No. 06-116

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN,
ATTORNEY GENERAL OF GUAM,
Petitioner,

v.

FELIX P. CAMACHO,
GOVERNOR OF GUAM,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

REPLY BRIEF FOR PETITIONER

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
JONATHAN G. CEDARBAUM
KELLY THOMPSON COCHRAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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I. THE PETITION FOR A WRIT OF CERTIORARI FROM THIS COURT WAS TIMELY

This Court has repeatedly recognized that actions that suspend the finality of a judgment sought to be reviewed restart the running of the 90-day period for filing a certiorari petition with this Court. Both petitioner's filing of a proper petition for certiorari with the Ninth Circuit—at a time when that court had exclusive jurisdiction to consider such petitions—and the Ninth Circuit's granting of the petition did just that, by subjecting the Guam Supreme Court's judgment—and thus the parties' rights—to revision. Respondent acknowledges (Br. 10) that, in the unusual circumstances of this case, the Ninth Circuit played a role analogous to that of a state high court exercising discretionary review over a lower court's judgment, and thus that petitioner's filing of a timely certiorari petition with the Ninth Circuit prevented the 90-day clock from running. Respondent also does not contest, but is hesitant to acknowledge, that the Ninth Circuit's granting of the petition continued the suspension of the filing period.[1] Respondent resists the full logic of the analogy, however, by insisting that the clock was not suspended throughout the pendency of the writ of the certiorari, but instead was restarted by the October 2004 amendment of the Guam Organic Act. None of respondent's arguments bears scrutiny.

A. The Considerations Driving The Timeliness Decisions Cited By Respondent Are Not Present Here

1. Respondent identifies (Br. 15) what he claims are four categories of decisions (two containing only a single decision) that supposedly establish the rule that "a lower court's resolution of its jurisdiction to resolve the merits of a case after that court already has been divested of jurisdiction over the case does not extend the time for filing a petition for a writ of *certiorari*." Respondent contends that this

[1] That hesitancy may explain the puzzling fact that the timeline offered by respondent on page 15 of his brief omits altogether the Ninth Circuit's granting of petitioner's certiorari petition on October 23, 2003.

case is such a case, and that the Ninth Circuit's deliberations following amendment of the Guam Organic Act in October 2004 therefore ceased to extend the time for filing a certiorari petition here. That argument fails for several reasons.

First, in this case, unlike in all of the ones described by respondent, the court below had affirmatively asserted jurisdiction over the case by granting the certiorari petition before the Guam Organic Act was amended. This Court in effect emphasized that fundamental point in its wording of the first question presented by referring to the period during which "the writ of certiorari . . . *was pending* before" the Ninth Circuit (emphasis added). Thus, the lower court here did in fact treat its granting of the writ of certiorari as "put[ting] the basis of th[e] earlier order again in issue." *Pfister* v. *Northern Ill. Fin. Co.*, 317 U.S. 144, 149 (1942). Contrary to respondent's assertion (Br. 14), holding that the 28 U.S.C. § 2101(c) clock did not restart until the Ninth Circuit made its determination and dismissed the case in no way opens the door to "dissatisfied litigants filing in the wrong court to extend proceedings and waiting for that court to declare its lack of jurisdiction before seeking further review from this Court." Instead, petitioner seeks recognition of a narrow application of this Court's normal rule that where the finality of an underlying judgment has previously been suspended by an intermediate court's review on the merits, such suspension continues until the court completes its review—even if that review includes consideration of an *intervening* change in its jurisdiction.

The sole decision in respondent's first category (Br. 15-16), *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548 (1945), is not analogous to this case for precisely this reason. In *Market Street Railway*, this Court stated in dictum that the 90-day clock would restart after the expiration of a state statutory deadline for consideration of an initial rehearing petition, even if the petitioned state court had not yet formally denied the petition. *Market Street Railway* thus involved the routine application of well-established

state procedural rules concerning petitions for rehearing,[2] not, as in this case, application of a federally mandated exhaustion requirement where the lower court had properly asserted jurisdiction and had begun merits deliberations before an intervening change in law required that court to reassess its jurisdiction over the pending matter.

Second, to the extent the decisions in respondent's three other categories (Br. 16-20) bear any resemblance to this case, both the rule and rationale of those decisions support resetting the filing period here. Those decisions hold that unlike the filing of *initial*, *timely* petitions for rehearing, which suspend the operation of appellate filing deadlines until the petition is resolved, requests for leave to file *second* or *untimely* petitions for rehearing or other post-judgment relief only reset appellate deadlines if they actually prompt the petitioned court to reopen consideration of the underlying judgment.[3] That rule favors suspension here because, as noted above, petitioner's certiorari petition to the Ninth Circuit was timely and the Ninth Circuit's grant of certiorari opened the merits of the Guam Supreme Court's judgment to reconsideration.

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[2] This Court's decision to dismiss the petition for writ of certiorari as untimely filed in *Doss* v. *Illinois*, 320 U.S. 762 (1943), also appears to fit in this category. The Supreme Court of Illinois issued an initial opinion on January 1, 1943. Petitioner filed a rehearing petition, but on March 11, 1943, the court struck the petition as violating court rules. *People* v. *Doss*, 46 N.E.2d 984 (Ill. 1943); *see also Jurisdiction of the Supreme Court of the United States* § 384, at 769 (R. Wolfson & P. Kurland eds., 2d ed. 1951). Thus, *Doss* appears to stand for the proposition that a defective initial rehearing petition that does not satisfy relevant state rules does not operate to reset appellate filing requirements. That rule has no application to this case.

