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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN
ON BEHALF OF THE PETITIONER

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

This case is properly before this Court, which should reverse under the plain language and purpose of the Organic Act of Guam. As to jurisdiction, at the time Congress amended the Organic Act to replace the certiorari jurisdiction of the Ninth Circuit with direct review in this Court, the Ninth Circuit had already granted the writ of certiorari that had been timely filed and the case had been briefed, argued and submitted. The amendment said nothing about its application to pending appeals, and someone had to decide whether and how it applied to this case. The Ninth Circuit was the proper body to do that, at least in the first instance, and until it did, this case was before that Court within the meaning of Gibbs versus 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 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 or not there is colorable jurisdiction
2 -- a hypothetical case, suppose the statute, Federal
3 statute is very clear that it applies to pending cases.
4 Would your 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 -- and the Court's cases are not clear here but
8 it does seem to me that in an 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 -- an
13 enactment 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 is the phrase we used, colorable
21 jurisdiction, or -- it's just something I made up, I
22 suppose -- is there some concept that we can refer to
23 or some phrase that works to -- in order to incorporate
24 your 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 the 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 STEVENS: Mr. Waxman, may I just ask
20 this question? I don't quite understand what the import
21 of this order on page 51a is. I have it in front of me.
22 What did that do? Was anything different immediately
23 after the order entered than was true immediately
24 before --

25 MR. WAXMAN: Yes. Yes, Your Honor. And I

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

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

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

25 Then turn to page 50a of the joint appendix.

1 A week later, on December 22, the Court sua sponte
2 issues an order withdrawing and deferring a ruling in
3 this case pending the decision in Santos. Santos is
4 then decided in January. And on February 1, the Court
5 issues an order in this pending case saying okay, it's
6 resubmitted to the panel. And shortly thereafter, the
7 panel issued the order dismissing this case for lack of
8 jurisdiction, and from that date we filed a timely
9 petition for certiorari.

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

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

25 MR. WAXMAN: The attorney -- there were two

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

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

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

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

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

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

17 In the three-judge court context,
18 Justice Ginsburg, although this Court's jurisdiction to
19 hear direct appeals in three-judge courts has been
20 greatly reduced since the 1950s and 60's and early
21 70's, there are certain instances that this Court
22 has realized where it is unclear whether an appeal lies
23 to a regional court of appeals or to this Court and it
24 is unavoidable there that you would file a notice of
25 appeal in both instances; but this is not a situation in

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

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

12 MR. WAXMAN: Yes.

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

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

1 in this case. The Guam Supreme Court considered this as
2 a court of first instance that original petition was
3 filed in the Guam Supreme Court.

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

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

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

25 JUSTICE GINSBURG: Perhaps you should go on

1 to the merits.

2 MR. WAXMAN: Thank you.

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

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

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

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

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

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

19 MR. WAXMAN: Indeed. But here's the
20 situation here, and this is why I think it's an a
21 fortiori case. The attorney general and the governor of
22 Guam are each separately elected. They each have
23 nondiscretionary obligations under Guam law in addition
24 to their obligation to interpret and enforce the
25 Constitution and laws of the United States. The

1 attorney general cannot be removed by, by the governor,
2 by Guam law, unlike the case in many of these Federal
3 executive branch intramural disputes; and she is
4 required by Guam law in any instance in which the
5 governor and the legislature attempt to borrow money
6 subject to the full faith and credit of the territory, to
7 certify that such borrowing is lawful. And in this
8 instance, therefore, she is, as the unremovable, elected
9 chief law enforcement of the territory, she is required
10 both to properly apply the Federal law that -- the Organic
11 Act that constitutes Guam's Constitution and Guam
12 territorial law which requires her affirmatively to
13 certify the legality of the proposed buy-in.

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

22 MR. WAXMAN: Justice Scalia --

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

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

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

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

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

1 to have a definitive answer from someone other than the
2 governor or me. Is it her position at the present time
3 that the position of her predecessor is correct or not?

