No. 19-827

IN THE
Supreme Court of the United States

GUAM, ET AL.,

Petitioners,

v.

ARNOLD DAVIS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave., N.W.,
Suite 625
Washington, D.C. 20036
(202) 833-8400

DOUGLAS R. COX
LUCAS C. TOWNSEND
Counsel of Record
ALEX GESCH
CLAIRE L. CHAPLA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3731
LTownsend@gibsondunn.com

Counsel for Respondent
[Additional Counsel Listed On Inside Cover]

MUN SU PARK
LAW OFFICES OF PARK &
ASSOCIATES
Isla Plaza, Suite 102
388 South Marine Corps Dr.
Tamuning, GU 96913
(671) 647-1200

J. CHRISTIAN ADAMS
ELECTION LAW CENTER, PLLC
1555 King St., Suite 200
Alexandria, VA 22314
(703) 963-8611

QUESTIONS PRESENTED

The Territory of Guam has enacted a law that permits only "Native Inhabitants of Guam" to register to vote in a taxpayer-funded referendum, or plebiscite, concerning Guam's political relationship with the United States. The term "Native Inhabitants of Guam" is expressly defined by statute with reference to bloodline, and consists almost exclusively of persons belonging to a single racial group, the Chamorros. Otherwise qualified voters who are not "Native Inhabitants of Guam" are excluded from voting in the plebiscite. Based on an extensive summary judgment record, the district court ruled that "Native Inhabitants of Guam" is in fact a proxy for race under *Rice v. Cayetano*, 528 U.S. 495 (2000), and violates both the Fourteenth and Fifteenth Amendments of the U.S. Constitution.

A panel of the Ninth Circuit unanimously affirmed, agreeing that the "Native Inhabitants of Guam" voter eligibility restriction is a proxy for race and its use as a voting qualification violates the Fifteenth Amendment.

The questions presented are:

1. Whether this Court has subject-matter jurisdiction where Guam neither filed its petition for a writ of certiorari nor obtained an extension of the time for filing a petition within the 90-day jurisdictional deadline applicable to civil cases under 28 U.S.C. § 2101(c).

2. Whether the Ninth Circuit correctly concluded on the summary judgment record that the "Native Inhabitants of Guam" voter eligibility restriction for Guam's taxpayer-funded political-status plebiscite violates the Fifteenth Amendment of the U.S. Constitution.

RULE 14.1(b)(iii) STATEMENT

Counsel for Respondent is not aware of any proceedings directly related to the case in this Court beyond the proceedings identified in the petition. Pet. iv.

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BRIEF IN OPPOSITION

Respondent Arnold Davis respectfully submits that the petition for a writ of certiorari should be denied.

JURISDICTION

The Ninth Circuit's judgment was entered on July 29, 2019. App. 1. Ninety-one days later, on October 28, 2019, Petitioners (collectively, "Guam") mailed an application for a 60-day extension of time within which to file a certiorari petition. On November 6, 2019, this Court docketed and Justice Kagan granted Guam's application. *See* No. 19A500. Guam filed its petition on December 26, 2019. This Court lacks jurisdiction because the petition was filed after the statutory 90-day jurisdictional deadline. *See* 28 U.S.C. § 2101(c); *infra* Section I.

STATEMENT

This Court has scrupulously held that there are no exceptions to the Fifteenth Amendment, and has repeatedly struck down race-based efforts to restrict the franchise by drawing a line to one's ancestors. But that has not stopped Guam from attempting to incorporate and enforce race-based grandfather clauses in its election laws, even though the Fifteenth Amendment is fully applicable in Guam.

For decades, Guamanian officials attempted to give a racially defined subset of Guam's inhabitants the power to speak for the island's entire population as to its preferred political status. Until 2000, Guam was transparent in this aim, enacting laws that explicitly limited the vote in a political-status plebiscite to the "Chamorro people." That year, however, this

Court held in *Rice v. Cayetano*, 528 U.S. 495 (2000), that a Hawaii law restricting the right to vote in a state election to "Hawaiians"—defined as descendants of the people inhabiting the Hawaiian Islands in 1778—was a "clear violation of the Fifteenth Amendment." *Id.* at 499. Immediately after *Rice* was decided, Guamanian officials made cosmetic changes to the laws governing the political-status plebiscite, replacing the word "Chamorro" with the term "Native Inhabitants of Guam," defined by reference to citizenship conferred by the 1950 Organic Act of Guam. But the laws remained transparently race-based, providing for automatic voter registration for "Chamorros" and excluding anyone else who cannot attest, under penalty of perjury, to being a "Native Inhabitant of Guam" as defined by ancestry—even if the person was adopted by a "Native Inhabitant."

Mr. Davis is a retired Air Force officer and an otherwise qualified voter in Guam who brought this lawsuit after he was excluded from registering to vote in the plebiscite because he could not attest to being a "Native Inhabitant of Guam." Based on an extensive summary judgment record, a unanimous Ninth Circuit panel affirmed the district court's judgment that the "Native Inhabitant" voter eligibility restriction in the plebiscite is an impermissible proxy for race that violates the Fifteenth Amendment.

At the outset, this Court lacks subject-matter jurisdiction because Guam neither filed its certiorari petition nor received an extension of time to file a petition within the 90-day jurisdictional deadline for petitioning for certiorari in civil cases. Even if there were jurisdiction, the petition identifies no conflict with authority from this Court or any court of appeals. In-

stead, the petition presents only a factbound disagreement with the Ninth Circuit panel's application of settled law to the summary judgment record. The panel committed no error and the petition should be denied.

A. Factual Background

1. Guam has long been inhabited by the Chamorros, "a racial group" that the parties agree "is usually defined by connections to and lineage with the groups of native peoples that inhabited Guam prior to the influx of people from Western Europe and the United States." Defendants-Appellants Excerpts of Record ("E.R."), D.E. 13, at E.R. 3-4, 12, *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019) (No. 17-15719); *see also* E.R. 58, 448 (agreeing that the U.S. Census Bureau recognizes "Chamorro" as a distinct racial category).