[3] Respondent (Br. 16) places *Isenberg* v. *Sherman*, 286 U.S. 547 (1932), which involved the filing of a motion to recall a state supreme court's remittitur based on claims of fraud on the court, in a category of its own. But it involved the same considerations that motivate the rule on successive or untimely petitions for rehearing. The state court expressly characterized the motion as "an attempt to secure a second rehearing on the merits." *Isenberg* v. *Sherman*, 7 P.2d 1006, 1007 (Cal. 1932) (en banc).

Moreover, the prudential considerations underlying this Court's rule denying finality-suspending effect to many successive and untimely petitions are plainly not present here. As respondent notes, this Court has placed on petitioners the risk that a successive or untimely request for rehearing or other post-judgment relief will be denied, thus requiring petitioners to file with this Court before knowing whether the court below will grant the request. *See, e.g.*, *Wayne United Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U.S. 131, 137 (1937). But the Court has done so because (i) such filings necessarily arise only when a petitioner has already had an opportunity to seek reconsideration at least once; and thus (ii) allowing later petitions automatically to extend appellate filing deadlines would invite abuse and substantially interfere with the repose provided by such time limits. *See, e.g.*, *Jurisdiction of the Supreme Court* § 384, at 772-773 (noting, in reference to *Isenberg*, that "to hold that such a maneuver tolled the time for Supreme Court review would be to permit losing parties to attack highest state court judgments with baseless charges of fraud in the procurement at any time after their entry, thus for practical purposes nullifying the time limit on review"); *cf. Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943) (per curiam) ("Would-be appellants could prolong indefinitely the appeal period, by making application to one judge within the three months and upon its denial by applying successively to other judges even after the prescribed time for appeal had ended.").

Neither of those conditions is present here. Petitioner did not engage in seriatim or untimely filings, but rather filed a single timely petition for certiorari in order to exhaust intermediate appeals as required by federal law. And petitioner can hardly be accused of trying to game the system to prolong the appellate process when, unlike in the cases upon which respondent relies, the event that arguably created uncertainty about the filing deadline in this Court (i) was not an action by petitioner but enactment of a statute by Congress, and (ii) occurred after petitioner had filed and

the court of appeals had granted his one post-judgment petition.[4]

2. In these respects, a better analogy is to this Court's practice under 28 U.S.C. § 1257, since both that statute and the Organic Act at the time the Guam Supreme Court rendered its judgment required exhaustion of intermediate appeals before seeking review by this Court. Under § 1257, this Court has accepted a number of cases for review in which a state high court had initially issued a writ of certiorari or agreed to exercise other discretionary review, but then dismissed the writ as improvidently granted without elaboration. That practice supports petitioner here because in those cases, unlike in the successive and untimely petition cases, even when it is unclear whether the state high courts considered the merits of the underlying judgments, the timing of the filings indicates that this Court treated its deadline as running from the date of the high court dismissals.[5]

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[4] Respondent suggests, in the alternative (Br. 24 n.6), that the tolling effect of the Ninth Circuit's grant of certiorari in this case should be considered to have terminated when the Ninth Circuit handed down its decision in *Santos* v. *Guam*, 436 F.3d 1051 (9th Cir. 2006), in which the Ninth Circuit addressed the effect of P.L. 108-378 on pending appeals. But if the grant of certiorari tolled the running of the clock, then it certainly did so until the writ of certiorari was dismissed, since it was not until that dismissal that the possibility of the Ninth Circuit's altering the parties' rights was eliminated. The Ninth Circuit made clear that the writ remained pending when it "resubmitted" this case after issuing the *Santos* decision (Pet. App. 51a), and the court might have distinguished *Santos*: this case had not received even one level of appellate review in the Guam system, it presents separation-of-powers concerns not involved in *Santos*, and, as the *Santos* decision itself noted, the Ninth Circuit had previously recognized a "manifest injustice" exception to the application of jurisdiction-stripping statutes to pending cases, *see Santos*, 436 F.3d at 1053-1054 (discussing *Gioda* v. *Saipan Stevedoring Co.*, 885 F.2d 625 (9th Cir. 1988)).

[5] *See, e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (reviewing the merits of a Pennsylvania Superior Court decision concerning post-conviction rights issued June 22, 1984, where the Pennsylvania Supreme Court dismissed a discretionary appeal as improvidently granted on April 23, 1986, and a petition for writ of certiorari to this Court was filed thereafter); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983) (reviewing the merits of a decision by the Kentucky Court of Appeals issued on April 24, 1981,

Moreover, respondent's contention regarding the effect of deliberations by a court that ultimately decides it does not have jurisdiction would bar many parties from seeking review by this Court under § 1257. As respondent himself notes (Br. 19-20 n.5), this Court has held that petitioners must seek review from state high courts before invoking this Court's jurisdiction unless it is absolutely clear as a matter of settled state law that the state high court lacks jurisdiction over the case. Respondent's purported "rule" would thus create a Catch-22, since petitioners who seek the required review but obtain a negative ruling from a state high court would then often be barred from appealing to this Court on timeliness grounds.

