No. 19-827

In the
Supreme Court of the United States

GUAM, GUAM ELECTION COMMISSION, and MICHAEL J. PEREZ, ALICE M. TAIJERON, G. PATRICK CIVILLE, JOSEPH P. MAFNAS, JOAQUIN P. PEREZ, GERARD C. CRISOSTOMO, and ANTONIA GUMATAOTAO, in Their Official Capacities as Members of the Guam Election Commission,

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

REPLY BRIEF

This case presents a question of exceptional importance: Whether the Fifteenth Amendment permits Guam to hold a nonbinding plebiscite to allow a political class of native inhabitants to express their views on the island's relationship with the United States. The plebiscite at issue incorporates a political category that Congress used in extending U.S. citizenship to residents of Guam. The plebiscite would provide a mechanism for Guam to ascertain its residents' views on a fundamental question of self-determination. But the Ninth Circuit declared it unconstitutional, based upon an interpretation of the Fifteenth Amendment that finds no support in the text or history of the Constitution, nor in this Court's scattered precedent applying the Fifteenth Amendment in starkly different circumstances.

In opposing review, respondent argues that none of this matters—in fact, respondent completely fails to address the substantial historical material at the heart of Guam's arguments. Instead, respondent quibbles with the petition's timeliness, downplays the importance of a case that affects an entire territory, and perpetuates the Ninth Circuit's mistake of expanding this Court's precedent to inapposite circumstances. None of these responses has merit, and respondent's eagerness to avoid confronting the unresolved constitutional questions at issue only confirms that this case warrants the Court's attention. The Court should grant the petition and seize the opportunity to articulate the parameters of the Fifteenth Amendment in a case that presents only that issue for review.

I. The Court Should Grant Certiorari To Clarify The Scope Of The Fifteenth Amendment "Right To Vote."

The petition presents an unsettled constitutional question with significant implications. Yet respondent—who has vigorously pursued this case for more than eight years—now maintains the question is unworthy of further judicial attention, contending that the decision below has minimal importance, existing law squarely resolves the issue, and the case is riddled with procedural problems. Respondent is wrong across the board.

A. This Case Presents an Important and Unresolved Legal Question.

Guam's political-status plebiscite has been in the works for more than twenty years and has great significance to the territory. While the plebiscite lacks direct legal or political consequences, it will provide critical information about the views of a discrete political class of inhabitants who have been forced to sit on the sidelines for the past half-millennium. This group has readily identifiable characteristics that transcend racial classifications—including their experiences under colonial occupation and unique political relationship with the United States—and Guam has an overwhelming interest in ascertaining their self-determination preferences.

Yet the Ninth Circuit tossed aside these details and held that Guam was merely interested in race-based voting restrictions. Although the plebiscite has no concrete political consequences, the court held that it would "decide a public issue" and thus constitutes a Fifteenth Amendment "vote." Pet.App.13–16. And

although the criteria for participating in the plebiscite perfectly mirror a federal law passed during a critical moment of Guam's history, the court concluded that Guam was discriminating on racial instead of political grounds.

The upshot of this decision is not only that Guam cannot hold the long-delayed plebiscite; the Ninth Circuit's expansive definition of the term "vote" and conflation of political and racial classifications also kneecap future efforts. If the decision below stands, Guam will be hard-pressed to determine the views of this discrete political class in a way that does not fall afoul of the Ninth Circuit's new Fifteenth Amendment rules.

Respondent's lead rejoinder to the importance of this case is to complain that Guam's petition does not use magic words from this Court's criteria for certiorari review. To be sure, the petition does not assert verbatim "that the Ninth Circuit 'decided an important federal question in a way that conflicts with relevant decisions of this Court,'" or "that the panel 'decided an important question of federal law that has not been, but should be, settled by this Court.'" BIO.17 (quoting Sup. Ct. R. 10(c)). But the petition indisputably makes these arguments in substance, and this Court "consider[s] substance, not surface," so "[t]he use (or non-use) of particular labels and terms is not what matters." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). For example, Guam argued that the decision below "rests on an unprecedented expansion of the Fifteenth Amendment," Pet.2, "distorts the Fifteenth Amendment beyond this Court's precedents and has dire consequences for

Guam," Pet.3, and "turns on a critical question that this Court has never answered in this context," Pet.11.

