1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ALICIA G. LIMTIACO,   :

4   ATTORNEY GENERAL OF   :

5   GUAM,   :

6   Petitioner   :

7   v.   :   No. 06-116

8   FELIX P. CAMACHO,   :

9   GOVERNOR OF GUAM.   :

10   - - - - - - - - - - - - - - - - - x

11   Washington, D.C.

12   Monday, January 8, 2007

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14   The above-entitled matter came on for oral

15   argument before the Supreme Court of the United States

16   at 10:05 a.m.

17   APPEARANCES:

18   SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of

19   Petitioner.

20   BETH S. BRINKMANN, ESQ., Washington, D.C.; on behalf

21   of Respondent.

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1   C O N T E N T S

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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

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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

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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 intrabranch

23   dispute that can be resolved by the electorate

24   essentially.

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

15

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 to 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 --

31

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

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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

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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.

35

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 appropriate 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

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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,

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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,

43

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.

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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 interepreted 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 statue, and local territorial

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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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24

25

A

able 24:9 29:7
 40:24 48:21
above-entitled
 1:14 55:1
absence 38:4
Absolutely
 19:21 48:18
accept 5:19 33:3
accepted 11:9
 31:14
accords 22:19
account 37:16
 39:2,10 50:19
 50:20
accountability
 42:10
accountable
 43:13
act 3:13,14 5:14
 7:3,9 8:11 9:2
 9:3 11:2 12:8
 12:11 13:12,19
 15:10 18:25
 19:18,23,25
 20:8 25:12,23
 30:23 45:23
 47:19,23 49:15
 51:15,17,25
 52:5
acting 43:2
active 4:21 5:13
actively 35:23
acts 26:3
actual 24:11
 28:10 40:19
 43:21,21 44:10
 44:13,14,17
 45:6,13,19,20
addition 14:22
additional 16:2
 46:15
address 14:16
 41:19 43:3
addressed 36:19
 39:25 51:13
 54:20

addressing 52:6
adjudicate
 25:16 26:11
adjustments
 50:19
administrative
 52:13
adopt 47:21
 51:4
adopted 23:5
adopts 17:8
adversely 37:10
advisory 14:14
advocate 13:12
affairs 8:16
affidavit 7:13
affirm 47:12
affirmatively
 6:3,17 15:11
affirmed 25:12
 37:15 41:15
afforded 45:24
Agana 21:5
agencies 13:23
agency 52:15,15
aggregate 18:5
 18:17 19:7
 20:9,10,12,16
 20:17,19 21:17
 23:19
ago 26:8
agree 14:7 27:19
 43:15
agreed 27:22
Alaska 20:9
 21:15,24 44:12
 45:5
ALICIA 1:3
ALITO 12:9
 35:8
alter 41:11
 42:12
altered 20:16
altering 40:11
ambiguous
 26:14
amended 3:14

 7:3
amendment
 3:19 5:12 8:11
 8:14 9:2 12:18
 12:18
amount 24:3
amounted 8:18
analysis 47:22
analytical 34:17
 34:17
Andrews 8:17
answer 16:9,25
 18:14 24:5
 39:16
anyplace 11:17
Apparently
 38:15
appeal 10:5,21
 10:24 11:14
 12:11 26:23
 34:9,11
appeals 3:20
 10:18,22 11:8
 11:15 12:3
 36:8,8
APPEARAN...
 1:17
appellate 11:16
 11:24 33:5
appendix 4:18
 7:2,14,24 53:7
 53:20
application 3:20
 5:9 24:10
 53:14
applied 3:21
applies 5:3
 26:15 54:14
apply 15:9 20:6
 26:17 52:4
appraisal 40:3
 40:19 42:5,8
 44:8 47:20
appraised 44:9
appropriate
 12:21 14:10
 36:23 37:2

approximately
 49:6 53:10
area 52:13
arena 43:14
argued 3:18
 54:3
argument 1:15
 2:2,5,8 3:3,7
 5:4,6 6:8 11:19
 12:12 21:8
 22:6 25:2
 28:25 32:25
 34:2 36:21
 37:9 51:3
 52:21
arguments 11:7
Article 13:20
articulate 4:10
ascertain 5:17
 16:4 24:9
ascertains 16:13
asked 9:8 27:22
 52:25
asking 43:3
asserted 5:11
 6:3,17
assessed 17:25
 18:17,17,20
 19:19 20:8,11
 20:12,15,19
 21:17,23 22:17
 22:18,22 24:11
 41:16,24 44:23
 45:10,16 47:24
 49:24 51:3,4,5
 53:18 54:4,8
 54:15,18
assessing 19:2
assessment 18:2
 18:4 40:10
 44:14,15,17
 54:22
assessor 53:11
assume 42:16,18
 42:21
assumed 11:5
assumes 39:16

assuming 27:19
attached 37:25
attempt 15:4
attempts 48:23
attorney 1:4
 8:10,22,24
 9:10,15,20
 12:4,5 13:3,4
 13:10 14:11,20
 14:25 15:18,19
 16:4 17:5
 48:15
authorities 22:1
 50:25
authority 11:5
 12:20 15:17
 25:16 27:13
 29:11,13 30:13
 31:10,11 50:14
 52:14,16 54:13
automatic 25:22
available 54:10
avoidance 6:9
a.m 1:16 3:2
 54:25

B

back 9:12 24:17
 27:11 35:3,20
 36:17,25 37:11
 43:18 49:7
 53:9
bad 27:19
bail 48:3
balance 18:13
 24:24
bankruptcy
 48:4
based 18:22
 37:19
basic 13:15
basis 20:3 31:13
 36:8 42:5
 43:22
began 32:10
beginning 36:7
behalf 1:18,20

