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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in case 06-116, Limtiaco versus
5 Camacho.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 This case is properly before this Court,
12 which should reverse under the plain language and
13 purpose of the Organic Act of Guam. As to jurisdiction,
14 at the time Congress amended the Organic Act to replace
15 the certiorari jurisdiction of the Ninth Circuit with
16 direct review in this Court, the Ninth Circuit had
17 already granted the writ of certiorari that had been
18 timely filed and the case had been briefed, argued and
19 submitted. The amendment said nothing about its
20 application to pending appeals, and someone had to
21 decide whether and how it applied to this case. The
22 Ninth Circuit was the proper body to do that, at least
23 in the first instance, and until it did, this case was
24 before that Court within the meaning of Gibbs versus
25 Wynn.

1 JUSTICE SCALIA: Mr. Waxman, I thought the
2 Ninth Circuit did decide that question in another case
3 that was pending, Santos.

4 MR. WAXMAN: It did decide it in Santos,
5 Justice Scalia.

6 JUSTICE SCALIA: Why wasn't that the time at
7 which it was clear that the Ninth Circuit no longer had
8 jurisdiction?

9 MR. WAXMAN: Well, for reasons that we
10 articulate, Your Honor, in a -- I forget the footnote
11 number, but a footnote in our brief, there are some
12 important distinctions, although they turned out not to
13 be dispositive, between the nature and position of this
14 case and Santos.

15 But in any event, we know from the Ninth
16 Circuit that it did not consider it otherwise, because
17 if the Court will refer to I believe it's page 50a or
18 51a of the joint appendix, after the Court decided
19 Santos, it sua sponte issued an order in this case -- it
20 is on page 51a -- resubmitting this case effective
21 February 1 to the Ninth Circuit's active consideration.
22 And shortly thereafter, it filed the order in this case
23 from that -- in our view, triggered the 2101(c) 90-day
24 period.

25 JUSTICE KENNEDY: Are you suggesting that

1 the test is whether under colorable jurisdiction -- a
2 hypothetical case, suppose the statute, Federal statute
3 is very clear that it applies in any case. Would your
4 argument be the same?

5 MR. WAXMAN: Well, I wouldn't have the most,
6 the strongest argument that I have in this case. I
7 think -- now, the Court's cases are not clear here but
8 it does seem to me that in the instance as here, where
9 it isn't just that a party has made some application or
10 filed a cert petition with a court, but the court has
11 actually reached out and asserted jurisdiction, surely
12 anything other than an amendment withdrawing -- that an
13 active withdrawing -- withdrawing jurisdiction that
14 requires anything other than merely a ministerial act,
15 where there can be no possible confusion about what
16 Congress intended to do, certainly anything short of
17 that, it lies with the Court to ascertain it. And here
18 --

19 JUSTICE KENNEDY: But if we accept that in
20 the opinion, what was the phrase you used, colorable
21 jurisdiction, or -- it's something I made up, I suppose
22 -- is there some concept that we can refer to or some
23 phrase that works to -- in order to incorporate your
24 test that you seem to be suggesting?

25 MR. WAXMAN: I actually would not embrace

1 that test. I think that in an instance, Your Honor,
2 where a court in which, properly had jurisdiction and
3 affirmatively asserted it and issued -- and I can take
4 the Court through this -- a series of orders of the
5 Court, following this 19, the October 19, 2004 enactment
6 leading up to the decision in Santos and thereafter,
7 which the Court continued to rule, continued to issue
8 orders in this case, I think a good argument can be made
9 that on a theory of constitutional avoidance the court
10 ought to construe any enactment of Congress, no matter
11 how pellucid it is, as not constituting a self-effecting
12 reversal of a preexisting order of the Court in which
13 the case had been pending per order of the Court.

14 And so I'm not sure that I would even
15 embrace a ministerial test concept in the context in
16 which a case is properly pending in front of a court
17 which has affirmatively asserted jurisdiction over it.

18 And indeed here --

19 JUSTICE KENNEDY: Mr. Waxman, may I just ask
20 this question? I don't understand what the import of
21 this order on page 51 is. I have it in front of me.
22 What did that do? Is it anything different immediately
23 after the order entered than --

24 MR. WAXMAN: Yes. Yes, Your Honor. And I
25 think you should -- well, I suppose you could start

1 anywhere. But let's, maybe it would be as well to start
2 on 49a of the joint appendix. In December 15 --
3 remember, the Guam Organic Act was amended I believe
4 October 30, 19 -- or 2004, and it was silent as to its
5 effect on cases that had already been filed and were
6 pending in the Ninth Circuit.

7 Sua sponte, the Court -- well, actually it
8 was not sua sponte. Almost two months after Congress
9 enacted the Organic Act, the respondent in this case,
10 Governor Camacho filed a motion on December 8 with the
11 Court renewing a previous motion for the Court to
12 expedite its resolution in this case. And Governor
13 Camacho's affidavit in support of that motion is
14 included in the joint appendix.

15 In response to the motion, not telling the
16 Court hey, by the way, it's been nice doing business
17 with you but we have no further truck with your court
18 because Congress passed the statute and you are ipso
19 facto by operation of law no longer in business, the
20 Ninth Circuit issued the order on page 49a that says no
21 opinion in this case can issue until the case of Santos
22 is decided clarifying our continuing certiorari
23 jurisdiction over decisions from the Guam Supreme Court.

24 Then turn to page 50a of the joint appendix.
25 A week later, on December 22, the Court sua sponte

1 issues an order withdrawing and deferring a ruling in
2 this case pending the decision in Santos. Santos is
3 then decided in January. And on February 1, the Court
4 issues an order in this pending case saying okay, it's
5 resubmitted to the panel. And shortly thereafter, the
6 panel issued the order dismissing this case for lack of
7 jurisdiction, and from that date we filed a timely
8 petition for certiorari.

9 Now the contention of the respondent in this
10 case that the attorney general should immediately upon
11 enactment of the Organic Act amendment have also filed a
12 petition with this Court would do one of two things. It
13 either would have put this Court in the position of
14 determining the effect of the amendment at the very same
15 time that the Ninth Circuit was doing so, which is a
16 state of affairs that this Court has repeatedly
17 rejected, most notably in Andrews versus Virginia
18 Railway, or it would have amounted to nothing more than
19 what this Court has called, quote, "the filing of a
20 redundant slip of paper."

21 JUSTICE KENNEDY: Well, am I wrong? I
22 thought that the Attorney General of Guam did file cert
23 in some cases that are pending, or am I wrong on that?

24 MR. WAXMAN: The attorney -- there were two
25 cases in which the Guam Supreme Court issued a final --

1 its own final ruling after the October 30, 2004
2 amendment of the Organic Act. And in that instance, the
3 Organic Act was in effect. He filed a petition for a
4 writ of certiorari in this Court. There were two cases
5 that were pending in the Ninth Circuit and over which
6 the Ninth Circuit had granted the writ, this case and
7 Santos. In Santos, but not in this case, the Court
8 asked the parties to file supplemental briefs with
9 respect to the Court's continued jurisdiction, and the
10 attorney general did so in this case, and it's discussed
11 in our reply brief.

12 JUSTICE GINSBURG: Mr. Waxman, going back to
13 what you just said, isn't a third possibility, the most
14 likely possibility, that this Court would simply hold
15 the petition if there were -- if the attorney general
16 filed a cert petition here while the Ninth Circuit had
17 not yet disposed of the case, this Court could have just
18 held it because the Ninth Circuit was likely soon to
19 dispose of it.

