Granted

Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

No. 99-51

In the Supreme Court of the United States

OCTOBER TERM, 1999

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,
Petitioners,

v.

JOSEPH F. ADA and
FELIX CAMACHO,
Respondents.

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

BRIEF OF AMICUS CURIAE THE VOTING INTEGRITY PROJECT IN SUPPORT OF PETITIONERS

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October 22, 1999

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INTEREST OF AMICUS CURIAE

The Voting Integrity Project ("VIP") submits this amicus curiae brief with the consent of the parties.[1] VIP is

[1] Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amicus states that the brief in its entirety was drafted by amicus curiae and its counsel. No

a non-profit, non-partisan public interest organization headquartered in Arlington, Virginia. It is dedicated to preserving and protecting the fundamental right to vote and the integrity of American elections.

VIP's primary focus is on educating citizens to protect election integrity in their own communities, with a special emphasis on preventing election fraud. In appropriate cases, VIP will institute or participate in litigation to protect the fundament right to vote. VIP has participated as a party or an amicus in state and federal courts in numerous cases involving election laws and practices.[2]

SUMMARY OF ARGUMENT

In considering the proper interpretation of 48 U.S.C. § 1422, which governs the election of the governor and lieutenant governor of Guam, the Ninth Circuit should have followed the plain language of the statute in light of the statute's context. Blank ballots and improperly marked ballots should have been held to be void and irrelevant to the final vote count as required by Guam's election code. Instead, the Ninth Circuit flouted common sense and long-standing holdings of this Court by requiring a runoff election where none was needed.

When Congress required that winning candidates must receive a majority of "the votes cast in any election" to

monetary contribution toward the preparation or submission of this brief was made by any person other than amicus curiae, its members, or its counsel.

[2] In filing this brief, VIP does not endorse the candidacy of the Petitioners' slate or express any unfavorable view with respect to the candidacy of the Respondents' slate. Nor does VIP take any position with respect to the merits of the election contest action of Respondents pending in the Guam territorial courts.

avoid a runoff, it was referring only to general gubernatorial elections. Congress did not mean to require a majority of *ballots* cast on Election Day in several different elections. If it had, it surely would have said so. Nothing in § 1422, however, refers to ballots. Yet the Ninth Circuit has admittedly rewritten the statute and substituted "ballots" for "votes." Similarly, nothing in § 1422 refers to any election other than the general gubernatorial election. The Ninth Circuit's ruling, however, allows the vote totals in the election for school board to throw a decisively resolved gubernatorial election into a runoff.

The Ninth Circuit's interpretation of § 1422 inevitably leads to absurd results. It allows even a small number of mismarked ballots to plunge Guam's political system into chaos. Not only would it require a runoff when it is nonsensical and antithetical to the will of the voters to do so, but it would make it possible for the runoff to fail to produce a winner. Not anticipating this distorted interpretation, Congress did not provide for a second runoff. Under the Ninth Circuit's decision, therefore, Guam could easily be left without a governor. That can not be what Congress intended.

The Ninth Circuit arrived at its flawed judgment because it ignored the definition of "election" that this Court established in *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464 (1997), and earlier cases. An election refers to the selection of an officeholder, not a series of choices for different offices. For example, a ballot asking voters to express their preferences for their presidential electors, senator, and representative calls for choices in three *different* elections held on the same day. When § 1422 employs the phrase "in any election" in a paragraph discussing *only* the gubernatorial election, the contest for

governor is the only election to which it is referring. Additionally, *Foster v. Love* mandates the conclusion that "votes cast" refers only to properly marked ballots. The casting of undervotes and overvotes are not actions "meant to make a final selection of an officeholder." Therefore they are not "votes cast" and need not be counted.

This Court resolved the issues at hand long ago when it decided *County of Cass v. Johnston*, 95 U.S. 360 (1877). In *Cass* the Court ruled that qualified voters who do not participate in an election assent to the will of those who do vote. Those who cast undervotes and overvotes in Guam did not "vote" as this Court has defined that term. They should not be counted in determining the number required for a majority. The Ninth Circuit's reasons for declining to apply *Cass* are not convincing.