2:4,7,10 3:8
25:3 52:22
believe 4:17 7:3
26:6 27:12
28:21 30:8
34:3 37:14
39:23 41:1,10
41:12 47:9
48:12 49:11
50:1,22
believed 12:20
believing 35:24
belly 47:6
BETH 1:20 2:6
25:2
big 23:11 36:9
bill 47:7
bit 39:9
body 3:22
bond 13:6 40:17
40:17 41:22
43:12 47:3
48:16,22 53:4
53:17 54:11
bonds 21:16
23:17 41:23
48:21,23 54:7
borrow 15:4
borrowing 15:6
15:16 16:2,14
17:4 22:25
48:14
bound 32:5
box 38:18
branch 15:2
Breyer 17:11,15
17:20,23 19:3
21:13 23:11
38:13,22 39:4
39:8,24 44:19
44:22 45:1,9
45:14
Breyer's 41:20
brief 4:11 9:11
13:14 21:3
28:8,13 37:3
37:25 51:22

briefed 3:18
briefs 9:8 51:22
Brinkmann
1:20 2:6 25:1,2
25:4,19 26:5
26:20 27:12,21
28:4,21 29:3,9
29:16 30:7,10
31:5,19 32:15
32:18,22 33:4
33:19 34:3,7
34:18,24 35:5
35:11 36:18
38:10 39:3,5
39:18 40:8,16
41:1,9,25 42:9
42:21,25 43:11
43:24 44:3,6
44:11,21,25
45:3,13,17
46:4,9,18,24
47:9 48:1,6,11
48:18 49:11,20
50:1,13 51:11
52:9,12,19,25
54:20
brought 27:7
29:19 31:22
37:12 48:24
Brunner 28:23
37:4
business 7:16,19
14:15 38:20
39:11
buy 54:7
buy-in 15:12

C

C 2:1 3:1
calculated 19:15
calculation
22:10
calculations
42:6
California 33:8
33:14,16
call 40:21 42:18

42:24
called 8:19
calling 10:12
calls 50:22
Camacho 1:8
3:5 7:10
Camacho's 7:13
campaign 16:18
caps 17:5
case 3:4,11,18
3:21,23 4:2,14
4:19,20,22 5:2
5:3,6 6:8,13,16
7:9,12,21,21
8:2,4,6,10 9:6
9:7,10,17 10:3
10:12 11:4,7,8
11:14,22,25
12:20,21 13:7
13:16 14:4,8
14:20 15:1,17
16:7 17:6,12
17:14 18:10,19
18:24 24:12
25:6,10,17,21
25:22,23 26:9
26:11,18 27:3
27:11,23 28:5
28:8,9,14 29:8
30:22,23,24
31:2,9,13,13
31:14,22,24
32:23 33:2,9
35:2,25 36:7
37:4 40:23
41:4 49:8 50:7
51:12,22 54:14
54:24,25
cases 5:7 7:5
8:23,25 9:4
10:12 13:21,23
26:15,17,22
30:19 31:20
32:22 33:4,6
34:9 35:23
36:1
cert 5:10 8:22

9:16 36:4,6,22
certain 10:20
39:6 53:4,5
certainly 5:16
18:12 36:24
41:9 45:7,21
certainty 40:18
43:16
certify 15:6,12
16:8
certiorari 3:15
3:17 7:22 8:8
9:4,21 11:1,3
12:5,17 25:7
26:10 30:11
challenge 28:11
challenges 14:4
challenging
24:19,23
change 39:12,13
40:1,10,21
42:11
changed 40:9,14
42:9,15,22,24
43:1
changes 50:12
changing 19:19
Chevron 52:14
chief 3:3,9 10:6
13:15 14:6,13
15:8 24:2,25
25:4 27:24
38:5 40:13
44:7 46:1,6,14
46:20 51:7
52:4,11,18,23
54:23
choose 34:17
Christmas 21:2
Circuit 3:15,16
3:22 4:2,7,16
7:6,20 8:15 9:5
9:6,16,18,23
11:3,4 12:3,10
12:12,16 25:16
26:3,3,7 27:4,9
27:19 28:23

29:10,12,15,17
29:20 30:11
31:23 32:2
33:1,24 34:25
35:9 37:5
Circuit's 4:21
circular 39:16
cited 13:21
clarifying 7:22
clarity 28:22
clear 4:7 5:3,7
24:15 26:14
28:5 29:1
30:20,22,25
32:23 34:8
37:9 38:17
clearly 52:3
clerk 17:23
close 48:4
closer 12:22
collateral 54:12
colorable 5:1,20
28:10 37:8
Columbia 45:15
Colville 10:3,11
come 19:14 23:3
29:20,25 30:2
35:19,20 40:25
comes 34:10
46:10 53:21
commission
14:1
common 34:4
commonplace
19:1
comparable
17:25 18:2
concede 32:13
conceded 31:11
concept 5:22
6:15
concern 47:10
concerned 43:9
conclusion 38:1
47:17
concrete 42:5,8
conducted 21:4

