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's "Native Inhabitant" limitation on voting, and its admitted use of the "machinery of the state" to enforce that limitation, is racial discrimination in violation of the Constitution and federal statutory law. The district court wrongly concluded that Mr. Davis suffered no injury when Guam's Election Commission denied him the right to register to vote in the plebiscite. The defendants repeat the district court's errors, and compound them by insisting that his challenge would not be ripe *even if the plebiscite were held tomorrow*.

The defendants do not deny that the "Native Inhabitant" classification is synonymous with the Chamorro racial group. Instead, they assert that whether the "Native Inhabitant" classification is a racial one is irrelevant, because *Congress* can discriminate against U.S. citizens living in unincorporated territories. The racial discrimination at issue here, however, is Guam's own; it has not been sanctioned by Congress. To the contrary, Congress has expressly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam, and has independently prohibited Guam from engaging in voter discrimination. Guam cannot hide behind Congress.

The defendants also attempt to minimize the consequences of their racial discrimination. They insist that Mr. Davis has no claim because the plebiscite—which they assert is simply a tool to determine the desires of the "Native

Inhabitants"—has no legal effect. But this Court has squarely held that the right to vote encompasses *any* election intended to elicit the "official expressions of an elector's will," *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995), which includes the plebiscite at issue here. Moreover, the plebiscite will have an effect—among other things, the law *requires* Guam's officials to perform the official act of transmitting the results of the election to Congress and the President.

This Court should reverse the district court's judgment and conclude that Guam's racially discriminatory plebiscite is invalid.

ARGUMENT

I. Mr. Davis Has Standing To Bring This Challenge To The "Native Inhabitant" Classification.

Mr. Davis has standing to challenge Guam's racial voting qualification, and this challenge is ripe.

A. Mr. Davis Has Already Suffered Several Cognizable Injuries.

In his opening brief, Mr. Davis established that he suffered at least four injuries, each of which has been recognized by the courts as legally cognizable: (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. Davis Br. Part I.A.1. The defendants ignore the second injury, and they fail to rebut the others.

1. Mr. Davis Was Denied The Right To Register To Vote.

The defendants do not dispute that the right to vote also encompasses *registration*. Davis Br. 20-22. Their failure amounts to a concession. *See Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) ("Arguments made in passing and inadequately briefed are waived.").

a. Instead, defendants' only argument is that the right to vote does not exist in so-called "advisory" elections. Guam Br. 7 ("it does not constitute a vote within the meaning of the Constitution or the Voting Rights Act"). This is incorrect: Neither the Fourteenth nor Fifteenth Amendment draws the distinction envisioned by the defendants, and the Voting Rights Act expressly defines "vote" to include votes cast with respect to "propositions." 42 U.S.C. § 1971(e). In any event, the defendants do not believe that this plebiscite is "advisory"; indeed, they concede that it is "*not* . . . meaningless." Guam Br. 21. The plebiscite will bind the hands of Guam's officials and *require* them to communicate with Congress. 1 Guam Code Ann. § 2105. The vote thus has a clear legal effect.

This Court's decision in *Hussey* is controlling. The Court considered whether Oregon's procedure for annexation was constitutionally equivalent to voting, even though the law vested the ultimate annexation decision in a state commission. 64 F.3d at 1262-65. Under Oregon's procedure, residents of a city who desired to annex a territory had to obtain the written consent of other voters.

Id. at 1262. Once the residents obtained the consents, they were required to file an annexation resolution with a state commission, which retained authority to authorize or prohibit the proposed annexation.

Even though the commission retained ultimate authority, this Court concluded that the written consents of the voters were the constitutional equivalent of votes. Like votes, this Court reasoned, the consents "are official expressions of an elector's will" that are "required to resolve political issues." 64 F.3d at 1263. It was irrelevant that the commission "would have to approve any boundary changes before they took effect": Even "traditional voting often has no direct, dispositive effect, but rather takes effect only when acted upon by others. For example, voters do not choose the president, the electoral college does." *Id*. at 1264; *see also Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003) (the right to petition is the equivalent of the right to vote because a signature on a petition "is an expression of a registered voter's will"); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 n.11 (9th Cir. 1986) (rejecting "[t]he argument that a recall notice is only a preliminary step to voting and therefore is unaffected by . . . the [Voting Rights] Act").