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

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

11 MR. WAXMAN: Correct.

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

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

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

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

21 JUSTICE BREYER: I know. Let me tell you my
22 question; I'd like you to go into it.

23 MR. WAXMAN: Okay.

24 JUSTICE BREYER: I've looked up -- my law clerk
25 has, and found eight States that seem roughly

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

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

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

1 Supreme -- that the Guam Organic Act was enacted
2 fractional valuation was a commonplace for purposes of
3 assessing property tax. Now, in the territories --

4 JUSTICE BREYER: Try Utah, try Iowa. Try
5 Illinois --

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

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

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

23 MR. WAXMAN: Absolutely nothing.

24 JUSTICE STEVENS: So there's no, no limit in
25 the Organic Act that is of any real meaning?

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

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

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

1 And we have been receiving the legislative history,
2 particularly the unpublished legislative histories, of
3 these provisions up to and including Saturday because in
4 the 11 days over the Christmas holiday in which we did
5 our reply brief we simply could not get hearing --
6 transcripts of hearings that were conducted in 1949 in
7 1949 Agatna, Guam.

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

12 JUSTICE SCALIA: Please don't.

13 (Laughter.)

14 MR. WAXMAN: But the --

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

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

1 and in the Philippines. I don't know about Alaska.

2 JUSTICE KENNEDY: Just on the merits, the
3 first thing that the tax authorities have to do is they
4 have to value the property.

5 MR. WAXMAN: Correct.

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

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

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

1 understanding that furthers Congress's central, consistent
2 goal of restraining borrowing by territories.

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

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

23 In other words, I'm trying to find ways of
24 getting at the practice.

25 MR. WAXMAN: Okay. I don't have any such

1 opinion letters. And I would therefore, much like to
2 reserve at least a minute for rebuttal. But with
3 respect --

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

8 MR. WAXMAN: Thank you.

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

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

1 reserve the balance of my time?

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Waxman.

4 Ms. Brinkmann.

5 ORAL ARGUMENT OF BETH S. BRINKMANN,
6 ON BEHALF OF RESPONDENT

7 MS. BRINKMANN: Mr. Chief Justice, and may
8 it please the Court:

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

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

22 JUSTICE GINSBURG: Ms. Brinkmann, Congress
23 sometimes withdraws jurisdiction from courts, but while
24 the case is spending it isn't until the court issues the
25 order -- there's no automatic dismissal of the case when

1 Congress passes an act. There is a case lodged in a
2 court, and that court will follow Congress's directions
3 and dismiss it. But until it does, there's no final
4 judgment. The judgment of the Guam Supreme Court is
5 suspended while it's sub judicata before the Ninth
6 Circuit, and then when the Ninth Circuit acts, then
7 there is a trigger. But until it does, there isn't.

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

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

23 MS. BRINKMANN: No, Your Honor, that is the
24 situation that the Court confronts in the three-judge
25 district court cases where there have been instances in

1 which there was a mistake made as to where the appeal
2 should be taken. And the Court has jurisdiction to decide,
3 the jurisdiction in those instances has vacated and
4 remanded the order.

5 I have to emphasize to this Court that in
6 the Santos case, Petitioner requested that the Ninth
7 Circuit remand the order to the Guam Supreme Court, and
8 in the language of this Court, what that does is it
9 refreshes the judgment of the Guam Supreme Court so it then
10 can be timely brought here. If Petitioner had in fact --

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

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

18 JUSTICE STEVENS: We did that. "We don't
19 have jurisdiction but we are nevertheless going to enter
20 the following order, which presumably depends on our
21 having jurisdiction, that the judgment is vacated, and
22 we're sending it back." You agree that the Ninth Circuit
23 could have done that?

24 MS. BRINKMANN: Yes, Your Honor. Petitioner
25 agreed that, he asked for that relief in the Santos

1 case.

2 CHIEF JUSTICE ROBERTS: Isn't that subject
3 to gamesmanship? Parties that are out of time in this
4 Court going to a lower court and saying well, just
5 vacate and re-enter, and then I can start all over
6 again? We've discouraged that.

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

21 JUSTICE SCALIA: Well, you'd say Santos,
22 then, is -- is -- is the Rubicon? Not the enactment of
23 the statute, but Santos?