confronts 26:21
confusion 5:15
  36:2
Congress 3:14
  5:16 6:10 7:8
  7:18 12:8 20:7
  25:19,23 30:13
  31:7 35:3
  36:11,17 39:24
  40:1 41:2,11
  41:14,16 42:2
  45:4 47:1,24
  50:2 51:2,10
  51:16
Congress's
  22:24 25:24
  35:6
consequences
  48:16
consider 4:16
consideration
  4:21
considered
  11:25
considering
  52:7
consistent 19:25
  22:24 50:17
constitutes
  15:10 16:14
  17:7
constituting
  6:11
constitution
  14:24 15:10
  19:7 47:11
constitutional
  6:9
construction
  12:7 13:12
construe 6:10
construed 54:16
construing
  51:24
consume 18:12
contemporane...
  43:18

contention 8:9
context 6:15
  10:1,16 11:22
  14:17 18:20
  19:12,13 21:23
  22:23
continue 13:11
  16:19
continued 6:7,7
  9:9 12:20
continues 13:5
continuing 7:22
  32:2
contrary 43:4
  51:6
controversy
  13:7,16,20
  14:5,9 48:14
conversely
  19:11
correct 17:2,10
  17:19 22:3
  29:9 38:3
counsel 13:10
  43:15 54:23
counties 54:9
county 49:19
couple 24:4
course 11:12
  16:18 23:18
  28:11 43:11
court 1:1,15
  3:10,11,16,24
  4:17,18 5:10
  5:10,17 6:2,4,5
  6:7,9,12,13,16
  7:7,11,11,16
  7:17,23,25 8:3
  8:12,13,16,19
  8:25 9:4,7,14
  9:17,22,25
  10:8,11,15,16
  10:20,22,22
  11:8,13,13,15
  11:16,25 12:1
  12:2,3,7,8 16:5
  16:6,20 19:9

  19:12,14 21:7
  21:7 23:5,6
  25:5,8,9,9,11
  25:17,18,21,24
  25:24 26:1,8
  26:10,12,21,22
  26:24 27:2,4,5
  27:6,10,13,14
  28:1,1,5,7,16
  29:14,20,21,23
  30:1,2,12,15
  30:17,21,23
  31:1,14 32:7
  33:9,11,12,14
  33:16 34:7,8,9
  34:14 35:13,14
  35:16,16,17,18
  35:22 36:3,5,7
  36:8,11,14,19
  36:22 37:9,11
  37:15,24 38:1
  41:12 45:25
  47:4,12,15,15
  47:16 48:20
  49:13 51:9,19
  51:21,24 52:16
  52:24 53:1,9
  53:22,25 54:2
  54:14
courts 10:1,18
  14:14 25:20
  27:13 29:24
  30:14 31:24
  33:5,5 34:19
  51:15,18 52:2
  53:12
Court's 5:7 9:9
  10:17 11:1
  14:11 32:22
  45:24 49:14
  52:8 53:2,21
created 51:16
credit 15:5 48:9
critical 36:16
crucial 32:11
currency 40:4
customary

  54:11

———————
D
———————
D 3:1
date 8:7 35:3,6
  36:16,16,17
day 35:1 37:6
days 21:2 30:5,5
  30:7,18 36:3
debate 45:22
debt 16:15 17:5
  19:15 20:4
  22:16 37:18
  39:6 40:2,11
  40:17 41:11,14
  42:1 43:4,5
  44:16 45:19
  47:10 51:2,6
  54:5,8,10
December 7:2
  7:10,25
decide 3:21 4:2
  4:4 26:24
  29:17 33:9
  34:10,20,21
  36:14 49:9
decided 4:18
  7:22 8:3 33:16
decides 36:15
decision 6:6 8:2
  11:2,13,14
  14:11 16:7
  35:2 50:14,24
decisions 7:23
declined 10:4
defer 52:1,7,14
deference 45:23
  51:8 52:13
deferring 8:1
deficit 46:7
definite 40:7
definitive 16:25
degree 39:6
delay 48:19
demarcate
  30:13
democracy

  42:20
depends 27:17
derived 46:17
designed 46:2
detailed 47:22
determination
  11:24 33:25
  40:4 52:16
  54:21
determine 31:12
  31:16,18 32:12
  32:13
determined
  31:13,25 32:2
  32:9 37:10
determining
  8:14 24:10
  32:7 43:16
devastating 49:2
difference 12:9
  46:7 53:3,19
different 6:22
  48:25 50:24
difficult 20:22
  43:17 51:3
difficulty 46:21
direct 3:16
  10:18 51:21
  52:24 53:1
directions 25:24
directly 29:25
  52:1
disagree 26:6
discouraged
  28:3
discretionary
  12:10
discussed 9:10
  19:5 20:19
  35:12,17
dismiss 14:10
  25:25 35:20
dismissal 25:14
  25:15,22
dismissed 25:6
  32:4 49:12
dismissing 8:6

furthered 42:4
furthers 22:24

_____ G _____

G 1:3 3:1
gamesmanship
    27:25
general 1:4 8:10
    8:22 9:10,15
    9:20 12:4,6
    13:4,5,10
    14:12,20,25
    15:18,20 16:4
    17:6 48:15
generally 46:3
getting 23:22
    24:16 49:7
    50:10
Gibbs 3:24
Ginsburg 9:12
    10:17 11:6,12
    12:24 13:2,8
    25:19 29:10
    31:15 34:21,25
    36:1 43:22,25
    44:4 48:13
give 24:4 52:20
given 12:15
    46:16 48:14
gives 41:13,14
go 12:6,24 17:21
    17:25 36:16,25
    41:21 53:9
goal 22:24
goes 43:12 46:12
    47:6
going 9:12 16:4
    16:10 23:15,16
    27:16 28:1
    38:24 40:24
    42:15,16,17,17
    42:24 43:7,8
    47:7 53:2
good 6:8 16:24
    50:9
governing 50:14
government

