]ll 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 . . . ." and their descendants. *Id.* § 2.

Guam's legislature then enacted a bill titled "An Act to Create the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination" to seek Guam's future political status with the United States. The express purpose of this law was to "end colonial discrimination and address a long-standing injustice [to] a people" and "recogniz[e] and approv[e] the inalienable right of the Chamorro people to self-determination." Guam Pub. L. No. 23-147 § 1 (1997). To that end, the legislature included a provision highlighting that only the "Chamorro people" could vote on the political status plebiscite. *Id.* § 10.

Guam's Committee on Federal and Foreign Affairs issued a series of findings showing that the law was intended to limit the right to vote on any

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

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

In 2000, the Guam legislature enacted a law titled the "Creation of the Guam Decolonization Registry for Native Inhabitants of Guam Self-Determination." Guam Pub. L. No. 25-106 (2000). This law created a "Commission on Decolonization for the Implementation and Exercise of Guam Self-Determination

for the Native Inhabitants of Guam" and directed the Commission to (1) hold a "Political Status Plebiscite" regarding Guam's future political relationship with the United States; (2) "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America"; and (3) "promptly transmit that desire to the President and the Congress of the United States of America." *Id*. §§ 10, 11 (codified at 1 Guam Code Ann. §§ 2110, 2105); *see also* 1 Guam Code Ann. § 2109(a) (providing that Guam's higher education institutions "may be included in the development and execution of the extensive public education program" purportedly necessary to "ensure a successful plebiscite relative to Guam's political status determination").

Under this law—the law challenged here—only "Native Inhabitants of Guam" are eligible to register with the Guam Decolonization Registry and thus vote in the plebiscite. Guam Pub. L. No. 25-106 § 2 (codified at 3 Guam Code Ann. § 21003). In fact, any person seeking to register with the Guam Decolonization Registry must attest to being a "Native Inhabitant." Guam Pub. L. No. 25-106 § 2 (codified at 3 Guam Code Ann. § 21002).

The term "Native Inhabitants of Guam" mirrors the definition of "Native Chamorro" in Guam's land trust law. Like "Native Chamorros," "Native Inhabitants" include "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam" and their

"descendants." Guam Pub. L. No. 25-106 §§ 2, 7 (codified at 3 Guam Code Ann. § 21001(e); 1 Guam Code Ann. § 2102(b)). "Descendants" are defined, in turn, with respect to their "blood relations"; the term is limited to those persons who have "proceeded by birth" from "any 'Native Inhabitant of Guam.'" Guam Pub. L. No. 25-106 § 2 (codified at 3 Guam Code Ann. § 21001(c)). The "Native Inhabitants" definition excludes many citizens of the United States living on Guam who are, for example, white, black, Korean, Chinese, and Filipino. *See* D.E. 1 ¶ 15 (E.R. 145).

In 2004, the Guam legislature amended the plebiscite law to require the Guam Election Commission to conduct the political status plebiscite in a general election year in which 70% of eligible voters were registered to vote. Guam Pub. L. No. 27-106 § 23 (2004) (codified at 1 Guam Code Ann. § 2110). Again, the legislature defined eligible voters to include only "Native Inhabitants" of Guam. *Id*.

C. Mr. Davis's Complaint

Arnold Davis, a non-Chamorro resident of Guam, attempted to register to vote for the plebiscite. D.E. 1 ¶ 21 (E.R. 146). Guam election officials refused to allow Mr. Davis to register solely because he did not meet the definition of a "Native Inhabitant" of Guam. *Id*. ¶¶ 18, 21 (E.R. 145-46). Indeed, the defendants do not dispute that, had Mr. Davis been a "Native Inhabitant," he would have been

permitted to register. *See* D.E. 86, Nov. 15, 2012 Tr. 53-54 (E.R. 83-84). Mr. Davis otherwise met the age and residency requirements to vote and had voted in the past in many of Guam's elections. D.E. ¶ 20 (E.R. 146).

The Organic Act and related federal laws provide the framework for the government of Guam. The Organic Act extends several provisions of the United States Constitution to Guam. 48 U.S.C. § 1421b(u). Among these provisions are the Fifteenth Amendment and the portion of the Fourteenth Amendment that prohibits Guam from (1) making and enforcing "any law which . . . abridge[s] the privileges or immunities of citizens of the United States" and (2) denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* 48 U.S.C. § 1421b(u).

The Organic Act also includes other anti-discrimination provisions. One such provision states that "[n]o discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied." 48 U.S.C. § 1421b(n). Another provision requires that "[n]o qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter." *Id*. § 1421b(m)). Moreover, 42 U.S.C. § 1971 provides that "[a]ll citizens of the United States who are otherwise qualified by law to vote at *any* election by the people in any . . . Territory . . . shall be entitled and allowed to vote

at *all* such elections, without distinction of race, color, or previous condition of servitude" (emphases added).

