No. 99-51

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

JOSEPH F. ADA and
FELIX CAMACHO,
Respondents

RESPONDENTS BRIEF ON THE MERITS

Filed November 19, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Whether a statute requiring a majority of the votes cast in any election requires a majority of *all* the votes cast in that election.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents Ada and Camacho[1] supplement petitioners' citations to relevant legal provisions (Gutierrez Merits Brief at 2-5) as follows:

A. Constitutional Provisions

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. Federal Statutes

At the time of its passage in 1968, 48 U.S.C. § 1422a, section 7, provided:

> Any Governor of Guam may be removed from office by a referendum election in which at least two-thirds of the number of persons voting for Governor in the last preceding general election at which a Governor was elected, vote in favor of recall and in which those so voting constitute

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[1] For convenience, plaintiffs and respondents Ada and Camacho hereafter refer to themselves as "respondents" or "Ada" and to petitioners and real parties in interest Gutierrez and Bordallo as "petitioners" or "Gutierrez."

a majority of all those participating in the referendum election. The referendum election shall be initiated by the legislature of Guam following (a) a two-thirds vote of the members of the legislature in favor of a referendum, or (b) a petition for such a referendum to the legislature by registered voters equal to the number to at least 50 per centum of the whole number of votes cast for Governor at the last general election at which a Governor was elected preceding the filing of the petition.

SUMMARY OF ARGUMENT

The decision by a panel of the Court of Appeals for the Ninth Circuit that a runoff election is required for the positions of governor and lieutenant governor of Guam is supported, and indeed compelled, by the plain language of the federal statute, a comparison with other statutes governing voting in Guam, the weight of relevant authority, and the policy objectives that underlie the statute.

The statute at issue, 48 U.S.C. § 1422, requires that a gubernatorial candidate obtain a majority of the "votes cast by the people who are qualified to vote for the members of the Legislature of Guam." There were 48,666 persons so qualified who cast votes in the November, 1998 general election. There is no doubt that petitioners failed to gain a majority of such votes cast.

Section 1422 also states that " . . . [i]f no candidates receive a majority of the votes cast in any election, . . . a runoff election shall be held between the candidates. . . . " The "votes cast in any election" plainly applies to all

48,666 votes cast in Guam's November, 1998 general election. Ballots containing votes for any office are necessarily "votes cast" in a general election. It is immaterial whether those ballots contain votes for gubernatorial offices. They remain "votes cast in any election." There is no other way to read the statutory language.

The Ninth Circuit correctly rejected petitioners' reading – that the statute refers only to votes cast for governor and lieutenant governor – because that reading renders the phrase "in any election" a nullity, contrary to established principles of statutory construction.

The Ninth Circuit buttressed its interpretation by comparing Congress' provision that in the election of a delegate from Guam to the United States Congress, the winning candidate need receive only "a majority of the votes cast *for the office of Delegate*." Congress clearly knew how to state that a majority had to vote for a candidate for a particular office. Its decision not to impose such a requirement but to provide that gubernatorial candidates must receive a majority of all votes cast in an election should be dispositive here.

The same distinction is made in Congress' requirement for a successful recall referendum. A governor of Guam can be removed only by a vote equal to two-thirds of the number who had voted *for the office of governor* at the previous general election. Having taken care to refer specifically to the governor's election in stating the requirements for a recall election, Congress cannot be supposed to have meant the governor's election when it said "any election" in the statute concerning the choice of

the governor. That would impute a degree of carelessness to Congress that has no place in statutory interpretation.

County of Cass v. Johnston, 95 U.S. 360, 366 (1877), while not deciding the question now before the Court, repeated the view that has now prevailed in American jurisprudence for over a century: "[T]here must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question." More important, that rule prevails in California, whose jurisprudence has traditionally been given special deference in Guam. While it is true that the Third Circuit, interpreting a similar statute, supports petitioners' position, respondents will show that the Third Circuit opinion rests entirely on a misreading of a district court opinion which actually supports respondents.