13:23 46:7,19
    47:2 48:3,4,25
    50:10
governor 1:9
    7:10,12 13:6
    14:20,25 15:4
    16:3,12 17:1
grant 23:2 30:11
granted 3:17 9:6
    11:4 12:16
greatly 10:19
Guam 1:5,9
    3:13 7:3,23
    8:22,25 11:1
    11:25 12:2,6
    14:2,11,13,21
    14:22 15:1,3
    15:10 18:3,7
    18:24,25 19:17
    19:19 20:10,21
    21:5 22:10,14
    23:4,5 25:8,11
    26:1 27:4,6,10
    28:15 29:25
    30:2,12,16
    37:11,15,19,20
    37:25 38:9,25
    39:6,12,20,20
    40:1,24 41:4
    41:12 43:12
    45:24 46:10,12
    46:15,15,16,17
    47:2,11,15,15
    48:4,10,25
    49:2,13,14,17
    51:1,6,8 52:8
    53:1,8,9,11,11
    53:20,25 54:13
Guamanian
    13:18 46:3,6
    46:21,22
Guamanians
    46:4 47:18
Guam's 13:18
    15:10
guess 16:22
    33:21 38:20

_____ H _____

habeas 36:24
half 48:20
Halsey 19:5
hand 24:14
happened 15:15
    18:6 24:17
    36:20
happening 18:7
    18:11
happens 18:22
    24:8
hard 21:18,20
harmony 22:14
Hawaii 20:10
    45:10,10,18
    54:2
hear 3:3 10:18
hearing 21:3
hearings 20:23
    21:4 24:21
held 9:18 35:9
    43:13
help 38:16,24
    45:2
hey 7:16
high 50:23
historical 43:16
histories 20:20
    20:25
history 20:24
    21:22 22:20
    38:15 48:3
    50:18 54:17
hold 9:14 25:25
holders 53:4,18
    54:11
holiday 21:2
Honor 4:10 6:1
    6:24 26:5,20
    27:21 28:4
    29:9,16 30:7
    31:6,20 32:15
    33:5 34:18
    35:11 36:18
    37:13 38:10
    39:3,18 40:9

41:25 43:11,14
    45:8,21 46:5
    46:19,24 47:9
    48:6,11,18
    49:11,21 51:11
    52:9,17
hypothetical 5:2

_____ I _____

ICC 13:25,25
idea 34:19
identical 10:13
    10:14
III 13:20
Illinois 19:12
imagine 47:5,8
immediately
    6:22 8:10
    26:18
imminently 16:1
implicates 16:14
import 6:20
important 4:12
    53:6
impose 41:6
    45:6
imposed 44:13
    45:18
improvements
    49:22
include 38:11
    47:23
included 7:14
    47:2
includes 53:8
including 20:21
    21:1
income 46:9,10
    46:11
incorporate
    5:23
incorrect 51:13
incorrectly 35:9
increase 40:10
independent
    47:1
Indian 10:3,11

Indiana 19:13
indicated 22:14
informal 50:19
information
    24:20
inject 50:2
instance 3:23
    5:8 6:1 9:2
    12:1,8,16 15:3
    15:7 16:10
    28:22
instances 10:20
    10:24 12:23
    20:23 21:15
    26:22,25
instructed 13:11
instructive
    20:14
intended 5:16
    41:16 50:2
intent 39:23
    41:2,4
interbranch
    13:22
interchangeably
    54:16
interepreted
    51:19
interest 13:24
interested 54:7
interpret 14:23
interpretation
    17:7,9 37:16
    37:23 38:2,3,6
    39:19 41:13,18
    45:8,23,24
    47:13,14,18
    49:14 52:15
interpreted 23:7
interpreting
    23:1 25:11
interprets 23:6
interval 30:5
intra 13:22
intrabranch
    15:22
intramural

41:17
manner 49:1
Marianas 20:11
market 21:17
30:21 40:17
41:6 44:10,20
44:24 45:11
48:22 53:14
material 43:17
matter 1:14 6:10
10:9 15:19
22:12 29:2
30:22 39:19
40:25 41:10
47:10 48:22
55:1
mean 11:20
16:23 19:10
23:1,7,20 29:1
38:7 40:24
42:14 43:8
44:8 48:14
51:1 52:5
53:23
meaning 3:24
16:15 19:23
22:7,8,8,9 23:4
23:4,5
meaningful 40:2
41:13 43:5
meaningless
23:2
means 16:23
49:1 53:23
measure 54:5
mechanism 50:3
meets 40:24
mentioned
20:13
mentioning
37:18
mere 10:2
merely 5:14
28:14
meritorious
50:21
merits 12:25

13:13 17:12,14
17:17 21:25
24:4 25:10,17
26:11 29:22
37:13
message 43:5
Mexico 51:14,16
51:17
military 49:4
million 16:2
53:10
ministerial 5:14
6:15
minus 30:5
minute 23:25
minutes 24:4
52:20
mistake 26:23
misunderstan...
34:2
mixed 36:25
modifier 19:9
modify 23:8,9
Monday 1:12
money 15:4
23:13,14
months 7:8 33:8
47:24
morning 3:4
motion 7:10,11
7:13,15
multiplied 20:4

N

N 2:1,1 3:1
name 19:6
natural 22:9
naturally 54:10
nature 4:13
need 29:25
needed 35:19
never 11:23
28:13
nevertheless
27:16
new 13:3,4
15:18 51:14,16