In 1950, Congress passed the Organic Act of Guam, declaring Guam an unincorporated U.S. territory. Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421 *et seq.*) ("1950 Organic Act"). Section 4 of the Act amended the Nationality Act of 1940 to extend U.S. citizenship to three classes of persons: (1) Spanish subjects who were inhabitants of Guam on April 11, 1899, when the Treaty of Paris took effect, along with their children; (2) all persons who had been born on Guam and were residing there on April 11, 1899, along with their children; and (3) all persons born on Guam after April 11, 1899. *Id.* sec. 4, § 206(a)-(b). The 1950 Organic Act extended citizenship almost exclusively to people of the Chamorro race. *See* E.R. 74 (expert report explaining 1950 census statistics); *see also* U.S. Bureau of the Census, Census of Population: 1950, Vol. II (1953). Indeed, it is undisputed that, as of 1950, 98.6% of all non-citizens living on Guam who could be vested with citizenship by the

1950 Organic Act were Chamorro. App. 5; E.R. 58, 447-49.

In June 1952, Congress repealed the Nationality Act of 1940 "and all amendments thereto," and replaced it with the Immigration and Nationality Act of 1952 (the "INA"). Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280. This had the effect of repealing the citizenship provisions of the 1950 Organic Act. The INA retained the substance of these provisions, *see id.* § 307, 66 Stat. at 237-38 (codified at 8 U.S.C. § 1407), while also including Guam in the definition of "United States," meaning that persons born in Guam thereafter would receive citizenship pursuant to the INA. *See id.* §§ 101(a)(38), 301(a)(1), 66 Stat. at 171, 235 (codified at 8 U.S.C. §§ 1101(a)(38), 1401(a)).

Although the citizenship provisions of the 1950 Organic Act were in force for less than two years, Guam's legislature repeatedly references those provisions, for a variety of purposes, because of the near-perfect correspondence between conferral of citizenship under the 1950 Organic Act and the Chamorro race. For example, Guamanian law expressly uses receipt of citizenship under the 1950 Organic Act to identify "Native Chamorro" people in a land-trust statute. 21 Guam Code Ann. § 75101(d).

2. In 1982, Guam held a political-status plebiscite. E.R. 31 (citing Political Status and External Affairs Subcommittee Transition Report, at 10 (2011) ("Transition Report"), https://www.pncguam.com/wp-content/uploads/2011/02/politicalstatusandexternalaffairs.pdf). All registered voters of Guam could vote, without regard to race, ethnicity, ancestry, or other extraneous characteristics. *See id.* In a run-off

election, a majority of voters elected for Guam to become a Commonwealth. *Id.*

Thereafter, Guam began drafting federal legislation ostensibly to implement the voters' choice for increased territorial autonomy as a U.S. "commonwealth." *See* E.R. 31. But the bill also contemplated that "the indigenous Chamorro people of Guam, defined as all those born on Guam before August 1, 1950, and their descendants," could exercise their own "inalienable right of self-determination" in the future, potentially overriding the results of the 1982 plebiscite. Guam Commonwealth Act, H.R. 98, 101st Cong., § 102(a)-(b) (1989) ("Commonwealth Bill"). U.S. officials voiced "[m]ajor disagreements" with several provisions of the bill, including this provision "limit[ing] the final vote on self-determination to indigenous Chamorros," which presented serious "Constitutional [i]ssues." Transition Report 8. Guam was unwilling to yield, and negotiations broke down. *See* E.R. 31.

In 1996, Guam's legislature enacted "An Act to Establish the Chamorro Registry," which established a registry of "Chamorro individuals, families, and their descendants." Guam Pub. L. No. 23-130 § 1 (1996) (codified at 3 Guam Code Ann. § 18001) (the "1996 Chamorro Registry Law"). The 1996 legislation further stated that the registry could be used "for the future exercise of self-determination by the indigenous Chamorro people of Guam," and also "for historical, ethnological, and genealogical purposes." *Id.* The 1996 Chamorro Registry Law relied on the citizenship provisions of the 1950 Organic Act to define who qualified as "Chamorro." The definition of the term "Chamorro" mirrored the 1950 Organic Act's first two citizenship provisions, limiting the term to Guam-

born persons and Spanish subjects who were "resid[ing] in Guam on April 11, 1899," and their descendants. *Id.* § 2.

One year later, Guam's legislature approved a Chamorro-only plebiscite by adopting "An Act to Create the Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination." Guam Pub. L. No. 23-147 (1997) (the "1997 Plebiscite Law"). This act was passed for the express purpose of "ascertain[ing] the desire of the Chamorro people of Guam as to their future political relationship with the United States." *Id.* § 5; *see id.* § 1 (stating that the legislature had "recognized and approved the inalienable right of the Chamorro people to self-determination"). The legislature provided that only the "Chamorro people" could vote in the political-status plebiscite. *Id.* § 10. Mirroring the 1950 Organic Act, the 1997 Plebiscite Law defined the "Chamorro people of Guam" as the "inhabitants of Guam in 1898 and their descendants." *Id.* § 2(b).

3. Before Guam held the Chamorro-only plebiscite contemplated by the 1997 Plebiscite Law, this Court held that a Hawaii law restricting the right to vote in a state election to "Hawaiians"—defined as descendants of the people inhabiting the Hawaiian Islands in 1778—was a "clear violation of the Fifteenth Amendment." *Rice v. Cayetano*, 528 U.S. 495, 499 (2000). Guam's legislature responded to *Rice* by passing the law at issue below 15 days later. *See* Guam Pub. L. No. 25-106 (2000) (referred to herein, together with the as-amended 1997 Plebiscite Law, as the "2000 Plebiscite Law"). The bill became law one month after *Rice* was decided. *See* App. 8; E.R. 503. Four sets of provisions are particularly relevant here.

First, the 2000 Plebiscite Law creates the "Guam Decolonization Registry" to "specifically delineate the list of qualified voters for the political status plebiscite." 2000 Plebiscite Law sec. 2, § 21000 (codified at 3 Guam Code Ann. § 21000). This registry is nearly identical to the 1996 Chamorro Registry, including requiring an affidavit to register, administering the registry through the Guam Election Commission, and criminalizing false registration. App. 37. The Decolonization Registry employs the term "Native Inhabitant[s] of Guam" rather than "Chamorro," *see* 2000 Plebiscite Law sec. 2, § 21003 (codified at 3 Guam Code Ann. § 21003), but the definitions of these terms are nearly identical. The term "Chamorro" in the 1996 Chamorro Registry essentially reproduces the first two citizenship provisions of the 1950 Organic Act. *See supra* 5-6. The term "Native Inhabitants of Guam" incorporates them by reference: "Native Inhabitants" are "persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam," along with their "descendants." 2000 Plebiscite Law sec. 2, § 21001(e) (codified at 3 Guam Code Ann. § 21001(e)). The term "descendant" is defined as "a person who has proceeded by birth, such as a child or grandchild, to the remotest degree, from any 'Native Inhabitant of Guam,' … and who is considered placed in a line of succession from such ancestor where such succession is by virtue of blood relations." *Id.* sec. 2, § 21001(c).