Finally, petitioners argue that Congress cannot have meant what Congress said because that would be irrational. Once again, petitioners ask this Court to replace the statute Congress wrote with one the petitioners would have written. As the Ninth Circuit observed, "[t]he argument that a new election will not change the old should be made to Congress and not the courts." In any event, the statute Congress wrote is eminently rational and serves valid policy objectives. Congress has an interest in seeing that the chief executive and the second-in-command have mustered a majority rather than a mere plurality, an outcome that reinforces the legitimacy of the newly elected persons. Furthermore, a runoff election may well produce a winner who did not have a plurality in the prior inconclusive election.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE TERM "MAJORITY OF THE VOTES CAST" IN 48 U.S.C. § 1422 CANNOT BE LIMITED BY JUDICIAL CONSTRUCTION TO THOSE VOTES CAST IN THE GUBERNATORIAL ELECTION

A. Introduction

Section 1422 requires that to be validly elected, a gubernatorial candidate must garner not merely the largest number of "votes cast" by those who participate in a general election, but a majority of those votes; otherwise, a runoff between the two top vote-getters is required. Voters discontented with the choices offered by the Democratic and Republican parties may write in "None of the above" or the names of half a dozen candidates, none of whom has the remotest chance of winning. In a hotly contested race, a small number of ballots so marked may prove sufficient to deny a majority to either of the two major candidates. Under the statute in question, no candidate could claim victory in the race, and a runoff between the Republican and Democratic candidates would be required.

Logically, the same result must obtain if the write-in votes are cast not for "none of the above" or for splinter candidates, but for Abraham Lincoln, Brad Pitt, or Donald Duck. A vote cast in protest, however futile or even silly, is still a vote cast. This Court has affirmed the constitutional right to the use of write-in ballots at a general election regardless of the candidate's chance of success. *Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S. Ct. 5, 21 L.Ed.2d 24 (1968).

What, however, of the citizen who, finding neither major party gubernatorial candidate palatable, casts a vote for other offices and measures found on the ballot, but chooses the equivalent of "nobody for Governor" by leaving his or her ballot blank as to the gubernatorial race? That is the issue posed by this case. In Guam's general election of November 3, 1998, both write-in and blank ballots were cast in the gubernatorial race. When both types of ballots are counted as "votes cast," neither major party candidate prevailed, and a runoff is required. Concededly, the write-in ballots for governor are included within the number of "votes cast." No rational distinction can be drawn between the political act expressed in marking a ballot with the name of a write-in candidate (who cannot win and may not even exist) and the act of expressing dissatisfaction with the choices offered by leaving that ballot unmarked as to that office.

B. The Language Of 48 U.S.C. § 1422 Compels The Conclusion That A Gubernatorial Candidate Must Obtain A Majority Of The Votes Cast At The General Election

As the Ninth Circuit recognized, in deciding the meaning of the term "majority of the votes cast" as used in § 1422, "the starting point . . . is the language [of the statute] itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, 98 S. Ct. 2923, 57 L.Ed.2d 932 (1978); *Ada v. Gov't of Guam*, 179 F.3d at 672, 676 (9th Cir. 1999). ("We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.") (Citation and internal quotation marks omitted).

Section 1422 contains two sentences which include the term "majority of the votes cast," and it is in those sentences that the meaning of the term is found. The first reads: "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.*" (Emphasis added)

Because § 1422 later requires that "the Governor and Lieutenant Governor shall be elected every four years at the general election" the gubernatorial election will always coincide with an election of the Guam Legislature, as was true of the November 3, 1998 election now under examination. As Gutierrez agrees, in the November 3rd general election, "[t]he total number of ballots returned with respect to all races was 48,666." (Gutierrez Merits Brief, at 6). Whether no gubernatorial candidate was named (an "undervote"), or both Democratic and Republican candidates were marked (an "overvote"), or another candidate was written in, each of these 48,666 ballots was a "vote[ ] cast" by a person "qualified to vote for the members of the Legislature of Guam." The language will not bear any other meaning.

The second sentence in § 1422 containing the term "majority" reads as follows: "If no candidates receive a majority of the votes cast *in any election* . . . a runoff election shall be held. . . . " (Emphasis added) The use of the term "any election" plainly supports respondents' reading of the statute.

As the panel below reasoned:

> We read "votes cast" as including all votes cast at the general election, for Congress presumably

> would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor . . . [A contrary] interpretation is problematic because it renders the phrase "in any election" a nullity, and thus violates "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States, 485 U.S. 759, 778, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988)* . . . The better interpretation is that Congress intended "votes cast" to constitute the votes cast for any of the offices up for election at that general election; that is, the number of ballots cast.