Finally, the Ninth Circuit's reliance on 48 U.S.C. § 1712, which provides for the election of Guam's delegate to Congress, is misplaced. Section 1712 was enacted four years after § 1422. The fact that it expresses the same thing as § 1422 using clearer syntax does not alter the meaning of § 1422. Common sense, this Court's precedent, and earlier opinions of the Third and Ninth Circuits all teach that § 1422 should be assigned the meaning suggested by the context of its plain language, under which undervotes and overvotes are not counted and no runoff is necessary. A subsequently enacted statute having no bearing on gubernatorial elections cannot change that meaning.

For all these reasons, the Ninth Circuit's judgement should be reversed.

ARGUMENT

I. The Ninth Circuit Wrongly Interpreted the Language of 48 U.S.C. § 1422.

Section 1422 of Title 48 governs gubernatorial elections in Guam. It provides, in pertinent part:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. *If no candidates receive a majority of the votes cast in any election*, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. § 1422 (emphasis added). The plain language of the statute and its context dictates the disposition of this case. Petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") received a clear majority of the votes cast in Guam's gubernatorial election on November 8, 1998. Section 1422's runoff provision is not triggered by the results of the election.

The Ninth Circuit disagreed. In an opinion in which it essentially rewrote § 1422, the court required that a winning candidate receive a vote total equal to a majority

of all the ballots cast on election day, including partially blank ballots and improperly marked ballots. *See Ada v. Government of Guam*, 179 F.3d 672, 682 (9th Cir. 1999). Under that standard, Gutierrez failed to secure a majority, so the Ninth Circuit affirmed the district court's decision ordering a runoff. *See id.* at 683.

The Ninth Circuit misinterpreted § 1422. The statute, by plain language confirmed by its statutory context, requires only that a gubernatorial slate garner a majority of votes cast in *its* election, not in every election on the ballot.

A. *The Ninth Circuit Ignored the Statutory Context and Issued a Prescription for Absurd Results.*

The resolution of this controversy turns on the interpretation of § 1422's phrase "a majority of the votes cast in any election." The Ninth Circuit concluded that Congress intended the phrase to mean "the votes cast for *any* of the offices up for election at the general election; that is, the number of ballots cast." *Id.* at 677. The court admitted that "this interpretation equates 'votes cast' with 'ballots cast,'" but argued that rewriting the statute "in such a way as to avoid an absurdity is preferable to reading the phrase ['in any election'] out of the statute entirely." *Id.* at 677 n.5.

In so doing, the Ninth Circuit effectively struck the word "votes" out of the first paragraph of § 1422 and replaced it with the word "ballots" despite the fact that "ballots" appears nowhere in the paragraph while Congress employed "votes" five times. By making this substitution, the Ninth Circuit implied "a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it."

Fedorenko v. United States, 449 U.S. 490, 513, 101 S. Ct. 737, 750 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38, 55 S. Ct. 31, 36 (1934)).

The Ninth Circuit's interpretation of § 1422 also ignores the statutory context because it reads down-ballot elections into a paragraph dealing solely with gubernatorial elections. In its entirety, § 1422 sets out the procedure for electing Guam's governor and lieutenant governor, prescribes the length of their terms, enumerates their powers and responsibilities, and establishes the qualifications for the gubernatorial offices. Section 1422 does not mention any other office or election. Yet in the Ninth Circuit's view, § 1422 compels the Guam Election Commission to consider the voter turnout in races for congressional delegate, legislature, and school board in determining who should be certified the winner in the gubernatorial race. *See Ada*, 179 F.3d at 675. The Ninth Circuit is simply wrong.

The Ninth Circuit did not have to read the phrase "in any election" out of the statute to arrive at the correct result. It could simply have put the phrase in context. Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 119 S. Ct. 2090, 2102 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 1582 (1961)). The remainder of § 1422, the statutory context, makes clear that the phrase "in any election" merely means "any gubernatorial general election." This Court should rely on that context "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061 (1995) (internal quotations omitted).

The Ninth Circuit found "a good deal of appeal" to the contention "that it is nonsensical to require a runoff election when there were only two gubernatorial slates in the election and even more so because Gutierrez would have received a majority of votes validly cast even if all of the write-in votes had gone to Ada." *Ada*, 179 F.3d at 682. Because it judged its own interpretation of the statute so elegant, however, the court brushed aside that concern.[3] The court failed to appreciate, however, the full extent of the absurdity its interpretation of § 1422 compels. In the election at issue in this case, 609 voters (1.3%) voted for both Gutierrez and Ada, thereby casting ballots that are deemed void under Guam's election law. *See* 3 Guam Code Ann. § 11114 (providing that "if for any reason it is impossible to determine his choice of any office his ballot shall not be counted for that office.").