In light of this legal framework, Mr. Davis challenged the legality of Guam's race-based voter-qualification scheme on behalf of himself and others similarly situated. In his complaint, Mr. Davis alleged that the definition of "Native Inhabitants" is designed, in purpose and effect, to exclude most non-Chamorros and thus results in a denial or abridgement of the right of citizens of the United States to vote on account of race. D.E. 1 ¶ 28 (E.R. 147). Mr. Davis alleged that this discrimination violates rights guaranteed by the Constitution, including the Fourteenth and Fifteenth Amendments; various provisions of the bill of rights contained within or added to the Organic Act; and similar civil rights statutes, including 42 U.S.C. § 1971. *Id*. ¶¶ 29, 33, 39 (E.R. 147-49).

The defendants moved to dismiss on the ground that, in their view, Mr. Davis's complaint failed to present a justiciable case or controversy. They admitted that the purpose of the plebiscite is to collect the votes of a specific racial group and not the many United States citizen residents of Guam who belong to other racial groups. "There is nothing constitutionally wrong with compiling a registry that identifies qualified voters by race," the defendants argued, because Congress and Guam cannot address "the interests of a colonized people whose racial identity coincides with their political identity" without excluding Mr. Davis

and others like him. D.E. 24, at 1, 8 (E.R. 132, 134). They admitted, however, that they were "not convinced of the argument that this controversy is not ripe merely because the conditions precedent and date of the future plebiscite are uncertain." D.E. 24, at 3 (E.R. 133).

D. The District Court's Opinion

The district court dismissed Mr. Davis's complaint. The court stated that Mr. Davis must demonstrate that he is subject to a recurring injury that "is causing [him] irreparable harm." D.E. 78, at 11 (E.R. 12). Under that standard, the district court concluded, it was "clear that there is no on-going, real and immediate threat of repeated injury sufficient to confer standing for injunctive relief," merely because "he cannot *register* to vote in a plebiscite that may, in fact, never be held." *Id*. at 10, 12 (E.R. 11, 13). The threat to Mr. Davis's "federally protected rights," it maintained, was "purely hypothetical." *Id*. at 12 (E.R. 13).

The district court also ruled that Mr. Davis's claims were not ripe because, in its view, there was little likelihood that the plebiscite election would be scheduled in the near future. As evidence, the district court considered an editorial written by Mr. Davis, in which he expressed the opinion that it was unlikely that 70% of eligible voters on Guam would register to vote in the plebiscite. D.E. 78, at 15 (E.R. 16).

Additionally, the district court relied on a case in which the District of the Northern Mariana Islands dismissed a challenge to voting requirements that would prohibit certain residents from voting on particular initiatives because (1) no such initiative had been presented and (2) the plaintiff had not been denied the right to vote. D.E. 78, at 16 (E.R. 17). *See John H. Davis, Jr. v. Commonwealth Election Comm'n*, No. 1-12-CV-00001, 2012 WL 2411252 (D. N. Mar. I. June 26, 2012). For Mr. Davis "to suffer a real discernible injury," the district court concluded, "any registration would have to be, by necessity, related to an election that is actually scheduled." D.E. 78, at 17 (E.R. 18).

SUMMARY OF ARGUMENT

The district court erred in dismissing Mr. Davis's claims on standing and ripeness grounds. It is undisputed that Mr. Davis attempted to register to vote in the plebiscite and was denied that right solely based on his racial ancestry.

Mr. Davis has suffered four different types of cognizable injuries-in-fact that permit him to enjoin the government's use of the "Native Inhabitant" classification: (1) the denial of the right to register to vote; (2) the denial of equal treatment on the basis of race; (3) the stigmatic harm that stems from the government engaging in racial discrimination; and (4) the invasion of a statutory right to be free from Guam's imposition of a racially-based voting qualification in

the plebiscite. The district court simply ignored these injuries when it determined that no injury could occur until the plebiscite had been scheduled.

The district court's exceedingly circumscribed view of Mr. Davis's injuries not only flies in the face of numerous Supreme Court and Ninth Circuit precedents, but also led the court to conclude—erroneously—that Mr. Davis's claims were not ripe. Well-settled precedent confirms that the standing and ripeness doctrines pose no barrier to reaching the merits of this case because the issues presented are definite, concrete, and fit for judicial review. Mr. Davis has also shown that withholding review has resulted in direct and immediate injury.

This Court can and should address the merits of Mr. Davis's claims without the need for a remand. *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), are controlling and establish that Guam's exclusionary voting requirement is an obvious violation of rights protected by the Fifteenth Amendment. The race-based exclusion cannot survive under the Fourteenth Amendment either, as Guam cannot articulate a compelling government interest in limiting participation in the plebiscite to "Native Inhabitants." Finally, the racial classification also violates 42 U.S.C. § 1971 and Guam's Organic Act.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss, accepting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to the plaintiff, Mr. Davis. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 834-35 (9th Cir. 2012).