24 MS. BRINKMANN: No we believe in this
25 particular instance, particularly on, with the clarity

1 under Bruner, of the divestiture of the Ninth Circuit
2 jurisdiction here. This is not a rule of tort.

3 JUSTICE SCALIA: Yes. Your last argument,
4 then, is irrelevant. I mean if it's clear, it doesn't
5 matter what they did before.

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

11 JUSTICE SCALIA: Which is not this case.

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

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

19 MS. BRINKMANN: No, Your Honor, the Ninth
20 Circuit maintained jurisdiction to decide jurisdiction.
21 And indeed if Petitioner had litigated the question of
22 jurisdiction they could have sought a writ to the Ninth
23 Circuit and come to this Court and litigated the
24 question of jurisdiction. If the Court had found there
25 was jurisdiction it could have reached the merits. If

1 the Court had found it was not, there was no
2 jurisdiction, it would have done what it does in the
3 three-judge courts and say, "no, you need to come
4 directly up from the Guam Supreme Court. We vacate and
5 remand for a fresh judgment, and then you come to the
6 Guam Supreme Court."

7 JUSTICE STEVENS: May I ask, how much time
8 did the Petitioners have after the statute passed? 90
9 days? Or the interval of 90 days minus what had already
10 run?

11 MS. BRINKMANN: 90 days Your Honor. We
12 believe that the --

13 JUSTICE STEVENS: Why would that be so?

14 MS. BRINKMANN: The timely petition to the
15 Ninth Circuit and its grant of certiorari review
16 suspended the finality of the Guam Supreme Court
17 judgment. Once Congress in its authority to demarcate
18 the jurisdictions of the lower Federal courts enacted
19 that statute, it was no -- for no court to question
20 that, was divested of jurisdiction at that time. The
21 Guam Supreme Court judgment was again final and it had
22 90 days to petition.

23 I should say there are other cases.
24 Eisenberg makes clear that time is not suspended when
25 the court below does not have jurisdiction. The Market

1 Street Railway case makes clear that when as a matter of
2 law the -- lower court no longer can act on the case, the
3 time is no longer suspended. And the Gypsy Oil case makes
4 clear that the party can not rely on a false exercise of
5 jurisdiction by the lower court.

6 JUSTICE SOUTER: Well, in this case if it
7 was not a false exercise in Santos, why was it a false
8 exercise here?

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

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

23 MS. BRINKMANN: There was jurisdiction, Your
24 Honor. Our position is the same in both of those cases.
25 And indeed if that issue of jurisdiction had been

1 litigated in this case, Petitioner could have brought a
2 writ to the Ninth Circuit judgment and litigated
3 jurisdiction in this case. But if the courts ultimately
4 determined that there was not jurisdiction, it had --

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

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

15 So it seems to me that the crucial question
16 is if it could determine its own jurisdiction in Santos
17 which you concede, why can't it determine its own
18 jurisdiction here?

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

20 JUSTICE SOUTER: Isn't that what it was
21 doing?

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

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

1 MS. BRINKMANN: Because this Court's cases
2 make clear, Hibbs v. Wynn, the Eisenberg case --

3 JUSTICE SOUTER: But those -- those -- are
4 they -- and you have got me here. The argument here is
5 that the, that the Ninth Circuit had already taken
6 jurisdiction in this case. It wasn't a question of
7 whether to accept it or not.

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

22 JUSTICE SOUTER: I --

23 MS. BRINKMANN: That is a well established
24 Federal jurisdiction principle.

25 JUSTICE SOUTER: I guess I'm still at a loss

1 on the point that for one purpose, the purpose of the
2 90-day filing period, you're saying that the Ninth
3 Circuit did not have jurisdiction; but for another
4 purpose, the determination of whether it had
5 jurisdiction, you're saying it does have jurisdiction.

6 Am I misunderstanding your argument?

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

9 JUSTICE SOUTER: I don't see why you can
10 have it both ways.

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

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

19 (Laughter.)

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

22 MS. BRINKMANN: No, Your Honor, I think it
23 rests on this core idea that courts have to have
24 jurisdiction to decide jurisdiction. But when there is
25 no --

1 JUSTICE GINSBURG: And then when they decide
2 they didn't have jurisdiction, then it's retroactive?
3 That's what your position is?