The 1950 Organic Act granted citizenship to a third category of people who are also considered "Native Inhabitants of Guam"—all people born on Guam after April 11, 1899. *See* 1950 Organic Act sec. 4, § 206(b). But this category includes few, if any, non-Chamorros as defined by the 1996 Chamorro Registry

Law. The "Native Inhabitants" definition extends to people who received citizenship exclusively through the 1950 Organic Act, and that Act was repealed in June 1952. Thus, the only people not included in the 1996 definition of "Chamorro" who could satisfy the "Native Inhabitants" definition are those born on Guam between 1899 and 1952 to non-citizen parents who were neither residents of the island in 1899, nor descended from such persons. As of 1950, that category of people was, at most, extremely small: It is undisputed that 98.6% of the non-citizen nationals on Guam were Chamorro, and thus were likely descended from people living on Guam in 1899. *See supra* 3-4; App. 36 n.15.

Second, the 2000 Plebiscite Law repealed and reenacted all sections of the 1997 Plebiscite Law that mentioned the word "Chamorro," replacing "Chamorro" with "Native Inhabitants of Guam." *See* 2000 Plebiscite Law §§ 7, 9-11. The word "Chamorro" was also removed from the title of the 1997 Plebiscite Law, *id.* § 5, and from the name of the commission administering the plebiscite, *id.* § 9 (codified as renumbered and amended at 1 Guam Code Ann. § 2104). The 2000 Plebiscite Law also rewrote the 1997 law's legislative findings, this time avoiding express racial references. *See id.* § 6 (codified as renumbered at 1 Guam Code Ann. § 2101). As with the 1996 Chamorro Registry, replacing the word "Chamorro" in the 1997 Plebiscite Law with "Native Inhabitants of Guam" made little practical difference: The 1997 Plebiscite Law's definition of "Chamorro" hewed closely to the first two categories of citizenship granted by the 1950 Organic Act, encompassing only persons living in Guam in 1898 and their descendants. *See* 1997 Plebiscite Law § 2(b). The 2000 Plebiscite Law used the

same definition for "Native Inhabitants of Guam" as in the Decolonization Registry—persons who received citizenship through the 1950 Organic Act, and their descendants. *See* 2000 Plebiscite Law § 7 (codified as renumbered at 1 Guam Code Ann. § 2102(b)).

Third, the 2000 Plebiscite Law directs that a plebiscite be held to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America," and provides that the results of the plebiscite "shall" be "promptly transmit[ted]" to the President, Congress, and the United Nations. 2000 Plebiscite Law §§ 10, 11 (codified as renumbered and amended at 1 Guam Code Ann. §§ 2105, 2110). Plebiscite voters are limited to "Native Inhabitants of Guam." *See id.* § 11; *see also id.* sec. 2, § 21003 (eligibility restriction for the Decolonization Registry) (codified at 3 Guam Code Ann. § 21003). Any person seeking to vote must attest to being a "Native Inhabitant of Guam," under penalty of perjury. *See id.* sec. 2, §§ 21002, 21009 (codified at 3 Guam Code Ann. §§ 21002, 21009).

Fourth, the 2000 Plebiscite Law denies that it is race-based, and instructs courts to construe it not to be race-based. *See* 2000 Plebiscite Law § 1 (asserting that the supposedly "separate" Decolonization Registry is "*not* [to] be one based on race," and that qualifications for voting in the plebiscite "shall not be race-based"); *id.* sec. 2, § 21000 (stating that the Decolonization Registry "shall *not* be construed … to be race based").

In 2010, Guam adopted a law providing that individuals who have received or been pre-approved for "a Chamorro Land Trust Commission property lease" will be automatically "included on the registration roll of the Guam Decolonization Registry" unless they opt

out. Guam Pub. L. No. 30-102, sec. 3, § 21002.1 (2010); *id.* § 6 (provision retroactive to 1993). Persons eligible to receive these leases are "Native Chamorro[s]," defined in the same way the 2000 Plebiscite Law defines "Native Inhabitant of Guam." *See* 21 Guam Code Ann. §§ 75101(d), 75107(a); App. 10.

In 2011, Guam enacted a law regarding times and locations to register for the plebiscite. *See* Guam Pub. L. No. 31-92 (2011). The law referred to the Commission on Decolonization by its 1997 name, the "Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination." *Id.* §§ 1-3 (adding Sections 3104(a), 3105(a), 20007(a) (now 18007(a)), and 21007(a) to Title 3 of the Guam Code Annotated).

B. Legal Proceedings

1. Respondent Arnold Davis is a non-Chamorro U.S. citizen and former U.S. Air Force officer. *See* E.R. 64. He completed a registration form to vote in the plebiscite and submitted it to the appropriate official. *See* App. 51. Although Mr. Davis is qualified and registered to vote, and has voted, in Guam general elections, Guam election officials refused to allow him to register to vote in the plebiscite solely because he did not meet the definition of "Native Inhabitant of Guam"—his registration form was marked "VOID." *See* App. 10-11, 45, 51; E.R. 72, 412; *see also* E.R. 6, 13.

In November 2011, Mr. Davis filed this lawsuit challenging Guam's race-based voter-qualification scheme. Mr. Davis alleged that this scheme 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 52 U.S.C. § 10101 (formerly 42 U.S.C. § 1971). App. 11, 44-46.

Guam moved to dismiss the complaint, arguing that there was no justiciable case or controversy. The district court granted Guam's motion and dismissed the case on standing and ripeness grounds. App. 11, 95. The Ninth Circuit reversed. *See Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015); App. 78. The court explained that unequal treatment was a sufficient harm to establish standing, and that Guam "understate[d] the effect of any plebiscite," which would "requir[e]" officials to "transmit the results to the President, Congress and the United Nations, thereby taking a public stance" and "mak[ing] it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome." 785 F.3d at 1315 (citation omitted). The court further held that Mr. Davis's claim was ripe because he was "currently being denied equal treatment under Guam law." *Id.* at 1316.

On remand, the parties cross-moved for summary judgment. The district court granted Mr. Davis's motion and denied Guam's. App. 44. Beginning with the Fifteenth Amendment, the court applied *Rice* and concluded that Guam's voting restriction used ancestry as a proxy for race, in part "because it excludes nearly all persons whose ancestors are not of a particular race." App. 55. The court concluded that the "specific sequence of events" leading to the 2000 Plebiscite Law made clear that the restriction is race-based and had a discriminatory purpose, citing its history as well as statements by lawmakers and others confirming that the plebiscite law secures a "Chamorro-only vote." App. 66-67; *see* App. 59-68. The court rejected Guam's

argument that the plebiscite was outside the Fifteenth Amendment's ambit, explaining that the plebiscite easily qualified as an election. App. 68-69.