Respondent's other efforts to minimize this case's importance are equally misguided. Respondent suggests, for example, that a Guam politician's refusal to publicly admit defeat constitutes proof that Guam has suffered little harm. BIO.18. Setting aside the impropriety of considering after-the-fact statements by a nonparty, the Governor's attempts to make the best of a bad situation do not diminish the harms inflicted by the decision below. So too for respondent's attempt to invoke the political-question doctrine, which gets the rule backwards. The point of that doctrine is to prevent courts from overstepping their boundaries and turning the Constitution into a one-size-fits-all cure for every social grievance—which is exactly what the *Ninth Circuit* did when it aggressively construed the Fifteenth Amendment to prohibit a nonbinding survey of a distinct political class that originated with an Act of Congress.[1]

Respondent also notes the lack of a circuit split, BIO.17–18, but that is to be expected. After all, this case features a U.S. territory with a unique history and special political class of inhabitants. Add in the fact that the Fifteenth Amendment is infrequently

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[1] Moreover, respondent misconstrues Guam's argument regarding the relevance of the territory's "political history." BIO.18. As explained in the petition, this unique political history is the very basis for the classification at issue, and so establishes a key distinction from cases like *Rice v. Cayetano* with laws that created classifications "solely because of . . . ancestry or ethnic characteristics." 528 U.S. 495, 515 (2000); *see also* Pet.25–33; *infra* pp.6–7.

litigated, and the prospects of a counter-point case from another circuit sink further still. In all events, the Court routinely hears cases involving issues that are important to U.S. territories, even without a split. *See generally, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, et al.*, No. 18-1334 (U.S. argued Oct. 15, 2019); *Limtiaco v. Camacho*, 549 U.S. 483 (2007); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *Territory of Guam v. Olsen*, 431 U.S. 195 (1977); *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224 (1959). The unusual nature of Guam's situation enhances rather than detracts from the importance of this case: it highlights the danger of extending the Fifteenth Amendment without careful consideration of history and precedent.

Finally, respondent defends the Ninth Circuit's decision by claiming that "[t]his case is materially indistinguishable from *Rice*." BIO.19. It is not. At the outset, *Rice* did not decide whether the Fifteenth Amendment applies to a nonbinding plebiscite. It had no occasion to consider the question, because the election in *Rice* had indisputable political consequences—the selection of Hawaiian public officials who managed state finances. *See* 528 U.S. at 498–99, 521. In contrast, Guam's proposed plebiscite neither "decide[s]" public issues nor "select[s]" public officials. *Id.* at 523. Its only consequence is that the government will report the results.

In an attempt to shoehorn this case into *Rice*, respondent claims that Guam's plebiscite is actually "an election to determine a territory's political relationship with the United States." BIO.26. But although respondent speculates that the plebiscite

"would make it more likely that Guam's relationship to the United States would be altered," respondent cites nothing to suggest that such an attenuated and contingent possibility converts the plebiscite into an "election" consistent with this Court's precedents. BIO.26–27. The plebiscite merely has power to *persuade*; it has no greater ability to *decide* a public issue than a well-coordinated letter-writing campaign.

Respondent's argument that Guam's obligation to report the results of the plebiscite is itself a sufficiently concrete political consequence, BIO.26–28, fares no better. Just because the government reports the outcome of a survey does not mean that the survey itself has any direct political effect. By the same logic, a government survey that features questions about race would violate the Fifteenth Amendment if the results must be transmitted to the legislature or a government agency. Respondent also argues that the vote in *Terry v. Adams* is analogous because it involved no "legal compulsion," BIO.28, ignoring that the vote in *Terry* had a demonstrated and perennial political effect: the candidates selected by that vote "nearly always" entered Democratic primaries and "with few exceptions . . . won without opposition in the Democratic primaries and the general elections," 345 U.S. 461, 463 (1953). Like the other elections addressed by this Court's Fifteenth Amendment precedents, the vote in *Terry* directly affected the balance of political power in a way that Guam's proposed plebiscite cannot. *See* Pet.15–20.