179 F.3d at 677.

Gutierrez complains that in equating "votes cast" with "ballots cast" the Court of Appeals "impermissibly rewrote" § 1422. To the contrary, the court simply equated "votes cast" with "votes cast for any of the offices up for election at that general election." The words "ballots cast" merely mean that the votes need not be for governor or lieutenant governor but for any office involved in that election. In any event, the terms "vote" and "ballot" are, as a matter of common usage, entirely fungible.[2] Nothing in the Ninth Circuit's reasoning depends in any

[2] The New Shorter Oxford English Dictionary, for example, defines "vote" as "cast a vote" and "express a choice or preference by ballot." Chambers 20th Century Dictionary likewise defines "vote" as "that by which a choice is expressed, as a ballot," while the Concise American Heritage Dictionary defines ballot as, *inter alia*, "the act, process, or method of voting" and "the total of all votes cast in an election." Equating vote and ballot does no violence to the plain meaning of § 1422.

way upon a distinction between votes and ballots. By using the terms interchangeably, the Ninth Circuit did not rewrite the statute.

Gutierrez's proposed reading of the statute is highly problematical. He contends that Congress intended the two "majority" sentences conjunctively to mean that the Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of only those votes cast "in any gubernatorial election." (Gutierrez Merits Brief, at 12) Thus Gutierrez would severely limit the scope of "any" by placing a qualifying adjective – gubernatorial – where Congress declined to do so. This Court disfavors such a construction. *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (" . . . [W]e ordinarily resist reading words or elements into a statute that do not appear on its face.")

"Any," standing unqualified, means without limit. "Any port in a storm" is not limited to warm-weather ports. Furthermore, tampering with legislative use of the term "any" is a wild horse to ride, as it is quite possibly the term most used in the laws of the United States,[3] and is certainly to be found in a staggering number of federal criminal statutes.[4] These statutes would be radically

[3] Indeed, the term appears in the very constitutional provision most relevant to this case. See U.S. Const. art. VI, cl. 2 (decreeing, *inter alia*, that, " . . . the Judges in every State shall be bound [by the Constitution and laws of the United States], *any* Thing in the Constitution or Laws of *any* State to the Contrary notwithstanding.") (Emphasis added.)

[4] See, e.g., 18 U.S.C. § 1114 (criminalizing slaying of "*any* officer or employee of the United States") (Emphasis added);

altered if the court chose to say that Congress cannot have meant "any" when the court preferred a different rule. That would constitute precisely the sort of "impermissible rewriting" of legislation that Gutierrez so vigorously condemns.

C. Examination Of Other Congressional Provisions Concerning Guam Elections Supports The Ninth Circuit's Reading Of The Statute

If Congress had intended to limit "votes cast" in the manner Gutierrez proposes, it could easily have made that clear by inserting a reference to the gubernatorial election in either or both of the sentences of § 1422 containing the word "majority." Thus the first could have read: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast for those offices." Alternatively, the second sentence might have begun: "If no candidates receive a majority of the votes cast in the election for the offices of Governor and Lieutenant Governor. . . . " Section 1422, however, says nothing of the kind.

Furthermore, when Congress intended that the term "votes cast" mean only those who vote for a particular office in Guam, rather than all those who vote in the

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§ 18 U.S.C. 371 (criminalizing conspiracy "to commit *any* offense against the United States") (Emphasis added); 18 U.S.C. § 1503 (criminalizing certain attempts to influence or intimidate " . . . *any* grand or petit juror, or officer in or of *any* court of the United States, or officer who may be serving at *any* examination or other proceeding before *any* United States magistrate judge or other committing magistrate . . . ") (Emphasis added).

general election, it has spoken in unambiguous terms. The Ninth Circuit made this point succinctly:

> Our interpretation is buttressed by a comparison of § 1422 to 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to the United States Congress. See 48 U.S.C. § 1712 (1987). In contrast to § 1422, § 1712 expressly requires that a candidate receive "a majority of the votes cast for the office of Delegate." Section 1712 provides in relevant 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 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.
>
> *Id.* (emphasis added).

The Ninth Circuit panel drew the inescapable conclusion from this divergent statutory language:

> If 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. 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.

> In sum, the text of § 1422 and the differences between it and § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates.