A racial voting qualification is a *per se* violation of the Fifteenth Amendment. *See Guinn v. United States*, 238 U.S. 347, 358 (1915). Moreover, the Fourteenth Amendment subjects all racial classifications to strict scrutiny. "This standard of review is not dependent on the race of those burdened or benefited by a particular classification. Thus, any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citations and internal quotation marks omitted).

ARGUMENT

I. Mr. Davis Has Article III Standing And His Claims Are Ripe.

To invoke the jurisdiction of the federal courts, a plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). The "constitutional component

of ripeness overlaps with the 'injury in fact' analysis for Article III standing." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). "Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract." *Id*. (internal quotation marks omitted).

The district court adopted an impermissibly narrow view of the injury alleged by Mr. Davis and an overbroad view of the standing and ripeness requirements imposed by Article III. Guam's creation of a race-exclusive plebiscite and its denial of Mr. Davis's ability to register to vote in that plebiscite have caused Mr. Davis to suffer ripe injuries sufficient to enjoin Guam from limiting the right to vote in the plebiscite to "Native Inhabitants."[3]

A. Mr. Davis Has Alleged An Injury Sufficient To Enjoin Guam From Limiting The Right To Vote To "Native Inhabitants."

Mr. Davis has alleged four injuries-in-fact sufficient to enjoin Guam from applying its "Native Inhabitant" classification. The nonbinding status of the plebiscite does not affect this analysis.

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[3] Guam did not challenge below that Mr. Davis has properly alleged the causation and redressability prongs of standing. D.E. 17. Nor could it: Mr. Davis's injuries are directly traceable to the application of the plebiscite law, and a favorable court ruling will permit him to register to vote.

1. Mr. Davis Has Alleged Four Independently Sufficient Injuries.

First, Mr. Davis suffered an injury-in-fact because he was denied the right to register to vote solely because he is not a "Native Inhabitant." By refusing to consider the registration process itself, the district court's decision conflicts with a long and unbroken line of decisions establishing that the Fifteenth Amendment applies "not only to the physical act of voting but to the entire voting process," "including the matter of registration where registering is required in advance of voting." *United States v. Dogan*, 314 F.2d 767, 771 (5th Cir. 1963).

The Constitution "forbids any distinction in the voting process," including during registration, "based on race or color, irrespective of whether such distinction involves an actual denial of the vote." *Dogan*, 314 F.2d at 771 (invalidating a poll tax where payment of the tax was a condition precedent to the right to vote). In *Guinn v. United States*, 238 U.S. 347 (1915), and *Lane v. Wilson*, 307 U.S. 268 (1939), for example, the Supreme Court invalidated laws imposing various discriminatory registration requirements, reasoning that the "Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise" and protects against "onerous procedural requirements which effectively handicap exercise of the franchise." *Lane*, 307 U.S. at 274-75 (voter qualification intended to make it more difficult for one racial group to register violated the Fifteenth Amendment); *see also Guinn*, 238 U.S. at 365

(statute that imposed a literacy requirement on voter registration but contained a "grandfather clause" applicable to certain individuals and their lineal descendants was "void from the beginning" under the Fifteenth Amendment). The Supreme Court has also ruled that registrars who forbid individuals from registering to vote because of their race are "subject to the ban" of the Fifteenth Amendment. *United States v. Raines*, 362 U.S. 17, 25 (1960); *see also Louisiana v. United States*, 380 U.S. 145, 153 (1965) (sustaining judgment against a registrar of voters who consistently discriminated against members of a racial group by denying them the right to register); *Bryce v. Byrd*, 201 F.2d 664 (5th Cir. 1953) (sustaining judgment against a registrar who, for 31 years, failed to register any black voters).

Because registration is a prerequisite to casting a ballot in the plebiscite, these cases demonstrate that Mr. Davis suffered an injury at the moment he was denied the right to register to vote. By relying on the fact that the plebiscite had not been scheduled, the district court thus erred as a matter of law. In analyzing whether a racial voting qualification runs afoul of the Constitution, the Supreme Court did not consider it relevant whether the next election had been scheduled. Rather, in *Guinn*, the Court reasoned that the racial voting qualification "was stricken with nullity *in its inception* by the self-operative force of the [Fifteenth] Amendment." *Guinn*, 238 U.S. at 358 (emphasis added). In *Lane*, the Court omitted any mention of a planned election altogether and explicitly recognized that

the basis of the plaintiff's Fifteenth Amendment claim was "inequality of treatment . . . under color of law, *not denial of the right to vote*." *Lane*, 307 U.S. at 274 (emphasis added). And neither *Raines* nor *Louisiana* turned on whether an election had been scheduled; both cases held that the plaintiff could enjoin a registrar simply because the registrar would not permit members of a particular racial group to register. *See Raines*, 362 U.S. at 25; *Louisiana*, 380 U.S. at 152-53. In each of these cases, the Supreme Court held that the reach of the Fifteenth Amendment extended to the registration process, demonstrating that the denial of the right to register posed a sufficiently live case or controversy under Article III.