The court next held that Guam's racial restriction failed strict scrutiny under the Fourteenth Amendment. App. 69-75. The court found that "[a]ll Guam voters have a direct interest [in] and will be substantially affected by any change to the island's political status," yet the plebiscite law prevented people from participating by using a racially discriminatory voting restriction. App. 72. Guam failed to show that its "method of achieving its goal is narrowly tailored," particularly given "other alternatives" for determining the desires of the "colonized people" including "conducting a poll with the assistance of the University of Guam." App. 74.

Because the court concluded that the Fifteenth and Fourteenth Amendments were "clearly violated in this case," it did not reach Davis's statutory arguments. App. 76.

2. A panel of the Ninth Circuit (Judges Wardlaw, Berzon, and Rawlinson) unanimously affirmed the district court's summary judgment order. App. 42. The court of appeals found it "at least clear" that the Fifteenth Amendment applied to Guam's plebiscite. App. 14. That was so, the court explained, because "the results of the planned plebiscite commit the Guam government to take specified actions and thereby constitute a decision on a public issue for Fifteenth Amendment purposes." App. 13. The court noted that "any suggestion that the Fifteenth Amendment be read restrictively should be viewed with skepticism" because "[t]he right to vote is foundational in our democratic system," *id.*, and cautioned that "[w]ere this plebiscite not covered by the Fifteenth

Amendment, the scope of the Amendment's prohibition on race-based voting restrictions in elections would be significantly narrowed," App. 16.

The court then held that the 2000 Plebiscite Law violates the Fifteenth Amendment because, as in *Rice*, "the classification 'Native Inhabitants of Guam' in this case serves as a proxy for race." App. 32. The Ninth Circuit agreed with the district court that the "definition is so closely associated with the express racial classification 'Chamorro' used in previously enacted statutes that it can only be sensibly understood as a proxy for that same racial classification." App. 33. The court analyzed the text, history, and purpose of the 2000 Plebiscite Law, including the "express racial classifications" in the 1996 Chamorro Registry Law and the 1997 Plebiscite Law and their "glaring" similarities to the 2000 Plebiscite Law. App. 34-38, 41. "The near identity of the definitions for 'Native Inhabitants of Guam' and 'Chamorro,' the lack of other substantive changes, and the timing of the 2000 Plebiscite Law's enactment" convinced the court that the 2000 Plebiscite Law "rests on a disguised but evident racial classification." App. 41. Because the Ninth Circuit "affirm[ed] the district court on Fifteenth Amendment grounds," it "d[id] not address Davis's arguments that the 2000 Plebiscite Law violates the Fourteenth Amendment, the Voting Rights Act, and the Organic Act of Guam." App. 2 n.1. Guam did not petition for rehearing.

3. On Monday, October 28, 2019, Guam mailed an application for extension of time to file a certiorari petition. This Court's Rule 13.5 requires that such applications be filed "at least 10 days before the date the petition is due, except in extraordinary circum-

stances." In its application, Guam claimed "extraordinary circumstances" for missing the 10-day deadline in Rule 13.5 because its newly retained Supreme Court counsel was not "aware of the past deadline" when he "agreed to take this case." Application 3-4, No. 19A500. Guam also argued that there was a "conflict" between the Sixth and Ninth Circuits, *id.* at 5, 7—an argument that appears nowhere in the petition. On November 6, 2019, the Clerk docketed and Justice Kagan granted the application. On December 26, 2019, Guam filed its petition with different counsel.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS JURISDICTIONALLY TIME-BARRED

At the outset, we must note a threshold jurisdictional issue that the Court should consider before investing time in evaluating Guam's arguments. This Court likely lacks subject-matter jurisdiction because Guam neither filed its petition, nor obtained an extension of time for filing its petition, within the 90-day statutory jurisdictional deadline applicable in civil cases. *See* 28 U.S.C. § 2101(c). The Clerk of this Court did not docket Guam's application for an extension, nor did Justice Kagan act on that application, until 100 days after entry of the Ninth Circuit's judgment. *See* No. 19A500. By then, that judgment had become "final and unreviewable." *Salazar v. Buono*, 559 U.S. 700, 711 (2010).

The 90-day deadline in § 2101(c) for seeking certiorari in civil cases "is mandatory and jurisdictional," and the Court "ha[s] no authority to extend the period for filing except as Congress permits." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Thus, "when an 'appeal has not been prosecuted in the manner directed,

within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'" *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (quoting *United States v. Curry*, 47 U.S. (6 How.) 106, 113 (1848)).

When the 90-day statutory deadline expired on October 27, 2019, Guam had not filed a certiorari petition. Nor had a Justice of this Court extended the time for filing a petition for certiorari. Indeed, Guam did not mail its application for an extension until the next day, Monday, October 28. While a petition for certiorari filed on that date may have been timely under this Court's precedent, *see Union Nat'l Bank v. Lamb*, 337 U.S. 38, 40-41 (1949), this Court has never held that an application for an extension of time mailed after the 90-day statutory deadline can revive and extend the Court's jurisdiction.

It is no answer that this Court's Rule 29.2 deems a filing timely if it "bears a postmark … showing that the document was mailed on or before the last day for filing." Even if Guam's application bore such a postmark, "'[i]t is axiomatic' that such rules 'do not create or withdraw federal jurisdiction.'" *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) (citation omitted). The 90-day jurisdictional deadline is mandated by statute and cannot be extended by operation of the rules.

Guam's application was not docketed until November 6—ten days after the statutory 90-day deadline. By then, Guam's Governor had announced that this Court "rejected" Guam's application.[1] Although

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[1] Office of the Governor, Statement on Davis v. Guam (Nov. 6, 2019), https://www.cir-usa.org/wp-content/uploads/2019/11/PR-DAVIS-V-GUAM-SUPREME-COURT-PHILLIPS.pdf ("Statement on Davis v. Guam") (stating that this outcome "was not unexpected").

timely applications for extensions occasionally are granted after the certiorari deadline, *see* Stephen M. Shapiro et al., Supreme Court Practice § 6.7(f) (11th ed. 2019), this Court has not explained that practice, much less in circumstances such as these, where the application was untimely.