179 F.3d at 677-678.

Similarly, in the same legislative act that created the majority requirement of 48 U.S.C. § 1422, Congress provided in § 1422a for the removal by referendum of the governor of Guam by expressly requiring a vote equal to two-thirds of the number who had voted *for the office of governor* at the previous general election.[5] Having taken care to refer specifically to the governor's election when stating the requirements for recall in § 1422a, Congress cannot be supposed somehow to have altered the very different requirement under § 1422 to conform with

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[5] At the time of its passage, § 1422a provided, in relevant part:

> Any Governor of Guam may be removed from office by a referendum election *in which at least two-thirds of the number of persons voting for Governor in the last preceding general election at which a Governor was elected, vote in favor of recall and in which those so voting constitute a majority of all those participating in the referendum election* . . .

1968 U.S. Cong. and Adm. News, p. 3278 (Emphasis added); see also 48 U.S.C.A. § 1422a, *Historical and Statutory Notes*. 48 U.S.C. § 1422a codified section one of the Guam Elective Governor Act, Public Law 90-497, which Congress enacted on September 11, 1968. The election provision disputed here – 48 U.S.C. § 1422 – codified section two of the same Act. *Id.*

the recall provision. Different language in related provisions is to be taken seriously as intending different results.[6]

In *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), this Court used related legislation in determining the meaning of a term in a federal drug statute. *Bailey* raised the issue of whether the possession of a firearm during a drug trafficking offense satisfied the "use of a firearm" element of a five-year mandatory minimum sentencing provision. This Court held that the conduct of possessing a firearm with the intent to use it, on the one hand, and its actual use, on the other, could not be equated, because:

> [h]ad Congress intended possession alone to trigger liability under 924(c)(1), it easily could have so provided. This obvious conclusion is supported by the frequent use of the term possess in the gun-crime statutes to describe prohibited gun-related conduct.

Id., 516 U.S. at 143.

For all of these reasons, the term "majority of the votes cast" in 48 U.S.C. § 1422 necessarily refers to a majority of all those who cast a vote for any office in the general election. As will now be demonstrated, the Ninth Circuit's analysis of the text of the statute is in accord with the weight of authority on the definition of an electoral majority.[7]

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[6] *See Bates v. United States*, 522 U.S. at 29-30 ("As this Court has reiterated: 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (Citations omitted).

[7] The amicus invokes *Jose v. Mesa* 503 F.2d 1048 (9th Cir. 1974) in its effort to bolster petitioners' proposed reading of

II. THE WEIGHT OF RELEVANT AUTHORITY RECOGNIZES THAT ALL THOSE WHO CAST VOTES AT A GENERAL ELECTION MUST BE COUNTED IN DETERMINING THE EXISTENCE OF A MAJORITY

A. *County of Cass v. Johnston* Supports The Lower Courts' Treatment Of Those Who Voted In The General Election But Did Not State A Preference In The Gubernatorial Contest

Petitioners and the amicus argue that *County of Cass v. Johnston*, 95 U.S. 360 (1877) required the Guam election commission to disregard the ballots of those who cast votes at the general election but declined to indicate a

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§ 1422. *Jose* involved a Guam election statute which permitted a gubernatorial slate to win nomination for the general election by obtaining a plurality of votes cast at a primary election. The appellant challenged the statute as invalid in light of the majority requirement set forth in 48 U.S.C. § 1422, but the Ninth Circuit upheld it on the grounds that the draftsmen of § 1422 " . . . meant general election" [rather than primary election] by the use of the term 'election' throughout this section . . . " *Id.*, 503 F.2d at 1049. In *Jose* the Ninth Circuit simply read the term "election" in § 1422 to mean "general election." That is the same reading of the statute which led the panel below to rule in favor of respondents Ada and Camacho.

Also cited by the amicus is *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997). *Foster* involved a Louisiana statute which provided, *inter alia*, for the election of " ' . . . a candidate [for United States senator] who receives a majority of the votes cast *for an office* in a primary election . . . ' ". *Id.*, 522 U.S. at 73 (Emphasis added) This Court found the statute invalid because it conflicted with federal statutes (2 U.S.C. §§ 1,7) governing the timing of federal elections. *Foster* does not remotely implicate the issue presented by the language employed in § 1422.

preference in the race for governor and lieutenant governor. (Gutierrez Merits Brief, at 20-22) The reliance of petitioners and amicus on *Cass* is mysterious since the case rested upon Missouri law rather than federal or Guamanian law. In any event, *Cass*, if it were relevant, would support respondents.