4 MS. BRINKMANN: No.

5 JUSTICE GINSBURG: The Ninth Circuit has
6 jurisdiction this whole time. But the day that it
7 issues its decision dismissing this case, then it is
8 retroactive back to the date that Congress passed the
9 statute? That's what you seem to be saying.

10 MS. BRINKMANN: The divestiture of the
11 jurisdiction occurred on the date that Congress's
12 statute went into effect.

13 JUSTICE ALITO: What if, what if the Ninth
14 Circuit had incorrectly held that it had jurisdiction?
15 Would it be the same?

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

1 can come up."

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

6 JUSTICE GINSBURG: But those cases really
7 are not on point. Because there was a vast confusion in
8 the days when there was a three-judge court, do I file a
9 jurisdictional statement, do I file a cert petition?
10 Sometimes this Court said we'll treat the jurisdictional
11 statement as a cert petition. But those existed from
12 the beginning. Here there's a case lodged in the court
13 of appeals, the court of appeals had every basis of
14 jurisdiction. There was nothing shaky about it. It
15 wasn't, did they file the right paper? And then
16 Congress does something. And the Court would follow
17 suit.

18 It just seems to me very strange to say the
19 court has jurisdiction to decide whether it has
20 jurisdiction, but if it decides it doesn't, then the
21 date of that order is not the critical date, but you go
22 back to the date that Congress passed the law.

23 MS. BRINKMANN: Your Honor, I think that
24 this Court addressed this scenario, and one of two
25 things could have happened. As you pointed out during

1 Petitioner's argument, it would have been a very easy thing
2 to file a protective cert position. This Court is well
3 familiar, has recognized the appropriate of protective
4 filings -- certainly in the Federal habeas situation
5 where there are mixed petitions and there's a need to go
6 back and exhaust, protective filing within the 90-day
7 period would have been appropriate. And I urge,
8 particularly because Petitioner filed a brief within that
9 period in the Santos case, recognizing that Bruner required
10 that there was a divestiture of Ninth Circuit jurisdiction
11 as of the day of the statute enactment.

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

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

1 valuation is the valuation of the property that is
2 subject to tax.

3 This is not an original interpretation of
4 this provision. In the superior court opinion from 1989
5 that we attached to our brief in opposition, the Guam
6 Supreme Court came to the same conclusion and
7 interpretation of this language. We think it is an
8 eminently reasonable and correct interpretation,
9 particularly in light of the absence of the word
10 "assessed."

11 CHIEF JUSTICE ROBERTS: But don't you --
12 doesn't your interpretation read the word "tax" out of
13 this statute? I mean your position would be exactly the
14 same if it just said 10 percent of the value of the
15 property in Guam.

16 MS. BRINKMANN: No, Your Honor. That would
17 include the tax-exempt property. That would be a much
18 larger number.

19 JUSTICE BREYER: That's where I'm having
20 trouble on your side. I can't get very far with a
21 history of other places. Apparently I can understand
22 that.

23 Tax doesn't seem to help me very much. So I
24 thought, well, one thing is clear. What they're trying
25 to do here is to take out of the box, if you look at

1 it, take off the list of property that they don't
2 tax. I guess a school, maybe some tax exempt business
3 or something.

4 MS. BRINKMANN: That's right. Government,
5 religious --

6 JUSTICE BREYER: Now their reason for doing
7 that must be that those people who they've exempted
8 entirely by statute, at least, are not going to be much
9 help in paying the bonds back. Well, if that's true, isn't
10 precisely the same thing true of the two-thirds of the property
11 that they don't take into account when they set their taxes?

12 MS. BRINKMANN: No, Your Honor.

13 JUSTICE BREYER: Because?

14 MS. BRINKMANN: Because that property in
15 Guam is still securing the debt to a certain degree.
16 It is property that must be valued for tax purposes.

17 JUSTICE BREYER: No. It doesn't secure it
18 one bit if, in fact, the tax statute says you can't take
19 it into account when you set your taxes. Just as is
20 true of, let's say, a tax-free business of some kind.
21 Now Guam doesn't have to do that, it could change its
22 statute, but so could it change its statute in respect
23 to the school, or to the university, or whatever the other
24 things are that are off those tax rolls. So that was --

25 JUSTICE KENNEDY: You know, you're answer was

1 circular. That assumes that the whole property is secure,
2 but it isn't.