If jurisdiction lapsed, no subsequent action on Guam's application could revive it. *Cf. FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994) (holding that the Solicitor General's effort "to authorize the FEC's [certiorari] petition after the time for filing it had expired did not breathe life into it"). Granting the application *nunc pro tunc* would have been possible only if an extension previously had been "ordered, but not entered, through inadvertence of the court." *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390 (1912); *see also Jenkins*, 495 U.S. at 49. That did not happen here; Guam simply filed too late.

In analogous contexts, this Court has recognized that "retroactively authoriz[ing]" otherwise unauthorized certiorari petitions "after the deadline had expired … would result in the blurring of the jurisdictional deadline." *NRA Political Victory Fund*, 513 U.S. at 99. The Court rejected that course because "'[t]he time of appealability, having jurisdictional consequences, should above all be clear.'" *Id.* (alteration in original; citation omitted). The Court similarly should dismiss Guam's petition as jurisdictionally out of time.

II. THE PETITION DOES NOT WARRANT REVIEW

Even if this Court has jurisdiction, review is unwarranted. Guam does not assert a conflict with a decision of this Court or any court of appeals. Rather,

Guam's petition presents nothing more than a fact-bound request for error correction in a case in which there was no error. The Ninth Circuit panel correctly applied this Court's precedent to the extensive summary judgment record to reach the correct outcome. The petition should be denied.

A. The Criteria For Certiorari Review Are Not Satisfied

Guam's petition never once cites this Court's criteria for certiorari review, *see* Sup. Ct. R. 10, presumably because it cannot satisfy them. For example, Guam does not argue that the panel below "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Nor does Guam argue that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And Guam does not assert that the panel "decided an important question of federal law that has not been, but should be, settled by this Court." *Id*.

Instead, Guam resorts to hyperbole in characterizing "[t]he Ninth Circuit's sweeping decision," which supposedly "radically expand[ed] the Fifteenth Amendment 'right to vote.'" Pet. 3, 12. Guam does this to set up an argument—never before articulated in this litigation—that application of the Fifteenth Amendment in these circumstances conflicts with "this Court's voting precedents." Pet. 25. The panel's decision does no such thing, and Guam's arguments should be viewed with deep skepticism. Just months ago, when Guam's Governor believed that this Court

had declined to entertain the case, the Governor issued a press statement describing the panel's decision as a "narrow holding" that would not deter the work of the Commission on Decolonization. Statement on Davis v. Guam. The Governor's own words are a far better indication of the limited impact of the decision below than the newly minted arguments of Guam's latest counsel.

Guam also argues that the panel's decision conflicts with "Guam's political history," Pet. 25, but that is not a basis for certiorari review. The Supreme Court is a court of law, not a platform for geo-political causes. *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) ("Sometimes, however, 'the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" (citation omitted)). Contrary to Guam's assertion that this case "presents a basic question about territorial rights to self-determination," Pet. 1, the case is actually about the Fifteenth Amendment.

In short, granting certiorari to entertain Guam's splitless, factbound, and inherently political arguments about the "right to self-determination" would be a journey into the unknown. And, as discussed below, on the factual and legal questions that are actually presented the Ninth Circuit panel committed no error.

B. The Panel Correctly Applied *Rice v. Cayetano* To Conclude That Guam's "Native Inhabitants" Voting Restriction Is An Impermissible Proxy For Race

This case is materially indistinguishable from *Rice v. Cayetano*, 528 U.S. 495 (2000), which the panel below correctly applied to conclude that the "Native Inhabitants of Guam" voter eligibility restriction violates the Fifteenth Amendment.

The Fifteenth Amendment applies with the "same force and effect" in Guam as it does in any State, 48 U.S.C. § 1421b(u), and categorically prohibits the denial or abridgment of the right to vote "on account of race," U.S. Const. amend. XV, § 1. "There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race." *Rice*, 528 U.S. at 523. The same is true where, as here, "[a]ncestry" is so closely intertwined with race as to be a "proxy for race." *Id.* at 514. As this Court has long recognized, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

At issue in *Rice* was a statute that defined the term "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." *Rice*, 528 U.S. at 509 (quoting Haw. Rev. Stat. § 10-2). A prior version of the definition had used the term "races" in place of "peoples," and the change was "at most cosmetic." *Id.* at 516. Like Guam, Hawaii argued that its new 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." *Id.* at 514. The Supreme Court rejected that argument, explaining that ancestry was "a proxy for race." *Id.* The "Native Inhabitants" classification at issue here is the same: It draws distinctions between people based on their ancestry, and thus serves as a proxy for race. It therefore violates the Fifteenth Amendment, as the Ninth Circuit correctly held.

First, the Ninth Circuit correctly determined that the 2000 Plebiscite Law's classification "Native Inhabitants of Guam" is "so closely associated with the express racial classification 'Chamorro' used in previously enacted statutes that it can only be sensibly understood as a proxy for that same racial classification." App. 33. Indeed, early in this litigation Guam admitted that the Decolonization Registry listing qualified voters for the Plebiscite is "a registry that identifies qualified voters by race," and argued that there was "nothing constitutionally wrong with compiling such a registry" and that "'race-identified registration lists are arguably superior to alternatives.'" Reply to Opp. to Mot. to Dismiss, ECF No. 24, at 1 (D. Guam Jan. 10, 2012) (No. 11-cv-35) (citation omitted). Guam also characterized the "Native Inhabitants" as "a colonized people whose racial identity happens to *coincide* with their political identity." Appellees' Answering Br. 2, 26-27, *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015) (No. 13-15199) (emphasis added).

The 2000 Plebiscite Law defines "Native Inhabitants of Guam" as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." 1 Guam Code Ann. § 2102(b). As the Ninth

Circuit observed, this definition is "nearly indistinguishable from the definitions of 'Chamorro' in the Registry Act, the 1997 Plebiscite Law, and the [Chamorro Land Trust Commission]." App. 36; *see* 21 Guam Code Ann. § 75101(d) (Chamorro Land Trust Law) ("The term *Native Chamorro* means 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."). In fact, a 2010 amendment to Guam's election laws requires the Guam Decolonization Commission to register automatically those individuals who have received or who would have been approved to receive a Chamorro Land Trust Commission lease. *See* 3 Guam Code Ann. § 21002.1; *see also* App. 10, 35, 59, 60.

The statutory parallels are further borne out by the undisputed record evidence showing that 98.6% of the people living in Guam in 1950 who were eligible to receive citizenship under the 1950 Organic Act—that is, those within the classification "Native Inhabitants of Guam"—were of the "Chamorro" race. App. 36 n.15; *see* E.R. 447-49; *see also* E.R. 74, 76 (expert report explaining that "nearly 99 percent of non-citizen nationals in 1950 were identified as Chamorro").

