No. 13-15199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARNOLD DAVIS,
on behalf of himself and 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; LEONARDO M. RAPADAS,

Defendants - Appellees.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of racial discrimination, racial preferences, and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past four decades, including *Fisher v. Univ. of Texas*, No. 11-345 (U.S. Argued Oct. 10, 2012); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF has also participated as amicus curiae in past voting rights cases such as *Shelby County v. Holder*, No. 12-96 (U.S. Argued Feb. 27, 2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

PLF submits this brief because it believes its public policy perspective and litigation experience in the area of equal protection and voting rights will provide an additional viewpoint with respect to the issues presented, which will be helpful to this court.[1]

INTRODUCTION

Under Article III of the U.S. Constitution, a person denied equal treatment on the basis of race has suffered an injury-in-fact cognizable by federal courts. *See Gratz*, 539 U.S. at 262; *Northeastern Florida Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993); *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012); *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003). Here, Arnold Davis alleges that Guam is preventing him from engaging in the political process because of his race. *See* Compl. ¶¶ 20-21, 28; *see* 1 Guam Code Ann. § 2102. Because he has been treated differently than other voters, he has suffered an injury-in-fact and has standing to challenge the unequal treatment.

The Guam Legislature established the Political Status Plebiscite (Plebiscite) to determine the voters' preferences regarding Guam's future political relationship with the United States. Pub. L. No. 27-106, § 23 (2004), *codified at* 1 Guam Code Ann.

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[1] All parties, through their attorneys, have consented to the filing of this brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Pacific Legal Foundation, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

§ 2110. The Plebiscite will appear on the ballot when 70% of the eligible voters have been registered. *Id.* But not all voters are eligible to vote on the Plebiscite, or even to participate in the process for putting it on the ballot. *Id.* Rather, only "Native Inhabitants of Guam" can register, and thereby participate in the process of placing the referendum on the ballot. *See* 1 Guam Code Ann. § 2102, 3 Guam Code Ann. § 21001(e); Pub. L. No. 27-106.

The court below ruled that Mr. Davis, who is not a Native Inhabitant of Guam, Complaint ¶ 21, did not have standing and his claims were not ripe because the court did not consider the unequal treatment that Mr. Davis suffered in the referendum process, but only the denial of his right to vote. *See* Order, No. 11-00035, at 10-17 (D. Guam Jan. 9, 2013). This Court should reverse the dismissal below and grant Mr. Davis his day in court.

ARGUMENT

The denial of the right to vote is not the only way that members of a minority can suffer discrimination in the political process. Suffering unequal treatment in the political process is itself an Article III injury. *See Shaw v. Hunt*, 517 U.S. at 904; *cf. Braunstein v. Arizona Dep't of Transp.*, 683 F.3d at 1184-87 (explaining that the denial of equal treatment is an injury sufficient for Article III standing). Recognition of this injury has allowed the courts to play an important historical role in ensuring equality in the political process; this role has not been limited to protecting the right

to vote. *See Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (race-based discrimination in the pre-election process can work the same evil as denying the franchise due to race). Accordingly, federal courts play a vital role in ensuring the political process is not tainted by race-based bigotry.

I

THE DENIAL OF EQUAL TREATMENT IN THE POLITICAL PROCESS IS AN ARTICLE III INJURY-IN-FACT

Standing under Article III, Section 2, of the United States Constitution requires that a plaintiff have: (1) suffered an injury-in-fact, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) which is caused by the defendant; and (3) could likely be redressed by the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d at 1184. A person denied equal treatment on the basis of race has suffered an injury-in-fact, sufficient for Article III standing.

Any person who suffers unequal treatment in the pre-election political process—such as the process for placing the Plebiscite on the ballot—has suffered an Article III injury. *Cf. Herndon*, 273 U.S. at 539-40 (invalidating Texas' "whites-only" primary). A plaintiff does not need to show that, but for the unequal treatment, she would have achieved a particular political goal or changed the outcome of a vote. *See Braunstein*, 683 F.3d at 1184; *see also Gratz*, 539 U.S. at 262 (holding that a college

applicant had standing to challenge a discriminatory admissions process without having to show that, but for the discrimination, she would have been accepted); *Northeastern Florida*, 508 U.S. at 666 (holding that an association had standing to challenge a discriminatory public contracts process without having to show that one of its members would have been awarded the contract had the system been fair). Therefore a person, like Mr. Davis, who has been denied the opportunity to participate in the political process due to his race, has suffered an injury-in-fact and is entitled to his day in court.