B. Respondent's Proposed Alternative Routes To Review By This Court Are Impractical

Respondent's suggestions that petitioner should have filed a "protective" certiorari petition with this Court before the court of appeals issued its decision or requested that the Ninth Circuit vacate the Guam Supreme Court's judgment in order to restart this Court's 90-day filing clock only highlight the unreasonableness of respondent's position. A rule that would encourage (or in fact require) protective filings would serve neither this Court nor litigants well, for it would foster uncertainty and needless expenditure of judicial resources. *See, e.g.*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 149-150 (1980)

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where the Kentucky Supreme Court dismissed review as improvidently granted on February 16, 1982, and a petition for writ of certiorari to this Court was filed thereafter); *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue*, 458 U.S. 832 (1982) (reviewing the merits of a New Mexico Court of Appeals decision issued July 1, 1980, where court denied rehearing on July 11, 1980, the New Mexico Supreme Court quashed its writ of certiorari as improvidently granted on March 30, 1981, and a notice of appeal and amended notice of appeal were filed with this Court thereafter); *Orr* v. *Orr*, 440 U.S. 268 (1979) (reviewing the merits of a decision by the Alabama Civil Court of Appeals issued on March 16, 1977, where rehearing was denied on April 12, 1977; the Alabama Supreme Court quashed its writ of certiorari as improvidently granted on November 10, 1977; and a notice of appeal was filed with this Court thereafter).

(adopting rule to minimize protective filings under 28 U.S.C. § 2101); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 515 (1967) (adopting rule to minimize protective filings under statutes creating limited waivers of statutory immunity). As the D.C. Circuit has noted, rules requiring protective filings bring with them a "whole train of unnecessary consequences . . . : the [agency] and other parties may be called upon to respond and oppose the motion for review; when the [agency] acts, the petition for judicial review must be amended to bring the petition up to date." *Outland* v. *Civil Aeronautics Bd.*, 284 F.2d 224, 228 (D.C. Cir. 1960).[6]

Respondent's proposed rule that appellate filing clocks are not suspended when a lower court evaluates the effect of an intervening change in a jurisdictional statute would be particularly wasteful of this Court's resources, since it would create a significant risk that "a judgment of a [lower] court susceptible of being reviewed by this court would ... be open at the same time to the power of a [lower] court to review and reverse," if the lower court ultimately determines that its jurisdiction remains intact. *Andrews* v. *Virginian Ry. Co.*, 248 U.S. 272, 275 (1919).[7]

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[6] This Court has repeatedly cited *Outland* with approval, *see, e.g.*, *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 285 (1987); *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 541 (1970); *Civil Aeronautics Bd.* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 326-327 (1961), and has further endorsed the D.C. Circuit's judicial-economy rationale, *see, e.g.*, *Stone* v. *INS*, 514 U.S. 386, 391-392 (1995) (quoting directly from *Outland* in setting out the "policy supporting the nonfinality rule," but finding it did not apply under an unusual provision of the Immigration and Nationality Act).

Respondent's related suggestion (Br. 27 n.8) that petitioner should have filed a petition for certiorari before judgment under 28 U.S.C. § 2101(e)—which under this Court's rules may be granted only "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," S. Ct. R. 11—would function only to impose an unnecessary additional burden on litigants and on the Court.

[7] The decisions respondent cites on this score (Br. 27) all concern review of decisions of three-judge district courts. Were this Court to adopt its procedures for handling appeals from those courts to this case, as re-

Respondent's suggestion that petitioner should have asked the Ninth Circuit to vacate the Guam Supreme Court's judgment in order to restart the clock under § 2101(c) is plainly at odds with respondent's assertion that P.L. 108-378 immediately stripped the Ninth Circuit of jurisdiction over this case. In addition, it ignores this Court's general rule that "[t]he time for applying for certiorari will not be tolled when it appears that the lower court ... amended its order solely for the purpose of extending that time." *Missouri* v. *Jenkins*, 495 U.S. 33, 49 (1990).[8]

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spondent advocates, the Court would proceed to decide the jurisdictional issue upon receipt of the petition—without the benefit of briefing and a decision by the lower court that would be simultaneously considering the same issues—in order to determine whether the petition should be dismissed. *See, e.g., Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 579-582 (1939). Such a procedure may be unavoidable under a statutory scheme in which certain direct appeals of right lie with this Court, but there is no reason to invite such waste of this Court's resources in other contexts. Alternatively, if the Court simply delays any consideration of the petition until the lower court issues its ruling, the protective filing would truly constitute "a redundant slip of paper" "devoid of any sound supporting rationale." *Confederated Tribes*, 447 U.S. at 150.