20 MR. WAXMAN: Well, the attorney general
21 could have filed a petition for writ of certiorari
22 before judgment in this Court, you know, at any time
23 prior to the time that the Ninth Circuit issued its
24 order dismissing jurisdiction.

25 This Court has said uniformly outside the

1 special context of three-judge courts that it will not
2 require the mere filing of a redundant piece of paper,
3 to quote the Colville Indian Reservation case, and it
4 has declined to extend this well, why don't you just
5 file a notice of appeal.

6 CHIEF JUSTICE ROBERTS: There's no sense in
7 which it's redundant, though. It would have been the
8 first piece of paper that this Court would have seen in
9 the matter.

10 MR. WAXMAN: Yes. But that is actually what
11 this Court was referring to in the Colville Indian
12 Reservation case and other cases in calling it redundant
13 in the sense that it was identical or effectively
14 identical to a piece of paper that had invoked the
15 jurisdiction of another court at the same time.

16 In the three-judge court context,
17 Justice Ginsburg, although this Court's jurisdiction to
18 hear direct appeals in three-judge courts has been
19 greatly reduced since the 1950s and sixties and early
20 seventies, there are certain instances that this Court
21 has realized where it is unclear whether an appeal lies
22 to a regional court of appeals or to this Court and it
23 is unavoidable there that you would file a notice of
24 appeal in both instances; but this is not a situation in
25 which there was any uncertainty about where the petition

1 for a writ of certiorari from the Guam Supreme Court's
2 decision had to be filed. The Organic Act said the
3 Ninth Circuit had certiorari jurisdiction. The Ninth
4 Circuit granted the petition in this case and had
5 assumed authority over it, and so --

6 JUSTICE GINSBURG: But isn't it just the
7 case -- you've made several arguments, but you have a
8 case that's lodged in the court of appeals. It's not
9 simply a petition there. They have accepted it for
10 review.

11 MR. WAXMAN: Right.

12 JUSTICE GINSBURG: So in the normal course
13 when you have a district court decision, a trial court
14 decision, then you're on appeal and the case is fully
15 lodged in the court of appeals, it's like the judgment
16 is suspended until the appellate court is done. So you
17 have no final judgment that is properly taken anyplace
18 else until that judgment is entered. I think that's the
19 essence of your argument, isn't it?

20 MR. WAXMAN: Yes, and in fact -- I mean,
21 it's -- I don't think that anything actually turns on
22 this in the context of this case, but it is quite
23 significant that at the time -- there has yet never been
24 any appellate determination of the substantive question
25 in this case. The Guam Supreme Court considered this as

1 a court of first instance that original petition was
2 filed in the Guam Supreme Court.

3 And the Ninth Circuit Court of Appeals at
4 the time that the attorney general filed the petition
5 for a writ of certiorari was the only place the attorney
6 general of Guam could go to get review of this
7 construction by a territorial court sitting as a trial
8 court in the first instance of an act of Congress.

9 JUSTICE ALITO: Does it make any difference
10 that the review was discretionary in the Ninth Circuit?
11 What if before the act was passed there was an appeal as
12 of right to the Ninth Circuit? Wouldn't your argument
13 be exactly the same?

14 MR. WAXMAN: It would be exactly the same.
15 We just think that, given the fact that this is an
16 instance in which the Ninth Circuit granted the writ of
17 certiorari and issued both before -- both before the
18 amendment and after the amendment and both before Santos
19 and after Santos orders reflecting the fact that it
20 believed it continued to have authority over this case,
21 the appropriate outcome in this case is more
22 straightforward than it might be in some other closer
23 instances.

24 JUSTICE GINSBURG: Perhaps you should go on
25 to the merits.

1 MR. WAXMAN: Thank you.

2 JUSTICE GINSBURG: And on that I have a
3 preliminary question, because we have a new attorney
4 general and the question is whether the new attorney
5 general continues to oppose the legislature and the
6 governor on this bond issue. Do -- in other words, do
7 we still have a case or controversy?

8 MR. WAXMAN: Yes, Justice Ginsburg, we do.
9 I have spoken personally and repeatedly with the
10 attorney general, who is with me at counsel table, who
11 has instructed me unequivocally to continue vigorously
12 to advocate the construction of the Organic Act that
13 reflected in our petition and in our merits and reply
14 brief.

15 CHIEF JUSTICE ROBERTS: I have a more basic
16 question, whether we had a case or controversy to start
17 with. This is kind of an intramural dispute between two
18 Guamanian officials about what Guam's position should be
19 with respect to the Organic Act and I'm wondering why
20 that's a justiciable controversy under Article III. The
21 cases you cited in your petition all involved on its --
22 only facially intra -- interbranch disputes within the
23 Federal Government; but the agencies in those cases
24 always -- were representing a real party in interest.
25 United States versus ICC, the ICC was actually the

1 railroad in whose favor the had commission ruled. Why
2 shouldn't we just let Guam figure out its position on
3 its own and then when a private party with standing
4 challenges something then we'll have a case or
5 controversy.

6 MR. WAXMAN: Well, Mr. Chief Justice, this
7 is actually an a fortiori. If you don't agree with me
8 and you think that there really wasn't a case or
9 controversy, then we would respectfully submit the
10 appropriate resolution would be to dismiss and vacate
11 the Guam Supreme Court's decision so that the attorney
12 general --

13 CHIEF JUSTICE ROBERTS: Oh, no. Guam --
14 presumably, some state courts issue advisory opinions.
15 We don't -- that's their business. It's just a question
16 of whether we have jurisdiction to address the question
17 in that context.

18 MR. WAXMAN: Indeed. But here's the
19 situation here, and this is why I think it's an a
20 fortiori case. The attorney general and the governor of
21 Guam are each separately elected. They each have
22 non-discretionary obligations under Guam law in addition
23 to their obligation to interpret and enforce the
24 Constitution and laws of the United States. The
25 attorney general cannot be removed by, by the governor,

1 by Guam law, unlike the case in many of these Federal
2 executive branch intramural disputes; and she is
3 required by Guam law in any instance in which the
4 governor and the legislature attempt to borrow money
5 subject to the full faith and credit of the territory to
6 certify that such borrowing is lawful. And in this
7 instance, therefore, she is, as the unremovable elected
8 chief law enforcement of the territory, she is required
9 both to properly apply the Federal law that, the Organic
10 Act that constitutes Guam's constitution and Guam
11 territorial law which requires her affirmatively to
12 certify the legality of the proposed buy-in.

13 JUSTICE SCALIA: Except that she is
14 removable by election, and that is indeed what has
15 happened. And I understand that one of the issues in
16 the election was precisely whether this borrowing
17 authority existed or not. And if that's the case, you
18 have a new attorney general that presumably as an
19 original matter would not do what the prior attorney
20 general did.

21 MR. WAXMAN: Justice Scalia --

22 JUSTICE SCALIA: So it is an intrabranh
23 dispute that can be resolved by the electorate
24 essentially.

25 MR. WAXMAN: There may very -- it may very

1 well occur. In fact, there either is or imminently will
2 be a proposed additional borrowing of \$123 million
3 proposed by the governor to the legislature, and that is
4 going to require this attorney general to ascertain,
5 presumably prior to the time this Court -- well, I won't
6 presume, but perhaps before this Court renders a
7 decision in this case were it to, whether she can or
8 cannot certify that.