Compare the facts of this case to those in *John H. Davis, Jr. v. Commonwealth Election Commission*. Case No. 1-12-CV-00001, 2012 WL 2411252 (D.N.M.I. June 26, 2012).[2] There, every voter, regardless of race, was allowed to participate in the process for placing a referendum on the ballot. *See id*. at *3. The pre-election procedure in *John Davis* was therefore *non*-discriminatory; the plaintiff would not be denied equal treatment until the actual vote on the plebiscite. *See id*. at **3-7. Here, Arnold Davis alleges that he is already being treated differently because of his race. Compl. ¶ 21. Unlike the Northern Mariana Islands' procedure, Guam's discrimination takes place before the election occurs. *Compare* N. Mar. I. Const. art. XVIII *with* 1 Guam Code Ann. § 2102, 3 Guam Code Ann. § 21001(d); Pub. L. No. 27-106.

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[2] The court below relied on *John H. Davis, Jr. v. Commonwealth Election Commission* in dismissing this suit. *See* Order, No. 11-cv-00035, at 15-17 (D. Guam Jan. 9, 2013).

II

THE DENIAL OF EQUAL TREATMENT IN THE POLITICAL PROCESS IS A COGNIZABLE INJURY OF HISTORICAL IMPORTANCE

After ratification of the Fifteenth Amendment—guaranteeing the right to vote irrespective of one's race—many jurisdictions continued to manipulate the political process to deny the franchise to politically weak races and ethnicities. *See Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424, 428-29 (D.D.C. 2011) (recounting the history of discrimination in the political process since the enactment of the 15th Amendment); H.R. Rep. No. 89-439, at 2439-40 (June 1, 1965) (same). The Supreme Court has described this country's history of racial discrimination in the political process as an "insidious and pervasive evil." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Because the Fifteenth Amendment is not self-enforcing, Congress recognized that providing individuals access to the courts to challenge discriminatory political procedures is necessary to ensure that the promise of the Fifteenth Amendment would be realized. *See* Voting Rights Act, 42 U.S.C. §§ 1973-1973aa-6;[3] *Katzenbach*, 383 U.S. at 309.

[3] The Voting Rights Act is made applicable to Guam pursuant to 48 U.S.C. § 1421q. The Guam Bill of Rights, 48 U.S.C. § 1421b(n), also prohibits discrimination in the political process.

A. Federal Courts Have Played a Historic Role in Stopping State and Local Governments That Denied Minorities Equal Treatment in the Political Process Through Facially Neutral Means

The "insidious and pervasive evil" recounted in *Katzenbach* did not always take the form of an explicit racial classification. Often, facially neutral tests were adopted because explicit racial qualifications were patently illegal. *See Katzenbach*, 383 U.S. at 310-11 (recounting the history of literacy tests and other facially neutral means to disenfranchise black voters). This practice made it more difficult for Congress to police the abuse, as did the tendency for states to replace a voided procedure with a new discriminatory practice. *See Lane v. Wilson*, 307 U.S. 268 (1939). Because of this iterative process, only the courts could effectively protect minority participation in the political process. *See Katzenbach*, 383 U.S. at 310-12.

One facially neutral mechanism that states adopted to disenfranchise black voters was the literacy test. *See id*. at 310-11. In 1890—when some jurisdictions adopted literacy requirements—more than two-thirds of adult African Americans were illiterate while less than one-quarter of adult whites were unable to read and write. *See id*. Where discriminatory procedures in the political process would also harm white individuals, states adopted exceptions to blunt the impact of the requirements on them. For example, Oklahoma imposed a literacy test, but grandfathered in anyone entitled to vote prior to January 1, 1866, or whose ancestor was entitled to do so. *See*

Guinn v. United States, 238 U.S. 347, 363-64 (1915).[4] Though this grandfather clause didn't explicitly discriminate on the basis of race, the choice of citizenship status in 1866—four years before the 15th Amendment was ratified—was intended to deny African American voters an equal opportunity to participate in the political process. *See id*. A restriction like this, although "somewhat disguised" because it did not explicitly refer to race, "calls to life the very conditions which [the 15th] Amendment was adopted to destroy." *Id*. at 361. Because the voter qualification based on status at a particular time in the past served merely as a proxy for race, the Supreme Court declared it invalid. *See id*.