[8] It is again telling that respondent (Br. 27-28) relies exclusively on precedents concerning appeals from three-judge district courts, which were largely abolished in 1976 because of widespread dissatisfaction with the burdens they imposed on the federal judiciary, including this Court. *See generally* 17 Wright & Miller, *Federal Practice & Procedure* §§ 4234, 4235 (2d ed. 1998). In particular, the right of direct appeal to this Court created such an enormous workload that this Court began to issue "a bewildering and constantly changing variety of rules on what orders were directly appealable to it and what were reviewable in the courts of appeals." *Id.* The resulting system was "so complex as to be virtually beyond belief," even to federal jurisdiction specialists. *Id.* To mitigate the impacts of this system, the Court adopted the practice of vacating and remanding judgments (over which it entirely lacked direct appellate jurisdiction because they should not have been heard by three-judge courts in the first instance) to the original court for re-entry of judgment in order to restart the clock for seeking review from the court of appeals. The precise origin and extent of the Court's authority for this practice is unclear, and it is rarely exercised today. Moreover, post-1976 decisions have specifically resisted attempts to invoke this practice in other contexts. *See, e.g., Donovan* v. *Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390-391. (1982).

C. Petitioner's Filings In Other Cases Are Consistent With His Position Here

Finally, the positions adopted by petitioner in *Santos* v. *Guam* and two other cases mentioned by respondent are in no way inconsistent with his conduct in this case.

In *Santos*, a criminal case, petitioner Attorney General did not seek additional review of the conviction by any appellate court; rather, the defendant did. When the Ninth Circuit requested supplemental briefing on the effect of the October 2004 amendment of the Guam Organic Act in P.L. 108-378, petitioner's brief spent four paragraphs outlining arguments that, under *Bruner* v. *United States*, 343 U.S. 112 (1952), the statute divested the Ninth Circuit of jurisdiction over pending appeals. That discussion was preceded, however, by a note explaining that attempts to apply statutes retroactively may be impermissible where they involve "the impairment of a vested right." Br. 2. The brief then spent seven pages following the *Bruner* discussion explaining why P.L. 108-378 could be understood to have affected the substantive or vested rights of parties engaged in pending litigation, and thus why P.L. 108-378 should not be interpreted to deprive the Ninth Circuit of jurisdiction over pending appeals. Petitioner explained that such parties could be considered to have been substantively prejudiced if P.L. 108-378 were read to eliminate Ninth Circuit review over pending cases because, in light of this Court's limited docket, such a reading would effectively foreclose the possibility of judicial review beyond the Supreme Court of Guam. Br. 7. Notably, petitioner did not assert that pending litigants would be barred from seeking Supreme Court review, but rather that the vast majority of cases simply would not meet this Court's certiorari criteria.[9]

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[9] Petitioner's filing of certiorari petitions with this Court in *Guam* v. *Pacificare Health Insurance Co. of Micronesia, Inc.*, No. 04-1074, and *Moylan* v. *A.B. Won Pat Guam International Airport Authority*, No. 04-1480, was also consistent with his position in this case (and with the position he advocated in *Santos* concerning cases pending before the Ninth

II. THE GUAM SUPREME COURT'S INTERPRETATION OF THE ORGANIC ACT'S DEBT LIMIT IS ERRONEOUS

A. The Guam Supreme Court's Interpretation Is Contrary To The Organic Act's Text And Purpose

1. Revealingly, respondent waits until page 44 of his brief to concede grudgingly that "'[t]he starting point for our interpretation of a statute is always its language.'" Even then, despite acknowledging the canon that every word should be given some meaning, respondent simply fails to explain why the word "tax" appears in Guam's debt-limitation proviso. If Congress had intended to base the debt ceiling on the full value of property regardless of how the Guam government's property tax system was structured, it could simply have used the phrase "aggregate valuation."[10] Instead, it included the qualifier "tax," with the evident purpose of tying the level of permissible indebtedness to the valuation of property used to generate property

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Circuit). The judgments at issue in those cases, unlike the one here, did not become final, even initially, until after P.L. 108-378's effective date of October 30, 2004. The Guam Supreme Court's judgment in *Pacificare* was handed down on September 20, 2004, but a timely petition for rehearing by that court was not denied until November 11, 2004. The Guam Supreme Court's judgment in *A.B. Won Pat* issued on February 8, 2005. Thus, when petitioner had to decide whether to seek review of those judgments, it was clear that this Court, rather than the Ninth Circuit, was the court to which a certiorari petition should be directed. No similar clarity existed about the fate of judgments, like the one at issue here (and the one at issue in *Santos*), that had already been accepted for review by the Ninth Circuit well before P.L. 108-387 was enacted. Whatever petitioner said in passing in his *Santos* brief about cases still pending in the Guam courts is irrelevant to this case, which was already before the Ninth Circuit.

[10] *Cf. Board of Educ.* v. *Passey*, 246 P.2d 1078, 1079 (Utah 1952); *Halsey & Co.* v. *City of Belle Plaine*, 104 N.W. 494, 495-497 (Iowa 1905); *Hansen* v. *City of Hoquiam*, 163 P.391, 392 (Wash. 1917). Contrary to respondent's argument (Br. 43-44), *Passey*, *Halsey*, and *Hansen* all focused on the specific language of their state debt limitations as referring to the "value of the taxable property." Here, Congress modified Guam's debt limitation to focus specifically on "aggregate *tax* valuation."

tax revenues—however that tax valuation system is structured by local officials.[11]