3 MS. BRINKMANN: No, Your Honor, as a
4 matter of textual interpretation "aggregate tax valuation
5 of property in Guam," you look to the property in Guam
6 and then you have to take the tax valuation. You're
7 taking the property that is subject to tax.

8 We believe that this is the intent of
9 Congress also for two reasons, Justice Breyer, that
10 addressed your issues before about -- one suggestion that
11 Guam could change this. The purpose of Congress here
12 was to set a meaningful debt limit. That is what real
13 value appraisal value does. It is an economic
14 determination of concrete fact.

15 JUSTICE SOUTER: Well, why does it do it
16 any more than the 35 percent value? That sets a
17 definite limit.

18 MS. BRINKMANN: Because that could be
19 changed at the whim of the legislature, Your Honor, and
20 the legislature could change that assessment to increase
21 the debt limit and -- while lowering taxes and altering
22 any tax liability.

23 CHIEF JUSTICE ROBERTS: With respect to much
24 of the tax-exempt property, that could be changed by the
25 legislature as well.

1 MS. BRINKMANN: But when you're looking to a
2 bond -- a debt limitation, you're looking at the bond market,
3 you're looking at investors, the certainty of an
4 appraisal value, actual real value, and --

5 JUSTICE SCALIA: But it doesn't have to be
6 100 percent. They could change what you call the tax
7 valuation from 100 percent of the fair value to 150
8 percent. There's really much less to this case than
9 meets the eye. I mean, Guam is going to be able to
10 fiddle with this thing no matter how you come out.

11 MS. BRINKMANN: We don't believe that was
12 the intent of Congress.

13 JUSTICE SCALIA: Well, whether it was their
14 intent or not, is it not the case that Guam could say
15 all property will be valued at 150 percent of its fair
16 market value and we will then impose a 1 percent real
17 estate tax instead of the 2 percent, or instead of the
18 1.5 percent we had before?

19 MS. BRINKMANN: Yes, they certainly could do
20 that as a matter of tax. We don't believe that should
21 alter the debt limitation Congress enacted, and that's
22 precisely why we believe that the Guam Supreme Court's
23 opinion gives a meaningful interpretation of the purpose
24 of Congress and gives a real debt limitation that
25 exactly should be affirmed as exactly the purpose that

1 Congress intended. And that's why the assessed value
2 can be so easily manipulated, and is not a reasonable
3 interpretation.

4 I also would like to address
5 Justice Breyer's question about the --

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

10 MS. BRINKMANN: Your Honor, the uncertainty,
11 however, that the debt limitation is a real limitation
12 that serves the purpose of Congress in order to have
13 some kind of fiscal responsibility to the territory is
14 what is furthered by the real limitation of having a
15 concrete appraisal full value as the basis for the
16 calculation of that type of limitation.

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

19 MS. BRINKMANN: But that can be changed at
20 the whim of the legislature without any accountability
21 to the voters because at the same time that they change
22 the tax rate and not alter any tax liability.

23 JUSTICE SOUTER: Well, you say without any
24 responsibility to the voters. I mean, the voters are
25 going to know that if the valuation is changed and the

1 tax rate isn't, their taxes are going up. So I assume
2 the voters are going to be vigilant to what is going on
3 and I assume they have telephones and they'll call their
4 representatives. Why is this -- why do you posit this
5 sort of failure of representative democracy?

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

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

10 MS. BRINKMANN: No. The tax rate will be
11 changed to be lower to maintain the same level, so there
12 would be no -- because the legislature isn't acting to
13 address any tax liability. They're simply acting to
14 manipulate the debt limitation, which seems very
15 contrary to the purpose and any meaningfulness that
16 debt limitation --

17 JUSTICE SOUTER: But they're going to know
18 this. I mean, they're going to be, if they are
19 concerned at all about it, they'll be in touch with
20 their representatives.