Guam's plebiscite process is analogous to Oregon's consent process. Like the consents, the votes cast in the plebiscite will constitute an "official expressio[n] of an elector's will" intended to "resolve political issues." *Hussey*, 64 F.3d at

1263. Indeed, the *very purpose* of the plebiscite is "to ascertain the intent" of the qualified voters. 1 Guam Code Ann. § 2105. And, similar to Oregon's annexation procedures, the plebiscite law requires officials to send the results of the election to a political body with ultimate decisionmaking authority: Guam *must* "transmit" the plebiscite results to Congress and the President. *See id*. Whether the federal government decides to ignore the wishes of the voters is irrelevant; defendants' contrary argument both ignores the plebiscite's effect on Guam's officials—compelling an official act—and impermissibly seeks to impose a "direct, dispositive effect" requirement that this Court has rejected, *Hussey*, 64 F.3d at 1264.

b. Rather than addressing controlling precedent, the defendants rely on three Puerto Rican district court cases—*New Progressive Party v. Hernandez*, 779 F. Supp. 646 (D. P.R. 1991), *Barbosa v. Sanchez Vilella*, 293 F. Supp. 831 (D. P.R. 1967), and *Sola v. Sanchez-Vilella*, 270 F. Supp. 459 (D. P.R. 1967)—to argue that the plebiscite law does not implicate the right to vote. Guam Br. 18, 29-31. These cases have no precedential value. *See Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 921 (9th Cir. 2009). In any event, the defendants' reliance on them is badly misplaced.

Hernandez does not support the defendants' position, but instead holds that a plaintiff may challenge barriers to voting even with respect to advisory elections

designed solely to elicit opinions. In that case, the New Progressive Party challenged a referendum on the political status of Puerto Rico, arguing that the election commission's inability to register all eligible voters would amount to an unconstitutional denial of the right to vote. *See* 779 F. Supp. at 651. The court held that the Party had standing to challenge the alleged disenfranchisement even though the referendum was "simply an expression of public opinion." *Id*. at 651, 655. Mr. Davis has standing to challenge Guam's voting qualification just as the New Progressive Party had standing.

Barbosa does not hold that the right to participate in a plebiscite can never implicate the right to vote. Rather, the court dismissed the plaintiffs' complaint, which "substantially fail[ed] to comply with the requirements of Rule 8(a)," because the plaintiffs failed to explain how conducting the plebiscite would harm them. *Barbosa*, 293 F. Supp. at 833. The defendants admit that *Barbosa* involved no claims of race discrimination, Guam Br. 30, and thus it offers no guidance to determine whether Mr. Davis has stated a cognizable injury.

Sola is even farther afield. In that case, the plaintiff, who did not live in Puerto Rico, sought to vote in a Puerto Rican election. The plaintiff did not allege

racial discrimination, and the court dismissed his complaint because he did not meet the one-year residence requirement. 270 F. Supp. at 464.[1]

c. Finally, the defendants mistakenly suggest (at 21) that *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), supports their position. In that case, the Tenth Circuit considered whether Section 4 of the Voting Rights Act—which requires states to provide certain materials "relating to the electoral process" in different languages—applies to the circulation of citizen-initiative petitions. The Court first considered whether the signing of a citizen-initiated petition is equivalent to voting by analyzing two dictionary definitions of the term "vote": "[t]he expression of one's will, preference, or choice, formally manifested by a member of . . . a body of qualified electors, in regard to the decision to be made by the body as a whole upon any proposed measure," and "[t]he formal expression of opinion or will in response to a proposed decision." *Id.* at 607 (quotation marks omitted). Based on these definitions, the Court concluded that the citizen-initiated petition does not implicate voting because there is no "opportunity for a voter to express opposition to the measure contained in the petition." *Id*. Instead, the voter

[1] Puerto Rico illustrates how Guam could have conducted its plebiscite. The Puerto Rican plebiscites "defined a 'Puerto Rican' as someone who is domiciled on the Island." *See* Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. Third World L.J. 159, 166 (1998). There is no racial element in the definition: domicile is independent of race. Guam chose to take a different, and unlawful, path.

could only "agree to place the matter on the ballot." *Id*. The Court also concluded that the Voting Rights Act was inoperative because private citizens provided the petitions rather than the state. *Id*. at 609.

The Tenth Circuit's definition of voting in *Montero* cannot be squared with this Court's decision in *Hussey*; and, in any event, Guam's plebiscite law is nothing like the citizen-initiated petition at issue in *Montero*. *First*, the plebiscite provides three options to voters and thus *is* intended to elicit the "expression of [the] will" of the qualified voters. *Montero*, 861 F.3d at 607 (quotation marks omitted). *Second*, unlike citizen petitions, the defendants *admit* that the plebiscite law invokes the "machinery of the state." Guam Br. 21. Guam not only spends taxpayer money on registering voters and mounting a public education campaign, but it also must "transmit" the results of the plebiscite to the federal government. 1 Guam Code Ann. §§ 2105, 2109.[2]