Second, after closely analyzing the text and history of the 2000 Plebiscite Law's predecessors, the Ninth Circuit correctly concluded that the 2000 Plebiscite Law "maintains nearly identically the features of the facially race-based Registry Act and the 1997 Plebiscite Law"—confirming that the "2000 Plebiscite Law's changes to the Chamorro classification were semantic and cosmetic, not substantive." App. 37. The 2000 Plebiscite Law contained similar substantive provisions, including "requiring an affidavit to regis-

ter"; administering the registry through Guam's official election machinery; and imposing criminal penalties for false registration. *Id.* Given the similarities of the substantive provisions and the definitions of "Chamorro" and "Native Inhabitants of Guam," the 2000 Plebiscite Law's deletion of references to "Chamorro" were "at most cosmetic," like the change from "'races'" to "'peoples'" in *Rice*, 528 U.S. at 516. *See* App. 37.

Third, the Ninth Circuit correctly determined that "the timing of the 2000 Plebiscite Law's enactment"—one month after this Court's decision in *Rice*—"confirms its racial basis." App. 38. Before *Rice*, Guam's statutes contained numerous express racial classifications. *See* App. 33-34. Section 102(a) of the Commonwealth Bill included a Chamorro-only self-determination provision. The Guam legislature created the 1996 Chamorro Registry "for the future exercise of self-determination by the indigenous Chamorro people of Guam." 1996 Chamorro Registry Law § 1. And the 1997 Plebiscite Law expressly restricted voter eligibility in the political-status plebiscite to the "Chamorro people." 1997 Plebiscite Law § 10. The 2000 Plebiscite Law's changes, including the shift from "Chamorro" to "Native Inhabitants of Guam," were merely cosmetic. As the Ninth Circuit recognized, "Guam's swift reenactment of essentially the same election law—albeit with a change in terms—indicates that the Guam legislature's intent was to apply cosmetic changes rather than substantively to alter the voting restrictions for the plebiscite." App. 38; *see also* App. 60 (district court holding that "[i]t is clear" that "the Guam Legislature attempted to manipulate the system to exclude others

from voting" by swapping terms "when the *Rice* decision was issued," and "clear" that "the Guam Legislature has used ancestry as a proxy for race").

Other record evidence confirms that the voter eligibility restriction is a classic example of a grandfather clause forbidden by the Fifteenth Amendment. The "Native Inhabitants of Guam" classification is expressly defined by "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam *and descendants of those persons*." 1 Guam Code Ann. § 2102(b) (emphasis added). "Descendant" is further defined as a "person who has proceeded by birth … from any 'Native Inhabitant of Guam' … and who is considered placed in a line of succession from such ancestor where such succession is by virtue of *blood relations*." 3 Guam Code Ann. § 21001(c) (emphasis added). The district court found, and Guam does not dispute, that "even an adopted child" cannot vote in the plebiscite because "[b]loodline/ancestry is required." App. 55.

The 2000 Plebiscite Law thus expressly "singles out 'identifiable classes of persons solely because of their ancestry or ethnic characteristics,'" which this Court has held qualifies as a racial classification. *Rice*, 528 U.S. at 515 (quoting *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)) (alteration omitted). "Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name," and thus implicate "the same grave concerns as a classification specifying a particular race by name." *Id.* at 517. Just as this Court rejected Hawaii's argument in *Rice* that its ancestry-based classification of "Hawaiian" was not a racial classification, Guam's "Native Inhabitants

of Guam" classification distinguishes between people based on ancestry in a way that serves as a "proxy for race." *Id.* Moreover, just as this Court in *Guinn v. United States*, 238 U.S. 347, 355-56 (1915), determined that Oklahoma's exception to a literacy requirement to any "lineal descendant[s]" of persons entitled to vote with reference to laws in 1866 was race-based, the 2000 Plebiscite Law's definition of "Native Inhabitants of Guam" with reference to the 1950 Organic Act is similarly race-based. *See* App. 39.

In response to the Ninth Circuit's careful, record-based analysis, Guam asserts that the panel held that the "Native Inhabitants" classification "*per se* violated the Fifteenth Amendment." Pet. 2-3. But the panel did not issue a categorical *per se* holding, as even Guam's Governor has recognized. Statement on Davis v. Guam. Nor did the panel "[b]rus[h] aside" Guam's argument that the classification is a political classification, Pet. 3; the panel recognized that this Court rejected an identical argument in *Rice*, App. 38-41.

Notably, the 1950 Organic Act extended citizenship to all people born on Guam after 1899, 1950 Organic Act sec. 4, § 206(b), and that provision was repealed and replaced in 1952, making it applicable only to persons born between 1899 and 1952. *See* INA § 403(a)(42), 66 Stat. at 280. As of 2020, anyone younger than age 68 must rely on ancestry to determine whether they are "descendants" of people who "became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam." 1 Guam Code Ann. § 2102(b). Although Guam asserts that the "same class of people" (Pet. i) who became citizens under the 1950 Organic Act are "a distinct political group" for purposes of voting in the plebiscite (Pet. 1),

Guam never explains why that "class" includes bloodline descendants "to the remotest degree" but excludes adopted children because they lack the proper "blood relations." 3 Guam Code Ann. § 21001(c).

Guam also invokes *Morton v. Mancari*, 417 U.S. 535 (1974), which held that Congress may authorize a State or territory to provide certain preferences for enrolled members of Indian tribes, subject only to rational basis review. *Id.* at 551-55. Even assuming that *sui generis* doctrine applied here, Congress has *not* authorized Guam to hold a race-restricted plebiscite. Moreover, as the panel recognized, *see* App. 40 & n.18, this Court found it unnecessary to consider an identical, "far reaching" argument in *Rice* that "exclusion of non-Hawaiians from voting" was permitted under case law "allowing the differential treatment of certain members of Indian tribes." 528 U.S. at 518. As with Hawaii's eligibility restriction in *Rice*, accepting Guam's restriction here would require the Court "to accept some beginning premises not yet established," including that Congress has determined that Native Inhabitants of Guam have a status like that of organized Indian tribes—a matter of "some dispute." *Id.* at 518-19.

As the Ninth Circuit's faithful application of *Rice* demonstrates, the decision below adheres to, and does not conflict with, this Court's controlling precedent.