51:17
nice 7:16
Ninth 3:15,16
3:22 4:2,7,15
4:21 7:6,20
8:15 9:5,6,16
9:18,23 11:3,3
12:3,10,12,16
25:15 26:2,3,7
27:3,8,19
28:23 29:10,12
29:14,16,19
30:11 31:23
32:1 33:1,23
34:25 35:8
37:5
nontaxable 53:8
non-discretio...
14:22
normal 11:12
Northern 20:11
notably 8:17
note 53:6
notice 10:5,23
number 4:11
38:12

O

O 2:1 3:1
obey 28:7
obligation 14:23
obligations
14:22
obscure 20:22
obtain 20:22
obtaining 24:20
occur 16:1
occurred 35:6
October 6:5 7:4
9:1 25:17 27:9
31:6
officials 13:18
Oh 14:13
Oil 30:24
okay 8:4 17:18
17:22 23:23
old 47:16

once 26:7 30:13
32:1,1 37:10
ones 44:22
one-quarter
49:21
operation 7:19
opinion 5:20
7:21 23:7,15
23:15,17,18,24
25:10,10 37:14
37:24 41:13
47:14,16,20
49:13 51:22
53:2,21,22,25
54:2
opinions 14:14
23:13
oppose 13:5
opposed 21:17
opposition
37:25
option 50:6
oral 1:14 2:2,5
3:7 25:2
order 4:19,22
5:23 6:12,13
6:21,23 7:20
8:1,4,6 9:24
25:22 27:1,4
27:17 32:4
36:16 42:2
orders 6:4,8
12:19 29:11,15
organic 3:13,14
7:3,9 8:11 9:2
9:3 11:2 13:12
13:19 15:9
18:25 19:18,23
19:25 25:12
45:23 47:19,23
49:15 51:14,17
51:25 52:5
origin 50:16
original 12:1
15:19 37:23
ought 6:10 18:9
outcome 12:21

outside 9:25
owe 51:8

P

P 1:8,18 2:3,9
3:1,7 52:21
page 2:2 4:17,20
6:21 7:20,24
53:7,19
pages 53:1
panel 8:5,6
paper 8:20 10:2
10:8,14 36:10
part 47:3
particular 28:22
particularly
20:14,25 28:22
37:2 38:4
parties 9:8
27:25 34:11
35:12
party 5:9 13:24
14:3 30:25
32:19 35:23
51:23
passage 51:19
passed 7:18
12:11 30:4,14
35:3 36:17
49:3 51:10
passes 25:23
Passy 19:5
path 34:17,17
paying 38:25
payment 54:10
pellucid 6:11
pending 3:20
4:3 6:13,16 7:6
8:2,4,23 9:5
26:15,17,19
people 23:12
38:23 54:7
percent 19:20
21:16 38:8
40:6,21,22,23
41:5,6,7,8 42:8
44:1,2,10

49:21,22,24,25
50:10 53:6
percentage
19:19 20:4
44:24 54:4
perception
50:22
period 4:24
32:10 33:15,23
37:1,3
personally 13:9
petition 5:10 8:8
8:12 9:3,15,16
9:21 10:25
11:4,9 12:1,4
13:13,21 25:7
30:10,18 36:4
36:6 53:7
petitioner 1:6,19
2:4,10 3:8 27:3
27:7,21 28:12
29:6,18 31:22
37:3,8 48:21
50:15,22 51:13
52:22
Petitioners 30:4
petitioner's
36:21 43:15
48:19
petitions 36:25
Philippines 18:3
18:8 20:13
21:14,24 24:14
24:17
phrase 5:20,23
piece 10:2,8,14
place 12:5 18:23
24:16
places 18:2,7
23:14 38:15
44:1
plain 3:12 22:13
plainest 22:8
plainly 23:10
please 3:10
21:10 25:5
point 28:8,16

32:7 33:22
36:2
pointed 36:20
43:20
policies 50:4
policy 50:14,24
political 43:13
50:23 54:19
portion 53:22
posit 42:19
positing 28:9
position 4:13
8:13 13:18
14:2 16:12,19
17:1,2,3,5
31:20 34:23
36:22 38:7
positions 25:14
positive 49:1
possibility 9:13
9:14
possible 5:15
23:3,5
possibly 45:11
poverty 50:20
powerless 29:13
practical 48:22
practice 44:8
46:25
precise 43:17
precisely 15:16
38:25 41:12
predated 47:19
predecessor
17:2,9
preexisting 6:12
44:16 45:17
prefer 41:22
preliminary
13:3
prepared 21:6
presence 49:5
present 17:1
presented 17:4
presumably
14:14 15:18
16:5 27:17

presume 16:6
31:12
prevail 49:13
prevent 19:18
previous 7:11
principal 25:13
principle 33:20
prior 9:23 15:19
16:5
private 14:3
proper 3:22
28:11
properly 3:11
6:2,16 11:17
15:9
property 18:22
19:2 20:3,5,6,9
22:2,16,18
23:9,10 37:19
37:20,21 38:8
38:11,19 39:1
39:5,7,17,20
39:20,22 40:14
41:5 44:2 53:4
53:5,9,12,24
54:12
proposed 15:12
16:2,3,14
protect 46:2
protective 36:22
36:23 37:1,7
provision 20:21
37:24 46:2
51:14,16,17
provisions 20:21
21:1,7 47:19
52:5,6
psychology
50:23 54:19
Puerto 18:3,8
20:17 21:14,23
23:13,19 24:7
24:7 43:20
purporting
31:10
purpose 3:13
33:22,22,25