Projecting that same 1.3% rate of overvoting into the court-ordered runoff between Gutierrez and Ada, a situation could easily arise in which no winner could ever be declared. For example, if 10,000 voters turned out for the runoff election, 4,970 voted for Gutierrez, 4,900 voted for Ada, and 130 voters improperly checked both candidates, under the Ninth Circuit rule, no winner could be certified. A normal counting method would throw out the overvotes, allowing Gutierrez to garner 50.3% in the hypothetical runoff. If the overvotes are added to the

[3] In explaining why it broke from *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), which ascribed the plain meaning urged by the petitioners in this case to 48 U.S.C. § 1591, a statute prescribing gubernatorial elections in the U.S. Virgin Islands using language identical to that of § 1422, the Ninth Circuit noted: "We respectfully decline to follow *Todman*, however, because it does not provide a more persuasive interpretation of the relevant statutory language than that gleaned from our own textual analysis of § 1422." *Ada*, 179 F.3d at 679.

total, however, Gutierrez would be left with only 49.7%, just short of the required majority. The ridiculous result is that no one wins.

The probability of such a "failure to elect" in a gubernatorial runoff would be increased if the runoff ballot included a runoff election for delegate to Congress, as is contemplated by 48 U.S.C. § 1712 when no candidate for delegate attains a majority vote in the genereal election. In that circumstance, there would likely be voters who would choose to vote only in the delegate runoff. In Guam's 1998 general election, such voters – those who voted in down-ballot elections but not in the gubernatorial election – may have made up as much as 2.7% of the vote.[4] Under the Ninth Circuit holding, the ballot of those voters would also have to be counted for the purposes of determining whether a gubernatorial slate garnered a majority. In a runoff where undervotes and overvotes amount to four percent of the total ballots cast, the Ninth Circuit's holding makes it highly likely that no slate could garner a majority.

Because Congress never considered that its language in § 1422 could be read as the Ninth Circuit has read it, it did not provide for the possibility that no one would gather "a majority of the votes cast" in the runoff. There

[4] The record shows that 1,313 persons who voted in the general election neither voted for a gubernatorial slate nor cast a write-in vote. The record does not reflect how many of those persons cast entirely blank ballots and how many voted in down-ballot elections but not in the gubernatorial election. It can be inferred from the Ninth Circuit's opinion that under its rule, the former would not be counted but the latter would be. *See Ada*, 179 F.3d at 677 n.5 ("For example, a 'vote cast' in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate.").

is no provision for a *second* runoff. Guam would be left without a governor.

The Ninth Circuit's interpretation of the statute leads to absurd results not only in some unlikely fantasy but *in this very case*. If the voting patterns in the runoff follow those in the general election, no victor can ever be declared under the Ninth Circuit's ruling. Nor is the intractability of this situation caused by a uniquely close competition between Gutierrez and Ada.

The Guam race was relatively clear cut for an American election.[5] Gutierrez defeated Ada by 7.11%. In the United States, it is common for elections to be much closer than the race at hand. For example, in the 1996 presidential elections, less than two percent of the vote separated President Clinton and Senator Robert Dole in the races for electors in Georgia and Colorado, and less than one percent separated them in Kentucky and Nevada.[6] Similarly, the margins of victory were extremely small in the 1996 U.S. Senate elections in Georgia (1.32%) and Louisiana (0.34%). *See* FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 96 (1997).

Races for the U.S. House of Representatives can make the Guam gubernatorial race look like a rout. Gutierrez's margin of victory over Ada was 3,050 votes. *See Ada*, 179 F.3d at 675. In Washington's ninth congressional district, the margin of victory in 1996 was only 1,208, despite the fact that the total number of voters in that race

[5] Among the properly marked ballots, Gutierrez won 24,250 votes (53.47%), Ada won 21,200 votes (46.36%), and write-in candidates won 275 votes (0.60%). *See Ada*, 179 F.3d at 675.