Second, Mr. Davis has suffered an injury-in-fact because he was denied equal treatment on the basis of his bloodline alone. "The Supreme Court has articulated a broad conception of Article III standing" where, as here, a plaintiff challenges a statute that imposes unequal treatment on a group of citizens because of their race or ancestry. *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012) (citing *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656, 658-59 (1993)). As the Supreme Court has explained, the injury-in-fact necessary to establish standing "is the *denial of equal treatment* resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (internal quotation marks omitted; emphasis added). Thus, "[w]hen the

government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-12 (1995) (same).

By characterizing the threat to Mr. Davis's federally protected rights as "purely hypothetical," the district court ignored the injury at hand. Several cases illustrate that Mr. Davis does not need to establish that he was deprived of an actual vote to establish a cognizable injury. In *Shaw v. Reno*, for example, the Supreme Court held that plaintiffs could challenge North Carolina's redistricting plan without showing that their votes were actually diluted. 509 U.S. 630, 642 (1993). Similarly, in *Regents of the University of California v. Bakke*, the Court held that a white applicant had standing to challenge a school's racial preference program even though he could not show that he would have been admitted to the school in the absence of the program. 438 U.S. 265, 280 n.14 (1978). These plaintiffs had standing, the Court held in both cases, because they alleged that the government denied them equal treatment based on race. *Shaw*, 509 U.S. at 642; *Bakke*, 438 U.S. at 320; *see also Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873-74 (9th Cir. 1995) (holding that the plaintiff had standing to challenge a state

law that established affirmative action goals in his industry, even though he did not allege that he would have received the business at issue in the absence of the law); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 704, 707 (9th Cir. 1997) (same). Like these plaintiffs, Mr. Davis has suffered a cognizable injury because Guam refused to treat him in the same way that it would have treated a Chamorro person in his position.

Third, Mr. Davis has alleged a sufficient injury-in-fact because Guam's actions "stigmatize [him] by reason of [his] membership in a racial group." *Shaw*, 509 U.S. at 643. The Supreme Court has "repeatedly emphasized" that "discrimination itself, . . . by *stigmatizing* members of the disfavored group as innately inferior and therefore as less worthy participants in the political community . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (emphasis added); *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (a stigmatic injury caused by racial discrimination can support standing if the plaintiffs personally had been or were likely to be subject to the challenged discrimination). Mr. Davis has alleged precisely this kind of "stigmatic" injury here: Separate and apart from the injury occasioned by Guam's refusal to allow him to register to vote, Mr. Davis is "directly stigmatized" by being told he cannot participate in a political process

solely on the basis of his race, and that is a sufficient injury to establish standing. *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052-53 (9th Cir. 2010) (en banc).

Fourth, Mr. Davis has standing to sue because he has alleged a violation of 42 U.S.C. § 1971, which itself is a cognizable injury. On several occasions, the Supreme Court has "recognized [that] the actual or threatened injury required by [Article] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (alterations and internal quotation marks omitted). Section 1971(a) creates a statutory right for any citizen "qualified by law to vote at any election" in Guam to "vot[e] at all such elections," regardless of race. And the statute specifically defines "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 42 U.S.C. § 1971(e) (incorporated by reference in 42 U.S.C. § 1971(a)(3)(A)). In *Trafficante v. Metropolitan Life Insurance Co.*, the Supreme Court determined that a white tenant had standing to challenge discriminatory housing practices against black tenants because he qualified as a "person aggrieved" under a similar civil rights statute. 409 U.S. 205, 208-11 (1972). Mr. Davis, who was actually denied the right to register because of a

racially-based voting qualification, is aggrieved under Section 1971, and he accordingly has standing to sue.

2. The Nonbinding Nature Of The Plebiscite Is Irrelevant.

That the plebiscite results may lack the full force of law does not affect the foregoing analysis. In briefing before the district court, the defendants argued that this case was not justiciable because the plebiscite was nothing more than a tool to measure the wishes of the "Native Inhabitants," the results of which Congress could simply ignore. *See* D.E. 17, at 7-9 (E.R. 136-38). The Supreme Court rejected a similar contention in *Smith v. Allwright*, where the Texas Democratic Party argued that its decision to exclude blacks from participating in primary elections was not justiciable on the ground that such elections were a mere tool to gauge the desires of its members about possible candidates. 321 U.S. 649, 657 (1944). The Supreme Court reasoned that, although primary election results lack any immediate consequence, such elections are conducted under governmental authority, and "[u]nder our Constitution the great privilege of the ballot may not be denied a man by the [government] because of his color." *Id*. at 662-63. Similarly,

whether Guam offends the Constitution by denying access to the ballot on the basis of ancestry is a justiciable issue.[4]