21 MS. BRINKMANN: Your Honor, of course the
22 bond issuance here also goes to the Guam legislature and
23 they are held accountable to that in the political
24 arena. I would suggest, Your Honor, the question
25 about -- I agree with Petitioner's counsel about the

1 certainty of determining some of this historical
2 material is difficult and not precise. But we have gone
3 back and looked at the contemporaneous statutes in each
4 of these territorial jurisdictions, and as Mr. Waxman
5 pointed out, Puerto Rico it turns out actually uses the
6 actual value, all of them use the actual value.

7 JUSTICE GINSBURG: Do they tax on the basis
8 of the --

9 MS. BRINKMANN: Yes.

10 JUSTICE GINSBURG: This is a fractional,
11 this 35 percent. In the other places, do they use as
12 the -- the value taxed 100 percent of the property --

13 MS. BRINKMANN: Yes.

14 JUSTICE GINSBURG: -- and then just have a
15 lower tax rate?

16 MS. BRINKMANN: Yes.

17 CHIEF JUSTICE ROBERTS: And what was the
18 appraisal practice? I mean, in a lot of these
19 jurisdictions you have appraised value, and it turns out
20 to be 30 percent of the actual market value.

21 MS. BRINKMANN: But here, in the Virgin
22 Islands and Alaska, Federal law required that the taxes
23 be imposed on the actual value. In the Virgin Islands
24 it said your assessment will be actual value. That's
25 why the term "assessment" was used in the Virgin Islands

1 debt limitation, because that was in a preexisting
2 Federal statute that required assessment be an actual
3 value.

4 JUSTICE BREYER: Which one? You say they've
5 all used market values?

6 MS. BRINKMANN: Yes.

7 JUSTICE BREYER: All of them. Which of the
8 ones that use it have in fact an assessed value that is a
9 percentage of market value?

10 MS. BRINKMANN: None.

11 JUSTICE BREYER: All right. Well, that
12 doesn't help us then.

13 MS. BRINKMANN: But I think it does further
14 the purpose of what Congress was looking to in both the
15 Virgin Islands and Alaska. The requirement for various
16 reasons that they impose their tax on the actual value
17 certainly supports the reasonableness of the
18 interpretation here, Your Honor.

19 JUSTICE BREYER: Well, we could look at
20 Hawaii. In Hawaii they use the word "assessed value."
21 They couldn't possibly have wanted it to be market
22 value, I wouldn't think.

23 MS. BRINKMANN: But the actual --

24 JUSTICE BREYER: And in the District of
25 Columbia -- where are we on this? It's something else

1 in D.C. They use assessed value in the Virgin Islands.

2 MS. BRINKMANN: The preexisting law in
3 Hawaii before it became a territory had tax imposed on
4 the actual value, and subsequent to the debt limitation,
5 the territorial law also put it on actual value.

6 I would suggest, Your Honor, certainly if
7 there is any debate that there's more than one
8 interpretation of the Organic Act, that deference should
9 be accorded to the Guam Supreme Court's interpretation
10 of that. That is well established under this Court.

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

14 MS. BRINKMANN: It's the Guamanians, Your
15 Honor. It is not --

16 CHIEF JUSTICE ROBERTS: If the Guamanian
17 government runs a deficit, where is the difference made
18 up from?

19 MS. BRINKMANN: Most of the income and
20 revenues on Guam comes from the Federal income tax,
21 because unlike on the mainland, the Federal income tax
22 goes to the Guam Treasury rather than the United States
23 Treasury.

24 CHIEF JUSTICE ROBERTS: I know that any
25 taxes from Guam are returned to Guam. Are additional

1 tax revenues given to Guam other than those that are
2 derived from Guam?

3 MS. BRINKMANN: Yes, other financial
4 relationships with the U.S. Government, yes, Your Honor.

5 CHIEF JUSTICE ROBERTS: So that if the
6 Guamanian Treasury runs into difficulty, it's made up
7 not just by Guamanian taxpayers, but by all Federal
8 taxpayers?

9 MS. BRINKMANN: No, Your Honor. That's not
10 my understanding of the practice. The encouragement of
11 Congress setting up the independent judiciary and
12 government of Guam has also included fiscal
13 responsibility, and part of that are the bond issuance
14 and the issues that are here before the Court.