* * *

The defendants cannot cite any case to support their contention that the plebiscite does not implicate the right to vote. Nor can their crabbed interpretation of voting be squared with any reasonable interpretation of federal law. In their view, a state could invoke its election machinery to hold a "whites only" vote on

[2] *Montero* has also been criticized. *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *13 (E.D. Mich. Aug. 29, 2006).

whether the state should secede from the United States, simply by claiming that the election is "advisory." Such a hypothetical "whites only" vote, like Guam's plebiscite, would be an offense to the Constitution, which is "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

2. Mr. Davis Has Established That He Was Denied Equal Treatment.

The defendants do not dispute that "the denial of equal treatment resulting from the imposition of [a government-erected] barrier" is sufficient to establish standing, even if the person challenging the barrier does not allege that "he would have obtained the benefit but for the barrier." *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); Davis Br. 22-23. In this respect, they concede once again that Mr. Davis has stated a cognizable injury.

The Supreme Court and this Court have repeatedly held that the denial of equal treatment is a cognizable injury-in-fact. Davis Br. 22-24 (collecting cases). The principle that "[a]ll persons, of . . . any ethnicity, are entitled to equal protection of the law" applies whether or not a person suffers from a separate loss of a tangible benefit. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Indeed, "[t]hat principle, and only that principle, guarantees individuals

that their ethnicity . . . will not turn into legal disadvantages as the political power of one or another group waxes or wanes." *Id.* Mr. Davis suffered an injury-in-fact because he was refused equal treatment when defendants denied him the opportunity to register to vote.

3. Mr. Davis's Stigmatic Injuries Support Standing.

The defendants do not seriously contest that stigmatic injuries satisfy the "injury-in-fact" component of standing. *Heckler v. Mathews*, 465 U.S. 728 (1984), is controlling on that point. In that case, the plaintiff sought a declaratory judgment that the application of certain Social Security rules operated to deprive him of equal protection. *Id*. at 730-31, 735. The Supreme Court agreed that the plaintiff had standing on the basis of stigmatic harm: "[D]iscrimination itself," the Court reasoned, "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." *Id*. at 739-40; *see also Hobby v. United States*, 468 U.S. 339, 347 (1984) (recognizing that "the injuries of stigmatization and prejudice associated with racial discrimination" are cognizable injuries-in-fact); *Smith v. Cleveland Heights*, 760 F.2d 720, 721-22 (6th Cir. 1985); Davis Br. 23-24 (collecting similar cases).

The defendants cite *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), to suggest that stigmatic harm is insufficient to confer standing. Guam Br. 22. But that case supports Mr. Davis. In *Carroll*, this Court considered whether a plaintiff could challenge racial preferences in a government loan program where he filed only a "symbolic, incomplete application" and did not demonstrate that he could compete for the loan. 342 F.3d at 942. Echoing the Supreme Court, this Court agreed that stigmatic harm "accords a basis for standing" to "persons who are personally denied equal treatment." *Id*. at 940 (quotation marks omitted). The Court then considered its previous decision in *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995), in which it held that a general contractor had standing to challenge a state law establishing affirmative action goals for using minority-owned businesses in utility contracts, because the contractor stood "able and ready" to bid on the contracts and the discriminatory policy prevented him from doing so on an equal basis. *See Carroll*, 342 F.3d at 942. The Court compared the *Bras* plaintiff to the *Carroll* plaintiff, and concluded that the government did not deny equal treatment to the *Carroll* plaintiff because he not only failed to file a complete loan application, but he had also "done essentially nothing to demonstrate that he [was] in a position to compete equally" with the other applicants. *Id*. at 942.

Mr. Davis stands in marked contrast to the *Carroll* plaintiff and has a stronger claim to standing than even the plaintiff in *Bras*. Unlike the *Bras* plaintiff—who only stood "able and ready" to take advantage of the government-sponsored opportunity—Mr. Davis has actually attempted to register to vote. *See* D.E. 1 ¶ 21 (E.R. 146). The defendants concede that Mr. Davis was denied the right to register because he is a "white, non-Chamorro." Guam Br. 2.[3] Because Guam has stigmatized Mr. Davis by denying him the treatment it would have afforded Chamorros in his position, Mr. Davis has alleged a sufficient injury-in-fact.

Relying on this Court's opinion in *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010), the defendants next insist that Guam has not stigmatized Mr. Davis because it has not "engag[ed] in speech nor endors[ed] any particular point of view." Guam Br. 24. This is mistaken. Guam *has* endorsed a particular view: only Chamorros should have their voice heard by Congress and the President. It is *this* message that has stigmatized Mr. Davis and left him "feeling like [a] second-class citize[n]." *Catholic League*, 624 F.3d at 1052.