In response to the Supreme Court's decision in *Guinn*, Oklahoma adopted a new, facially neutral registration regime that would continue to deny African American voters an opportunity to participate in the political process. It adopted a voter registration regime that required eligible voters to register during the twelve

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[4] The standing doctrine was not made a part of the Case or Controversy inquiry under Article III until 1944. *See Stark v. Wickard*, 321 U.S. 288, 304 (1944); *see also* Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. Tol. L. Rev. 93, 108-46 (1996) (explaining the development of the standing doctrine). The injury-in-fact requirement did not appear until 1970, and did not become fully developed until the early 1990s. *See Barlow v. Collins*, 397 U.S. 159 (1970); Kelso & Kelso, 28 U. Tol. L. Rev. at 94-95 n.12. Therefore, the early cases invalidating political procedures under the Fifteenth Amendment do not speak directly to standing or the injury-in-fact requirement. *See, e.g.*, *Guinn*, 238 U.S. 347. But these cases do demonstrate how important access to the courts has been to ensure that the political process does not unfairly discriminate against minorities.

days between April 30 and May 11, 1916, or be forever disenfranchised. *See Lane*, 307 U.S. at 275-76. However, those who voted in the 1914 election—the last election before the Supreme Court declared the grandfather clause invalid—were exempt from this registration requirement. *See id*. The effect of this exception (and the incredibly brief window during which registration would be accepted) was to continue to prevent African American citizens from voting, while ensuring that white citizens would face no similar burden. As the Court explained:

> The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them.

See id. at 276.

Much like the illegal grandfather clause in *Guinn*, Guam is limiting participation in the political process according to one's status—or one's ancestor's status—at a particular point in the past. *See* Compl. ¶¶ 20-21, 28; *compare Guinn*, 238 U.S. at 361 *with* 1 Guam Code Ann. § 2102. And like a racially discriminatory grandfather clause, Mr. Davis alleges that the date chosen by Guam is a proxy for race. *See* Compl. ¶¶ 20-21, 28. The court may hear Mr. Davis' challenge to Guam's discriminatory, albeit facially neutral, registration requirement.

B. Federal Courts Have Also Played a Historic Role in Stopping State and Local Governments from Enforcing Racially Discriminatory Pre-Election Procedures

Jurisdictions have also denied racial minorities equal access to the political process by manipulating the procedures that precede elections. For example, in the early 20th century, Texas instituted a "whites-only" primary system. *See Herndon*, 273 U.S. at 539. Texas barred black participation in party primaries, effectively ensuring that no candidate could stand for election unless he was preferred by white voters, the race with the most political power. *See id*.; *see generally* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. St. U. L. Rev. 55 (2001) (detailing the history of white-primaries and the importance of eliminating this practice to ensure non-discriminatory access to the political process). A unanimous Supreme Court determined that Texas' regime was illegal. *Herndon*, 273 U.S. at 539. The Court held that denying a person the right to participate in the political process that influences the final result of a general election is illegal for the same reasons as denying the right to vote in the general election. *Id*. at 540. According to the Court, the illegality of such a provision was "obvious." *Id*.

The *Herndon* Court addressed the injury suffered by a member of a minority subject to a discriminatory political process:

> That private damage may be caused by [a limitation on the right to participate in a primary] and may be recovered for in suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, and has been recognized by this Court. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.

Herndon, 273 U.S. at 540 (citations omitted). Whether a person is denied the right to vote *de jure* or *de facto* makes no difference as to standing because the injury is the same: the outcome of the election is determined by a process from which the minority is excluded. *See id*. The person suffering this injury is entitled to his day in court.

