1	IN THE SUPREME COURT OF	THE UNITED STATES
2		x
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	Wash	ington, D.C.
12	Mond	ay, January 8, 2007
13		
14	The above-ent	itled 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., Washi	ngton, D.C.; on behalf of
19	Petitioner.	
20	BETH S. BRINKMANN, ESQ., Wa	shington, D.C.; on behalf
21	of Respondent.	
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1	PROCEEDINGS
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
LO	please the Court:
L1	This case is properly before this Court,
L2	which should reverse under the plain language and
L3	purpose of the Organic Act of Guam. As to jurisdiction,
L 4	at the time Congress amended the Organic Act to replace
L5	the certiorari jurisdiction of the Ninth Circuit with
L6	direct review in this Court, the Ninth Circuit had
L7	already granted the writ of certiorari that had been
L8	timely filed and the case had been briefed, argued and
L9	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.
- But in any event, we know from the Ninth
- 16 Circuit that it did not consider it otherwise, because
- 17 if the Court will refer to I believe it's page 50a or
- 18 51a of the joint appendix, after the Court decided
- 19 Santos, it sua sponte issued an order in this case -- it
- 20 is on page 51a -- resubmitting this case effective
- 21 February 1 to the Ninth Circuit's active consideration.
- 22 And shortly thereafter, it filed the order in this case
- 23 from that -- in our view, triggered the 2101(c) 90-day
- 24 period.
- 25 JUSTICE KENNEDY: Are you suggesting that

- 1 the test is whether under colorable jurisdiction -- a
- 2 hypothetical case, suppose the statute, Federal statute
- 3 is very clear that it applies in any case. Would your
- 4 argument be the same?
- 5 MR. WAXMAN: Well, I wouldn't have the most,
- 6 the strongest argument that I have in this case. I
- 7 think -- now, the Court's cases are not clear here but
- 8 it does seem to me that in the instance as here, where
- 9 it isn't just that a party has made some application or
- 10 filed a cert petition with a court, but the court has
- 11 actually reached out and asserted jurisdiction, surely
- 12 anything other than an amendment withdrawing -- that an
- 13 active withdrawing -- withdrawing jurisdiction that
- 14 requires anything other than merely a ministerial act,
- 15 where there can be no possible confusion about what
- 16 Congress intended to do, certainly anything short of
- 17 that, it lies with the Court to ascertain it. And here
- 18 --
- 19 JUSTICE KENNEDY: But if we accept that in
- 20 the opinion, what was the phrase you used, colorable
- 21 jurisdiction, or -- it's something I made up, I suppose
- 22 -- is there some concept that we can refer to or some
- 23 phrase that works to -- in order to incorporate your
- 24 test that you seem to be suggesting?
- 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.
- 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.
- Then turn to page 50a of the joint appendix.
- 25 A week later, on December 22, the Court sua sponte

- 1 issues an order withdrawing and deferring a ruling in
- 2 this case pending the decision in Santos. Santos is
- 3 then decided in January. And on February 1, the Court
- 4 issues an order in this pending case saying okay, it's
- 5 resubmitted to the panel. And shortly thereafter, the
- 6 panel issued the order dismissing this case for lack of
- 7 jurisdiction, and from that date we filed a timely
- 8 petition for certiorari.
- 9 Now the contention of the respondent in this
- 10 case that the attorney general should immediately upon
- 11 enactment of the Organic Act amendment have also filed a
- 12 petition with this Court would do one of two things. It
- 13 either would have put this Court in the position of
- 14 determining the effect of the amendment at the very same
- 15 time that the Ninth Circuit was doing so, which is a
- 16 state of affairs that this Court has repeatedly
- 17 rejected, most notably in Andrews versus Virginia
- 18 Railway, or it would have amounted to nothing more than
- 19 what this Court has called, quote, "the filing of a
- 20 redundant slip of paper."
- JUSTICE KENNEDY: Well, am I wrong? I
- 22 thought that the Attorney General of Guam did file cert
- in some cases that are pending, or am I wrong on that?
- 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.
- 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.
- 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
- 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.
- 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.
- MR. WAXMAN: Right.
- 12 JUSTICE GINSBURG: So in the normal course
- 13 when you have a district court decision, a trial court
- 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?
- 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.
- JUSTICE GINSBURG: Perhaps you should go on
- 25 to the merits.