9 Now, the answer to that question will turn
10 in the first instance -- and she's not going to be
11 reelected before then. She can't be removed by the
12 governor before then. Her position is that if she
13 ascertains that in the form in which it's enacted that
14 proposed borrowing implicates, you know, constitutes
15 debt within the meaning of section 11, she will not sign
16 that legislation.

17 And that, it seems to me, during the
18 campaign -- of course, none of this is in the record --
19 her position was that she would continue to pursue this
20 litigation in the Supreme Court, which is why she's
21 here.

22 JUSTICE SOUTER: I guess I'm not quite sure
23 what that means. I mean, it's one thing to say I will
24 pursue the litigation because it would be a good thing
25 to have a definitive answer from someone other than the

1 governor or me. Is it her position at the present time
2 that the position of her predecessor is correct or not?

3 MR. WAXMAN: It is her position that if she
4 were presented tomorrow with a borrowing that would
5 exceed the debt caps under the position of the attorney
6 general in this case, she will not sign it because that
7 constitutes her interpretation of the law.

8 JUSTICE SOUTER: So she adopts the
9 interpretation of her predecessor?

10 MR. WAXMAN: Correct.

11 JUSTICE BREYER: I have a question, if I
12 can, if we should reach the merits of the case --

13 MR. WAXMAN: I think you should reach the
14 merits of the case.

15 JUSTICE BREYER: I know that. That isn't
16 it. I have a question about -- I have a question about
17 the merits.

18 MR. WAXMAN: Okay. I have four reasons why
19 I think we are correct --

20 JUSTICE BREYER: I know, but I have a
21 question I'd like you to go into.

22 MR. WAXMAN: Okay.

23 JUSTICE BREYER: I looked up, my law clerk
24 has, and found eight States that seem roughly
25 comparable. Those that go to assessed value, every

1 single one of them -- and most of them do -- they have
2 the word like "assessment. The only comparable places
3 we found are Puerto Rico, Philippines in 1916, and Guam
4 here which don't use the word "assessment," but use the
5 words "aggregate taxable value."

6 All right. Now, what's happened in those
7 places? We know what's happening in Guam. I can't --
8 with the Philippines in 1916 and Puerto Rico, there
9 ought to be some experience there even if we couldn't
10 find a case how they treated it.

11 MR. WAXMAN: Well, they -- what's happening
12 in all those jurisdictions will certainly consume at
13 least the rest of the balance of my time. The simple
14 answer is that -- is the following. There are --
15 looking first at the States, there are States that use
16 the term "the valuation." There are States that use
17 "the assessed valuation," "aggregate assessed
18 valuation," and there are a few States that use "tax
19 valuation." It is uniformly the case in the States and
20 elsewhere that the word "assessed" in this context is
21 understood to refer to the valuation against which the
22 property tax is based, whether that happens to be a
23 place where it is full value or a fractional value; but
24 it is also the case that at the time that the Guam
25 Supreme -- that the Guam Organic Act was enacted

1 fractional valuation was a commonplace for purposes of
2 assessing property tax. Now, in the territories --

3 JUSTICE BREYER: Try Utah, try Iowa. Try --

4 MR. WAXMAN: There were three States that we
5 discussed, Passy is one, Halsey is the other and I can't
6 remember the name of the other one, where they used --
7 where the State constitution just said "aggregate
8 valuation" or "the valuation" and the State supreme
9 court said: There's no modifier for valuation; that
10 must mean full value.

11 There are, conversely, the State supreme
12 court in Fishburn in the Illinois context and in the
13 Indiana context where even that formulation, "the
14 valuation," the State supreme court said: Come on, it
15 is -- the debt limitation is always calculated --

16 JUSTICE KENNEDY: Mr. Waxman, can I ask you
17 this, just about Guam, not about the other territories.
18 Is there anything in the Organic Act that would prevent
19 Guam from changing the assessed percentage from 35
20 percent to 100 or 150?

21 MR. WAXMAN: Absolutely nothing.

22 JUSTICE KENNEDY: So there's no, no limit in
23 the Organic Act of any real meaning?

24 MR. WAXMAN: That's -- the limit in the
25 Organic Act, and it makes it entirely consistent with

1 all of the other territories that I -- are not that many
2 and I will explicate -- which is the uniform rule has
3 been that the basis for valuation of property against
4 which the debt limitation percentage is multiplied is
5 the same as the valuation of property against which the
6 property taxes apply. And in the territories the
7 Congress has used essentially two formulations: In the
8 Springer Act it was "assessed value of taxable
9 property." In Alaska, it was "aggregate taxable value."
10 In Guam it's "aggregate tax valuation." In Hawaii, it
11 was "assessed value;" in the Northern Marianas,
12 "aggregate assessed valuation."

13 The Philippines, which you mentioned, is a
14 particularly instructive example because in 1902 and
15 1905 it was "assessed valuation," but then in 1916 and
16 1922, it was altered to be "aggregate tax valuation."
17 And then the Virgin -- Puerto Rico is "aggregate tax
18 valuation" and the virgin Islands, which we've
19 discussed, is "aggregate assessed valuation."

20 Now, the legislative histories of these
21 provisions, including the Guam provision, are lengthy,
22 obscure and frankly have been very difficult to obtain
23 because in many instances the hearings are unreported.
24 And we have been receiving the legislative history,
25 particularly the unpublished legislative histories, of

1 these provisions up to and including Saturday because in
2 the 11 days over the Christmas holiday in which we did
3 our reply brief we simply could not get hearing,
4 transcripts of hearings that were conducted in 1949 in
5 that Agana, Guam.

6 But we are prepared to lodge the relevant
7 provisions with the Court for the Court, and I don't
8 want to, therefore don't want to make any argument about
9 it, but I don't want to say that these words --

10 JUSTICE SCALIA: Please don't.

11 (Laughter.)

12 MR. WAXMAN: But the --

13 JUSTICE BREYER: My question is the
14 following. In Puerto Rico and in the Philippines after
15 1916, and in Alaska, were there any instances in which
16 they issued bonds that exceeded the 10 percent of the
17 assessed value as opposed to the aggregate market value?
18 They either did or didn't and that shouldn't be hard to
19 find out.

20 MR. WAXMAN: I think that would be hard to
21 find out, and I don't know. I do know that there is
22 legislative history with respect to the use of the word
23 "assessed" and tax in this context both in Puerto Rico
24 and in the Philippines. I don't know about Alaska.

25 JUSTICE STEVENS: Just on the merits, the

1 first thing that the tax authorities have to do is they
2 have to value the property.

3 MR. WAXMAN: Correct.

4 JUSTICE KENNEDY: And they're valuing it for
5 tax purposes, so that sounds like tax valuation.

6 MR. WAXMAN: I'm not -- our argument is that
7 the word "tax valuation" has to have meaning; and the
8 plainest meaning is the meaning, we respectfully submit,
9 the most natural meaning of "tax valuation" is the
10 valuation that is used by Guam for the calculation of
11 tax.

12 And that's true not only as a matter of
13 plain language, but for three other reasons. First of
14 all, as I indicated, it puts Guam in harmony with the
15 regime that has existed in every other U.S. territory in
16 which the value of property against which the debt
17 limitation rate is assessed is the same as the value of
18 property against which the tax rate is assessed. And
19 secondly, or thirdly, that fully accords with the
20 statutory and legislative history both with respect to
21 the territories and the states that reflects that it has
22 always been understood that tax valuation and assessed
23 valuation are equivalent in this context, and
24 understanding that furthers Congress's consistent goal
25 of restraining borrowing by territories.