[3] In any event, the Court must accept Mr. Davis's factual allegations as true, including that the "Native Inhabitant" classification is a racial one. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 834-35 (9th Cir. 2012).

Indeed, both the defendants' brief and the plebiscite law actively promote the view that Chamorros are somehow more qualified than non-Chamorros to vote on the plebiscite. The defendants admit that the "election machinery of the government of Guam" will be used to "transmit the desires of a historically distinct and unique *colonized* people." Guam Br. 7-8; *see also id*. at 21 (the plebiscite "invokes the machinery of the state to *poll* a select segment of its citizens as to their *desires*"). And Guam established a government agency—the Commission on Decolonization for the Implementation and Exercise of Chamorro Self Determination—to push this policy. 1 Guam Code Ann. ch. 21. Furthermore, after finding that "native inhabitants have the right to one day exercise their collective self-determination through a decolonization process," *id*. § 2101, Guam's legislature created three task forces to explore political status options and to prepare position papers for Guam's Election Commission, *id*. §§ 2106, 2107. The Election Commission will automatically register those Chamorros who have received, or who have been approved to receive, a Chamorro Land Trust Commission lease, unless they request in writing not to be registered. 3 Guam Code Ann. § 21002.1. It is not plausible for the defendants to assert that Guam has expressed no view on *this* point.

Moreover, although the *Catholic League* plaintiffs felt stigmatized because the government expressed its views through a nonbinding resolution, the opinion

does not suggest—let alone hold—that other forms of action cannot also stigmatize. For example, this Court has held that plaintiffs had standing to challenge a city's decision to lease property to the Boy Scouts, reasoning that the plaintiffs stated a cognizable injury by alleging that the Boy Scouts' policies caused them psychological harm. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 785-86 & nn.5-6 (9th Cir. 2008). Other cases similarly recognize standing for a stigmatized plaintiff despite the absence of any government speech. *See*, *e.g.*, *Heckler*, 465 U.S. 728; *Bras*, 59 F.3d 869.

4. Mr. Davis Established A Violation Of A Statutory Right.

The defendants suggest that the invasion of a statutory interest—here, 42 U.S.C. § 1971—is not a cognizable injury-in-fact because they do not believe the violation of a statute can support standing. Guam Br. 16. Not so. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982), the Court held that "testers" of fair housing practices—who were provided false information about the availability of housing—had suffered an Article III injury under the Fair Housing Act because the Act establishes an enforceable right of "any person" to truthful information regarding the availability of housing. It was irrelevant that the testers had no actual interest in the housing and expected to receive false information. *Id.* Here, Section 1971(a)(1) creates a statutory right for qualified voters to "vot[e] at *all*" elections regardless of race (emphasis added). The denial of the right to

register, for any election, is a far more significant injury than that found sufficient in *Havens.*

B. Mr. Davis's Challenge Is Ripe.

Mr. Davis's challenge is ripe because Guam has already discriminated against him by denying him the right to register. Davis Br. 29-30. That is particularly true because resolution of the question of *who qualifies* as an eligible voter is inextricably bound up with *when* the plebiscite will take place, because the defendants argue that the election must be scheduled in the same year in which 70% of qualified voters register to vote, *see* 1 Guam Code Ann. § 2110. Davis Br. 30-31; *see also Reg'l Rail Reorg'n Act Cases*, 419 U.S. 102, 144 (1974) (concluding that plaintiffs' injuries were ripe where the timing and merits issues were inextricably "interwoven").

1. The defendants ignore this analysis and contend that Mr. Davis's challenge is not ripe because it is not clear when the plebiscite election will occur. Guam Br. 3, 6-7, 10-16. This argument tracks the district court's impermissibly narrow view of both the injuries alleged by Mr. Davis and the type of injury necessary to sustain a voter qualification challenge.

Contrary to the defendants' assertion, Mr. Davis has not stated that the only hardship he faces is that he is not "getting any younger." Guam Br. 15. Mr. Davis has explained that he has *already* suffered four separate cognizable injuries which

Guam exacerbates every day that it chooses to expend taxpayer dollars on treating non-Chamorros like second-class citizens. Davis Br. 30. The defendants intimate that these injuries are insufficient for ripeness purposes by pointing out that Mr. Davis does not face criminal prosecution and that "[n]othing in the law impairs him from exercising his first amendment right[s]" to speak against the plebiscite. Guam Br. 15. The defendants do not explain how they can insulate specific constitutional injuries from review by noting that they have not imposed other injuries. Particularly because "the stigmatizing injury often caused by racial discrimination" is the "sort of noneconomic injury" that is "one of the most serious consequences of discriminatory government action," *Allen v. Wright*, 468 U.S. 737, 755 (1984), the plaintiffs cannot evade review of that discrimination by pointing to rights that Mr. Davis may still exercise.