[6] In Georgia, Dole beat Clinton by 1.17%. In Colorado, Dole beat Clinton by 1.37%. In Kentucky, Clinton beat Dole by 0.96%. In Nevada, Clinton beat Dole by 0.98%. *See* FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 96 (1997).

was more than double that in the Guam election. *See* FEDERAL ELECTION COMMISSION, *supra*. Runoff elections can be even closer. In the 1992 U.S. Senate runoff in Georgia, Paul Coverdell defeated Wyche Fowler by less than 20,000 votes out of more than 1.2 million votes cast. *See* Ronald Smothers, *Republican Ousts Georgia Senator*, N.Y. TIMES, Nov. 25, 1992, at A1. Assuming a rate of improper balloting similar to that in Guam and assuming a majority vote requirement, none of these races could produce a winner if subjected to the requirements imposed by the Ninth Circuit's reading of § 1422. Runoffs would be required in all of them, and there would be no guarantee that even the runoff would produce a winner.

This could not be what Congress intended when it passed § 1422. The Ninth Circuit's application of the rule of statutory interpretation that no provision should be construed to be entirely redundant is not appropriate in this case because it leads to an untenable result. A canon of construction should be disregarded where its "application would render a regulation inconsistent with the purpose and language of the authorizing statute." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703, 111 S. Ct. 2524, 2537 (1991). The purpose of the statute at issue here is to provide for the election of the governor of Guam. The Ninth Circuit's application of the canon it has selectively chosen would frustrate that purpose immeasurably. This Court "should not and will not countenance" an interpretation of § 1422 that "leads to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120, 108 S. Ct. 1666, 1674 (1988) (internal quotations and citations omitted).

B. *The Ninth Circuit's Interpretation Ignores This Court's Long-Standing Definitions of "Election" and "Vote."*

Section 1422 commands that a runoff election be held if "no candidates receive a majority of the votes cast in any election." The Ninth Circuit rewrote that language to require a runoff if no candidates receive a majority of all the *ballots cast in the general election.* Such an interpretation ignores the fact that the words and phrases at issue here have already been assigned clear meaning both by this Court and by the Ninth Circuit itself.

On November 8, 1998, Guam did not hold just one election. Although there was only one ballot used, Guam held *multiple* elections to choose the governor and lieutenant governor, the congressional delegate, members of the legislature, and members of the school board. Each of those was a separate election. Only the gubernatorial election is mentioned in § 1422. When § 1422 refers to "in any election," it can only be referring to "any gubernatorial general election."

An election fills only one office, or, as in this case, a slate of offices (governor and lieutenant governor). The Court made this clear in *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464 (1997), when it defined "election" for purposes of 2 U.S.C. §§ 1 and 7: "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of *an* officeholder (subject only to the possibility of *a* later runoff)." 522 U.S. at __, 118 S. Ct. at 467 (emphasis added) (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "the act of choosing a person

to fill an office")). Note the singular: *the election* results in the selection of *a person* to serve as *an officeholder.*

When this Court defined "election" in *Foster*, it was building upon a substantial body of law holding that when used in the Constitution or the United States Code, "election" refers to a single choice, not a series of choices unconnected by statute or common sense. *See, e.g., United States v. Classic*, 313 U.S. 299, 318, 61 S. Ct. 1031, 1039 (1941) ("From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified voters of their choice of candidates); *Newberry v. United States*, 256 U.S. 232, 250, 41 S. Ct. 469, 472 (1921) (holding that an election for purposes of Article I, Section 4, of the Constitution is the "final choice of an officer by the duly qualified electors."); BLACK'S LAW DICTIONARY 517-18 (6th ed. 1990) (defining "election" as "[a]n expression of choice by the voters of a public body politic. . . . [T]he expression by vote of the will of the people.").

Foster and the blocks on which it is built support the petitioner's position in a second way. They illustrate why the undervotes and overvotes in the Guam election cannot be included among the "votes cast." They are not votes at all, because they do nothing to advance "the final selection of an officeholder." *Foster*, 522 U.S. at __, 118 S. Ct. at 467. When a voter leaves a ballot blank, he is not "expressing . . . his choice of candidates," *Classic*, 313 U.S. at 318, 61 S. Ct. at 1039, so he cannot be participating in an election as this Court has defined that term. Likewise, to vote for both candidates when instructed to choose one is not to make a "final choice of an officer," *Newberry*, 256 U.S. at 250, 41 S. Ct. at 472, but to decline to do so. This Court's holdings, then, support what Guam's own election code explicitly

establishes: blank ballots and improperly marked ballots are void and need not be counted. *See* 3 Guam Code Ann. §§ 11111, 11114. They are not votes cast because the elector has chosen not to express his or her choice.[7]