1 And finally, interpreting tax to mean full
2 renders the word tax all but meaningless. I grant you,
3 Justice Kennedy, that it is possible to come up with a
4 meaning. It is not a meaning that the Guam Supreme
5 Court adopted but it is a possible meaning; but the Guam
6 Supreme Court interprets -- actually said in its
7 opinion, tax has to mean something. It interpreted tax
8 not to modify valuation, the word that follows it, but
9 to modify the word "property," and to read it as taxable
10 property, which is with all respect plainly wrong.

11 JUSTICE BREYER: There are big lenders in
12 the United States and those people don't fool around.
13 They get opinions. And they lend money to Puerto Rico
14 or they lend money to some of these places. They're
15 going to have opinion letters. And those opinion
16 letters are going to say whether they think in their
17 opinion this is over reaching to many bonds or not. And
18 Of course, I would think those opinion letters would say
19 for Puerto Rico, what the words aggregate tax valuation
20 mean. They might or might not.

21 In other words, I'm trying to find ways of
22 getting the tax.

23 MR. WAXMAN: Okay. I don't have any such
24 opinion letters. And I would therefore, much like to
25 reserve at least a minute for rebuttal. But with

1 respect --

2 CHIEF JUSTICE ROBERTS: Now Mr. Waxman,
3 we've taken a fair amount of your time before you got to
4 the merits. So we'll give you a couple of minutes for
5 rebuttal. Why don't you answer that.

6 MR. WAXMAN: Thank you.

7 With respect to Puerto Rico, Puerto Rico
8 happens to be a situation which so far as we have been
9 able to ascertain, the law actually requires that for
10 purposes of determining valuation for application of the
11 tax rate, the assessed rate is required to be the actual
12 value, as is the case in the Virgin Islands. So that
13 distinction wouldn't exist.

14 On the other hand, in the Philippines, it is
15 clear from 1902 on that a system of fractional valuation
16 was in place. Now, getting -- figuring out what
17 actually happened in the Philippines way back when, when
18 it was a territory of the United States, has been
19 challenging and its may very well be that there is
20 information; but simply, simply obtaining for example,
21 the -- the three unpublished hearings with respect to
22 the Virgin Islands legislation in 1949 has been actually
23 surprisingly -- surprisingly challenging. If I may
24 reserve the balance of my time?

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Waxman. Ms. Brinkmann?

2 ORAL ARGUMENT OF BETH S. BRINKMANN,

3 ON BEHALF OF RESPONDENT

4 MS. BRINKMANN: Mr. Chief Justice, and may
5 it please the Court:

6 This case should be dismissed for want of
7 jurisdiction because the certiorari petition filed in
8 this Court to review the judgment of the Guam Supreme
9 Court was untimely. If the Court were nonetheless to
10 reach the merits of the opinion of the case, the opinion
11 of the Guam Supreme Court interpreting section 11 of the
12 Organic Act should be affirmed.

13 There are three principal reasons supporting
14 both of these positions. First, on the dismissal:
15 Dismissal is required, one, because when the Ninth
16 Circuit was divested of authority to adjudicate the
17 merits of the case, on October 30th, 2004, this Court
18 was then the only court that could review that judgment.

19 JUSTICE GINSBURG: Ms. Brinkmann, Congress
20 sometimes withdraws jurisdictions from courts, but while
21 the case is spending it isn't until the court issues the
22 order -- there's no automatic dismissal of the case when
23 Congress passes an act. There is a case lodged in the
24 court, and that court will follow Congress's directions
25 and dismiss it. But until it does, its hold final

1 judgment. The judgment of the Guam Supreme Court is
2 suspended while it's sub judicata before the Ninth
3 Circuit, and then when the Ninth Circuit acts, then
4 there is a trigger. But until there isn't.

5 MS. BRINKMANN: Your Honor, we respectfully
6 disagree. We don't believe that there was any
7 suspension of the time for filing once the Ninth Circuit
8 was divested of jurisdiction. This Court as long ago as
9 the Eisenberg case has recognized that the time for
10 filing certiorari is suspended so long as a lower court
11 has jurisdiction to adjudicate the merits of the case.
12 The Court reinforced that more recently --

13 JUSTICE SCALIA: What if, what if you have
14 an ambiguous statute where it really is not clear
15 whether it applies to pending cases or not? What, what
16 -- you say if it turns out after the fact that it does
17 apply to pending cases, you are out of time, if you
18 haven't immediately filed here while the case is still
19 -- is still pending.

20 MS. BRINKMANN: No, Your Honor, that is the
21 situation that the Court confronts in the three-judge
22 district court cases within in the instances in which
23 there was a mistake made as to where the appeal should
24 be taken. And the Court has jurisdiction to decide, the
25 jurisdiction in those instances has vacated and remanded

1 the order.

2 I want to emphasize to this Court that in
3 the Santos case, Petitioner requested that the Ninth
4 Circuit remand the order to the Guam Supreme Court, and
5 in the language of this Court, what that does is it
6 refreshes the judgment of the Guam Supreme Court so that
7 it can timely brought here. If Petitioner --

8 JUSTICE STEVENS: May I ask, would the Ninth
9 Circuit have had jurisdiction after October 30, 2004 to
10 vacate the judgment of the Guam Supreme Court and send
11 the case back?

12 MS. BRINKMANN: Yes. We believe under the
13 authority of this Court in those three-judge courts,
14 that is the solution that this Court has established --

15 JUSTICE STEVENS: We did that. "We don't
16 have jurisdiction but we are nevertheless going to enter
17 the following order, which presumably depends on our
18 having jurisdiction, that the judgment is vacated,"
19 assuming it's bad. You agree that the Ninth Circuit
20 could have done that?

21 MS. BRINKMANN: Yes, Your Honor. Petitioner
22 agreed that, he asked for that relief in the Santos
23 case.

24 CHIEF JUSTICE ROBERTS: Isn't that subject
25 to gamesmanship? Parties that are out of time in this

1 Court going to a lower court and saying well, just
2 vacate and re-enter, and then I can start all over
3 again? We've discouraged that.

4 MS. BRINKMANN: We think not, Your Honor.
5 In the Donovan Ricky Richland case, the Court made clear
6 you would not vacate it when it was simply a failure to
7 obey the rules. The Court refused to vacate and remand
8 in that case, as we point out in our brief. This is a
9 case such as Justice Scalia was positing where there is
10 an actual issue of, colorable question of jurisdiction.
11 The proper course would be to challenge, and here
12 Petitioner did not even try to litigate the question,
13 did not file any brief after Santos came down, never
14 tried to distinguish this case from Santos. He merely
15 waited and did not timely pursue the writ of the Guam
16 Supreme Court, the judgment that was final at that point
17 in time.

18 JUSTICE SCALIA: Well, you'd say Santos,
19 then, is -- is -- is the Rubicon? Not the enactment of
20 the statute, but Santos?

21 MS. BRINKMANN: No we believe in this
22 particular instance, particularly on, with the clarity
23 under Brunner, of the divestiture of the Ninth Circuit
24 jurisdiction here. This is not a rule of force.

25 JUSTICE SCALIA: Yeah. Your last argument,

1 then, is irrelevant. I mean if it's clear, it doesn't
2 matter what they did before.

3 MS. BRINKMANN: Well, I'm suggesting in
4 response to your question, Justice Scalia, that in those
5 other situations where there may be a question, that
6 does not put the Petitioner in a situation of not being
7 able to seek review.