2. Respondent's primary argument (Br. 32-34) is that Congress "*precisely*" and "purpose[fully]" limited borrowing "to some percentage of the aggregate *assessed* value of taxable property" in certain territories, but not in others (including Guam) (emphasis in original). Yet he articulates no rationale why Congress would have intended such a strange result. And he identifies no indication that Congress recognized such a contrast or expected different valuation measures to be used for debt limitation and for property taxation. In fact, a review of territorial debt-limitation provisos demonstrates that while Congress used different phrasings over time, it consistently advanced two broader goals: restraining borrowing to prudent levels and linking territorial debt caps to local property taxation systems, however those systems were structured in individual territories.[12] Petitioner's interpretation promotes both of these goals by requiring

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[11] Respondent's argument (Br. 44) about the significance of the Organic Act's language authorizing the Guam Legislature to provide for "[t]axes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions," 48 U.S.C. § 1423a, provides no support for his proposed interpretation. "Assessments, as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement and are laid with reference to the special benefit which the property is supposed to have derived therefrom." 14 McQuillin, *The Law of Municipal Corporations* § 38.01 (3d ed. 2005). Thus, "[t]axes and assessments" refers to distinct revenue streams, as do all of the other items listed. *See, e.g.*, *Beecham* v. *United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Respondent would render this language superfluous (and ungrammatical) by reading it to create "two separate powers, to tax and to assess," relating to the *same* revenue stream.

[12] *Cf. Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005) (refusing to apply the presumption that Congress intends differences in language to carry different meanings where the record shows "*numerous* changes that are attributable to nothing more than stylistic preference" (emphasis in original)).

territorial officials to compare apples to apples (*i.e.*, using the same valuation that generates property tax revenues to calculate debt limits). Respondent's interpretation, by contrast, would lead to anomalous results that cannot be squared with congressional purposes.

Respondent's failure to identify any statutory or legislative history recognizing the contrast in the wording or operation of debt-limitation provisions that he emphasizes is telling given Congress's numerous debt-limitation enactments. It is striking, for example, that both the 56th Congress (1899-1901) and the 81st Congress (1949-1951) enacted provisions limiting certain territories' debt to a percentage of "assessed value" or "assessed valuation" (Hawaii and the Virgin Islands, respectively) and to "tax valuation" for others (Puerto Rico and Guam, respectively),[13] yet respondent has not identified a single indication that Congress expected the debt-limitation calculations to differ substantively as between the pairs of jurisdictions. Similarly, in the Philippines, the 1902 Organic Act limited municipal borrowing to a specific percentage of "assessed valuation," but Congress revised the debt-limitation provision in the 1916 Organic Act to largely echo the Puerto Rican limitation on debt as a percentage of "aggregate tax valuation."[14] The 1916 committee report notes the new language without suggesting that any

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[13] *Compare* Act of Apr. 30, 1900, ch. 339, § 55, 31 Stat. 141, 151 (limiting Hawaii's territorial debt to "one per centum upon the assessed value of taxable property" annually and "seven per centum of such assessed value" cumulatively); Act of Oct. 27, 1949, ch. 769, § 1, 63 Stat. 940 (limiting the Virgin Islands' territorial debt to "10 per centum of the aggregate assessed valuation of the taxable real property in the islands"); *with* Act of Apr. 12, 1900, ch. 191, § 38, 31 Stat. 77, 86 (limiting Puerto Rico's territorial debt to "seven per centum of the aggregate tax valuation of its property"); Act of Aug. 1, 1950, ch. 512, § 11, 64 Stat. 384, 388 (limiting Guam's territorial debt to "10 per centum of the aggregate tax valuation of the property in Guam").

[14] *Compare* Act of July 1, 1902, ch. 1369, § 66, 32 Stat. 691, 707 (limiting municipal debt to "five per centum of the assessed valuation of the [municipality's] property"), *with* Act of Aug. 29, 1916, ch. 416, § 11, 39 Stat. 545, 548 (limiting same to "seven percentum of the aggregate tax valuation of [the municipality's] property").

substantive change was intended.[15] To the contrary, to the extent that legislative history on one territory's debt provision references other territories' limits, Congress appears to have emphasized their similarities rather than differences.[16]

Respondent relies on snippets of legislative history from the Virgin Islands and Alaska that he claims suggest that "assessed valuation" consistently refers to fractional value and "taxable value" to full value. Respondent's own analysis of the Virgin Islands statutes (Br. 33 n.12), however, undercuts the argument by indicating that those statutes' use of the term "assessed" actually refers to full value, not a fractional, assessed value.[17] Moreover, when Congress enacted the Virgin Islands debt cap in 1949, it changed the proposed language from "aggregate tax valuation" to "aggregate assessed valuation" without indicating that a substantive change was intended. *See* H.R. Rep. No. 81-682 (1949); S. Rep. No. 81-1152 (1949). Accordingly, the Virgin Islands statute does not appear to reflect a "purpose[ful]" decision by Congress to restrict debt limits based on "aggregate assessed valuation" to fractional value, while mandating that other territories' limits (such as Guam's) be based on full value.

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[15] *See* H.R. Rep. No. 64-499, pt. 1 at 12 (1916).