Furthermore, that the plebiscite results are "nonbinding" does not lessen the stigma that Mr. Davis has suffered by virtue of being treated differently on the basis of his race. This Court's en banc decision in *Catholic League* is controlling. In that case, Catholics challenged a San Francisco Board of Supervisors' resolution criticizing their church's directive to end adoption placements in same-sex households. Although the resolution lacked any legal effect, this Court held that the plaintiffs had standing to bring their suit, because the resolution "convey[ed] a government message of disapproval and hostility" and sent "a clear message" that the plaintiffs were "outsiders, not full members of the political community." 624 F.3d at 1053 (internal quotation marks omitted). Because Mr. Davis is treated like an "outsider" and not like a "full membe[r] of the political community," he has a

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[4] Further, *Rice* squarely forecloses the argument that Guam has any special interest in ascertaining the wishes of the "Native Inhabitants" based on their alleged political status. *See infra* at 37-38.

cognizable injury sufficient to sue even if Congress ultimately ignores the plebiscite results. *Id*. (internal quotation marks omitted).[5]

Any contrary approach would permit naked voter discrimination whenever an election is formally nonbinding. In 2012, for example, Missouri's Republican primary was conducted as a "beauty contest" that did not bind delegates to the results of the election. *See* Jeff Zeleny, *In Missouri, the G.O.P. Fight for Delegates Enters Round 2 (Post-Beauty Contest)*, N.Y. Times, Mar. 16, 2012, at A13. If the defendants were correct, then the Missouri Republican Party could have excluded entire segments of the population from voting based on race or any number of other impermissible factors, and then successfully defended against a lawsuit by claiming (as the defendants did below) that the primary was nonbinding.

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[5] In any event, it is far from clear that the results of the plebiscite would have no legal effect. The plebiscite law requires Guam to transmit the results of the plebiscite to Congress, 1 Guam Code Ann. § 2105, which is empowered to, and may, alter the existing political relationship between Guam and the United States, *see* U.S. Const. art. IV, § 3 (Congress may "dispose of" Territories by allowing them to become independent of the United States or by admitting them as states). Congressional resolutions have expressed support for following the will of the citizens of Guam. *See*, *e.g.*, H. Res. 494, 105th Cong. (1998) (resolving to "reaffirm its commitment to the United States citizens of Guam for increased self-government, consistent with self-determination for the people of Guam").

There is no support for such a perverse outcome in the Supreme Court's or this Court's precedents.

B. Mr. Davis's Challenge To The "Native Inhabitant" Classification Is Ripe.

The district court also erroneously determined that Mr. Davis's claims were not ripe. While the injury-in-fact inquiry focuses on "*who* is a proper party to litigate a particular matter," *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997), ripeness is "a question of *timing*, designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action," *Wolfson*, 616 F.3d at 1057 (emphasis added; citations and internal quotation marks omitted). The ripeness inquiry involves the consideration of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc) (internal quotation marks omitted).

The issues in this case are definite, concrete, and fit for judicial review. A challenge is fit for judicial review if "further factual development would not significantly advance the Court's ability to deal with the legal issues presented." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011) (alteration and internal quotation marks omitted). Here, it is undisputed that Mr. Davis attempted to register to vote and was denied that right solely because he

is not a "Native Inhabitant." Any further development of the record in this case would not affect the question whether his exclusion from the political process establishes a constitutional violation or a violation of federal statutory law. Rather, the issues presented are purely legal and ready for decision.

Mr. Davis has also shown "that withholding review would result in 'direct and immediate hardship.'" *Winter v. Cal. Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990). Indeed, the registrar's refusal to allow Mr. Davis to register to vote has *already* caused him to suffer at least the four injuries described above: (1) the denial of the right to register to vote; (2) the denial of equal treatment under the law; (3) the stigmatic harm that stems from the government engaging in racial discrimination; and (4) the invasion of Mr. Davis's statutory rights under 42 U.S.C. § 1971. *See supra* Part I.A.1. These injuries continue to this day and are compounded by the fact that Guam uses taxpayer money to continue discriminating against otherwise qualified voters on the basis of race. All of Guam's voters, including Mr. Davis, have "an interest in learning whether [Guam's plebiscite law] runs afoul of rights guaranteed by the U.S. Constitution" and federal statutory law. *Neal v. Shimoda*, 131 F.3d 818, 825 (9th Cir. 1997).