After *Herndon* invalidated the mandatory whites-only primary system, Texas adopted a new statute repealing the unconstitutional provision and replacing it with a provision authorizing a committee within each party to prescribe the qualifications for voting in a party primary. *See Nixon v. Condon*, 286 U.S. 73, 81-82 (1932). The state's then-dominant Democratic party promptly restricted participation in the primary to white voters. *See id*. at 82. The Supreme Court again declared this discriminatory pre-election process invalid. *See id*. at 89. The Court determined that because the petitioner was "[b]arred from voting at a primary . . . for the sole reason that his color is not white. The result for him is no different from [*Herndon*]." *See id*. at 83; *see also Smith v. Allwright*, 321 U.S. 649, 663-66 (1944) (holding that the

party committee that sets primary voting qualifications exercises a delegated state function).

Herndon recognized that individuals who are denied the right to participate in a pre-election process that informs the content of the ballot suffer a serious injury. *Herndon*, 273 U.S. at 540. A discriminatory initiative process works the same harm as a discriminatory primary: it restricts the choices available on a ballot via a process in which members of a minority are excluded. Without recognition of this injury, the courts could not have played their historic, and constitutional, role of protecting minorities from discrimination in the political process.

III

FEDERAL JUDICIAL OVERSIGHT OF DISCRIMINATION IN THE POLITICAL PROCESS REMAINS ESSENTIAL TO PROTECTING INDIVIDUAL RIGHTS

Courts have continued to recognize that individuals subject to a discriminatory political process suffer an injury. *See Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (invalidating a state constitutional amendment that denied gays and lesbians equal access to government or the opportunity to pass laws to protect their interests); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471-74 (1982) (nullifying an initiative that allocated government power in a racially discriminatory manner); *Hunter v. Erickson*, 393 U.S. 385 (1969) (voiding a city charter amendment that made

adopting anti-housing discrimination measures uniquely difficult). These cases demonstrate that the courts must take special care to ensure that political minorities enjoy access to political power on equal terms with the rest of the population. *See* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1041-45 (1996) (explaining that federal courts are necessary to police discrimination and marginalization).

A. The Political Branches Cannot Be Expected To Provide Relief to an Individual Denied Equal Treatment in the Political Process

One of the concerns evident in the standing element of the Case and Controversy requirement is that the Courts will exercise a political role that the Constitution entrusts to the Legislative and Executive branches. *See Lujan*, 504 U.S. at 576; *see also Baker v. Carr*, 369 U.S. 186, 208-37 (1962) (explaining that political questions are not justiciable because they are questions left to the political branches). This concern is not justified when a person challenges the legality of a discriminatory political process. *Cf. Baker*, 369 U.S. at 226-37 (holding that an apportionment challenge under the Equal Protection Clause did not raise a non-justiciable political question). An individual who has been subjected to a discriminatory political process cannot expect or hope that the political branches will provide relief. Because he has been denied influence in the political process, the political branches will not hear his plea. Only the courts can protect him.

By recognizing that the denial of equal treatment in the political process is an injury-in-fact, federal courts have provided protection to such individuals. *See Braunstein*, 683 F.3d at 1184-87. In doing so, federal courts are fulfilling an important role. The right of citizens to participate in the process of government is a core democratic value. *See* John Hart Ely, *Democracy and Distrust* 87 (1980) (The Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large—with ensuring broad participation in the processes and distributions of government."); *see also Evans v. Romer*, 854 P.2d 1270, 1276-84 (Colo. 1993) (upholding a preliminary injunction against a referendum because it infringed "the fundamental right to participate equally in the political process).

Anytime a political process is manipulated to reduce the influence of a member of a political minority, that loss of influence is a cognizable harm. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L. Rev. 576, 590-94 (1997) (arguing that standing to challenge racial gerrymandering is not seriously contestable, even for white voters placed in majority black districts because of their race). Individuals have standing in federal court even where the burdens placed on the political minority are less restrictive than those at issue in this case. *See Shaw v. Hunt*, 517 U.S. 904 (holding that white residents in a racially gerrymandered district have standing to challenge this discriminatory treatment). The individual need not

have been excluded from the political process entirely. If, because of his race, a person is effectively prevented from meaningful participation in the political process, he has been injured and satisfies the standing requirement. *See Shaw*, 517 U.S. at 904. Therefore, he must also have standing if he is precluded from participating in the political process altogether.