[16] *See, e.g.*, S. Rep. No. 94-433, at 84 (1976) (noting the inclusion of a debt limitation based on "aggregate assessed valuation" in the Northern Mariana Islands' Constitution and providing cites to "[s]imilar provisions" for Virgin Islands, Guam, and Puerto Rico, without noting that the latter two provisions reference "aggregate tax valuation"); S. Rep. No. 81-1152, at 1-2 (1949) (noting in connection with Virgin Islands legislation that "Congress in the past has granted similar authority to the local governments and to municipalities in Hawaii, Alaska, and Puerto Rico. This bill contemplates no change in congressional policy.").

[17] Specifically, as respondent himself notes (Br. 32-33 & n.12), the Virgin Islands property tax law enacted in 1936 mandated that taxes "shall be computed on the basis of the actual value of such property" and set a default tax rate of 1.25% on such "assessed value" until such time as the island's municipalities enacted conforming laws of their own. 48 U.S.C. §§ 1401a-1401b. Accordingly, there was no distinction between assessed and actual value at the time that Congress enacted the 1949 statute authorizing the territorial and municipal governments to incur debt not in excess of 10% of "aggregate assessed valuation."

Similarly, as to Alaska, in light of the fact that its Second Organic Act specifically required that for taxation purposes "assessments shall be according to the actual value thereof,"[18] it is hardly surprising that a 1936 committee report discussing legislation authorizing Alaskan municipalities to incur debt up to 10% of "aggregate taxable value" of property describes the debt cap as "a limitation of 10 percent of the total value of the taxable property." H.R. Rep. No. 74-2290, at 1 (1936) (discussing Pub. L. No. 74-626, § 1, 49 Stat. 1388 (1936)). Although respondent places great significance on the report's statement that the Alaskan statute was "in harmony" with Puerto Rico's debt limitation, this comment is consistent with petitioner's interpretation. In light of the fact that Congress had not *required* Puerto Rico to use an actual valuation system, the debt limitations are most naturally read "in harmony" if they are simply construed to require that the valuation used to generate property tax revenues be used for purposes of debt-limitation calculations as well—however that valuation is calculated—rather than to require use of full valuation *per se*.[19]

Thus, respondent fails to account for the fact that the Virgin Islands and Alaska were the only territories out of

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[18] Act of Aug. 24, 1912, ch. 387, § 9, 37 Stat. 512, 515 (dictating that property taxation "assessments shall be according to the actual value thereof" and capping taxation by territorial and municipal governments at specified percentages "of the assessed valuation of property").

[19] Puerto Rico, like Guam, apparently had no pre-existing property-tax system at the time Congress first capped its debts at a percentage of "aggregate tax valuation" (although Puerto Rico later went on to adopt an actual valuation system). Act of Apr. 12, 1900, ch. 191, §§ 38, 40, 31 Stat. 86; S. Doc. No. 56-147, at 26, 39-40, 77, 94-95 (1900); S. Doc. No. 57-77 (1901) (reprinting C.B. 5, §§ 1, 8 (Jan. 31, 1901)); *Downes* v. *Bidwell*, 18 U.S. 244, 284 (1901). Accordingly, even if the 1936 Alaskan report is construed as suggesting that Alaska's debt limitations, like Puerto Rico's, would be based on actual valuation, such a statement does not indicate that Congress intended the phrase "aggregate tax valuation" to mandate such a result. It might also be noted that, given that the Puerto Rican provision refers to "aggregate tax valuation" rather than "aggregate taxable value," the comment supports petitioner's argument that Congress did not intend minor variations in language to have substantive impact.

the larger group in which Congress had previously dictated specific federal requirements regarding property taxation. When read in proper context, the legislative history on which respondent relies does not support a sharp distinction between "taxable value" and "assessed valuation," but rather simply reflects congressional attempts to describe and harmonize the operation of the debt limitations with those specific territories' pre-existing, federally mandated property tax statutes.

Indeed, that Congress left all of the territories cited by respondent other than the Virgin Islands and Alaska free to adopt either fractional or actual valuation systems illustrates further why respondent's interpretation is unworkable and inconsistent with Congress's overall goals.[20] Had all of the unrestricted territories subsequently decided to adopt fractional-valuation systems, respondent's interpretation would have required Hawaii and the Northern Mariana Islands to calculate their debt limit based on the assessed, fractional value subject to taxation, while basing the Puerto Rico and Guam limits on full value. Respondent offers no explanation why Congress would have intended that perverse outcome.

The broader history of territorial debt caps, then, does not support respondent's claim that "tax" and "assessed"

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[20] Fractional valuation had been used at least as early as 1820, *see, e.g.*, *E. Ingraham Co.* v. *Town & City of Bristol*, 132 A.2d 563, 565 (Conn. 1957), but attracted new attention starting in the late nineteenth century as States struggled with the fact that local assessors had been arbitrarily underassessing property values for decades despite formal actual-valuation requirements. Adopting formal fractional-valuation systems was viewed as a compromise that accounted for various political pressures that contributed to underassessment, while promoting transparency and political accountability by requiring an explicit, uniform standard. By 1950, numerous jurisdictions had authorized fractional assessment systems. *See generally Louisville & Nashville R.R. Co.* v. *Coulter*, 131 F. 282, 290-291 (E.D. Ky. 1903), *rev'd on other grounds*, 196 U.S. 599 (1905); *Passey*, 246 P.2d at 1079; Jensen, *Property Taxation in the United States* 35-43 (1931); Shannon, *Conflict between State Assessment Law and Local Assessment Practice*, in *Property Taxation USA* 39, 40-45 (R. Lindholm ed., 1967).

have been used as contrasting terms, one referring to full value and the other to fractional value. Petitioner's interpretation is the most natural because it simply requires territorial officials to use the same valuation from which property taxes are generated to calculate their debt limitations, regardless of how those valuation systems are structured.