2. At bottom, the defendants' ripeness arguments are nothing but a transparent attempt to shield the plebiscite law from meaningful judicial review. Although the defendants contend that the plebiscite must be held "on a date of the General Election at which seventy percent (70%) of eligible voters" have registered, 1 Guam Code Ann. § 2110, the defendants and their *amicus* admit that the law does not indicate how the Election Committee will determine that threshold, Guam Br. 3; Hattori Br. 7. They also do not dispute that, if the Guam legislature so desired, it could change the law and hold the plebiscite tomorrow.

After all, the defendants note that "one legislature cannot bind its successors," Guam Br. 12 n.5, and, indeed, Guam has recently amended the plebiscite law to state that that the Commission on Decolonization and the Guam Election Commission "*shall* determine the date" for the plebiscite "which *shall* take place following the completion of the public education program." 1 Guam Code Ann. § 2109(b). Finally, the defendants assert that, "even if the plebiscite were held tomorrow," Mr. Davis "will suffer no injury in fact." Guam Br. 28 (capitalization altered). This assertion leaves little doubt that even the defendants do not take their ripeness arguments seriously.[4]

The defendants' reliance (at 13-14) on *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), and *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), is puzzling. Those cases *illustrate* the dangers of waiting to resolve election claims until the eve of a pending election. In *Babbitt*, the Supreme Court concluded that a challenge to procedures governing the election of employee-bargaining representatives was ripe even though plaintiffs had not invoked those procedures. *Babbitt*, 422 U.S. at 299. The Court cautioned against delay because

[4] The defendants' *amicus* states that "more than eleven years have passed without any real certainty as to when the plebiscite will be held." Hattori Br. 8. In those eleven years, Guam has never disavowed its intent to hold the plebiscite and has taken many steps to ensure that it will take place. *See* Mar-Vic Cagurangan, *August 2015 Self-Determination Plebiscite Possible*, Marianas Variety, July 16, 2013, http://mvguam.com/local/news/30391-august-2015-self-determination-plebiscite-possible.html.

"[c]hallengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment." *Id*. at 301 n.12. In *Brown*, the Fourth Circuit invoked similar concerns to permit plaintiffs to challenge Virginia's primary system even though they had not yet participated in the upcoming primary. 462 F.3d at 321; *see also LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011) (candidate had standing to challenge election system early in his campaign; requiring him "to delay suing until the eve of election" would "impos[e] burdens on the courts by requiring them to expedite the litigation").

Those dangers are imminent here, especially if defendants are right that Guam must schedule the election in the *same year* in which 70% of qualified voters register to vote. This means that if the 70% threshold is met in November, a court would have less than a month to determine the constitutionality of the voting qualification. Forcing Mr. Davis to challenge the registration procedures that have *already* been applied to him only "on the eve of pending elections" would not only "disrup[t] the electoral process," but also create an unnecessary and "troublesome" need for the parties and the courts to consider serious constitutional questions on an expedited timetable. *Brown*, 462 F.3d at 320.

II. This Court Should Invalidate Guam's "Native Inhabitant" Classification.

It remains for the Court to address Mr. Davis's constitutional challenge. The defendants do not dispute that the "Native Inhabitant" classification that would prohibit Mr. Davis from voting distinguishes among citizens on the basis of race. This concession is sufficient to establish that the classification is a violation of the Fifteenth Amendment under *Rice v. Cayetano*, 528 U.S. 495 (2000), and numerous other cases. And because Guam has neither articulated a compelling state interest for classifying voters based on their race nor explained how this discriminatory scheme is narrowly tailored, the classification also violates the Fourteenth Amendment's Equal Protection Clause, as well as 42 U.S.C. § 1971 and the Organic Act itself.

A. Guam's "Native Inhabitant" Classification Distinguishes Among Citizens Based On Their Race.

The defendants do not dispute that "Native Inhabitant" is a proxy for race. Indeed, the defendants embrace the racial component of the classification by differentiating Mr. Davis—an individual they describe as a "white, non-Chamorro"—from the "Native Inhabitants," whom they characterize as "a colonized people whose racial identity happens to coincide with their political identity." Guam Br. 2, 26-27.

Their *amicus* nonetheless argues that this classification is not based on race. Hattori Br. 10. But the requisite "careful consideration" of the "'unusual'"

classification drawn by the Guam legislature (*United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted)) leaves no doubt that the "Native Inhabitant" classification was both intended to, and does, distinguish among citizens based on race.