35:23 37:18
40:1 41:13,15
42:2 43:5 45:4
purposes 19:1
22:5 24:10
39:7 53:3
54:22
pursuant 54:21
pursue 16:19,24
28:15
pursuing 35:24
put 8:13 29:6
45:20
puts 22:14

Q

question 4:2
6:20 11:24
13:3,4,16
14:15,16 16:9
17:11,16,16,21
21:13 28:10,12
29:4,5,18,21
30:15 32:11
33:2 41:20
43:14 48:2
50:6
questions 52:25
53:17
quite 11:22
16:22 51:22
quote 8:19 10:3
quoting 54:1,3

R

R 3:1
railroad 14:1
Railway 8:18
Railways 30:22
raise 49:24
50:11
rate 22:17,18
24:11,11 42:12
42:16,22,23,25
44:5 49:17,17
49:25 50:12,24
53:15
rating 48:9

ratio 54:8
reach 17:12,13
25:10
reached 5:11
29:22 47:16
reaching 23:17
read 23:9
reads 38:6
real 13:24 19:23
40:2,19 41:6
41:14 42:1,4
49:18 54:11
realized 10:21
really 14:8
26:14 36:1
40:23
reason 38:22
reasonable 38:3
41:17 47:13
reasonableness
45:7
reasoned 47:14
reasoning 29:12
reasons 4:9
17:18 22:13
25:13 37:16
39:24 45:6
54:19
rebuttal 2:8
23:25 24:5
52:21
recall 33:7
receiving 20:24
recognized 26:9
36:23
recognizing
37:4
record 16:18
48:9
recovering 49:4
reduce 49:25
reduced 10:19
42:8
redundant 8:20
10:2,7,12
reelected 16:11
refer 4:17 5:22

18:21
referring 10:11
reflected 13:13
  53:7
reflecting 12:19
reflects 22:21
refreshes 27:6
refused 28:7
  48:15
regime 22:15
regional 10:22
reinforced
  26:12
reinforces 51:24
rejected 8:17
relationships
  46:19
relevant 21:6
relied 32:20
  54:14
relief 27:22
rely 30:25
remand 27:4
  28:7 30:1
  37:11
remanded 26:25
remember 7:3
  19:6
remittitur 33:8
removable
  15:14
removed 14:25
  16:11
renders 16:6
  23:2
renewing 7:11
repeatedly 8:16
  13:9
replace 3:14
reply 9:11 13:13
  21:3
representative
  42:20
representatives
  42:19 43:10
representing
  13:24

request 33:7
requested 27:3
require 10:2
  16:4
required 15:3,8
  24:11 25:15
  37:4 44:17
requirement
  45:5
requires 5:14
  15:11 24:9
  44:12
Reservation
  10:3,12
reserve 23:25
  24:24
resolution 7:12
  14:10
resolved 15:23
respect 9:9
  13:19 21:22
  22:20 23:10
  24:1,7,21
  39:13 40:13
  51:12
respectfully
  14:9 22:8 26:5
respond 52:10
responded
  48:22
respondent 1:21
  2:7 7:9 8:9
  25:3
response 7:15
  29:4 52:24
  53:16
responsibility
  42:3,14 47:3
rest 18:13 53:18
  54:6
restraining
  22:25
rests 34:19
resubmitted 8:5
resubmitting
  4:20
retroactive

34:22 35:3
returned 46:15
  49:2
returning 49:4
returns 49:7
revenue 46:10
revenues 46:16
  54:9
reversal 6:12
reverse 3:12
reversed 35:16
review 3:16
  11:10 12:6,10
  25:8,18 29:7
  33:13
re-enter 28:2
Richland 28:5
Ricky 28:5
Rico 18:3,8
  20:17 21:14,23
  23:13,19 24:7
  24:7 43:20
right 11:11
  12:12 18:6
  36:10 45:1
  51:9
ripping 50:9
ROBERTS 3:3
  10:6 13:15
  14:13 24:2,25
  27:24 38:5
  40:13 44:7
  46:1,6,14,20
  51:7 52:4,11
  52:18 54:23
roll 53:8
rolls 39:15
roughly 17:24
route 35:20
Rubicon 28:19
rule 6:7 20:2
  28:24
ruled 14:1
rules 28:7
ruling 8:1 9:1
  35:15 49:14
run 30:6 32:10

runs 46:7,21

S

S 1:20 2:1,6 3:1
  25:2
Santa 51:12
Santos 4:3,4,14
  4:19 6:6 7:21
  8:2,2 9:7,7
  12:18,19 27:3
  27:22 28:13,14
  28:18,20 29:12
  31:3,10,17
  32:12 37:4
Saturday 21:1
saying 8:4 28:1
  32:6 33:23
  34:1 35:4
says 7:20 35:18
  39:9 53:22
  54:2
Scalia 4:1,5,6
  15:13,21,22
  21:10 26:13
  28:9,18,25
  29:4,8 40:20
  41:3 47:5
  49:16,23
Scalia's 48:2
scenario 35:12
  35:16,25 36:19
school 38:20
  39:14
secondly 22:19
  53:16
section 16:15
  25:11 49:15
secure 39:8
  41:24
securing 39:6
see 31:17 34:5
  52:9
seek 29:7
seen 10:8 50:18
self-effecting
  6:11
send 27:10