B. The Referendum Process Is Too Important To Escape Judicial Scrutiny

The referendum is an important democratic mechanism throughout most of the United States. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13 (1995). Thirty-six states provide for some form of referendum, and twenty-six provide for referenda in their constitutions. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1509-10 (1990).

The referendum process ensures that the government is responsive to its citizens and is "'one of the most precious rights of [the] democratic process.'" *See Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982) (citation omitted). In California, for instance, the Constitution enshrines the right to participate in the referendum process because it is the means by which the voters may protect themselves from corrupt or unresponsive politicians. *See* 1911 Inauguration Address of Gov. Hiram Johnson, *quoted in* V.O. Key, Jr. & Winston W. Crouch, *The Initiative and the Referendum in*

California 435 (1939). Because this process is so important, it is essential that the courts ensure that all individuals enjoy an equal right to participate.

States and territories heavily regulate the referendum process, limiting the issues that can be addressed; requiring review by a state official before a measure can be put on the ballot; restricting who can draft or propose a ballot measure; mandating disclosure of information about a measure; and providing minimum signature thresholds before a measure can be included on the ballot. *See* Elizabeth F. Maher, *When a Majority Does Not Rule: How Supermajority Requirements on Voter Initiatives Distort Elections and Deny Equal Protection*, 15 Geo. Mason L. Rev. 1081, 1085-86 (2008). Although many of these regulations are designed to prevent initiatives from overwhelming the democratic process, they sometimes distort the political process by restricting participation. *See Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (nullifying a contribution limit imposed on groups participating in the initiative process); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (voiding a prohibition against corporate speech on certain types of referenda); *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) (upholding a requirement that a petition signed by a number of registered voters be equivalent to 10% of the votes case in the most recent election); *see also* Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*,

77 Tex. L. Rev. 1845, 1854-63 (1999) (explaining how access to the initiative process can shape the policy agenda and how limitations on that access can distort it).

If this Court holds that an individual does not have standing to challenge the denial of an equal opportunity to participate in the referendum process, history suggests that jurisdiction, unfortunately, may be expected to engage in discriminatory conduct. For instance, states and territories could adopt rules requiring a petition to be signed by a certain number of white voters before an initiative was placed on the ballot. Or they could exclude certain subjects of particular interest to minorities. *But see Hunter*, 393 U.S. 385; *cf.* J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. Ann. Surv. Am. L. 129, 138-44 (2008) (recounting the history of content and viewpoint based restrictions on the subjects eligible for the initiative process).

All-too-often, governments have attempted to restrict who can participate in the referendum process. Massachusetts prohibited corporations from supporting initiative campaigns, until the Supreme Court held the practice invalid under the First Amendment. *See Belotti*, 435 U.S. at 784. The City of Phoenix restricted the right to vote on bond measures to property owners. *See City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). The Supreme Court declared this discrimination invalid, noting that "all residents . . . property owners and nonproperty owners alike, have a

substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election[.]" *Id*. at 209.

Likewise, all residents of Guam have an interest in its relation to the United States. This Court should continue to recognize that a party denied equal access to the political process has standing to challenge this discrimination. A discriminatory initiative process works the same evil as the whites-only primary in *Herndon*—it determines the options available on a ballot based on a process from which members of a disfavored race are excluded. *See Herndon*, 273 U.S. at 540. Because the initiative process is such an important democratic mechanism in many states, erecting a barrier to judicial review of discrimination in this process would have pernicious effects.

CONCLUSION

The denial of equal treatment is an injury-in-fact and a basis for standing. Both the Supreme Court and this Court have recognized this injury. *Gratz*, 539 U.S. at 262; *Northeastern Florida*, 508 U.S. at 666; *Braunstein*, 683 F.3d at 1184; *Carroll*, 342 F.3d at 940. Arnold Davis alleges that he is prevented from participating in the process for placing the Plebiscite on the ballot because of his race. Compl. ¶¶ 20-21, 28. He has therefore alleged an injury-in-fact. Recognition of this injury enables the courts to continue to serve their historic role in protecting members of political minorities from discrimination and marginalization in the political process.

The decision below should be reversed.

DATED: June 14, 2013.

Respectfully submitted,

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s/ Jonathan Wood
JONATHAN WOOD

Counsel for Amicus Curiae
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