Moreover, because the election must be scheduled in a year in which 70% of *qualified* voters register to vote, *see* 1 Guam Code Ann. § 2110, this Court's resolution of the merits will also affect the timing of the election. Whether this

70% threshold is met will depend, in part, on whether Mr. Davis and other non-"Native Inhabitants" of Guam will be treated as qualified voters. This Court's ruling on the constitutional issues presented in this case is, therefore, essential to determine the eligible pool of qualified voters for the plebiscite and, in turn, when the plebiscite will be held.[6]

In determining that Mr. Davis's claims were not ripe, the district court relied on *John H. Davis, Jr. v. Commonwealth Election Commission*, No. 1-12-CV-00001, 2012 WL 2411252 (D. N. Mar. I. June 26, 2012). *See* D.E. 78, at 15-17 (E.R. 16-18). In that case, the plaintiff (an unrelated Mr. Davis) moved to enjoin the election commission of the Central Northern Mariana Islands (CNMI) from denying him the right to vote on any initiative to repeal an article of the Territory's constitution that restricted ownership of certain properties to persons of CNMI descent. Because no initiative had been placed on the ballot, the court concluded that the plaintiff's injury would not occur until he was actually "denied the right to vote." 2012 WL 2411252, at *6.

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[6] In addition, if this Court were to conclude that Mr. Davis's injuries are not ripe until the election is actually scheduled, it would have an exceedingly short amount of time to consider the merits of his claims. Indeed, because the law requires that the election be held during the same year in which the requisite registrations are obtained, *see* 1 Guam Code Ann. § 2110, any judicial review of his claims would need to proceed on a highly expedited timetable.

Commonwealth Election Commission is both easily distinguishable and wrongly decided. As explained above, the question of *who* can vote on Guam's plebiscite is inextricably bound up with *when* the plebiscite will take place, which was not true in *Commonwealth Election Commission*. Because resolution of the legal question would affect the universe of people who could vote, and therefore the timing of the election, the district court's resolution of the ripeness question is incorrect.

In any event, *Commonwealth Election Commission* relies on a mistaken understanding of the injury and ripeness doctrines and is therefore unpersuasive. In that case, the court did not consider whether the denial of the right to register to vote, the denial of equal treatment, the stigmatic harm that stems from the government engaging in racial discrimination, or the invasion of a statutory right is a cognizable injury. Rather, the district court characterized the injury as "not being permitted to vote." *Commonwealth Election Comm'n*, 2012 WL 2411252, at *5. As shown above, courts do not permit the franchise to be chopped up in that way to exclude necessary preliminary steps such as voter registration, and it was error for the *Commonwealth Election Commission* court to do so. *See supra* Part I.A.1.

A favorable ruling now would cure Mr. Davis's injuries, and there is no legitimate interest in delaying review. In fact, the immediacy of Mr. Davis's injuries requires a swift resolution. *See*, *e.g.*, *Enquist v. Or. Dep't of Agric.*, 478

F.3d 985, 1000 n.11 (9th Cir. 2007) (a constitutional challenge to a statute "easily" satisfied a ripeness defense because the issues presented were "purely legal and delay [would] cause unnecessary hardship"), *aff'd*, 553 U.S. 591 (2008). This Court should not permit Guam to short-circuit the democratic process by refusing to rule on whether non-"Native Inhabitants" of Guam have a right to register to vote.

II. Guam's Voting Restriction Is Unconstitutional And Violates Federal Statutory Law.

Because Mr. Davis's challenge is ripe and he has standing to bring it, this Court should proceed to hold on the merits that Guam's race-based voting classification violates the Fifteenth and Fourteenth Amendments as well as several federal statutes. This Court can decide these issues in the first instance because they are purely legal and do not turn on any facts that have yet to be developed. *See Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985).

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

The Fifteenth Amendment's command is absolute, and allows for no exceptions: "The right of citizens of the United States to vote shall not be denied

or abridged . . . on account of race." U.S. Const. amend. XV, § 1.[7] Thus, in *United States v. Reese*, the Supreme Court declared that the Fifteenth Amendment grants all citizens a constitutional "exemption from discrimination in the exercise of the elective franchise on account of race." 92 U.S. 214, 218 (1875); *see also United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875) ("[E]xemption from discrimination in the exercise of [the right to vote] on account of race" is "a necessary attribute of national citizenship."). The reach of the Fifteenth Amendment is broad and applies to any election held "to determine public governmental policies." *Terry v. Adams*, 345 U.S. 461, 467 (1953) (op. of Black, J.).

Despite this inexorable command, Guam has created a voting qualification based on race. In briefing before the district court, the defendants did not disclaim that the "Native Inhabitant" classification was race-based. Indeed, they expressly admitted as much. *See* D.E. 24, at 1 (E.R. 132) ("There is nothing constitutionally wrong with compiling a registry that identifies qualified voters by race."); *see also id.* at 8 n.7 (E.R. 134) (claiming that race is "socially constructed" (internal quotation marks omitted)).

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[7] This Amendment applies with full force in Guam. *See* 48 U.S.C. § 1421b(u).