The Supreme Court has held that a classification is racial, even if it "d[oes] not mention race," if it uses some proxy—such as ancestry—"as a racial definition and for a racial purpose," *Rice*, 528 U.S. at 513, 515. In *Rice*, for example, Hawaii argued that the classification at issue was "not a racial category at all," but instead "limited to those whose ancestors were in Hawaii at a particular time, regardless of their race." *Id.* at 514. But the Supreme Court readily concluded that the classification was a "proxy for race" that sought to "preserve th[e] [racial] commonality of people to the present day." *Id.* at 514-15; *see also* Davis Br. 20-21, 37 (collecting cases).

The "Native Inhabitant" classification at issue is just as obviously a pretext for racial discrimination. As Mr. Davis noted in his opening brief, Guam has used the terms "Native Inhabitant" and "Native Chamorro" interchangeably. Davis Br. 7-12. And its decision to employ the "Native Inhabitant" classification in the plebiscite was no accident: The legislative history of the plebiscite confirms that the legislature purposefully excluded non-Chamorro citizens from the plebiscite electorate. *Id.* at 36-37.

The defendants' *amicus* attempts to paper over these facts by asserting that the pre-1950 residents of Guam were a "multi-racial, multi-ethnic group of people." Hattori Br. 2. But this assertion is both legally irrelevant and factually untrue. As a legal matter, the factual allegations in Mr. Davis's complaint must be accepted as true in ruling on the defendants' motion to dismiss, *see Oklevueha,* 676 F.3d at 834-35, and he plainly alleges that the definition of "Native Inhabitant" "excludes, and was designed to exclude, most non-Chamorros," D.E. 1, at 5 ¶ 15 (E.R. 145). In any event, the indisputable factual record shows that, before 1950, Chamorros were *overwhelmingly* the dominant race living on Guam: Indeed, more than 90% of the population of Guam in 1901 and in 1940 was Chamorro. *See Issues in Guam's Political Development: The Chamorro Perspective* 105 (The Political Status Education Coordinating Commission, 1996); *see also Rice,* 528 U.S. at 514-15 (examining comparable sources to determine that "Hawaiian" was a racial classification).

Nor is the defendants' *amicus* correct that the "Native Inhabitant" classification can be salvaged by claiming that it draws *political*, rather than *racial*, distinctions. Hattori Br. 15-16. Even if the government purports to "structur[e] . . . the political process" in a facially neutral way, the Supreme Court has recognized, it nevertheless creates a racial classification if "it uses the racial nature of an issue to define the governmental decisionmaking structure." *Washington v. Seattle Sch.*

Dist. No. 1, 458 U.S. 457, 470 (1982). Guam has done just that: The defendants' *amicus* asserts that the plebiscite "implement[s] the process of decoloniz[ing]" the "Native Inhabitants," Hattori Br. 14-15, and defendants admit that the "political identity" of the "Native Inhabitants" "coincide[s]" with their "racial identity," Guam Br. 26-27.

B. Congress Has Not Approved Guam's Racially Discriminatory Voting Classification.

The defendants and their *amicus* argue that, even if the "Native Inhabitant" classification is a racial one, Congress can engage in "patently discriminatory action" with respect to the residents of unincorporated territories under the Supreme Court's decisions in *The Insular Cases*. Hattori Br. 4, 16-20; Guam Br. 27-36. But *The Insular Cases* do not shield the plebiscite law from constitutional review. Instead, they hold that Congress may choose to insulate unincorporated territories from the reach of the Constitution so long as the right at issue is not "fundamental." *See, e.g.*, *Dorr v. United States*, 195 U.S. 138, 148-49 (1904).

Of course, it is also true that Congress can *forbid* territories from engaging in racial discrimination—as it has done here. *See* U.S. Const. art. IV, § 3, cl. 2; *see also, e.g.*, *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002) (recognizing that Congress may "extend constitutional rights to the inhabitants of unincorporated territories"). Through the Organic Act, Congress extended

provisions of the United States Constitution to Guam, including the Fifteenth Amendment and the equal protection portion of the Fourteenth Amendment. *See* 48 U.S.C. § 1421b(n), 1421b(u). Congress also chose to include other anti-discrimination provisions in the Organic Act, including one that forbids Guam from imposing any "qualification" upon voters apart "from citizenship, civil capacity, and residence." *Id*. § 1421b(m). Thus, even if Congress *could* have permitted Guam to engage in racial discrimination in voting, it has elected not to do so.[5]