15 JUSTICE SCALIA: I cannot imagine that if a
16 territory of the United States goes belly up, that the
17 United States is not going to foot the bill. I just
18 can't imagine that.

19 MS. BRINKMANN: Your Honor, we believe here
20 that the debt limitation is a matter of local concern.
21 It is the Constitution of Guam. And we are not
22 suggesting that the Court affirm an erroneous
23 interpretation at all. This is a more than reasonable
24 interpretation of a theory, well-reasoned opinion by the
25 Guam Supreme Court. The Guam Supreme Court had before it

1 a 17-year old superior court opinion that had reached
2 the same conclusion. That was the only law out there
3 that Guamanians had looked to for their interpretation
4 of this provision of the Organic Act. It predated the
5 1993 appraisal. And it took that opinion and did not
6 simply adopt it, but went through and did a very
7 detailed analysis of the text of the statute of the
8 Organic Act, the fact that it did not include the word
9 assessed, which was used 10 months later by Congress in
10 the Virgin Islands.

11 JUSTICE STEVENS: Miss Brinkmann, just to
12 follow up on Justice Scalia's question, is there any
13 history of the Federal Government having to bail out the
14 Guam government for bankruptcy or anything close to
15 that?

16 MS. BRINKMANN: No, Your Honor, none
17 whatsoever.

18 JUSTICE STEVENS: And is there anything in
19 the record that tells us what kind of a credit rating
20 Guam has?

21 MS. BRINKMANN: No, Your Honor, I don't
22 believe it does.

23 JUSTICE GINSBURG: Did this bond issue -- I
24 mean, was the borrowing effective given the controversy
25 between, the attorney general refused to sign, did that

1 have any consequences for whether this bond issue went
2 through?

3 MS. BRINKMANN: Absolutely, Your Honor.
4 Because of Petitioner's delay for more than a year and a
5 half in a court that did not have jurisdiction, these
6 bonds still have not been able to issue. And Petitioner
7 responded no. As a practical matter, the bond market
8 will not support issuance of these bonds until attempts
9 to undermine their validity have been brought to an end.
10 And so the Guam government has been doing different
11 means of financing in a positive manner. The economy of
12 Guam has returned because of many of the devastating
13 world events have taken, have passed in time, and the
14 economy is recovering. The U.S. military is returning
15 with a very large presence there. But they are still,
16 my understanding, approximately two years behind in
17 getting back tax returns.

18 JUSTICE KENNEDY: In that case, you should
19 want us to exercise jurisdiction -- decide it one way or
20 the other.

21 MS. BRINKMANN: Your Honor, we believe that
22 it should be dismissed for want of jurisdiction, the
23 Guam Supreme Court opinion stands, and we prevail under
24 that ruling of the Guam Supreme Court's interpretation of
25 section 11 of its Organic Act.

1 JUSTICE SCALIA: Could you tell me whether
2 the rate of tax is uniform throughout Guam? The rate of
3 real estate tax. Is it an island-wide tax or is it
4 local, county?

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

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

11 MS. BRINKMANN: We don't believe that
12 Congress intended to inject itself into the workings of
13 this local territorial tax mechanism. The various
14 policies --

15 JUSTICE KENNEDY: But you still have the
16 option, and I'm just dying to ask the question not
17 having anything to do with the case. Why did they do
18 this? Why did they have -- was it just to make
19 everybody feel good and they think they're ripping off
20 the Government because they're getting only a 35 percent
21 value, even though everybody knows they'll just raise
22 the rate if it's changed?

23 MS. BRINKMANN: That is exactly the kind of
24 policy decision that the local governing authority makes
25 about taxes. Actually the Petitioner in the reply has a

1 footnote explaining the origin of fractional tax valuation.
2 Indeed, it seems to be consistent with some of the
3 history also that we've seen that there would be
4 informal adjustments of valuations to take into account
5 perhaps poverty, or to take into account less
6 meritorious justifications. And the -- because of the
7 perception or, I believe Petitioner calls it the
8 political psychology perhaps, of having such a high
9 rate, that is a policy decision that different taxing
10 authorities make.