8 JUSTICE SCALIA: Which is not this case.

9 MS. BRINKMANN: That's correct, Your Honor.

10 JUSTICE GINSBURG: The Ninth Circuit would
11 have been without authority to issue the orders in
12 Santos under your reasoning. The Ninth Circuit is
13 powerless because the authority had been transferred by
14 virtue of the statute to this Court, so the Ninth
15 Circuit was wrong in any orders it issued.

16 MS. BRINKMANN: No, Your Honor, the Ninth
17 Circuit maintained jurisdiction to decide jurisdiction.
18 And indeed if Petitioner had litigated the question of
19 jurisdiction they could have brought a writ to the Ninth
20 Circuit and come to this Court and litigated the
21 question of jurisdiction. If the Court had found there
22 was jurisdiction it could have reached the merits. If
23 the Court had found it was not, there was no
24 jurisdiction, it would have -- in the three-judge courts
25 and said no, you need to come directly up from the Guam

1 Supreme Court with vacate and remand for a fresh
2 judgment, and then you come to the Guam Supreme Court.

3 JUSTICE STEVENS: May I ask, how much time
4 did the Petitioners have after the statute passed? 90
5 days? Or the interval of 90 days minus whatever had
6 been run?

7 MS. BRINKMANN: 90 days Your Honor. We
8 believe that the --

9 JUSTICE STEVENS: Why would that be so?

10 MS. BRINKMANN: The timely petition to the
11 Ninth Circuit and the grant of certiorari would have
12 suspended the finality of the Guam Supreme Court
13 judgment. Once Congress in its authority to demarcate
14 the jurisdictions of the lower Federal courts had passed
15 that the statute, it was no -- for no court to question
16 that, was divested jurisdiction at that time. The Guam
17 Supreme Court judgment was again final and it had 90
18 days to petition.

19 I should say there are other cases.
20 Eisenberg makes clear that time was not suspended when
21 the court below does not have jurisdiction. The Market
22 Street Railways case makes clear when as a matter of law
23 the lower court no longer can act on the case, the time
24 is no longer suspended. And the Jesse Oil case makes
25 clear that the party can not rely on a false exercise of

1 jurisdiction by the lower court.

2 JUSTICE SOUTER: Well, in this case if it
3 was not a false exercise in Santos, why was it a false
4 exercise here?

5 MS. BRINKMANN: It was not a false exercise,
6 Your Honor, until October 30 of 2004. At that time
7 Congress spoke. And what that --

8 JUSTICE SOUTER: But it, it, it was still an
9 exercise -- it was an exercise in this case of the same
10 authority that it was purporting to exercise in Santos,
11 which you conceded. And that is the authority to
12 determine its own jurisdiction. I presume that
13 jurisdiction is determined on a case by case basis when
14 a case has already been accepted by the Court, and as
15 Justice Ginsburg said is sub judice. So if there was,
16 if there was jurisdiction to determine jurisdiction in
17 Santos, I don't see why there wasn't likewise
18 jurisdiction to determine it here.

19 MS. BRINKMANN: There was jurisdiction, Your
20 Honor. Our position is the same in both of those cases.
21 And indeed if that issue of jurisdiction had been
22 litigated in this case, Petitioner could have brought a
23 writ to the Ninth Circuit judgment and litigated
24 jurisdiction in this case. But if the courts ultimately
25 determined that there was not jurisdiction, it had --

1 JUSTICE SOUTER: Once the -- once the Ninth
2 Circuit determined that it had no longer a continuing
3 jurisdiction to do anything more than it did, in the
4 order that finally dismissed this, the other side wasn't
5 bound to litigate that here.

6 All the other side is saying is that up to
7 that point, the court was determining its own
8 jurisdiction. And therefore it is only when it
9 determined that its jurisdiction no longer existed, that
10 the filing period began to run.

11 So it seems to me that the crucial question
12 is if it could determine its own jurisdiction in Santos
13 which you concede, why can't it determine its own
14 jurisdiction here?

15 MS. BRINKMANN: It can, Your Honor, but --

16 JUSTICE SOUTER: Isn't that what it was
17 doing?

18 MS. BRINKMANN: Yes, but if it is found
19 there is no jurisdiction, then the party cannot have
20 relied on that to suspend --

21 JUSTICE SOUTER: Why -- why can't it?

22 MS. BRINKMANN: Because this Court's cases
23 make clear, the Wynn, Eisenberg case --

24 JUSTICE SOUTER: But those -- those -- are
25 they -- and you have got me here. The argument here is

1 that the, that the Ninth Circuit already had taken
2 jurisdiction in this case. It wasn't a question of
3 whether to accept it or not.

4 MS. BRINKMANN: And in those cases, Your
5 Honor, the courts also -- appellate courts were
6 undoubtedly exercising jurisdiction in those cases. And
7 in Eisenberg, for example, it was a request to recall
8 the remittitur. It took months for the California
9 Supreme Court to decide that case. And they said yes,
10 there's a standard where you can do that there -- the
11 court. We find you don't make it, so we don't have
12 jurisdiction. They came to this Court and said out of
13 time. You had to have sought our review timely, from
14 the final judgment of the California Supreme Court, you
15 could not wait for that period of time in which the
16 California Supreme Court decided to not have
17 jurisdiction.

18 JUSTICE SOUTER: I --

19 MS. BRINKMANN: That is a well established
20 Federal jurisdiction principle.

21 JUSTICE SOUTER: I guess I'm still at a loss
22 on the point that for one purpose, the purpose of the
23 90-day filing period, you're saying that the Ninth
24 Circuit did not have jurisdiction; but for another
25 purpose, the determination of whether it had

1 jurisdiction, you're saying it does have jurisdiction.

2 Am I misunderstanding your argument?

3 MS. BRINKMANN: I don't believe so. I think
4 that's very common --

5 JUSTICE SOUTER: I don't see how you can
6 have it both ways.

7 MS. BRINKMANN: Well this Court has made
8 clear, for example, in the three-judge district court
9 cases, that this Court has jurisdiction when an appeal
10 comes before it, to decide whether or not it has
11 jurisdiction over that appeal. When parties have made
12 --

13 JUSTICE SOUTER: Maybe I should say I don't
14 know why this Court can have it both ways.

15 (Laughter.)

16 JUSTICE SOUTER: Don't, don't we have to
17 choose one analytical path or the other analytical path?

18 MS. BRINKMANN: No, Your Honor, I think it
19 rests in this whole idea that courts have to have
20 jurisdiction to decide jurisdiction. But when you're --

21 JUSTICE GINSBURG: And then when they decide
22 they didn't have jurisdiction, then it's retroactive?
23 That's what your position is?

24 MS. BRINKMANN: No.

25 JUSTICE GINSBURG: The Ninth Circuit has

1 jurisdiction this whole time. But the day that it
2 issues its decision dismissing this case, then it is
3 retroactive back to the date that Congress passed the
4 statute? That's what you seem to be saying.

5 MS. BRINKMANN: The divestiture of the
6 jurisdiction occurred on the date that Congress's
7 statute went into effect.

8 JUSTICE ALITO: What if, what if the Ninth
9 Circuit had incorrectly held that it had jurisdiction?
10 Would it be the same?