The racial discrimination here stems not from any congressional decision but instead the Guam legislature's determination to hold a plebiscite limited to a racially defined subset of the electorate. For this reason, the defendants' and their *amicus*'s reliance on *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990), Guam Br. 33-36; Hattori Br. 17-18, is badly misplaced. In *Wabol*, this Court considered whether *Congress* could impose race-based restrictions on the acquisition of interests in land in the Northern Mariana Islands. 958 F.2d at 1451. It did not consider whether a *territory* could impose those restrictions—either without Congress's permission, or (as here) against Congress's expressed will. The

[5] Neither *The Insular Cases* "nor their reasoning should be given any further expansion" to authorize the type of racially discriminatory voting regime adopted by Guam here. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.). To the extent that *The Insular Cases* could be read to do so, it should be overruled by the Supreme Court in an appropriate case.

defendants and their *amicus* do not and cannot argue that *Congress* has approved Guam's discriminatory plebiscite law. To the contrary, the Organic Act demonstrates that Congress intended to foreclose such discrimination. Davis Br. 6-7. As a result, there is no basis for invoking any act of Congress under *The Insular Cases* to justify Guam's own discriminatory law.

C. The "Native Inhabitant" Classification Is Unconstitutional And Violates Federal Statutory Law.

The plebiscite law is a plain violation of the Fifteenth Amendment, U.S. Const. amend. XV § 1, and also contravenes the Fourteenth Amendment's Equal Protection Clause, U.S. Const. amend. XIV § 1, and federal statutory law. Davis Br. 33-44.

1. Guam's Racial Voting Classification Violates The Fifteenth Amendment.

The defendants attempt to cabin the scope of the Fifteenth Amendment, claiming that it does not apply to purportedly advisory elections. Guam Br. 17-22. This argument is impermissible: Accepting it would lead to a dismissal with *prejudice*, which the defendants cannot seek because they did not cross-appeal from the district court's order dismissing the complaint *without prejudice*. *See* D.E. 78 at 7 & n.3 (E.R. 8). "Absent a cross-appeal," an appellee "may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (citation omitted); *see also, e.g.*, *Turpen v. City of Corvallis*, 26 F.3d

978, 980 (9th Cir. 1994) (appellees could not challenge a district court holding without a cross-appeal because, if successful, the challenge would have the effect of "modifying the judgment to expand their rights").

Even if the defendants could pursue this argument, and even if they were correct to characterize the plebiscite as advisory—they are not, *see supra* at 3—this Court has squarely held that whether an election is advisory is irrelevant to the constitutional analysis; instead, what matters is whether the election is intended to elicit the "official expressions of an elector's will," as the plebiscite demonstrably is. *Hussey*, 64 F.3d at 1263-64. The defendants do not seriously dispute that, *if the Fifteenth Amendment applies to the plebiscite*, it cannot survive constitutional scrutiny under *Rice*.

According to the defendants, however, the underlying district court decision in *Rice* confirms that there is a "critical distinction" between an advisory plebiscite and an election for "specific offices." Guam Br. 26. They note that the district court in *Rice* upheld a "Hawaiian only" sovereignty vote that was not at issue in the Supreme Court's later decision with respect to trustee elections. To be sure, the Supreme Court did not *explicitly* consider the sovereignty election when it invalidated Hawaii's racial classification in the trustee election. But its *reasoning* leaves no doubt that the sovereignty election, like the trustee election, would not survive Fifteenth Amendment scrutiny.

The district court in *Rice* did not rely on the advisory nature of the sovereignty election, but instead held that, under *Morton v. Mancari*, 417 U.S. 535 (1974), the Hawaiian-only nature of the vote does not violate the Fifteenth Amendment because (1) the Amendment applies only to racial classifications, and (2) the Native Hawaiian classification is not a racial classification. *Rice v. Cayetano*, 941 F. Supp. 1529, 1539-1545 & n.22 (D. Haw. 1996). The Supreme Court doubly rejected this analysis: It held that the "Native Hawaiian" classification is a racial one, and it also declined the district court's invitation to extend *Mancari* to the voting context. *See Rice*, 528 U.S. at 514, 522; Davis Br. 37-38. Thus, the Supreme Court rejected the sole line of reasoning proffered by the district court in support of its conclusion that the Fifteenth Amendment did not apply to the Hawaiian election.[6]

2. Guam's Racial Discrimination Violates The Fourteenth Amendment.

As Mr. Davis explained in his opening brief, a racial classification fails strict scrutiny unless it is narrowly tailored to achieve a compelling state interest. Davis

[6] The defendants' *amicus* also attempts to distinguish *Rice* on the ground that the date used in the Hawaiian statute for determining whether someone qualified as "Hawaiian" (1778) is distinguishable from the date used in the Guam statute for determining whether someone qualifies as a "Native Inhabitant" (1950). Hattori Br. 20-23. This attempted temporal distinction cannot override the fact that Guam intended the "Native Inhabitant" classification as a racial proxy to exclude most non-Chamorros, *see supra* at 19-22, just as Hawaii used the "Native Hawaiian" classification as a "proxy" for race, *Rice*, 528 U.S. at 514.