C. *The Ninth Circuit Could Have Avoided Its Misinterpretation by Looking to Its Own Precedent.*

The apparent reason for the Ninth Circuit's contortionist efforts in this case is the perceived necessity to avoid rendering the phrase "in any election" redundant. But the Ninth Circuit did not need to strain so hard to find meaning in the words of the statute. It should simply have looked to its own decision in *Jose v. Mesa*, 503 F.2d 1048 (9th Cir. 1974). In that case, a Guam citizen challenged Guam's primary system for the selection of party candidates for governor and lieutenant governor. Guam's primary system allowed the candidate receiving a plurality of the vote in the June primary to be nominated for a place on the November general election ballot. The challenge argued that the phrase "in any election" in § 1422 must be applied to primaries, an interpretation that would have

[7] The Respondents cannot seriously contend that non-voting by leaving a ballot blank with respect to the gubernatorial slate (or by voting for both slates) is entitled to any significance, perhaps as a measure of voter disenchantment with the choice of candidates. The function of an election is to select an officeholder, *see Foster*, 522 U.S. at __, 118 S. Ct. at 467, not to express discontent. *See Burdick v. Takushi*, 504 U.S. 430, 438, 112 S. Ct. 2059, 2066 (1992) ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") (internal quotations and citations omitted).

required a party nominee to secure a majority in the primary. *See id.* at 1048-49. The court held otherwise:

> Directly after the "in any election" language . . . appears the sentence: "The first election for Governor and Lieutenant Governor shall be held on November 3, 1970." Congress's repetition of the unqualified term "election" in this sentence indicates that the draftsman meant "general election" by the use of the term "election" throughout the section; otherwise, it would have been natural to add the word "general" to this sentence setting the election date.

Id. at 1049. Both the court's conclusion and methodology in *Mesa* are noteworthy and should have served as a model for the Ninth Circuit in the instant case.

The ultimate conclusion is important because the *Mesa* court assigned an ordinary meaning to "in any election" without jumping through hoops to do so. The phrase is not "entirely redundant," as the Ninth Circuit feared in *Ada*, because it serves to limit the "majority of votes cast" requirement to general elections.

It is also instructive that the court in *Mesa* arrived at its conclusion by examining the phrase in context and reviewing the substance of the entire statute. Had the Ninth Circuit undertaken a similar examination in the instant case, it would have adopted the interpretation of § 1422 urged by the petitioners. It would have observed, as the *Mesa* court did, that directly after the "in any election" language in the statute appears the sentence: "The first election *for Governor and Lieutenant Governor* shall be

held on November 3, 1970." Surely the Ninth Circuit would have reasoned that Congress's earlier use of the unqualified term "election" indicates that the draftsman meant "general election for governor and lieutenant governor" by the use of the term "election" throughout the section; otherwise, it would have been natural to add the words "for any office" to the sentence requiring the runoff.

II. *County of Cass v. Johnson* Controls the Outcome of This Case and Instructs that Undervotes and Overvotes Should Not Be Counted.

Before the Ninth Circuit, the petitioners took the position that the outcome of this case is controlled by the Court's decision in *County of Cass v. Johnson*, 95 U.S. 360 (1877). The *Cass* holding, which both the Petitioners and the Ninth Circuit quote, states:

> This we understand to be the basic rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

Id. at 369. Under this rule, Gutierrez won the election, because the undervotes would not be counted in the vote total. Those individuals who chose not to vote in the gubernatorial election would be presumed to assent to the will of those who did participate.

The Ninth Circuit declined to apply *Cass* for two reasons, neither of which survives scrutiny. First, the court observed that *Cass* addresses the issue of whether qualified voters who do not go to the polls should be included when calculating a majority. *See Ada*, 179 F.3d at 681. The court asserted that "[q]ualified voters who did not participate in the Guam election are not at issue in this case." *Id.* In fact, they are at issue. Those qualified voters who cast blank ballots *did not participate* in this election. They did not take an action "meant to make a final selection of an officeholder." *Foster*, 522 U.S. at __, 118 S. Ct. at 467. Likewise, those qualified voters who pulled levers for both Gutierrez and Ada did not make an "expression . . . of their choice of candidates." *Classic*, 313 U.S. at 318, 61 S. Ct. at 1039. The electorate expresses its will and makes the final selection of an officeholder in an election by *voting*. The mere fact that the people in Guam went to a polling place and picked up a ballot does not differentiate them from the voters in *Cass* who stayed home. None of them voted.