35:20
sense 10:6,13
sentence 54:6
separately 14:21
series 6:4
serves 42:2
set 38:4 39:2,10
  40:2
SETH 1:18 2:3
  2:9 3:7 52:21
sets 40:6
setting 47:1
seventies 10:20
shakes 36:9
short 5:16
shortly 4:22 8:5
side 32:4,6
  38:14
sign 16:15 17:6
  48:15
significance
  54:6
significant
  11:23
silent 7:4
simple 18:13
simply 9:14 11:9
  21:3 24:20,20
  28:6 43:3
  47:21 51:24
single 18:1
sitting 12:7
situation 10:24
  14:19 24:8
  26:21 29:6
  36:24
situations 29:5
sixties 10:19
skipping 54:6
slip 8:20
solution 27:14
soon 9:18
sort 42:20
sought 33:13
sounds 22:5
SOUTER 16:22
  17:8 31:2,8

32:1,16,21,24
33:18,21 34:5
34:13,16 40:5
42:13,23 43:7
special 10:1
spending 25:21
spoke 31:7
spoken 13:9
sponte 4:19 7:7
7:8,25
Springer 20:8
standard 33:10
standing 14:3
stands 49:13
start 6:25 7:1
13:16 28:2
state 8:16 14:14
19:7,8,11,14
54:5,9
statement 36:4,6
states 1:1,15
13:25 14:24
17:24 18:15,15
18:16,18,19
19:4 22:21
23:12 24:18
46:12 47:6,7
statue 51:25
statute 5:2,2
7:18 26:14
28:20 29:14
30:4,15 35:4,7
37:6,17 38:7
38:24 39:9,13
39:13 44:17
47:22 51:9,20
statutes 43:18
52:1 54:17
statutory 22:20
STEVENS
21:25 27:8,15
30:3,9 48:1,8
straightforward
12:22
strange 36:13
Street 30:22
strongest 5:6

sua 4:19 7:7,8
7:25
sub 26:2 31:15
subject 15:5
27:24 37:22
39:22
submit 14:9
22:8
submitted 3:19
54:24 55:1
subsequent
45:19
substantive
11:24
suggest 43:14
45:21
suggesting 4:25
5:24 29:3
47:12
suggestion
39:25
suit 36:12
summarize 53:2
superior 37:24
47:16
supplemental
9:8
support 7:13
47:15 48:23
supporting
25:13
supports 45:7
suppose 5:2,21
6:25
supreme 1:1,15
7:23 8:25 11:1
11:25 12:2
14:11 16:20
18:25 19:8,11
19:14 23:4,6
25:8,11 26:1
27:4,6,10
28:16 30:1,2
30:12,17 33:9
33:14,16 37:11
37:15 38:1
41:12 45:24

47:15,15 49:13
49:14 51:8
52:8 53:1,9,21
53:25 54:2,14
sure 6:14 16:22
surely 5:11
surprisingly
24:23,23
surrendered
51:5
surrenders 51:1
suspend 32:20
suspended
11:16 26:2,10
30:12,20,24
suspension 26:7
synonymously
54:16
system 24:15

T
T 2:1,1
table 13:10
take 6:3 38:18
38:19 39:2,9
39:21 50:19,20
taken 11:17 24:3
26:24 33:1
49:3
takes 37:16
talked 51:7
tax 18:18,22
19:2 20:10,16
20:17 21:23
22:1,5,5,7,9,11
22:18,22 23:1
23:2,7,7,19,22
24:11 37:20,20
37:22 38:6,16
38:20,20 39:7
39:9,11,15,19
39:21,22 40:12
40:14,21 41:7
42:12,12,16,21
42:23,25 43:3
43:22 44:5
45:6,18 46:10

46:11,16 49:7
49:17,18,18,20
49:25 50:3,16
53:7,11,15,22
53:24 54:9,12
taxable 18:5
20:8,9 23:9
53:23 54:15
taxation 53:13
taxed 44:2 49:21
49:22 53:5,5
taxes 20:6 39:2
39:10 40:11
42:16 44:12
46:15 50:15
taxing 50:24
taxpayers 46:3,3
46:22,23
tax-exempt
38:11
telephones
42:18
tell 49:16
telling 7:15
tells 48:9
term 18:16
44:15
terms 53:4
territorial 12:7
15:11 43:19
45:20 50:3
51:6,13,21,25
54:17
territories 19:2
19:17 20:1,6
22:21,25
territory 15:5,8
22:15 24:18
42:3 45:18
47:6
test 5:1,24 6:1
6:15 47:22
text 37:17
textual 39:19
Thank 13:1 24:6
24:25 52:17,18
52:23 54:23

theory 6:9 47:14
thing 16:23,24
22:1 36:21
38:17 39:1
40:25
things 8:12
36:20 39:14
think 5:7 6:1,8
6:25 11:18,21
12:15 14:8,19
17:13,19 21:20
23:16,18 28:4
34:3,18 35:14
36:18 38:2
45:3,12 50:9
52:12 53:23
third 9:13
thirdly 22:19
thought 4:1 8:22
37:1 38:17
three 19:4 22:13
24:21 25:13
37:15
three-judge
10:1,16,18
26:21 27:13
29:24 34:8
35:17 36:3
time 3:14 4:6
8:15 9:22,23
10:15 11:23
12:4 16:5 17:1
18:13,24 24:3
24:24 26:7,9
26:17 27:25
28:17 30:3,16
30:20,23 31:6
33:13,15 35:1
42:11 49:3
52:9
timely 3:18 8:7
27:7 28:15
30:10 33:13
tomorrow 17:4
touch 43:9
transcripts 21:4
transferred