In any event, *Rice* leaves no doubt that the "Native Inhabitant" classification is a racial one. Like the "Hawaiian" classification at issue in *Rice*, the "Native Inhabitant of Guam" classification grants the right to vote "to persons of defined ancestry and to no others." *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). In *Rice*, the Hawaiian legislature defined "Hawaiian" to mean "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id*. at 516 (quoting Haw. Rev. Stat. § 10-2). Guam defines "Native Inhabitant of Guam" in the *same* way: "'Native Inhabitants of Guam' shall mean those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam," a group that consisted almost exclusively of Chamorros, "and descendants of those persons." 1 Guam Code Ann. § 2102(b).

Although Hawaii argued that its definition was not a racial classification "but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race," the Supreme Court rejected that argument, explaining that ancestry was "a proxy for race." *Rice*, 528 U.S. at 514. As the Court observed, "racial discrimination is that which singles out identifiable classes of persons solely because of their ancestry or ethnic characteristics." *Id*. at 515 (alteration and internal quotation marks omitted). "The ancestral inquiry

mandated by the State," the Court reasoned, "implicates the same grave concerns as a classification specifying a particular race by name," *i.e.*, that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Id*. at 517; *see also St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (concluding that race discrimination means that "identifiable classes of persons . . . are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"); *Arakaki v. Hawaii*, 314 F.3d 1091, 1095 (9th Cir. 2002) (concluding that the Fifteenth Amendment prohibits an ancestry-based candidate restriction that directly and expressly excludes all non-Hawaiians from qualifying as candidates for a state agency's trustee position). Like the classification at issue in *Rice*, the "Native Inhabitant" classification is a proxy for race.

Furthermore, the historical context surrounding the plebiscite law aptly demonstrates the law's express "racial purpose and . . . effects." *Rice*, 528 U.S. at 517. Guam has used the "Native Inhabitant" and "Chamorro" classifications interchangeably. For example, both the Chamorro land trust law and the plebiscite law use the same definition for "Native Chamorro" and "Native Inhabitant." *See supra* at 7, 11-12. In fact, the plebiscite law *requires* the Guam Decolonization Commission to automatically register those individuals who have received or who have been approved to receive a Chamorro Land Trust Commission lease. *See* 3

Guam Code Ann. § 21002.1. The legislative findings and comments in support of the first plebiscite bill also confirm that the Chamorro classification is a racial one. *See supra* at 8-10; *see also Rice*, 528 U.S. at 514-15 (considering similar legislative history to confirm that the Native Hawaiian definition was race-based); *Guinn*, 238 U.S. at 355 (considering history of discrimination to confirm that Oklahoma exception to literacy requirement for any "lineal descendants" of persons entitled to vote in 1866 was race-based).

In briefing before the district court, the defendants relied on *Morton v. Mancari*, 417 U.S. 535 (1974), to argue that Guam has a special interest in fostering discussions about its political future among the "Native Inhabitants of Guam," which purportedly exempts it from the reach of the Fifteenth Amendment. D.E. 17, at 11 (E.R. 140). This reliance is patently misplaced. In *Mancari*, the Supreme Court held that a "special relationship" exists between the United States and federally recognized Indian Tribes by virtue of the Indian Commerce and Treaty Clauses of the Constitution. 417 U.S. at 551-52. The Court concluded that the Bureau of Indian Affairs could engage in preferential hiring, in limited part, because the preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather "only to members of 'federally recognized' tribes." *Id*. at 553 n.24. Importantly, the Court was careful to note that the case was further confined to the authority of the Bureau of Indian Affairs and that the preference

was intended to "further Indian self-government." 417 U.S. at 551-55; *compare id. with Adarand*, 515 U.S. at 205 (refusing to enforce a federal program benefiting "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities"), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (invalidating a municipal program benefiting "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts"). On its face, *Mancari* has no application here because the "Native Inhabitant" classification is not a tribal one intended to further Indian self-government.

Rice declined Hawaii's identical invitation to extend *Mancari* to the voting context on the ground that *Mancari* does not permit the government to "fence out whole classes of its citizens from decisionmaking in critical [governmental] affairs." 528 U.S. at 522. In that case, the Court considered whether the State of Hawaii could limit the right to vote in a statewide election for the trustees of the Office of Hawaiian Affairs (OHA) to "Hawaiians"—a group defined with respect to certain ancestral ties. *Id.* at 499-500. Hawaii argued that its voting qualification was valid because the results of the trustee election disproportionally affected "Hawaiians" compared to other residents of Hawaii, as OHA administered programs designed to benefit "Hawaiians" only. The Court rejected that position, reasoning that it rested "on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." *Id*. at 523.