Even assuming the plebiscite involves a "vote," nothing in *Rice* forbids Guam from limiting participation based on political status. The proposed

category of participants shares important non-racial attributes—namely, their connection to a concrete moment in Guam's political history when the island had just escaped Japanese occupation and was entering a new political relationship with the United States. In contrast, the law in *Rice* limited participation to "descendant[s] of the *aboriginal peoples* inhabiting the Hawaiian Islands." 528 U.S. at 509 (emphasis added). To be sure, the Plebiscite Law also mentions ancestry in defining eligible participants, but ancestry is not always "a proxy for race." *Id.* at 514. As even the Ninth Circuit recognized, ancestry has proper legal uses, including in rules for inheritance, child custody, and citizenship. Pet.App.28–29. What matters is whether ancestry is used to link an existing group of people to a previous race-based group, for race-related reasons. *E.g.*, *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating a grandfather clause with an 1866 cutoff because the *only* possible explanation was "the continuance of [the conditions] which the 15th Amendment prohibited"). In *Rice*, ancestry clearly had that purpose, given that the ancestral chain there led back simply to "aboriginal peoples." 528 U.S. at 509. Here, however, ancestry traces back to a strictly *political* event—Congress's decision to single out a class of people who had not enjoyed the benefits of citizenship and pull them into a closer relationship with the United States.

B. Legal and Historical Authority Indicate That a Nonbinding Plebiscite Is Not a "Vote."

Given the lack of guidance from this Court on what counts as a "vote" for purposes of the Fifteenth Amendment, Guam's petition canvasses Fifteenth Amendment history to demonstrate why "vote" refers to elections with real political consequences. Indeed, the ratification process illustrates a popular understanding that the Amendment would affect only those kinds of elections, and this Court's jurisprudence reinforces that view. *See* Pet.13–25.

Yet respondent completely fails to grapple with this history and suggests that this Court should ignore it entirely. BIO.29–30 ("The petition's extended dissertation on the topic . . . should not be considered in this Court."). That course has nothing to recommend it. Indeed, legal and historical authority are key to interpreting any text, including "language in the Constitution," which "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *see also, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018) (Fourth Amendment analysis is "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Amendment] was adopted'" (citation omitted)); *McDonald v. City of Chicago*, 561 U.S. 742, 768–69 (2010) (Second Amendment protections are considered in light of "the right's origins," including colonial

history, ratification debates, and early post-ratification practice).[2]

II. The Court Has Jurisdiction And This Case Is An Ideal Vehicle.

1. Respondent contends the Court lacks jurisdiction because Guam filed its application for an extension of time on Monday, October 28, 2019—supposedly one day outside the 90-day-period prescribed by 18 U.S.C. § 2101(c) for the filing of a petition for certiorari after an adverse judgment. But there is no real question about the Court's jurisdiction because the ninetieth day was a Sunday and, "where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or legal holiday is timely." *Union Nat'l Bank of Wichita v. Lamb*, 337 U.S. 38, 40 (1949). In *Lamb*, the Court adopted the time-measurement method from Federal Rule of Civil Procedure 6(a), which "provides the method for computation of time" under "any applicable statute" or "order of court." 337 U.S. at 41. Applying that rule, the Court held that a petition for certiorari filed on the ninety-first day after the lower court's judgment—like Guam's extension

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[2] There is no merit to respondent's theory that Guam waived or abandoned its argument about what constitutes a "vote." Below, Guam urged that "[a] non-binding plebiscite is not an election within the meaning of the Fifteenth Amendment," Guam.CA9.Br.33, and the Ninth Circuit considered and answered that precise question, Pet.App.13–18. Guam properly preserved the issue and is entitled to invoke all relevant authorities in support of its position. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995).

application—was timely because the ninetieth day was a Sunday. *Id.* at 40–41.