Cass addressed the issue of whether those who do not go to the polls must be included in the numeric base from which a two-thirds majority is determined; the question before the Court was *not* whether one who participates in the election by casting a blank or defective ballot is to be included in that base. The Missouri constitution required that the issuance of county bonds be approved by "two-thirds of the qualified voters of the town, at a regular or special election . . . " *Cass*, 95 U.S. at 365. The bonds held by plaintiffs had been approved under a statute which required only a two-thirds majority of all votes cast in the election.

This Court found that the majority issue was well-settled by Missouri case law. "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. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 560, 57 S.Ct. 592, 81 L.Ed. 789 (1937), also cited by Gutierrez, is to the same effect.

While the question of whether blank ballots are to be included in the base from which a majority is determined was not before the Court in *Cass*, it was at issue in *State v. Winkelmeier*, 35 Mo. 103 (1864), another Missouri case

upon which *Cass* relied in deciding the "stay at home" question. *Cass* noted that in *Winkelmeier*, the Supreme Court of Missouri held a regulatory measure had failed because "there must be a majority of the voters *participating in the election at which the vote was taken*, and not merely a majority of those voting upon that particular question." *Cass*, 95 U.S. at 366 (Italics added).[8]

Under Missouri law, those who stayed home were apples, those who cast blank ballots on a specific question were oranges. To the extent that *Cass* provides guidance on the question now before this Court, it strongly supports the holdings of the district court and Ninth Circuit.

B. The Clear Weight Of Authority From Other Jurisdictions After *Cass* Holds That Where A Statute Requires A Candidate To Obtain A Majority Of Votes Returned In A General Election, All Votes Cast In That Election Must Be Tallied For Purposes Of Deciding Whether The Candidate Has Achieved That Majority

The rule discussed in *Cass* and stated in *Winkelmeier*, that there must be a majority of the voters participating in the election at which the vote was taken and not merely a majority of those who voted on that particular question, has endured for well more than a century and

[8] In *Winkelmeier*, thirteen thousand voters had participated in a general election. One measure on the ballot in that general election proposed the sale of refreshments on any day of the week; by statute, a "majority of the legal voters of the city" was required for approval. Five thousand votes were cast in favor of the measure, while two thousand opposed its passage.

controls the result in the present case. In *Thurston County Farm Bureau v. Thurston County*, 136 Neb. 575 (Neb. 1939), noted by the district court below (Pet. App. A-45), the Nebraska Supreme Court considered whether a proposition placed on the ballot in a general election to approve annual appropriations for agricultural extension work had been carried by a "majority" of votes within the meaning of the relevant statute. *Id.*[9] The Court considered the legislative history of the statute, noting, among other things, that the vote on such a proposition was required to be held at a general election, *id.* at 583, and that the relevant statutory language required a majority of votes "at the election."

Thurston found that, at least where a measure is required to be submitted at a general election, "the great weight of authority . . . supports the view that in order to pass such a measure it must have the actual affirmative vote of a majority or the required proportion of those who participate in the election." *Id.* at 584. *Thurston* canvassed a host of other state court decisions which either explicitly or implicitly confirmed this view and distinguished the minority which did not. *Id.* at 585 et seq. The *Thurston* Court recognized the significance of the statutory language, which, like the statute in this case, required a majority of votes cast "at the election" to pass the measure, construing such words themselves to mean

[9] "The record presents a single question of law: Does the statute require the proposition to receive a majority of all votes cast at the election or a majority of all votes cast on the proposition, even though that majority be a minority of all votes cast?" *Id.* at 576-577.

a majority of all those voting *at the election* as opposed to a majority of those voting *on the measure*. *Id.* at 585-586. For these reasons and others, the Court determined that the appropriation measure had not passed. *Id.* at 601.

The weight of other state authority noted by the district court is to the same effect. See, e.g., *Allen v. Burkhart*, 377 P.2d 821 (Okla. 1962) (in order to be approved, initiated measure, submitted to the people by operation of law at the general election, must receive an affirmative vote by a majority of voters casting their vote in such general election); *cf. Stembridge v. Newton*, 213 Ga. 304 (Ga. 1957) (decisional law holding that votes of all participants should be counted to determine majority inapplicable where disputed votes were cast at *special*, rather than *general*, election).