Τ	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
- original matter would not do what the prior attorney
- 20 general did.
- 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

- 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 quess 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?
- 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.
- MR. WAXMAN: Okay. I have four reasons why
- 19 I think we are correct --
- JUSTICE BREYER: I know, but I have a
- 21 question I'd like you to go into.
- MR. WAXMAN: Okay.
- 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 --
- 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?
- 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,
- "aggregate assessed valuation."
- 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."
- 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.
- 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.)
- MR. WAXMAN: But the --
- 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.
- 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.
- 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
- 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
- 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.
- In other words, I'm trying to find ways of
- 22 getting the tax.
- 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.
- 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

court, and that court will follow Congress's directions

and dismiss it. But until it does, its hold final

24

25

- 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 --
- 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.
- 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?
- 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.
- 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.
- 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.
- 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.
- 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 --

- JUSTICE SOUTER: Once the -- once the Ninth
 Circuit determined that it had no longer a continuing
 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.
- 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?
- 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 --
- JUSTICE SOUTER: Why -- why can't it?
- 22 MS. BRINKMANN: Because this Court's cases
- 23 make clear, the Wynn, Eisenberg case --
- 24 JUSTICE SOUTER: But those -- those -- are
- 25 they -- and you have got me here. The argument here is

- 1 that the, that the Ninth Circuit already had taken
- 2 jurisdiction in this case. It wasn't a question of
- 3 whether to accept it or not.
- 4 MS. BRINKMANN: And in those cases, Your
- 5 Honor, the courts also -- appellate courts were
- 6 undoubtedly exercising jurisdiction in those cases. And
- 7 in Eisenberg, for example, it was a request to recall
- 8 the remittitur. It took months for the California
- 9 Supreme Court to decide that case. And they said yes,
- 10 there's a standard where you can do that there -- the
- 11 court. We find you don't make it, so we don't have
- 12 jurisdiction. They came to this Court and said out of
- 13 time. You had to have sought our review timely, from
- 14 the final judgment of the California Supreme Court, you
- 15 could not wait for that period of time in which the
- 16 California Supreme Court decided to not have
- 17 jurisdiction.
- 18 JUSTICE SOUTER: I --
- 19 MS. BRINKMANN: That is a well established
- 20 Federal jurisdiction principle.
- 21 JUSTICE SOUTER: I quess 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 --
- JUSTICE SOUTER: Maybe I should say I don't
- 14 know why this Court can have it both ways.
- 15 (Laughter.)
- 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
- they didn't have jurisdiction, then it's retroactive?
- 23 That's what your position is?
- MS. BRINKMANN: No.
- 25 JUSTICE GINSBURG: The Ninth Circuit has

- 1 jurisdiction this whole time. But the day that it
- 2 issues its decision dismissing this case, then it is
- 3 retroactive back to the date that Congress passed the
- 4 statute? That's what you seem to be saying.
- 5 MS. BRINKMANN: The divestiture of the
- 6 jurisdiction occurred on the date that Congress's
- 7 statute went into effect.
- 8 JUSTICE ALITO: What if, what if the Ninth
- 9 Circuit had incorrectly held that it had jurisdiction?
- 10 Would it be the same?
- 11 MS. BRINKMANN: Your Honor, that would have
- 12 been the scenario I discussed before, the parties could
- 13 have litigated that. If it came to this Court, and the
- 14 Court found there was jurisdiction, so be it. We think
- 15 it would have been a wrong ruling. And if it came to
- 16 this Court and this Court reversed, that is the scenario
- 17 we discussed, where in the three-judge district court
- 18 when that turns out, the court says we don't have
- 19 jurisdiction, you needed to come up through the other
- 20 route, we will dismiss, vacate and send back and come
- 21 up.
- 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.

JUSTICE GINSBURG: But those cases really 1 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 jurisdiction. This was no big shakes about it. It 9 10 wasn't, did they file the right paper? And then Congress does something. And the Court would follow 11 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 back to the date that Congress passed the law. 17 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
- 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.
- This is not an original interpretation of
- 24 this provision. In the Superior Court opinion from 1989
- 25 that we attached to our brief in opposition, the Guam