The second reason offered by the Ninth Circuit for declining to apply *Cass* is that "*Cass* expressly notes that this principle applies only in the absence of a statutory provision to the contrary." *Ada*, 179 F.3d at 681. That is an accurate restatement of the portion of *Cass* that the court quoted in its opinion, but it ignores the very next sentence of *Cass*: "Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." 95 U.S. at 369. Based on its opinion in the instant case, the Ninth Circuit cannot believe that Congress "clearly expressed" its intention that undervotes and overvotes be counted in Guam's gubernatorial elections. To the contrary, the Ninth Circuit implicitly

admitted that it views § 1422 as ambiguous: "[i]f the statute is ambiguous, resort to legislative history is appropriate." *Ada*, 179 F.3d at 676. After making this statement, the Ninth Circuit proceeded to resort to legislative history. *See id.* at 678-79. The court also found it necessary to effectively rewrite the statute. *See id.* at 677 n.5 ("Admittedly, this interpretation equates 'votes cast' with 'ballots cast.'") Presumably, if the Ninth Circuit believed that Congress had "clearly expressed" its legislative will, it would not have felt compelled to replace words that appear in the statute with words that do not. In fact Congress did not clearly express its will that undervotes and overvotes be counted, so *Cass* controls. Those who did not vote properly must be deemed to assent to the will of the majority, which voted for Gutierrez.

III. The Ninth Circuit's Reliance on Its Comparison of § 1422 with 48 U.S.C. § 1712 Is Inappropriate.

The Ninth Circuit found support for its misinterpretation of § 1422 by comparing its language with that of 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to Congress. Section 1712 provides in pertinent part:

> The Delegate shall be elected at large, by separate ballot and *by a majority of the votes cast for the office of Delegate*. If no candidate receives such a majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate.

48 U.S.C. § 1712 (emphasis added).

The Ninth Circuit deduced that "[i]f Congress had intended a gubernatorial slate to require only a majority of the votes cast for governor and lieutenant governor, presumably, it would have used language similar to that used in § 1712." *Ada*, 179 F.3d at 678. The court continued:

> Furthermore, given the fact that § 1422 and § 1712 involve the closely-related subjects of the election of Guam's governor, lieutenant governor, and delegate to Congress, it can be inferred that, by employing such clearly different language, Congress intended to depart from the scheme fashioned in § 1422, when it enacted § 1712 four years later.

Id.

Indeed, there are obvious differences in the language of the two statutes, and these differences form a large part of the basis for the Ninth Circuit's decision. *See id.* However, the Ninth Circuit's reliance on the distinction in word usage in statutes passed by different Congresses four years apart from one another is misplaced.

Section 1712 in no way aids in interpreting § 1422. Put bluntly, § 1712, coming four years after the enactment of § 1422, is

> beside the point. [It does] not declare the meaning of earlier law. [It does] not seek to clarify an earlier enacted general term. [It

> does] not depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute. [It does] not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions. Consequently, we do not find in [it] any forward looking legislative mandate, guidance, or direct suggestions about how courts should interpret the earlier provisions.

Almendarez-Torres v. United States, 523 U.S. 224, ___, 118 S. Ct. 1219, 1227 (1998) (citations omitted).

A review of § 1712 shows that *none* of the *Almendarez-Torres* factors are present here. Section 1712 does not declare the meaning of § 1422, as it does not say anything about what is required for victory in a gubernatorial election. Section 1712 does not depend for its effectiveness upon clarification of or a change in the meaning of § 1422. Most importantly, § 1712 does not reflect any direct focus by Congress upon the meaning of the earlier enacted § 1422. Rather, it reflects a focus on an entirely different office by an entirely different Congress.

The language in § 1712 simply states more clearly what Congress undoubtedly thought it was expressing in § 1422. The meaning that Congress intended when it enacted § 1422 is clearly established by a contextual reading of the plain language of the statute, the precedent of this Court in *Foster*, *Classic*, and *Newberry*, the Third Circuit's decision in *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982), and even the Ninth Circuit's holding in *Mesa*. Congress's subsequent enactment of an unrelated but better-worded statute cannot change that meaning.

CONCLUSION

For these reasons and those stated by the petitioners, amicus respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 22, 1999