11 MS. BRINKMANN: Your Honor, that would have
12 been the scenario I discussed before, the parties could
13 have litigated that. If it came to this Court, and the
14 Court found there was jurisdiction, so be it. We think
15 it would have been a wrong ruling. And if it came to
16 this Court and this Court reversed, that is the scenario
17 we discussed, where in the three-judge district court
18 when that turns out, the court says we don't have
19 jurisdiction, you needed to come up through the other
20 route, we will dismiss, vacate and send back and come
21 up.

22 Now I have to urge on the Court there's a
23 purpose for that. In those cases the party is actively
24 believing and pursuing the view that jurisdiction
25 exists. In this case that was not the scenario.

1 JUSTICE GINSBURG: But those cases really
2 are not on point. Because there was a vast confusion in
3 the days when there was a three-judge court, do I file a
4 jurisdictional statement, do I file a cert petition?
5 Sometimes this Court said we'll treat the jurisdictional
6 statement as a cert petition. But those existed from
7 the beginning. Here there's a case lodged in the Court
8 of Appeals, the Court of Appeals had every basis of
9 jurisdiction. This was no big shakes about it. It
10 wasn't, did they file the right paper? And then
11 Congress does something. And the Court would follow
12 suit.

13 It just seems to me very strange to say the
14 court has jurisdiction to decide whether it has
15 jurisdiction, but if it decides it doesn't, then the
16 date of that order is not the critical date, but you go
17 back to the date that Congress passed the law.

18 MS. BRINKMANN: Your Honor, I think that
19 this Court addressed this scenario, and one of two
20 things could have happened. As you pointed out during
21 Petitioner's argument, it would have been an easy thing
22 to file a protective cert position. This Court is well
23 familiar, has recognized the appropriateness of protective
24 filings -- certainly in the Federal habeas situation
25 where there are mixed petitions and we go back in

1 thought, protective filing within the 90-day period
2 would have been appropriate. And I urge, particularly
3 because Petitioner filed a brief within that period in
4 the Santos case, recognizing that Brunner required that
5 there was a divestiture of Ninth Circuit jurisdiction as
6 of the day of the statute enactment.

7 Even if there had not been that protective
8 filing, if Petitioner had a colorable jurisdiction
9 argument and litigated it, this Court has made clear
10 that once that has been determined adversely, there can
11 be a vacation and remand back to the Guam Supreme Court
12 so that judgment can be brought up. I would like to
13 turn to the merits if I could, Your Honor.

14 We believe that the well-reasoned opinion of
15 the Guam Supreme Court should be affirmed for three
16 reasons. First, the interpretation takes full account
17 of the text of the statute. As Justice Kennedy was
18 mentioning before, the purpose of this is to have a debt
19 limitation that is based on the property in Guam and the
20 tax valuation of that property in Guam. The tax
21 valuation is the valuation of the property that is
22 subject to tax.

23 This is not an original interpretation of
24 this provision. In the Superior Court opinion from 1989
25 that we attached to our brief in opposition, the Guam

1 Supreme Court came to the same conclusion and
2 interpretation of this language. We think it is an
3 eminently reasonable and correct interpretation,
4 particularly in light of the absence of the word as set.

5 CHIEF JUSTICE ROBERTS: But don't you know
6 that your interpretation reads the word tax out of this
7 statute? I mean your position would be exactly the same
8 if it just said 10 percent of the value of the property
9 in Guam.

10 MS. BRINKMANN: No, Your Honor. That would
11 include the tax-exempt property. That would be a much
12 larger number.

13 JUSTICE BREYER: That's where I'm having
14 trouble on your side. I can't get very far with a
15 history of other places. Apparently I can't get there.

16 Tax doesn't seem to help me very much. So I
17 thought, well, one thing is clear. What they're trying
18 to do here is they take out of the box, if you look at
19 it, take all of the list of property that they don't
20 tax. I guess a school, maybe some tax exempt business
21 or something.

22 JUSTICE BREYER: Now their reason for doing
23 that must be that those people who they've exempted
24 entirely by statute are not going to be much help in
25 paying Guam. Well, if that's true, isn't precisely the

1 same thing true of the two-thirds of the property that
2 they don't take into account when they set their taxes?

3 MS. BRINKMANN: No, Your Honor.

4 JUSTICE BREYER: Because?

5 MS. BRINKMANN: Because that property in
6 Guam is still securing this debt to a certain degree.
7 It is property that must be valued for tax purposes.

8 JUSTICE BREYER: No. It doesn't secure it
9 one bit if, in fact, the tax statute says you can't take
10 it into account when you set your taxes. Just as is
11 true of, let's say, a tax free business of some kind.
12 Now Guam doesn't have to do that, it could change its
13 statute, but so could it change its statute in respect
14 to a school, a university, or whatever the other things
15 are that are off those tax rolls. You know that, you
16 know, your answer was circular. That assumes that the
17 whole property is, but it isn't.

18 MS. BRINKMANN: Well, Your Honor, as a
19 matter of textual interpretation as to the tax valuation
20 of property in Guam, you look at the property in Guam
21 and then you have to take the tax valuation. You're
22 taking the property that is subject to tax.

23 We believe that this is the intent of
24 Congress also for two reasons, Justice Breyer, that
25 addressed your issues before about one suggestion that

1 Guam could change this. The purpose of Congress here
2 was to set a meaningful debt limit. That is what real
3 value appraisal value does. It is an economic
4 determination of currency fact.

5 JUSTICE SOUTER: Well, why why does it do
6 any more than the 35 percent value? That sets a
7 definite limit.

8 MS. BRINKMANN: Because that could be
9 changed at the whim of the legislature, Your Honor, and
10 the legislature could change that assessment to increase
11 the debt limit and -- while lowering taxes and altering
12 any tax liability.

13 CHIEF JUSTICE ROBERTS: With respect to much
14 of the tax exempt property, that could be changed by the
15 legislature as well.

16 MS. BRINKMANN: But when you're looking to a
17 bond debt limitation, you're looking at the bond market,
18 you're looking at investors, the certainty of an
19 appraisal value, actual real value, and --

20 JUSTICE SCALIA: But it doesn't have to be
21 100 percent. They could change what you call the tax
22 valuation from 100 percent of the fair value to 150
23 percent. There's really much less to this case than
24 meets the eye. I mean, Guam is going to be able to
25 fiddle with this thing no matter how you come out.

1 MS. BRINKMANN: We don't believe that was
2 the intent of Congress.

3 JUSTICE SCALIA: Well, whether it was their
4 intent or not, is it not the case that Guam could say
5 all property will be valued at 150 percent of its fair
6 market value and we will then impose a 1 percent real
7 estate tax instead of the 2 percent, or instead of the
8 1.5 percent we had before?

9 MS. BRINKMANN: Yes, they certainly could do
10 that as a matter of fact. We don't believe that should
11 alter the debt limitation Congress enacted, and that's
12 precisely why we believe that the Guam Supreme Court
13 opinion gives a meaningful interpretation of the purpose
14 of Congress and gives a real debt limitation that
15 exactly should be affirmed as exactly the purpose that
16 Congress intended. And that's why the assessed value
17 can be so easily manipulated, and is not a reasonable
18 interpretation.

19 I also would like to address
20 Justice Breyer's question about the --

21 JUSTICE KENNEDY: No, just before you go
22 there, if I were a bond investor, I would much prefer
23 issuing bonds if it's the lower value, if it's the
24 assessed value. I'm just more secure.

25 MS. BRINKMANN: Your Honor, the uncertainty,

1 however, that the debt limitation is a real limitation
2 that serves the purpose of Congress in order to have
3 some kind of fiscal responsibility to the Territory is
4 what is furthered by the real limitation of having a
5 concrete appraisal full value as a basis for the
6 calculations.

