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

On Writ Of Certiorari To The Supreme Court Of Guam

BRIEF FOR RESPONDENT

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DECEMBER 18, 2006

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QUESTIONS PRESENTED

1. Whether the time for filing a petition for writ of *certiorari* from this Court was tolled while a petition for writ of *certiorari* or writ of *certiorari* with respect to the same judgment was pending before the United States Court of Appeals for the Ninth Circuit.

2. Whether the Supreme Court of Guam erred in interpreting the phrase "aggregate tax valuation" in the Guam Organic Act's debt-limitation provision, 48 U.S.C. § 1424a, as tying the limit on borrowing by the Guam territorial government to the full value of property on Guam rather than to the assessed value used for purposes of taxation.

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INTRODUCTION

The Guam Supreme Court held that the debt limitation provision in the Guam Organic Act limits the Guam government's borrowing to 10 percent of the value of the taxable property on Guam. Petitioner disagrees and urges an interpretation that would limit government borrowing to 10 percent of assessed property values, which would substantially lower the limit and preclude additional government borrowing, in particular certain bonds that have been authorized by the Guam legislature and Governor in order to refinance decade-old debt at a lower rate and to pay other pre-existing government obligations.

Petitioner sought reversal of the Guam Supreme Court ruling in the Ninth Circuit. On October 30, 2004, however, when the case was awaiting opinion from the Ninth Circuit, Congress eliminated the Ninth Circuit's jurisdiction over decisions of the Guam Supreme Court. As of that date, the Ninth Circuit no longer possessed any authority to modify the judgment of the Guam Supreme Court or to alter the parties' rights. The Guam Supreme Court's judgment was then no longer reviewable by any court other than this Court so that a petition for a writ of *certiorari* to this Court was due within 90 days under 28 U.S.C. § 2101(c), *i.e.* January 28, 2005. Petitioner did not, however, obtain an extension of time for filing in this Court until May 2006, claiming timeliness because of a delayed jurisdictional dismissal from the Ninth Circuit. But this Court has made clear, on numerous occasions, that a lower court's deliberation as to its jurisdiction to resolve a case, after it has been divested of jurisdiction, does not extend the time for the filing of a petition for a writ of *certiorari* if the lower court concludes it lacks jurisdiction. Thus, this case should be dismissed for want of jurisdiction.

If the Court reaches the merits of the Guam Supreme Court's ruling, it should be affirmed. Congress enacted the Guam Organic Act to establish a democratic regime within the territory, by conferring United States citizenship and establishing a popularly elected legislature with broad

powers to govern local aspects of the territory, including the core governmental powers to tax and borrow, with few limitations. Congress has repeatedly reaffirmed the significance of self-governance in Guam, including by establishment of the popular election of the Governor and the independence of the Guam Supreme Court. The Guam Supreme Court's interpretation here is fully grounded in the language, purpose, and history of the statute, and is entitled to the same substantial deference that this Court has accorded other territorial courts that have construed federal laws of purely local application.

STATEMENT

A. Statutory and Factual Background

1. Section 11 of the Organic Act of Guam, 48 U.S.C. § 1423a, provides in relevant part that:

> [W]hen necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam.

Congress enacted Section 11 in 1950 as part of the Organic Act's establishment of a civil government for the people of Guam, who at that point had been under the jurisdiction and control of the United States by virtue of the Treaty of Paris at the end of the Spanish-American War in 1898. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, 30 Stat. 1754 (1898) (ratified Feb. 6, 1899). The Act bestowed United States citizenship on the people of Guam and empowered them to elect their own legislature for the first time. Pub. L. No. 81-630, 64 Stat. 384 (1950). In 1968, federal law established the popular election of the Governor of Guam as well. *See* Pub. L. No. 90-497, § 1, 82 Stat. 842 (1968).

In 1984, Congress amended the Guam Organic Act to authorize the establishment of a Guam Supreme Court, Pub. L. No. 98-454, tit. VIII, 98 Stat. 1742 (1984), which the Guam legislature created in 1992 and which began

functioning in 1996. *See Topasna v. Superior Court of Guam*, 1996 Guam 5, 1996 WL 870741, at *3 (1996). Congress initially provided that, for the first 15 years after the court's creation, the Ninth Circuit would maintain intermediate appellate oversight through petitions for *certiorari*. Pub. L. No. 98-454, tit. VIII, § 801, 98 Stat. 1732. In 2004, after eight years, however, Congress abolished that Ninth Circuit jurisdiction and established that the decisions of the Guam Supreme Court are subject to review only in the Supreme Court of the United States. *See* Pub. L. No. 108-378, § 2, 118 Stat. 2208 (2004).