- 1 Supreme Court came to the same conclusion and
- 2 interpretation of this language. We think it is an
- 3 eminently reasonable and correct interpretation,
- 4 particularly in light of the absence of the word as set.
- 5 CHIEF JUSTICE ROBERTS: But don't you know
- 6 that your interpretation reads the word tax out of this
- 7 statute? I mean your position would be exactly the same
- 8 if it just said 10 percent of the value of the property
- 9 in Guam.
- 10 MS. BRINKMANN: No, Your Honor. That would
- 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.
- 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.
- 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 --
- JUSTICE SCALIA: But it doesn't have to be
- 21 100 percent. They could change what you call the tax
- 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.
- 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 --
- 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.
- MS. BRINKMANN: Your Honor, the uncertainty,

- 1 however, that the debt limitation is a real limitation
- 2 that serves the purpose of Congress in order to have
- 3 some kind of fiscal responsibility to the Territory is
- 4 what is furthered by the real limitation of having a
- 5 concrete appraisal full value as a basis for the
- 6 calculations.
- 7 JUSTICE KENNEDY: Well, you do have a
- 8 concrete appraisal, but it's just reduced to 35 percent.
- 9 MS. BRINKMANN: But that can be changed at
- 10 the whim of the legislature without any accountability
- 11 to the voters because at the same time that they change
- 12 the tax rate and not alter any tax liability.
- 13 JUSTICE SOUTER: Well, you say without any
- 14 responsibility to the voters. I mean, the voters are
- 15 going to know that if the valuation is changed and the
- 16 tax rate isn't, their taxes are going up. So I assume
- 17 the voters are going to be vigilant to what is going on
- 18 and I assume they have telephones and they'll call their
- 19 representatives. Why is this -- why do you posit this
- 20 sort of failure of representative democracy?
- 21 MS. BRINKMANN: Because I assume the tax
- 22 rate will be changed, so it's not just -- there's no --
- 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.
- JUSTICE GINSBURG: Do they tax on the basis
- 23 of the --
- MS. BRINKMANN: Yeah.
- JUSTICE GINSBURG: This is a fractional,

- 1 this 35 percent. In the other places, do they use as
- 2 the -- the value taxed 100 percent of the property --
- 3 MS. BRINKMANN: Yeah.
- 4 JUSTICE GINSBURG: -- and then just have a
- 5 lower tax rate?
- 6 MS. BRINKMANN: Yes.
- 7 CHIEF JUSTICE ROBERTS: And what was the
- 8 appraisal practice? I mean, in a lot of these
- 9 jurisdictions you have appraised value that turns out to
- 10 be 30 percent of the actual market value.
- 11 MS. BRINKMANN: But here, in the Virgin
- 12 Islands and Alaska, Federal law requires that the taxes
- 13 be imposed on the actual value. In the Virgin Islands
- 14 it said your assessment will be actual value. That's
- 15 why the term assessment was used in the Virgin Islands
- 16 debt limitation, because that was in a preexisting
- 17 Federal statute that required assessment be an actual
- 18 value.
- JUSTICE BREYER: Which one? You say they've
- 20 all used market values?
- 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?
- 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.
- MS. BRINKMANN: But the actual --
- 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.
- 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.
- I would suggest, Your Honor, certainly if
- there is any debate that there's more than one
- 23 interpretation of the Organic Act, that deference should
- 24 be afforded to the Guam Supreme Court's interpretation
- 25 of that. That is well established under this Court.

1 CHIEF JUSTICE ROBERTS: But doesn't it --2 who is this provision designed to protect, just the 3 Guamanian taxpayers or Federal taxpayers more generally? 4 MS. BRINKMANN: It's the Guamanians, Your 5 Honor. It is not --6 CHIEF JUSTICE ROBERTS: If the Guamanian 7 government runs a deficit, where is the difference made 8 up from? 9 MS. BRINKMANN: Most of the income and 10 revenue on Guam comes from the Federal income tax, 11 because unlike on the mainland, the Federal income tax 12 goes to the Guam Treasury rather than the United States 13 Treasury. 14 CHIEF JUSTICE ROBERTS: I know that any taxes from Guam are returned to Guam. Are additional 15 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 Guamanian Treasury runs into difficulty, it's made up 21 22 not just by Guamanian taxpayers, but by all Federal 23 taxpayers? 24 MS. BRINKMANN: No, Your Honor. That's not

my understanding of the practice. The encouragement of

25

- 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.
- 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.
- 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?
- 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.
- 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?
- 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

statutes, and there directly said that they should defer 1 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. 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 ON BEHALF OF PETITIONER 22 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.
- 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,
- 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	<pre>submitted.)</pre>
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