7 JUSTICE KENNEDY: Well, you do have a
8 concrete appraisal, but it's just reduced to 35 percent.

9 MS. BRINKMANN: But that can be changed at
10 the whim of the legislature without any accountability
11 to the voters because at the same time that they change
12 the tax rate and not alter any tax liability.

13 JUSTICE SOUTER: Well, you say without any
14 responsibility to the voters. I mean, the voters are
15 going to know that if the valuation is changed and the
16 tax rate isn't, their taxes are going up. So I assume
17 the voters are going to be vigilant to what is going on
18 and I assume they have telephones and they'll call their
19 representatives. Why is this -- why do you posit this
20 sort of failure of representative democracy?

21 MS. BRINKMANN: Because I assume the tax
22 rate will be changed, so it's not just -- there's no --

23 JUSTICE SOUTER: But if the tax rate is
24 changed, they're going to call twice.

25 MS. BRINKMANN: No. The tax rate will be

1 changed to be lower to maintain the same level, so there
2 would be no -- because the legislature isn't acting to
3 address any tax liability. They're simply asking to
4 manipulate the debt limitation, which is very contrary
5 to the purpose and any meaningful message that debt
6 limitation --

7 JUSTICE SOUTER: But they're going to know
8 this. I mean, they're going to be, if they are
9 concerned at all about it, they'll be in touch with
10 their representatives.

11 MS. BRINKMANN: Your Honor, of course the
12 bond issuance here also goes to the Guam legislature and
13 they are held accountable for that in the political
14 arena. I would suggest, Your Honor, the question
15 about -- I agree with petitioner's counsel about the
16 certainty of determining some of this historical
17 material is difficult and not precise. But we have gone
18 back and looked at the contemporaneous statutes in each
19 of these territorial jurisdictions, and as Mr. Waxman
20 pointed out, Puerto Rico it turns out actually uses the
21 actual value, all of them use the actual value.

22 JUSTICE GINSBURG: Do they tax on the basis
23 of the --

24 MS. BRINKMANN: Yeah.

25 JUSTICE GINSBURG: This is a fractional,

1 this 35 percent. In the other places, do they use as
2 the -- the value taxed 100 percent of the property --

3 MS. BRINKMANN: Yeah.

4 JUSTICE GINSBURG: -- and then just have a
5 lower tax rate?

6 MS. BRINKMANN: Yes.

7 CHIEF JUSTICE ROBERTS: And what was the
8 appraisal practice? I mean, in a lot of these
9 jurisdictions you have appraised value that turns out to
10 be 30 percent of the actual market value.

11 MS. BRINKMANN: But here, in the Virgin
12 Islands and Alaska, Federal law requires that the taxes
13 be imposed on the actual value. In the Virgin Islands
14 it said your assessment will be actual value. That's
15 why the term assessment was used in the Virgin Islands
16 debt limitation, because that was in a preexisting
17 Federal statute that required assessment be an actual
18 value.

19 JUSTICE BREYER: Which one? You say they've
20 all used market values?

21 MS. BRINKMANN: Yes.

22 JUSTICE BREYER: Well, which of the ones
23 that use it have in fact an assessed value that is a
24 percentage of market value?

25 MS. BRINKMANN: None.

1 JUSTICE BREYER: All right. Well, that
2 doesn't help us then.

3 MS. BRINKMANN: But I think it does further
4 the purpose of what Congress was looking to in both the
5 Virgin Islands and Alaska. The requirement for various
6 reasons that they impose their tax on the actual value
7 certainly supports the reasonableness of the
8 interpretation here, Your Honor.

9 JUSTICE BREYER: Well, we could look at
10 Hawaii. In Hawaii they use the word assessed value.
11 They couldn't possibly have wanted it to be market
12 value, I wouldn't think.

13 MS. BRINKMANN: But the actual --

14 JUSTICE BREYER: And in the District of
15 Columbia -- where are we on this? It's something else
16 in D.C. They use assessed value in the Virgin Islands.

17 MS. BRINKMANN: The preexisting law in
18 Hawaii before it became a territory had tax imposed on
19 the actual value, and subsequent to the debt limitation,
20 the territorial law also put it on actual value.

21 I would suggest, Your Honor, certainly if
22 there is any debate that there's more than one
23 interpretation of the Organic Act, that deference should
24 be afforded to the Guam Supreme Court's interpretation
25 of that. That is well established under this Court.

1 CHIEF JUSTICE ROBERTS: But doesn't it --
2 who is this provision designed to protect, just the
3 Guamanian taxpayers or Federal taxpayers more generally?

4 MS. BRINKMANN: It's the Guamanians, Your
5 Honor. It is not --

6 CHIEF JUSTICE ROBERTS: If the Guamanian
7 government runs a deficit, where is the difference made
8 up from?

9 MS. BRINKMANN: Most of the income and
10 revenue on Guam comes from the Federal income tax,
11 because unlike on the mainland, the Federal income tax
12 goes to the Guam Treasury rather than the United States
13 Treasury.

14 CHIEF JUSTICE ROBERTS: I know that any
15 taxes from Guam are returned to Guam. Are additional
16 tax revenues given to Guam other than those that are
17 derived from Guam?

18 MS. BRINKMANN: Yeah, other financial
19 relationships with the U.S. Government, yes, Your Honor.

20 CHIEF JUSTICE ROBERTS: So that if the
21 Guamanian Treasury runs into difficulty, it's made up
22 not just by Guamanian taxpayers, but by all Federal
23 taxpayers?

24 MS. BRINKMANN: No, Your Honor. That's not
25 my understanding of the practice. The encouragement of

1 Congress setting up the independent judiciary and
2 government of Guam has also included fiscal
3 responsibility, and part of that are the bond issuance
4 and the issues that are here before the Court.

5 JUSTICE SCALIA: I cannot imagine that if a
6 territory of the United States goes belly up, that the
7 United States is not going to foot the bill. I just
8 can't imagine that.

9 MS. BRINKMANN: Your Honor, we believe here
10 that the debt limitation is a matter of local concern.
11 It is the Constitution of Guam. And we are not
12 suggesting that the Court affirm an erroneous
13 interpretation at all. This is a more than reasonable
14 interpretation of a theory, well reasoned opinion by the
15 Guam Supreme Court. The Guam Supreme Court has support,
16 it's 17-year old superior court opinion that had reached
17 the same conclusion. That was the only law out there
18 that Guamanians had looked to for the interpretation of
19 those provisions of the Organic Act. It predated the
20 1993 appraisal. And it took that opinion and did not
21 simply adopt it, but went through and did a very
22 detailed analysis of the test of the statute of the
23 Organic Act, the fact that it did not include the word
24 assessed, which was used 10 months later by Congress in
25 the Virgin Islands.

1 JUSTICE STEVENS: Miss Brinkmann, just to
2 follow up on Justice Scalia's question, is there any
3 history of the Federal government having to bail out the
4 Guam government for bankruptcy or anything close to
5 that?

6 MS. BRINKMANN: No, Your Honor, none
7 whatsoever.

8 JUSTICE STEVENS: And is there anything in
9 the record that tells us what kind of a credit rating
10 Guam has?

11 MS. BRINKMANN: No, Your Honor, I don't
12 believe it does.

13 JUSTICE GINSBURG: Did this value issue -- I
14 mean, was the borrowing effective given the controversy
15 between, the attorney general refused to sign, did that
16 have any consequences for whether this bond issue went
17 through?