11 It should not mean that Guam surrenders
12 two-thirds of its debt limitation. Congress did not use
13 the word "assessed" and it's a very difficult argument to
14 adopt that by failing to use "assessed," they limited it
15 to an assessed value that surrenders two-thirds of the
16 Guam territorial debt limitation contrary to all --

17 CHIEF JUSTICE ROBERTS: So you talked
18 about this as the deference we owe to the Guam Supreme
19 Court. This is a Federal statute, right? This was
20 passed by Congress.

21 MS. BRINKMANN: Yes, Your Honor, and in the
22 Santa Fe case versus Friday, with all due respect,
23 Petitioner is incorrect that that addressed local
24 territorial laws. That was a provision in the New Mexico
25 Organic Act that set up the jurisdiction of district courts

1 that Congress created in New Mexico. There was a provision
2 in that Organic Act provision of New Mexico that said
3 the jurisdiction of those courts was as limited as law.

4 That passage was interpreted in this Court
5 in Friday looking at another Federal statute and some
6 territorial laws. I would direct the Court to the
7 briefing in the case, the opinion itself is quite brief,
8 and when you look at the explications of the party, it
9 simply reinforces that the Court there was construing an
10 organic act, a Federal statute, and local territorial
11 statutes, and there directly said that they should defer
12 to the local understanding of the courts unless it is
13 clearly wrong. So we urge that that, too, should be --

14 CHIEF JUSTICE ROBERTS: Does that apply to
15 all the provisions of the Organic Act? I mean, there
16 are provisions there addressing the jurisdictional issue
17 that we are considering here as well. Do we defer to
18 the Guam Supreme Court's view on that?

19 MS. BRINKMANN: Your Honor, I see my time is
20 up, but if I may respond?

21 CHIEF JUSTICE ROBERTS: That's fine.

22 MS. BRINKMANN: I think that you could look
23 to your area of administrative deference, for example,
24 under Chevron, where you do also defer to the authority
25 of an agency, the interpretation of an agency. The

1 determination of its own authority the Court has so
2 held.

3 Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, Ms.
5 Brinkmann.

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

7 REBUTTAL ARGUMENT OF SETH P. WAXMAN
8 ON BEHALF OF PETITIONER

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

10 I want to direct the Court -- in response to
11 two questions that were asked of Ms. Brinkmann, I want
12 to direct the court to two pages of the Guam Supreme
13 Court's opinion, and I'm going to summarize them for you
14 now, but for purposes of what's the difference between
15 in terms of bond holders, the fact that certain property
16 isn't taxed at all and certain property is only taxed at
17 35 percent. What's important to note here, and that is
18 reflected at page 26a of the petition appendix, the tax
19 roll on Guam includes a valuation of all nontaxable
20 property. The Guam Supreme Court then has to go back
21 and say, well, of this approximately 183 million is
22 exempt. So in Guam, the tax assessor and the Guam
23 courts are treating property that is wholly exempt from
24 taxation the same way that it treats the two-thirds of
25 fair market value that is exempt from application of the

1 tax rate.

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

11 The Guam Supreme Court in its opinion in
12 footnote 8, quoting from some language from a dissenting
13 opinion in the Hawaii Supreme Court, says as follows,
14 and I'm quoting from footnote 8: "It has been argued
15 that the use of a percentage of assessed value as a
16 measure of the State debt limit is without
17 significance," now skipping the rest of the sentence.
18 "The people that buy the bonds are interested in the
19 ratio of your debts to your assessed value because, while
20 all of the tax revenues of the State or the counties
21 naturally are available for the payment of the debt,
22 it's been customary for bond holders to look to the real
23 property tax as their collateral."

24 That is the authority on which the Guam
25 Supreme Court relied and it applies to this case and it

1 explains why the word "assessed" and the word "taxable"
2 have been construed synonymously and interchangeably in
3 the legislative history of these territorial statutes
4 and why assessed value is understood to be usually
5 fractional value for reasons of political psychology
6 that Ms. Brinkmann addressed, but even where it's full
7 value, it is only pursuant to a determination that for
8 assessment purposes full value should be used.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:08 a.m., the case in the
12 above-entitled matter was submitted.)

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