2. On April 28, 2003, pursuant to the authority granted by Section 11 of the Guam Organic Act, the Guam legislature enacted Guam Pub. L. No. 27-19 to authorize the issuance of new bonds by the Guam government of up to $418,309,857. Pet. App. 2a. Nearly half of that amount is to refinance old debt incurred by prior Guam administrations, *i.e.*, $200 million is to "fund an escrow to pay debt service on all or a portion of the Government of Guam General Obligation Bonds, 1993 Series A at matched maturity." *Ibid*. (quoting Guam Pub. L. No. 27-19, § 2 (2003)). The bonds thus would mean significant savings for the government of Guam through refinancing pre-existing obligations at a more favorable rate.

The other portion of the bond amount, $218,309,857, was aimed at meeting other pre-existing governmental obligations, and could be used "to pay income tax refunds, utility payments to the Guam Power Authority, retirement fund payments, withholding tax payments, general fund vendor payables, and public school repairs." *Ibid*. The need for these government funds resulted from the devastating impact on Guam of an unusual combination of major world events within a relatively short time period, *i.e.* the decline in the tourism industry on the Island due to the tragedy of September 11, 2001, particularly Japanese tourism which typically is very significant on Guam; a super-typhoon; the health crisis in parts of Asia due to SARS; and increased tensions with North Korea. Pet. App. 44a-48a. The need for the bonds to recover from that period remains but Guam is looking forward to increased economic prosperity

in the near future, including the substantial increase of United States military on the Island and the attendant infusion in the commerce of the local economy that will result. *See* First Hawaiian Bank, *Economic Forecast: Guam Outlook Brighter Than In Several Years* 1-2, 8-12 (2006-2007). Indeed, in anticipation of this future growth, Guam real estate values have attained pre-recession levels and are still rising. *Id.* at 10-11.

On April 28, 2003, the Governor of Guam signed the bond legislation into law. Pet. App. 2a. On May 14, 2003, however, petitioner, the Attorney General of Guam, notified the Speaker of the Guam Legislature and the Governor of his refusal to sign any contract for issuance of the bonds, a signature of approval that is required under 5 G.C.A. § 22601 for government contracts. Pet. App. 2a-3a.[1]

Petitioner claimed that the issuance of the bonds would violate the debt limitation of Section 11 of the Organic Act based on his unilateral conclusion that the Section 11 limit must be based on the *assessed* value of property on Guam and that the current tax list was inaccurate. *Id*. at 3a. By contrast, the Guam Legislature and Governor understand Section 11 not to impose such an unstated restriction on the borrowing power of the government and read it to allow calculation of Guam's debt-limit based on the full appraised value of taxable property on Guam.

B. Proceedings Below

1. On July 1, 2003, the Governor filed an action for a declaratory judgment in the Guam Supreme Court that the

[1] Petitioner's authority not to approve a contract can be exercised only if the contract is illegal or not in the proper form. *See A.B. Won Pat Guam Int'l Airport Auth. v. Moylan*, 2005 Guam 5, 2005 WL 291577, at *4, *17-18, *cert. denied*, 126 S. Ct. 338 (2005) (statute prohibiting execution of contracts "without the approval of the Attorney General" permits Guam Attorney General to review contracts only "with respect to their legality and form" and imposes on the Attorney General "a legal duty," which can be enforced through mandamus, "to approve a contract which is lawful as to form and content").

authority to issue bonds under Guam Pub. L. No. 27-19 would not violate Section 11 of the Organic Act, and petitioner was permitted to intervene. Pet. App. 1a, 3a.

After briefing and oral argument, the Guam Supreme Court issued a lengthy published opinion, Pet. App. 1a-35a, and held that "the allowable public indebtedness under Section 11 is to be ascertained with reference to the appraised value of the property on Guam, as reflected on the certified tax roll in effect at the time the debt is incurred." *Id*. at 2a. As such, the court determined that the Guam government's issuance of the bonds authorized by Guam Public Law No. 27-19 would not violate Section 11. *Ibid*.

2. Under the federal law then in effect, as discussed above, petitioner timely filed a petition for intermediate review by the Ninth Circuit of the Guam Supreme Court judgment and the Ninth Circuit granted review on October 23, 2003. Pet. App. 37a. The parties briefed the case and presented oral argument before the panel in May 2004. J.A. 12a-13a.

On October 30, 2004, Congress enacted a statute to eliminate the Ninth Circuit's jurisdiction to review cases from the Guam Supreme Court, Pub. L. No. 108-378, § 2, 118 Stat. 2208 (2004). Petitioner did not file a petition for a writ of *certiorari* in this Court to review the Guam Supreme Court ruling within 90 days of that date.