Respondent recognizes *Lamb* but attempts to manufacture a distinction between a petition and an extension application. *See* BIO.15–16. No such distinction appears in § 2101(c) or in this Court's jurisprudence. Indeed, *Lamb*'s timeliness rule is based on "the considerations of liberality and leniency which find expression in Rule 6(a)," not on some feature unique to certiorari petitions. 337 U.S. at 41. If there were any doubt that the same principles apply to calculating time for an application for extension, Supreme Court Rule 30 expressly adopts Rule 6(a)'s approach to deadlines for "any period of time prescribed . . . by these Rules . . . or by an applicable statute," Sup. Ct. R. 30.1, and provides that an application for extension "shall be filed within the period sought to be extended," Sup. Ct. R. 30.2. Here, the "period sought to be extended" was the period for filing a petition; and that period extended until Monday, October 28th under § 2101(c) and *Lamb*.[3]

None of respondent's cases casts doubt on this outcome, because those cases address the effect of an untimely filing, not the date upon which a petition or application becomes untimely. Guam's filing was timely, so this Court has jurisdiction to consider the petition and should do so.

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[3] Recent events confirm that this Court has the authority to modify the deadline for petitions even absent an extension application in appropriate circumstances. *See* Miscellaneous Order, 589 U.S. __ (Mar. 19, 2020) (extending deadline to 150 days for petitions due on or after March 19, 2020).

2. Respondent cannot deny that the decision below offers a concise interpretation of a single constitutional provision in the context of summary judgment—simply put, a clean-cut legal question. Instead, respondent tries to muddy the waters by pointing to extraneous issues and speculating about how the Ninth Circuit might approach the case on remand. None of these arguments undermines Guam's petition.

For example, respondent claims that this case is "hopelessly entangled with the Fourteenth Amendment," BIO.30, but does not explain why. Instead, respondent simply argues that "the only time the parties arguably contested strict scrutiny was with respect to [respondent's] Fourteenth Amendment equal protection claim." BIO.30. But that Guam defended an alternate claim says nothing about the appropriateness of reviewing the decision below, which resolved only the Fifteenth Amendment claim and thus gives this Court a rare chance to hear a case in which the Fifteenth Amendment is outcome-determinative. As Guam points out in its petition, Pet.34, this case is even simpler than those that presented both Fifteenth and Fourteenth Amendment issues to the Court. *See, e.g.*, *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (ruling only on the Fourteenth Amendment); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (same); *see also, e.g.*, *Terry*, 345 U.S. at 481, 484 (ruling only on the Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649, 666 (1944) (same).

Furthermore, and contrary to respondent's suggestion, Guam did not forfeit the argument that the Plebiscite Law would satisfy strict scrutiny under

the Fifteenth Amendment. Nor did Guam forfeit the argument that this Court's precedents do not resolve whether Fifteenth Amendment constraints are "absolute," as the Ninth Circuit held. Pet.App.18. Guam preserved its challenge to the lower courts' determinations that the Plebiscite Law violates the Fifteenth Amendment, and it may develop related arguments in support of that challenge. *See supra* n.2. The Ninth Circuit also broke new ground when it invoked a single sentence from *Rice* to hold that "levels of scrutiny applied to other constitutional restrictions are not pertinent" in the Fifteenth Amendment context. Pet.App.18. Neither *Rice* nor any of this Court's precedents has decided that issue, and the Ninth Circuit has now cleanly presented it for review.

Finally, that alternative grounds might exist for the Ninth Circuit's disposition is no reason to deny review. The Court often resolves the issue(s) decided by the courts of appeals and leaves alternative arguments for resolution on remand. *E.g.*, *United States v. Rutherford*, 442 U.S. 544, 559 n.18 (1979) (declining to consider alternative grounds addressed by district court when court of appeals ruled only on the question presented); *see also, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999); *Mead Corp. v. Tilley*, 490 U.S. 714, 725–26 (1989); *Mathews v. United States*, 485 U.S. 58, 66 (1988).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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