Hawaii's reasoning, the Court held, "attack[ed] the central meaning of the Fifteenth Amendment" because "[a]ll citizens, regardless of race, have an interest" in the political process, even if the policies "will affect some groups more than others." *Id*. The defendants' arguments attempt to resurrect the "demeaning premise" rejected in *Rice* and cannot be squared with *Rice's* holding that a racial voting qualification is a *per se* violation of the Fifteenth Amendment.

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

Guam's racial voting restriction also violates the Equal Protection Clause of the Fourteenth Amendment.[8] Strict scrutiny is required both because the plebiscite law is racially discriminatory, and because it involves voting rights; the law cannot satisfy such a demanding inquiry.

The Equal Protection Clause requires strict judicial scrutiny of all government-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418-19 (2013). Moreover, "[i]n decision after decision, th[e] [Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in

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[8] This Clause applies with full force in Guam, as does a similar provision of the Organic Act. *See* 48 U.S.C. §§ 1421b(n), (u).

the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). If a challenged statute, therefore, "grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (per curiam) (internal quotation marks omitted).

Very few compelling state interests may justify racial discrimination. In the higher education context, the Supreme Court has held that a school's interest in the educational benefits that flow from a diverse student body is a compelling state interest. *See Bakke*, 438 U.S. at 307-09 (op. of Powell, J.). The Court has also recognized that a "social emergency rising to the level of imminent danger to life and limb" constitutes a compelling state interest. *See Johnson v. California*, 543 U.S. 499, 512 (2005) (internal quotation marks omitted). And the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible. *See Croson*, 488 U.S. at 500.

Guam, however, has not ever come close to articulating a compelling state interest to justify its discriminatory voting scheme. Throughout the process of defending the plebiscite, Guam has never advanced any argument that Native Inhabitants of Guam are entitled to reparations for any alleged wrongs. Rather,

Guam has chosen to justify its racial voting qualification on the sole ground that only Chamorros should have the right to vote in the plebiscite. *See supra* at 14-15.

Neither the Supreme Court nor this Court has ever recognized this type of interest as compelling. At most, in *Cipriano*, the Supreme Court assumed, for the sake of argument, that a statute "might, in some circumstances, constitutionally limit the franchise to qualified voters who are . . . 'especially interested' in the election." 395 U.S. at 704. Nevertheless, the Court explained that "whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Id*. (internal quotation marks omitted). No court has ever determined that a voter can be more or less interested in an election because of race.

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

cannot further a sufficiently substantial state interest). Particularly in this case, where the so-called interested persons are themselves defined by race, *a fortiori* the government does not have a "compelling interest" in using race-based voting restrictions to extend a classification that is itself constitutionally suspect. *See Croson*, 488 U.S. at 496 (plurality op.) ("The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake,' forbidden by the Constitution." (citation omitted)).

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

C. Guam's Voting Restriction Violates 42 U.S.C. § 1971 And The Organic Act.

Aside from the constitutional problems posed by Guam's voting qualification, the race and ancestry-based restriction violates several federal laws, including 42 U.S.C. § 1971 and the Organic Act.

42 U.S.C. § 1971. Section 1971 contains a broad anti-discrimination provision designed to ensure that duly qualified voters, including in federal Territories, are not excluded from their right to vote in particular elections on account of their race. Under Section 1971(a), "[a]ll citizens of the United States who are otherwise qualified by law to vote at any election by the people in any . . . Territory . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any . . . Territory, or by or under its authority, to the contrary notwithstanding." Notably, the statute broadly defines the term "vote" to "includ[e] all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 42 U.S.C. § 1971(e) (incorporated by reference in 42 U.S.C. § 1971(a)(3)(A)).

Mr. Davis is a registered voter in Guam, so he is "otherwise qualified by law to vote at any election" in the Territory. But he is nonetheless denied the ability to register to vote in the plebiscite, which the statute defines as a denial of his right to

vote, on account of his race. The racially discriminatory plebiscite law is squarely foreclosed by 42 U.S.C. § 1971.

Organic Act. Additionally, the plebiscite law cannot be reconciled with Guam's bill of rights. That bill of rights, which is part of the Organic Act, provides that "[n]o discrimination shall be made in Guam against any person on account of race," 48 U.S.C. § 1421b(n), and that "[n]o qualification with respect to . . . any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter." *Id*. § 1421b(m). The voting qualification violates both provisions because it discriminates on the basis of race, *see supra* at 35-37, and imposes a qualification unrelated to citizenship, civil capacity, and residency.

CONCLUSION

This Court should reverse the district court's decision dismissing the case and hold that Mr. Davis has standing to pursue his claims, which are ripe now.

This Court should also strike down the plebiscite law's voting qualification in accordance with the Fifteenth and Fourteenth Amendments, as well as 42 U.S.C. § 1971 and Guam's Organic Act.

STATEMENT OF RELATED CASES

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

Dated: September 3, 2013

Respectfully submitted,

/s/ Douglas R. Cox

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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