Br. 39. The defendants suggest that this analysis is somehow relaxed because Guam is an unincorporated territory. Guam Br. 27. But the Organic Act provides that the equal-protection portion of the Fourteenth Amendment "shall have the same force and effect [in Guam] as in the United States or in any State of the United States." 48 U.S.C. § 1421b(u).

Guam has not stated a compelling state interest in discriminating against non-Chamorros like Mr. Davis. The defendants contend that the plebiscite is intended to ascertain the wishes of the "Native Inhabitants" about "their future." Guam Br. 4-5. But this argument places unbearable weight on the use of one adjective ("their") in 1 Guam Code Ann. Section 2105, which makes no explicit reference to the plebiscite; the argument also ignores a host of other statutes, all of which make abundantly clear that it is *Guam's* political future that is the topic of the plebiscite. *See, e.g.*, Davis Br. 11 (quoting 1 Guam Code Ann. § 2109(a) regarding the need for "a successful plebiscite relative to *Guam's* political status determination" (emphasis added)); 3 Guam Code Ann. § 3104(a) (referring to "the plebiscite relative to *Guam's* political status" (emphasis added)); 3 Guam Code Ann. § 3105(a) (same); 3 Guam Code Ann. § 20007(a) (same); 3 Guam Code Ann. § 21007(a) (same). The implicit notion that a choice among "independence," "free association," or "statehood" with the United States, does not concern the future of Guam, or is of no interest to anyone else on Guam, is absurd.

In any event, the defendants cannot explain why the solicitation of the desires of one racial group is a compelling interest. Although the defendants insist that *The Insular Cases* "say" that eliciting the "Native Inhabitants'" opinions about their political fate is "constitutionally compelling," Guam Br. 28, those cases do not consider compelling state interests at all. Instead, they hold only that, while the Constitution applies fully in incorporated territories, it may apply partially in unincorporated territories. *See Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008). *The Insular Cases* have no application where, as here, Congress has extended constitutional protections to citizens living in Guam. *See supra* at 22-23.

The defendants' reliance (at 28) on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), fares no better. That case *also* does not discuss compelling state interests. Instead, it holds only that, "[i]n the area of state taxation, . . . 'absent cession of jurisdiction or other federal statute permitting it [or clear congressional intent],'" states are without power to tax "reservation lands and reservations Indians." *Id.* at 258 (citation and alteration omitted). The defendants never explain what bearing this taxation-specific holding might have in this case.

Moreover, the defendants have never articulated how the plebiscite law is narrowly tailored. Throughout their brief, the defendants argue that the plebiscite is simply an advisory poll designed to ascertain the views of "Native Inhabitants."

Guam Br. 5, 7-8, 16-18, 21, 26-30, 33, 36. But they have never explained why Guam must invoke the *election machinery of the state* to elicit a particular racial group's opinions. Nor have they explained why government officials must "transmit" the results of the plebiscite to the federal government. This lack of narrow tailoring is fatal. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418-19 (2013); Davis Br. 42.

3. Guam's Racial Discrimination Violates 42 U.S.C. § 1971 And The Organic Act.

Aside from the constitutional problems posed by Guam's voting qualification, the race-based restriction violates 42 U.S.C. § 1971 and the Organic Act. Davis Br. 43-44. Other than to suggest in general terms that these laws do not apply, the defendants do not contest that—if the laws *do* apply—Guam's voting qualification violates them. Nothing in the text of Section 1971 draws any distinction between advisory and other elections; to the contrary, it expressly guarantees the right to vote at "all . . . elections" once a particular citizen has been granted the right to vote in "any . . . election." 42 U.S.C. § 1971(a)(1). And the Organic Act similarly does not draw any distinction between types of elections but instead protects the rights of "voter[s]" generally. 48 U.S.C. § 1421b(m). Because there is no basis for concluding that these statutes do not apply to the plebiscite, this Court should strike down the "Native Inhabitant" classification under Section 1971 and the Organic Act.

CONCLUSION

Mr. Davis has standing to pursue his claims, those claims are ripe, and the racial voting qualification violates the Fifteenth and Fourteenth Amendments, as well as 42 U.S.C. § 1971 and the Organic Act. This Court should enjoin Guam from applying the racial classification, so that all otherwise-eligible Guamanian voters can participate in the plebiscite.

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Respectfully submitted,

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I hereby certify that on October 17, 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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