29:13
Treasury 46:12
46:13,21
treat 36:5
treated 18:10
treating 53:12
treats 53:13
trial 11:13 12:7
tried 28:14
trigger 26:4
triggered 4:23
trouble 38:14
truck 7:17
true 22:12 38:25
39:1,11
try 19:3,3,3
28:12
trying 23:21
38:17
turn 7:24 16:9
37:13
turned 4:12
turns 11:21
26:16 35:18
43:20 44:9
twice 42:24
two 7:8 8:12,24
9:4 13:17 20:7
36:19 39:24
49:6 52:25
53:1
two-thirds 39:1
51:2,5 53:13

U

ultimately 31:24
unavoidable
10:23
uncertainty
10:25 41:25
unclear 10:21
undermine
48:24
understand 6:20
15:15
understanding
22:24 46:25

49:6 52:2
understood
18:21 22:22
54:18
undoubtedly
33:6
unequivocally
13:11
uniform 20:2
49:17
uniformly 9:25
18:19
United 1:1,15
13:25 14:24
23:12 24:18
46:12 47:6,7
university 39:14
unpublished
20:25 24:21
unremovable
15:7
unreported
20:23
untimely 25:9
upheld 52:16
urge 35:22 37:2
52:3
use 18:4,4,15,16
18:18 21:22
43:21 44:1,23
45:10,16 51:2
51:4 54:4
uses 43:20
usually 54:18
Utah 19:3
U.S 22:15 46:19
49:4

V

v 1:7
vacate 14:10
27:10 28:2,6,7
30:1 35:20
vacated 26:25
27:18
vacation 37:11
validity 48:24

valuation 18:16
18:17,18,19,21
19:1,8,8,9,14
20:3,5,10,12
20:15,16,18,19
22:5,7,9,10,22
22:23 23:8,19
24:10,15 37:20
37:21,21 39:19
39:21 40:22
42:15 50:16
53:8,18,24
valuations 50:19
value 17:25 18:5
18:23,23 19:10
20:8,9,11
21:17,17 22:2
22:16,17 24:12
38:8 40:3,3,6
40:19,19,22
41:6,16,23,24
42:5 43:21,21
44:2,9,10,13
44:14,18,23,24
45:6,10,12,16
45:19,20 48:13
49:24 50:11
51:5 53:14
54:4,8,18,19
54:21,22
valued 39:7 41:5
values 44:20
valuing 22:4
various 45:5
50:3
vast 36:2
versus 3:4,24
8:17 13:25
51:12
view 4:23 35:24
52:8
vigilant 42:17
vigorously
13:11
virgin 20:17,18
24:12,22 44:11
44:13,15 45:5

45:16 47:25
Virginia 8:17
virtue 29:14
voters 42:11,14
42:14,17

W

wait 33:15
waited 28:15
want 21:8,8,9
25:6 27:2 49:9
49:12 52:24,25
wanted 45:11
Washington
1:11,18,20
wasn't 4:6 14:8
31:17 32:4
33:2 36:10
Waxman 1:18
2:3,9 3:6,7,9
4:1,4,9 5:5,25
6:19,24 8:24
9:12,20 10:10
11:11,20 12:14
13:1,8 14:6,18
15:21,25 17:3
17:10,13,18,22
18:11 19:4,16
19:21,24 21:12
21:20 22:3,6
23:23 24:2,6
25:1 43:19
52:20,21,23
way 7:16 24:17
49:9 53:13
ways 23:21 34:6
34:14
week 7:25
well-reasoned
37:14
went 35:7 47:21
48:16
we'll 3:3 14:4
24:4 36:5
52:20
we've 20:18 24:3
28:3 50:18

whatsoever 48:7
whim 40:9 42:10
wholly 53:12
withdrawing
5:12,13,13 8:1
withdraws
25:20
wondering
13:19
word 18:2,4,20
21:22 22:7
23:2,8,9 38:4,6
45:10 47:23
51:3 54:15,15
words 13:6 18:5
21:9 23:19,21
workings 50:2
works 5:23
world 49:3
wouldn't 5:5
12:12 24:13
45:12 53:17
writ 3:17 9:4,6
9:21 11:1 12:5
12:16 28:15
29:19 31:23
wrong 8:21,23
23:10 29:15
35:15 52:3
Wynn 3:25
32:23

X

x 1:2,10

Y

Yeah 28:25
43:24 44:3
46:18 51:7
year 48:19
years 49:6

$

$123 16:2

0

06-116 1:7 3:4

1 4:21 8:3 41:6
  49:21,22
1.5 41:8
10 21:16 38:8
  47:24
10:05 1:16 3:2
100 19:20 40:21
  40:22 44:2
  49:24
11 16:15 21:2
  25:11 49:15
11:08 54:25
15 7:2
150 19:20 40:22
  41:5
17-year 47:16
18a 53:19
183 53:10
19 6:5,5 7:4
1902 20:14
  24:15
1905 20:15
1916 18:3,8
  20:15 21:15
1922 20:16
1949 21:4 24:22
1950s 10:19
1989 37:24
1993 47:20

2

2 41:7
2004 6:5 7:4 9:1
  25:17 27:9
  31:6
2007 1:12
2101(c) 4:23
22 7:25
25 2:7
26a 53:7

3

3 2:4 52:20
30 7:4 9:1 27:9
  31:6 44:10
  49:24
30th 25:17
35 19:19 40:6

42:8 44:1
  50:10 53:6

4

49a 7:2,20

5

50a 4:17 7:24
51 6:21
51a 4:18,20
52 2:10

8

8 1:12 7:10
  53:20 54:1,3

9

90 30:4,5,7,17
90-day 4:23
  33:23 37:1