The district court placed particular emphasis on California case law, which, as already noted, is given particular deference in construing Guamanian law. *See Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979), and cases cited therein. Thus, as the district court observed (Pet. App. A-48), *People ex rel. Wells v. Town of Berkeley*, 102 Cal. 298, 307 (Cal. 1894) held that the term, "majority of electors voting at a general election" was to be taken literally, and that all voters' votes were to be counted in determining a majority. *Santa Rosa v. Bower*, 142 Cal. 299 (Cal. 1904) proclaimed an even broader statement of the rule. There the California Supreme Court considered a charter vote which was to be "submitted to the qualified voters of said city at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature . . . ". *Id.* at 300. The charter having been submitted

to the electorate at a general election, *Bower* held that, under these circumstances, the word "thereat" referred to the general election actually held, so that a majority of *all* votes cast in that election, not just those cast on the charter, was required.[10]

Finally, as petitioners themselves observe, "Congress is deemed to have followed relevant judicial statutory interpretations rendered before a statute was passed, unless the statute makes clear that a different interpretation is intended." (Gutierrez Merits Brief, at 21, citing

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[10] Similarly, *People ex rel. Smith v. City of Woodlake*, 41 Cal. App.2d 119 (1940), involved an election on the incorporation of a municipality. 171 votes were cast in favor of incorporation, 163 against, and 9 expressed no choice on incorporation but cast votes on the other matters presented on the same ballot, for a total of 343. The Court observed that, "it is the general rule that when a proposition is required to carry by a majority of votes cast at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the vote on a particular question." *Id.* at 122-123. On this basis the Court held that the proposition had been defeated for failure to garner more than half of the 343 votes cast. *Id.* at 125. The Court also observed that "if the legislature had intended that the total votes cast at the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. *Id.*; see also *People ex rel. Rowe v. West Side County Water District*, 112 Cal.App.2d 228 (1952) (declining to conclude that measure passed where, of 490 votes, 242 were in favor, 241 were against, and seven were abstentions, because all 490 votes were to be considered as votes cast, and noting that "if the legislature had intended to authorize [the proposition] upon a favorable majority of the votes on the proposition rather than upon a favorable majority of the votes cast at the election it would have been a very simple matter to say so in concise terms.")

Morissette v. United States, 342 U.S. 246 [1952]). As the district court recognized (Pet. App. A-50), however, this principle undermines petitioners' claim. *Cass*, *Thurston*, and the California cases reflect the prevailing judicial view in 1968: in any race conducted at a general election, the total number of votes cast in that general election is the number to be used in computing the requisite majority as to any particular issue or office.

C. *Todman v. Boschulte*, Relied Upon By Petitioners, Is Poorly Reasoned And Should Not Be Followed, While *Euwema v. Todman*, Relied Upon By *Boschulte*, Actually Supports Ada's Position

Gutierrez urges this Court to adopt the holding of *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). *Boschulte* interpreted statutory language like that contained in 48 U.S.C. § 1422 and concluded that, under the Virgin Islands Organic Act, voters who submitted ballots blank as to gubernatorial race candidates were to be ignored for purposes of calculating whether a given gubernatorial candidate had garnered a majority of the total votes.

The district court and Ninth Circuit correctly rejected *Boschulte* as neither binding nor persuasive. As they correctly discerned, *Boschulte* is of no value because the most cursory examination reveals that it contains no legal discussion beyond a citation to a single case, the holding of which it flatly misreads. That opinion, *Euwema v. Todman*, 323 F.Supp.167 (D.V.I. 1971), was decided 11 years before *Boschulte*, and in fact supports the general proposition

recognized in *Cass* and applied by the district court below.

In *Euwema*, pursuant to Congressional mandate, a special election was held in the Virgin Islands on a referendum to lower the voting age. Some 13,000 votes were cast in the referendum on the voting age issue; of these 13,000 votes, over 7,000 were in favor of lowering the voting age to eighteen. *Id.*, at 169-170. The 7000-plus vote to confer the franchise on eighteen year olds was challenged as inadequate on the ground that there were 19,756 qualified voters in the Virgin Islands.