3. Respondent's observation that the Guam government derives much of its revenue from sources other than property taxes speaks to the wisdom (or folly) of basing debt limitations on property valuation generally—regardless of whether the specific metric is full property value or fractional, assessed value.

Congress was well aware that Guam would have substantial revenue from non-property tax sources, since the Organic Act itself provided for the Guam government to receive "[a]ll customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam," as well as authorizing sales taxes, license fees, and various other royalties and concessions. Act of Aug. 1, 1950, ch. 512, §§ 11, 30, 64 Stat. 384, 388, 392.[21] Moreover, the distinction respondent draws between municipal governments being highly dependent on property taxes and state governments relying on other sources of revenue was already clear by 1950.[22] Congress nonetheless chose to base Guam's debt limitation on the "aggregate tax valuation of the property in Guam," just as it had done for the various other territories cited by respon-

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[21] In 1977, Congress authorized the Guam legislature to levy an additional 10% income tax on residents, Pub. L. No. 95-134, § 203(c), 91 Stat. 1159-1162 (Oct. 15, 1977) (codified at 48 U.S.C. § 1421i(a)), but did not, it might be noted, revise the debt cap to permit additional borrowing.

[22] *See, e.g.*, Newcomer, *The Decline of the General Property Tax*, 6 Nat'l Tax J. 38, 39-40 (1953) (reporting that in 1950 less than 2% of state tax revenue and 89% of local tax revenue derived from property taxes).

dent, because doing so promotes political accountability and transparency. The Guam legislature is free to fund its debt from other sources or to change its fractional system in a way that would increase its debt cap, but it cannot do the latter without changing the basic valuation used for property tax purposes such that current taxpayers can hold lawmakers appropriately accountable.[23] Without such limitations, the legislature could excessively postpone the enactment of taxes needed to keep the government within its means, thereby imposing the burden for current spending on future taxpayers. To the extent that respondent questions the wisdom of this policy and its implications for Guam's current economic recovery, it is for Congress rather than this Court to amend the Organic Act.[24]

B. The Guam Supreme Court's Decision Is Not Entitled To Deference

Unable to defend the Guam Supreme Court's interpretation using the usual tools of statutory construction, re-

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[23] Respondent's argument (Br. 42-43) that the Guam government could raise the borrowing limit by increasing the assessment rate while lowering the tax rate ignores the political psychology that leads jurisdictions all around the United States to keep assessment rates lower than full appraised value. That widespread practice, no doubt familiar to members of Congress, reflects voters' preference for assessment rates of less than 100%, perhaps because voters are both skeptical of the willingness of legislatures to lower tax rates as property values increase and sensitive to the risk that rising property values may lead to unrealized gains yet current-year tax burdens.

[24] Respondent pleads (Br. 45-47) that the borrowing at issue in this case would benefit the Guam economy. It may be open to question whether "taking extraordinary financial obligations, such as borrowing in the bond markets to fulfill existing obligations," Bank of Hawaii, *Guam Economic Report* 5 (Oct. 2003), is wise fiscal policy, particularly when undertaken by a government that suffers from "material weaknesses in internal controls over financial operations" and has been unable to achieve clean audit reports, GAO, *U.S. Insular Areas: Economic, Fiscal, and Financial Accountability Challenges* 30 (Dec. 2006). Notably, while the recent GAO report documents several challenges to Guam's economy, debt-limitation constraints are nowhere mentioned. In any event, whether the borrowing at issue would be beneficial is irrelevant to the question of legal permissibility that this Court must resolve.

spondent insists that this Court must nonetheless defer to that interpretation because the issue concerns Guam alone. No such deference is warranted.

This Court has made clear that Article III courts owe deference to territorial courts' interpretations of local law, not federal law. *See Waialua Agric. Co.* v. *Christian*, 305 U.S. 91, 109 (1938) (territorial court's interpretation of Hawaiian law concerning validity of actions taken by incompetent to convey or assign property rights); *Matos* v. *Hermanos*, 300 U.S. 429, 432 (1937) (territorial supreme court's interpretation of territorial law mandating whether sales contract was voidable rather than void); *Santa Fe Cent. Ry. Co.* v. *Friday*, 232 U.S. 694, 700 (1914) (territorial court's interpretation of territorial statutes defining jurisdiction of territorial courts). This Court has expressly recognized the distinction between decisions of territorial courts interpreting local law and decisions interpreting federal law, explaining that "great deference must be paid to local decisions . . . [*w*]*here the Constitution or statutes of the United States* [*are*] *not involved*." *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 457-458 (1944) (emphasis added); *cf. United States* v. *Fullard-Leo*, 331 U.S. 256, 259, 269 (1947) ("[w]hile in matters of local law the federal courts defer to decisions of the territorial courts, we are dealing here with a problem of federal law" (footnote omitted)). When, as here, a federal question is presented, no such deference is called for.[25]

Ignoring this distinction, respondent relies on three decisions to support his claim for deference, principally *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974).[26] But *Pernell* affords

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[25] The courts of appeals have followed the same policy in excercising certiorari jurisdiction over decisions of territorial supreme courts. *See, e.g.*, *Gutierrez* v. *Pangelinan*, 276 F.3d 539, 546 (9th Cir. 2002) (deferring to the Guam Supreme Court on Guam law, but reviewing federal law rulings *de novo*); *Campose* v. *Central Cambalache, Inc.*, 157 F.2d 43, 44 (1st Cir. 1946) (per curiam) (same with regard to Puerto Rico).