C. The Panel Correctly Concluded That The Fifteenth Amendment Applies To Guam's Taxpayer-Funded Plebiscite

The principal basis on which Guam attempts to distinguish *Rice* is with respect to the purpose of the plebiscite, but that is not a meaningful distinction. As

surely as the Fifteenth Amendment applies to an election of public officials, it also applies to an election to determine a territory's political relationship with the United States.

The panel held that "[i]t is at least clear that the [Fifteenth] Amendment includes any government-held election in which the results commit a government to a particular course of action." App. 14. That narrow holding does not conflict with—and is compelled by—this Court's precedent. "The Fifteenth Amendment secures freedom from discrimination on account of race *in matters affecting the franchise*." *Lane*, 307 U.S. at 274 (emphasis added); *accord United States v. Reese*, 92 U.S. 214, 218 (1875); *United States v. Cruikshank*, 92 U.S. 542, 555 (1875). In *Rice*, this Court held that "a State [may not] fence out whole classes of its citizens from *decisionmaking in critical state affairs*." 528 U.S. at 522-23 (emphasis added).

To avoid this precedent, Guam invents an exception to the Fifteenth Amendment found nowhere in this Court's cases. Guam repeatedly characterizes the plebiscite as "nonbinding," "advisory," or "symbolic" to imply that its outcome somehow does not concern non-Chamorro voters or implicate government action. *E.g.*, Pet. i, 2, 3, 9, 11, 12, 13, 16, 20, 25. Even if such characterizations qualified for an exception to the Fifteenth Amendment—and they do not—the exception would not be presented here because the lower courts found, as a factual matter, that the plebiscite is not purely symbolic. Rather, as the Ninth Circuit recognized, "the issue the 2000 Plebiscite Law would decide is public in nature," App. 14, and the outcome of the vote "commits Guam to a particular course of action: A governmental commission with prescribed duties would be bound to transmit the result of the plebiscite

to the federal government and to the United Nations," App. 15-16. This, in turn, "would make it more likely that Guam's relationship to the United States would be altered to conform to that preferred outcome, rather than one of the other options presented in the plebiscite, or remaining a territory." App. 83. Guam does not deny these features of the plebiscite, despite euphemistically describing it as a mere "poll." Pet. i. But a poll can be conducted without deploying the government's election machinery and requiring the government to act on the results, as the plebiscite does.

Indeed, Guam undermines its argument that the plebiscite would have "no legal effect" (Pet. 9) by insisting elsewhere that the issue "implicat[es] the self-determination of a U.S. territory" (Pet. 11) and is "critical to Guam's political future" (Pet. 33). These are the very "concerns of practical political power" that Guam admits are covered by the Fifteenth Amendment. Pet. 24. It is hard to envision a more "critical state affai[r]," *Rice*, 528 U.S. at 522-23, than Guam's political relationship with the United States. *Accord* App. 68 (finding that "ascertaining the future political relationship of Guam to the United States is a public issue that affects not just the Native Inhabitants of Guam but rather, the entire people of Guam").

Guam argues that the plebiscite can be distinguished from the election of public officials because it "has no direct legal consequence," Pet. 13, but that distinction crumbles on the most cursory inspection. The plebiscite *does* have a direct legal consequence because it commits an arm of the Government of Guam to take a position on Guam's political status with respect to the federal government and the United Nations. Furthermore, the Fifteenth Amendment applies to all "elections to determine public government

policies," even if they are not self-executing. *Terry v. Adams*, 345 U.S. 461, 467 (1953) (plurality op.). The *Terry* plurality, for instance, found a Fifteenth Amendment violation in "election[s] in which public issues are decided or public officials selected" notwithstanding that the election at issue merely identified candidates that still needed to make an independent decision to run—there was "no legal compulsion on successful [party] candidates to enter Democratic primaries." *Id.* at 463, 468-70; *see also* App. 14-15.

As the Ninth Circuit panel acknowledged, recognizing Guam's exception would mean that a "broad category" of primaries, referenda, and voter initiatives would be "exempt … from Fifteenth Amendment protection." App. 17. Even a presidential election might not be covered by the Fifteenth Amendment because it could be argued that the results of the vote merely provide non-binding information to electors casting their ballot in the Electoral College.

In short, Guam's attempt to constrain the Fifteenth Amendment to votes with "direct legal consequence," Pet. 13, or "the right to participate in concrete political decisionmaking," Pet. 24, has no basis in the text of the Fifteenth Amendment or this Court's precedents applying it. And Guam's long march through this Court's Fifteenth Amendment case law merely underscores that the Amendment has been applied broadly and without exception wherever the franchise is restricted by race. Pet. 14-20. The Ninth Circuit's decision conflicts with no precedent and needs no further review.

III. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE FOR MAKING NEW FIFTEENTH AMENDMENT LAW

Contrary to Guam's assertion that there would be "no distractions" in reaching the question presented, Pet. 34, there are numerous vehicle problems.

At the most fundamental level, the Court's jurisdiction is in serious doubt due to Guam's failure to abide by statutory deadlines and the Court's rules. *See supra* Part I. Lingering questions over the Court's subject-matter jurisdiction could mean that the Court is unable to reach the merits. *E.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam).

Guam also is mistaken in claiming that the petition supposedly presents "several Fifteenth Amendment issues in one neat package." Pet. 34. In support of that assertion, Guam attempts to argue for the first time in this case that the Fifteenth Amendment must satisfy the tiers of constitutional scrutiny traditionally applicable to violations of the Fourteenth Amendment. Pet. 33 n.3, 34-35. That argument is forfeited because Guam never pressed it below. *See*, *e.g.*, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015). Accordingly, this case would be an extremely poor vehicle for adopting a "scrutiny-based analysis" (Pet. 33 n.3) for the first time in more than a century of Fifteenth Amendment jurisprudence.

With respect to that jurisprudence, Guam never articulated its argument below. In its Ninth Circuit briefing, Guam cited just two Supreme Court cases for the scope of the Fifteenth Amendment's right to vote: *Rice*, 528 U.S. at 523, and *Terry*, 345 U.S. at 467. *See* Opening Br. of Defendants-Appellees, *Davis v. Guam Election Comm'n*, 932 F.3d 822 (9th Cir. 2019) (No.

17-15719), 2017 WL 4157072, at *33-36. The petition's extended dissertation on the topic—going back to *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), and the surrounding "historical context," Pet. 14-25—was never presented below and should not be considered in this Court in the first instance.