The district court began the *Euwema* opinion by stating that, "[t]he question presented here is not . . . whether a blank ballot should be tallied as an affirmative or negative vote on a given proposition." *Id.* at 168 (emphasis added). The issue, instead, was, "(W)hether, under the (Virgin Islands' statute), the voting age question submitted to the electorate is to be deemed part and parcel of the general elections held on November 3, 1970, or a separate and special election held on the same date." *Id.* The question whether the referendum was a general or special election was critical because of the established rule governing general elections:

> Despite one or two holdings to the contrary, it is settled law that a "proposition must receive the majority or other required proportion of all the votes cast at the election, where the Constitution or Statute requires ratification by a majority of the electors of the State or provides for ratification 'whenever a majority of the electors voting

> at a general election shall so determine' or, generally where the requirement is that the proposition submitted at a general election must receive in its favor a majority or other proportion of the votes of the electors voting at such election, or a majority or other proportion of all the votes cast at the election. *In other words, the proposition is not carried by a majority of the votes cast therefore unless such majority is also a majority of all votes cast at the election."*

Id. at 170. (Emphasis added)

On the other hand, *Euwema* found that in a special election on a proposition, only votes cast on a specific measure are counted towards a majority. Finding that the voting age referendum was a special election, the district court rejected the challenge, holding that the 7,000 vote total was "a clear majority of the 13,416 voters [who] participated in the election." *Euwema*, 323 F.Supp. at 171. The district court here correctly distilled the meaning of *Euwema* for present purposes:

> The Virgin Islands District court in that case did *not* hold that blank ballots should not be counted. It held that it would only count those ballots cast by the voters participating in the so-called special election. *But Euwema means, by implication, that if the question had been a part of the general election, all votes would have to be used to calculate the majority, not just the votes cast on the proposition at issue.*

(Pet. App. at A-46) (Emphasis added).

In this case, of course, the statute requires that the gubernatorial election be conducted as part and parcel of

the *general* election in Guam.[11] Because the rule pertaining to general elections requires that the number of total votes be computed by counting all persons who voted at the general election, and not merely those who stated a preference for one gubernatorial slate over another, the district court's determination, affirmed by the Ninth Circuit, that Gutierrez failed to garner a majority of total votes cast *at the election* must be upheld.

III. GUAM'S LOCAL ELECTION STATUTES HAVE NO BEARING ON THE MAJORITY REQUIREMENT SET FORTH IN 48 U.S.C. SECTION 1422

Gutierrez also makes much of two Guam election statutes (3 Guam Code Annotated §§ 11111 and 11114) which limit the validity of election ballots not adhering to certain formal requirements. *See* Gutierrez Merits Brief at 4-5, 23-24. These statutes, however, only establish that such irregular ballots are not counted in favor of any candidate for the office as to which they are invalid. They do not purport to preclude such ballots from being counted as "votes cast" under 48 U.S.C. § 1422. Indeed, as the Court of Appeals correctly noted, § 11114 "expressly provides that these ballots are still valid for purposes of other races in the election." *Ada v. Gov't of Guam*, 179 F.3d at 682. In addition, Guam's election statutes, being subordinate to 48 U.S.C. § 1422's clear mandate under the Supremacy Clause, must be interpreted in conformity with § 1422. *See* U.S. Const. art. VI, cl. 2; *see also Ada v.*

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[11] " . . . [B]eginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election . . . ". 48 U.S.C. § 1422.

Gov't of Guam, 179 F.3d at 682 (citing *Euwema v. Todman*, 323 F. Supp. at 170); *Guam Fresh v. Governor of Guam*, 849 F.2d 436 (9th Cir. 1988) (test for federal preemption of territorial laws under Supremacy Clause is same as the test for preemption of state law).

Gutierrez invokes *Ramsey v. Chaco*, 549 F.2d 1335 (9th Cir. 1977) for the proposition that the Guam statutes are "deemed to have Congressional approval" because they were enacted prior to 1968 and not annulled by Congress thereafter. See Gutierrez Merits Brief at 27-28. Even if that were true and both the Guam statutes could be considered federal in nature, section 1422, being a later law speaking to the same topic, trumps the earlier.[12]

IV. THE DISTRICT COURT'S INTERPRETATION OF 48 U.S.C. SECTION 1422 FULFILLS THE POLICY OBJECTIVES UNDERLYING THE STATUTE BECAUSE IT ENSURES THE LEGITIMACY OF THE ELECTION RESULT

Finally, Gutierrez argues that, "when there are only two slates in a gubernatorial election, it is senseless to