18 MS. BRINKMANN: Absolutely, Your Honor.
19 Because of Petitioner's delay for more than a year and a
20 half in a court that did not have jurisdiction, these
21 bonds still have not been able to issue. And Petitioner
22 responded no. As a practical matter, the bond market
23 will not support issuance of these bonds until attempts
24 to undermine their validity have been brought to an end.
25 And so the Guam government has been doing different

1 means of financing in a positive manner. The economy of
2 Guam has returned because of many of the devastating
3 world events have taken, have passed in time, and the
4 economy is recovering. The U.S. military is returning
5 with a very large presence there. But they are still,
6 my understanding, approximately two years behind in
7 getting back tax returns.

8 JUSTICE KENNEDY: In that case, you should
9 want us to exercise jurisdiction, decide it one way or
10 the other.

11 MS. BRINKMANN: Your Honor, we believe that
12 it should be dismissed for want of jurisdiction, the
13 Guam Supreme Court opinion stands, and we prevail under
14 that ruling, the Guam Supreme Court's interpretation of
15 Section 11 of the Organic Act.

16 JUSTICE SCALIA: Could you tell me whether
17 the rate of tax is uniform throughout Guam? The rate of
18 real estate tax. Is it an island-wide tax or is it
19 local, county?

20 MS. BRINKMANN: It is an island-wide tax,
21 Your Honor. Land is taxed at one-quarter of 1 percent
22 and improvements are taxed at 1 percent.

23 JUSTICE SCALIA: I don't know why you just
24 didn't raise your assessed value from 30 percent to 100
25 percent and reduce the rate of tax accordingly.

1 MS. BRINKMANN: We don't believe that
2 Congress intended to inject itself into the workings of
3 this local territorial tax mechanism. The various
4 policies --

5 JUSTICE KENNEDY: But you still have the
6 option, and I'm just dying to ask the question not
7 having anything to do with the case. Why did they do
8 this? Why did they have -- was it just to make
9 everybody feel good and they think they're ripping off
10 the government because they're getting only a 35 percent
11 value, even though everybody knows they'll just raise
12 the rate if it changes?

13 MS. BRINKMANN: That is exactly the kind of
14 policy decision that the local governing authority makes
15 about taxes. Actually the Petitioner has a footnote
16 explaining the origin of fractional tax valuation.
17 Indeed, it seems to be consistent with some of the
18 history also that we've seen that there would be
19 informal adjustments of valuations to take into account
20 perhaps poverty, or to take into account less
21 meritorious justifications. And the -- because of the
22 perception or, I believe petitioner calls it the
23 political psychology perhaps, of having such a high
24 rate, that is a policy decision that different taxing
25 authorities make.

1 It should not mean that Guam surrenders
2 two-thirds of its debt limitation. Congress did not use
3 the word assessed and it's a very difficult argument to
4 adopt that by failing to use assessed, they limited it
5 to an assessed value that surrendered two-thirds of the
6 Guam territorial debt limitation contrary to all --

7 CHIEF JUSTICE ROBERTS: Yeah, but you talked
8 about this as the deference we owe to the Guam Supreme
9 Court. This is a Federal statute, right? This was
10 passed by Congress.

11 MS. BRINKMANN: Yes, Your Honor, and in the
12 Santa Fe case versus Friday, with all due respect,
13 Petitioner is incorrect that that addressed territorial
14 laws. That was a provision in the New Mexico Organic
15 Act that fed up the jurisdiction of district courts that
16 Congress created in New Mexico. There was a provision
17 in that Organic Act provision of New Mexico that said
18 the jurisdiction of those courts was as limited as law.

19 That passage was interpreted in this Court
20 in Friday looking at another Federal statute and some
21 territorial laws. I would direct the Court to the
22 briefs in the case, that opinion itself was quite brief,
23 and when you look at the explications of the party, it
24 simply reinforces that the Court there was construing an
25 organic act, a Federal statute, and local territorial

1 statutes, and there directly said that they should defer
2 to the local understanding of the courts unless it is
3 clearly wrong. So we urge that that, too, should be --

4 CHIEF JUSTICE ROBERTS: Does that apply to
5 all the provisions of the Organic Act? I mean, there
6 are provisions there addressing the jurisdictional issue
7 that we are considering here as well. Do we defer to
8 the Guam Supreme Court's view on that?

9 MS. BRINKMANN: Your Honor, I see my time is
10 up, but if you'd like me to respond?

11 CHIEF JUSTICE ROBERTS: That's fine.

12 MS. BRINKMANN: I think that you could look
13 to your area of administrative deference, for example,
14 under Chevron, where you do also defer to the authority
15 of an agency, the interpretation of an agency. The
16 determination of its own authority the Court has upheld.

17 Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you, Ms.
19 Brinkmann.

20 Mr. Waxman, we'll give you 3 minutes.

21 REBUTTAL ARGUMENT OF SETH P. WAXMAN

22 ON BEHALF OF PETITIONER

23 MR. WAXMAN: Thank you, Mr. Chief Justice.

24 I want to direct the Court -- in response to
25 two questions that were asked of Ms. Brinkmann, I want

1 to direct the court to two pages of the Guam Supreme
2 Court's opinion, and I'm going to summarize them for you
3 now, but for purposes of what's the difference between
4 in terms of bond holders, the fact that certain property
5 isn't taxed at all and certain property is only taxed at
6 35 percent, what's important to note here, and that is
7 reflected at page 26a of the petition appendix, the tax
8 roll on Guam includes a valuation of all nontaxable
9 property. The Guam Supreme Court then has to go back
10 and say, well, of this approximately 183 million is
11 exempt. So in Guam, the tax assessor and the Guam
12 courts are treating property that is wholly exempt from
13 taxation the same way that it treats the two-thirds of
14 fair market value that is exempt from application of the
15 tax rate.

16 Secondly, in response to Justice Kennedy's
17 questions about why are we focusing -- why wouldn't bond
18 holders focus on assessed valuation rather than the rest
19 and what difference does all of this make, page 18a of
20 the joint appendix, which is footnote 8 of the Guam
21 Supreme Court's opinion, which comes in the -- the
22 portion of the opinion where the court says, look, "tax"
23 has to mean something; we think it means taxable
24 property, not tax valuation.

25 The Guam Supreme Court in its opinion in

1 footnote 8, quoting from some language from a dissenting
2 opinion in the Hawaii Supreme Court, says as follows,
3 and I'm quoting from footnote 8: "It has been argued
4 that the use of a percentage of assessed value as a
5 measure of the State debt limit is without
6 significance," now skipping the rest of the sentence.
7 "The people that buy the bonds are interested in the
8 ratio of your debt to your assessed value because, while
9 all of the tax revenues of the State or the counties
10 naturally are available for the payment of the debt,
11 it's been customary for bond holders to look to the real
12 property tax as their collateral."

13 That is the authority on which the Guam
14 Supreme Court relied and it applies to this case and it
15 explain why the word "assessed" and the word "taxable"
16 have been construed synonymously and interchangeably in
17 the legislative history of these territorial statutes
18 and why assessed value is understood to be usually
19 fractional value for reasons of political psychology
20 that Ms. Brinkmann addressed, but even where it's full
21 value, it is only pursuant to a determination that for
22 assessment purposes full value should be used.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 (Whereupon, at 11:08 a.m., the case in the

1 above-entitled matter was submitted.)
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