Guam's belated attempt to argue for tiered scrutiny also shows why this case is "hopelessly entangled with [the] Fourteenth Amendment." Pet. 34. In the proceedings below, the only time the parties arguably contested strict scrutiny was with respect to Mr. Davis's Fourteenth Amendment equal protection claim. In granting relief on that claim, the district court found, as a factual matter, that Guam had "not shown that the government's method of achieving its goal is narrowly tailored" because, among other things, "[t]here are other alternatives for the government to determine the desires of the colonized people … such as conducting a poll with the assistance of the University of Guam." App. 74. Guam fails to acknowledge that finding, even though it is binding on Guam.

Moreover, Guam's Governor recently admitted that Guam has "other alternatives" to the relief sought in this case, including "[d]raft legislation, which will attempt to meet the narrow holding of the 9th Circuit Court." Statement on Davis v. Guam. Guam therefore cannot be heard to argue that its "Native Inhabitants" voting restriction is narrowly tailored, even if that argument were somehow preserved and appropriate in this context.

Guam's arguments also highlight another reason why this case is a poor vehicle: The Ninth Circuit's judgment can be affirmed on alternative grounds. Stephen M. Shapiro et al., Supreme Court Practice § 4.4(e) (11th ed. 2019) (discussing alternative

grounds for affirmance as a reason for denying review). Guam devoted only a single sentence in its opening brief below to arguing that its "Native Inhabitants" voter restriction satisfies strict scrutiny, thereby forfeiting the argument even with respect to the Fourteenth Amendment claim. Opening Br. of Defendants-Appellees, *Davis v. Guam Election Comm'n*, 932 F.3d 822 (9th Cir. 2019) (No. 17-15719), 2017 WL 4157072, at *48; *see also* Br. for United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance, 2017 WL 5957470, at *27 (noting that Guam's argument was "waived"). And at no time has Guam proffered a stitch of evidence to support its summary assertion that the "Native Inhabitants" voter restriction satisfies constitutional scrutiny, even though it was Guam's "ultimate burden" to do so. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007). Although the Ninth Circuit did not deem it necessary to reach the Fourteenth Amendment claim, the district court's equal protection judgment could be summarily affirmed on this record.[2]

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[2] Even if Guam's scrutiny-based argument were preserved, it is meritless. Directly contradicting the district court's factual finding that the results of the plebiscite "will affect not just the 'Native Inhabitants of Guam,' but every single person residing on this island," App. 72, Guam argues that the plebiscite might fall within *dicta* in *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam), suggesting that there may be "some circumstances" in which a state could limit the franchise to voters "specially interested in the election." Pet. 34 (quoting 395 U.S. at 704) (internal quotation marks omitted). The argument is forfeited because Guam did not press it below. *See OBB Personenverkehr*, 136 S. Ct. at 397-98. Moreover, the Court in *Cipriano*

The Ninth Circuit's judgment could be affirmed on other grounds as well. Guam's voter eligibility restriction fails under the Voting Rights Act because it denies Mr. Davis the right to register "on account of race," 52 U.S.C. § 10301(a); it denies Mr. Davis the ability to vote in the plebiscite even though he is "otherwise qualified by law to vote at any election," *id.* § 10101(a); and it creates qualifications for Mr. Davis that differ from the registration qualifications applied to others, *id.* § 10101(a)(2). *See* Response Br. for Appellee, *Davis v. Guam Election Comm'n*, 932 F.3d 822 (9th Cir. 2019) (No. 17-15719), 2017 WL 5640351, at *58-60. The 1950 Organic Act provides an even broader protection against discrimination, declaring that "[n]o discrimination shall be made in Guam against any person on account of race, … nor shall the equal protection of the laws be denied," 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). *See* Response Br. for Appellee, 2017 WL 5640351, at *60-61. For these additional reasons, it is unlikely that Guam could enforce its "Native Inhabitants" voter restriction even if the Fifteenth Amendment judgment were reversed.

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expressed those *dicta* in striking down a state law under the Fourteenth Amendment that permitted only "property taxpayers" to vote in "elections called to approve the issuance of revenue bonds by a municipal utility." 395 U.S. at 702. No authority suggests that any such exception, assuming one exists, applies under the Fifteenth Amendment to a race-restricted state or territorial election. Indeed, *Rice* forecloses that argument. *See* 528 U.S. at 523 ("All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.").

The petition amounts to a plea for a massive exception to the Fifteenth Amendment based on the supposed "right to self-determination." Pet. 1. But the only source Guam cites for that proposition is legislative history from 1950 that directly contradicts Guam's asserted right. *See* Pet. 6. It shows that an earlier draft of the Organic Act contained a proviso authorizing Guam's legislature to "enact such legislation as may be necessary to protect the lands and business enterprises of persons of Guamanian ancestry," notwithstanding general prohibitions on discrimination "on account of race" and "denial of the equal protection of the laws." S. Rep. No. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2846. Unsurprisingly, that "proviso was deleted because it appeared to authorize discriminatory, un-American laws which would penalize persons of non-Guamanian ancestry." *Id.* at 2844. Congress made the determination about Guam's political status seventy years ago, and Congress is where Guam's remedy lies.

Finally, it bears mention that this is not a close case. The extensive factual record shows beyond any reasonable doubt that Guam is attempting to enforce a race-based voter restriction in a taxpayer-funded election on an issue of tremendous importance to *all* of Guam's population. The Fifteenth Amendment issue was resolved 20 years ago in *Rice*—as evidenced by the cosmetic changes that Guam hurriedly made in the 2000 Plebiscite Law in direct response to that decision. That Guam attempts to cast its restriction as an ancestry-based grandfather clause changes nothing. *See Guinn*, 238 U.S. at 355-56 (striking down similar grandfather clause imposing a literacy requirement for "lineal descendant[s]" of persons not entitled to vote in 1866).

Guam may not use the election machinery to deny a voice on important public issues to voting taxpayers who do not meet Guam's race-based classification. Such an outcome would upend settled Fifteenth Amendment jurisprudence and "would be contrary to American principles of equality." 1950 U.S.C.C.A.N. at 2846.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave., N.W.,
Suite 625
Washington, D.C. 20036
(202) 833-8400

MUN SU PARK
LAW OFFICES OF PARK &
ASSOCIATES
Isla Plaza, Suite 102
388 South Marine Corps Dr.
Tamuning, GU 96913
(671) 647-1200

DOUGLAS R. COX
LUCAS C. TOWNSEND
Counsel of Record
ALEX GESCH
CLAIRE L. CHAPLA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3731
LTownsend@gibsondunn.com

J. CHRISTIAN ADAMS
ELECTION LAW CENTER, PLLC
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 963-8611

Counsel for Respondent

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