[12] Ada also notes that Gutierrez relies on *Ramsey* and the Guam election statutes to argue that *both* overvotes and undervotes should have been disregarded in calculating the gubernatorial majority. To the extent it challenges the counting of overvotes, however, the claim was never raised before the district court and was relegated to footnotes in petitioners' brief to the Court of Appeals. See Petitioners' Opening Brief on Appeal at n. 1 and 2. The challenge to the counting of overvotes should, accordingly, be disregarded. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("As the Seventh Circuit . . . stated aptly: '[j]udges are not like pigs, hunting for truffles buried in briefs.' ")

require a 'runoff election' between the two slates 'receiving the highest and second highest number of votes cast.' " (Gutierrez Merits Brief, at 28). Such a result is by no means "senseless," and there are any number of circumstances in which § 1422 would plainly require it.

Suppose that, as here, there are two gubernatorial slates in contention at the general election and, as here, 48,666 votes are cast. One slate receives 24,308 votes, twenty-six short of a majority; the other receives 23,258, seventy-six short of a majority; and a person not appearing on the ballot receives one hundred write-in votes. There can be no question that under section 1422, a runoff would be required despite the fact that "there were only two slates in the gubernatorial election" and despite the minuscule number of write-in votes.

Nor would such a runoff be a meaningless exercise. When voters are confronted with a choice between two candidates rather than among a universe of candidates, they may well prefer the candidate who did not receive a plurality in the prior election. *See*, e.g., *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821 (N.D.Ga. 1993), *affirmed*, 992 F.2d 1548 (11th Cir. 1993) (Court upholds result of election for office of U.S. senator where incumbent who had received 49.22% of votes to opponent's 47.66% in general election lost runoff to opponent.)[13]

[13] The brief of amicus largely attacks the Ninth Circuit's ruling by raising the specter of never-ending gubernatorial elections. It does so by suggesting that the majority requirements imposed by 48 U.S.C. § 1422 for election of governor at a general election would apply whenever a run-off election is required "between the candidates for Governor and

Furthermore, the underlying purpose of section 1422 is to confer on the prevailing party the greater *legitimacy* inherent in having received more than 50% of the votes of all those who went to the polls and participated in the election, a point which the district court distinctly recognized. Noting that inclusion of all votes cast at the election would leave Gutierrez without a majority but very close to it, the court expressed "no joy" in ordering a runoff, but asked,

> . . . is this Court to simply ignore the law? To say it was close enough, why worry about the few extra votes is unacceptable. The law does not authorize a casual approach. The Organic Act requires a majority.

(Pet. App. A-53). As the court then observed,

> . . . The requirement of a majority is important in precisely this situation, where the election is very close, when the results are otherwise extremely unreliable. (Note omitted) The requirement of a majority is a built-in safeguard against petty fraud in a close election, where a small amount of fraud can make an enormous difference. In that case the exact calculation of a majority is all the more important.

(Pet. App. A-53-54).

This analysis duly recognizes § 1422's patent concern that any gubernatorial election result be viewed as legitimate and squarely refutes Gutierrez's suggestion that in a two-party race, merely approaching a majority should be equated with attaining it.

When all is said and done, Gutierrez provides no meaningful response to the question why, if Congress intended the term "votes cast" to mean something other than the total votes cast at the general election, it did not simply say so. The answer is that, given section 1422's plain language and related decisional authority, Congress intended that a gubernatorial candidate would be required to garner a majority of all votes cast at the election in order to prevail.

Lieutenant Governor receiving the highest and second highest number of votes cast." This is simply untrue. A run-off which is expressly limited to two candidates is won by determining which of those two candidates receives the higher number of votes. *Public Citizen, Inc. v. Miller*, 821 F.Supp. at 832-833 ("As for the runoff election, the requirement that a candidate receive a majority of the vote is merely a restatement of the truism that in a race between two people, the person who receives the most votes wins"); *Cunningham v. Queen, et al.*, 96 S.W.2d 798 (Tex.Civ.App. 1936) (Rejecting claim that write-ins should be permitted at runoff election held pursuant to state statute limiting ballot choices at such election to two candidates, and observing that, " . . . the whole purpose of the runoff [election] is to have an elimination between the two candidates having the highest number of votes, but not a majority, in the first [election]").

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Dated: November 18, 1999

Respectfully submitted,

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