[26] Respondent simply mischaracterizes *Santa Fe Cent. Ry. Co.* v. *Friday*, 232 U.S. 694 (1914), as turning on deference on an issue of federal law. The determination to which this Court gave deference was the New

no basis for deference to the Guam court on the issue presented in this case. First, *Pernell* recognized a policy of deference only with respect to decisions of the courts of the District of Columbia, not those of territorial courts. The precedents upon which *Pernell* relied all concerned the District, and this Court has never cited *Pernell* as supporting deference to any court outside the District.[27] Second, the statute at issue in *Pernell* was one enacted by Congress in its role as legislature for the District (pursuant to Art. I, § 8, cl. 17), not in its role as the national legislature. Thus, although the law was enacted by Congress, it was local in the relevant sense. The law at issue here, far from being local,

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Mexico Supreme Court's interpretation of a territorial statute defining the jurisdiction of certain territorial courts. Part of the basis for the New Mexico court's interpretation, and a reason that this Court thought it "plainly right," *id.* at 700, was that a contrary interpretation would have brought the local statute into conflict with the New Mexico Organic Act. But it was the proper interpretation of the territorial statute that was in question, as the precedent upon which this Court relied in deferring also makes plain. The Court cited *Phoenix Ry. Co.* v. *Landis*, 231 U.S. 578, 579-580 (1913), which re-stated, with citations to many earlier decisions, the principle that this Court "is disposed to accept the construction which the territorial court has placed upon *a local statute*" (emphasis added).

Respondent also mischaracterizes *Waialua Agric. Co.* v. *Christian*, 305 U.S. 91, 109 (1938), which addressed issues of common law concerning "the validity of a lease, a contract for maintenance, and a deed," *id.* at 93, not questions of federal statutory law. *Waialua*'s references to "general" as well as "local" law, as its footnotes make clear, *see id.* at 109 & nn.37-38, were references to the "general" federal common law recognized by this Court before its decision in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1937). In the context of the case, then, those references are best understood as references simply to common, as distinct from statutory, law. *Waialua* certainly offers no support for the claim that this Court defers to territorial courts' interpretations of federal statutes.

[27] Respondent thus is simply wrong when he asserts (Br. 38 n.15) that *Pernell* "relied upon a long-standing rule of deference" to territorial courts' interpretations of territorial law. On the contrary, *Pernell* nowhere mentions the territorial deference cases, and those cases have not mentioned *Pernell*. One other decision cited by respondent, *Hall* v. *C & P Tel. Co.*, 793 F.2d 1354 (D.C. Cir. 1986), is simply an application of *Pernell* to a worker's compensation statute for the District that incorporated many provisions from the equivalent general federal statute.

in the sense of being enacted either by the Guam legislature or by Congress as a substitute for the Guam legislature, was enacted by Congress in its role as constitution-maker for the territory. The Organic Act defines and constrains the powers of the Guam government. It would therefore be particularly inappropriate to defer to the decisions of the territory's supreme court interpreting the very law designed to limit the powers of the territory's government.[28]

CONCLUSION

For the reasons given above and in petitioner's opening brief, the judgment of the Supreme Court of Guam should be reversed.

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[28] Moreover, while *Pernell* mentioned the 1970 overhaul of the District's court system to make it more clearly resemble a state court system by subjecting decisions of the D.C. Court of Appeals to direct review in this Court as "lend[ing] additional support" to its "longstanding practice of" of deferring to "the courts of the District on local law matters," 416 U.S. at 369, a comparison on this score only cuts against deference here. For at the time the judgment under review was handed down (in 2003), Congress had yet to make the equivalent changes of establishing the Guam Supreme Court as a co-equal branch of the Guam government and shifting direct review of its decisions from the court of appeals to this Court. Those changes were made only in 2004.

While, as respondent notes (Br. 37 n.13), then-Judge Kennedy, speaking for the Ninth Circuit Judicial Council, endorsed the proposed legislation that in 1984 would authorize the Guam legislature to create a territorial appellate court, he also strongly objected to the proposed limitation of the Ninth Circuit's review to federal questions. *1983 Omnibus Territories: Hearing Before the S. Subcomm. on Energy Conservation and Supply of the Comm. Energy & Natural Res.* 371-372 (Oct. 6, 1983) (statement of Anthony Kennedy). The Kennedy/Judicial Council insistence that the Ninth Circuit's review of the territorial appellate court be plenary ultimately prevailed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
JONATHAN G. CEDARBAUM
KELLY THOMPSON COCHRAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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