The Ninth Circuit ultimately entered an order dismissing the instant case more than one year later, on March 6, 2006, and the mandate issued on March 28, 2006. J.A. 14a. Two months later, on May 24, 2006, petitioner filed an application for an extension of time for filing a *certiorari* petition in this Court, indicating that he intended to seek this Court's review of the Guam Supreme Court judgment over which the Ninth Circuit had lost jurisdiction on October 30, 2004. This Court granted an extension on May 31, 2006, pursuant to which petitioner filed on July 19, 2006 a petition in this Court for a writ of *certiorari* to the Guam Supreme Court. This Court granted *certiorari* on September 26, 2006, and posed the additional question presented regarding whether the Attorney General's *certiorari* petition in this Court was timely filed.

SUMMARY OF ARGUMENT

I.

A. The Court should dismiss this case for lack of jurisdiction because the petition for a writ of *certiorari* in this Court was not timely filed. The jurisdictional question posed by this Court when it granted *certiorari* in this case raises two different issues with regard to the running of the 90-day period for filing a *certiorari* petition in this Court. The parties agree that the time for filing a petition for a writ of *certiorari* in this Court to review the Guam Supreme Court was initially tolled while a petition for a writ of *certiorari* was pending before the Ninth Circuit. The parties also agree that Congress's enactment of Public Law No. 108-378 on October 30, 2004, eliminated the Ninth Circuit's jurisdiction over Guam Supreme Court decisions, such as this one, then awaiting decision in the Ninth Circuit. *See Santos v. Guam*, 436 F.3d 1051 (9th Cir. 2006).

The parties do not agree, however, that tolling continued *after* Congress eliminated the Ninth Circuit's jurisdiction over the case. This Court's precedents demonstrate that tolling ceased as of the date on which Congress eliminated the Ninth Circuit's jurisdiction because the Ninth Circuit no longer had any authority to "modify the judgment and alter the parties' rights." *Hibbs v. Winn*, 542 U.S. 88, 98 (2004). As such, petitioner was subject to the requirement of 28 U.S.C. § 2101(c) to seek review of the Guam Supreme Court's judgment within 90 days of that elimination of jurisdiction.

B. Petitioner is wrong that the time for filing a *certiorari* petition in this Court continued to be tolled until the date on which the Ninth Circuit exercised ancillary jurisdiction to issue an order dismissing the case for lack of jurisdiction. There are several analogous circumstances in which this Court has made clear that a lower court's resolution of whether it has or will exercise jurisdiction to resolve the merits of a case after that court already has been divested of jurisdiction over such a case does not extend the time for filing a petition for a writ of *certiorari* in this Court. If petitioner's contrary rule were to apply,

there would be no bar to dissatisfied litigants filing in the wrong court to extend proceedings, thus denying prevailing parties the repose that appellate time limits provide.

C. In any event, petitioner (who is the Attorney General of Guam) filed briefs in other cases in both the Ninth Circuit and in this Court, during the 90-day period for filing a *certiorari* petition in this case, that demonstrated that he understood that the Ninth Circuit was divested of jurisdiction over decisions from the Guam Supreme Court as of October 30, 2004.

Petitioner now urges this Court to extend its tolling doctrines because, he insinuates, the Guam Supreme Court is not sufficiently independent. Congress's elimination of the Ninth Circuit's jurisdiction over Guam Supreme Court decisions, however, reflected Congress's confidence that the Guam judiciary had been following the rule of law and had shown such a commitment so as to no longer need the additional intermediary review of the Ninth Circuit. Indeed, before petitioner lost in the Guam Supreme Court, he had been a champion of the review by that court, having urged the Governor and the Speaker of the Guam legislature to seek a declaratory judgment in that court to resolve this very case.

Petitioner had ample opportunity to preserve this Court's jurisdiction over the instant case. He could have filed a petition for a writ of *certiorari* within 90 days of Congress's elimination of the Ninth Circuit's jurisdiction on October 30, 2004. He also could have requested that the Ninth Circuit vacate the judgment and remand the case to the Guam Supreme Court so that it could re-enter its judgment and facilitate the filing of a timely *certiorari* petition to this Court, but petitioner made no such request in this case. Such relief is not available from this Court in this case at this time, however, because an *untimely* petition to this Court cannot empower it to facilitate the creation of an order that could have been timely reviewed in this Court.

II.

A. With respect to the merits, the Guam Supreme Court properly construed Section 11 of the Guam Organic Act to limit the Guam legislature to borrowing no more than 10 percent of the appraised value of taxable property on Guam. This interpretation tracks the language of Section 11, provides meaning to each statutory term, and neither omits nor adds meaning to any words of the statute. Had Congress, as petitioner argues, intended to limit the Guam legislature's borrowing power to 10 percent of the *assessed* valuation of the taxable property on Guam, Congress would have done so, as it had in other statutes limiting territorial borrowing authority to the "assessed valuation of the taxable real property." 48 U.S.C. § 1403.

The decision of the Guam Supreme Court also is well-supported on other grounds. Congress has imposed debt limitations in other circumstances without any reference to "assessed" valuation, and has interpreted such provisions to constitute a limitation based upon the "total value of the taxable property." Moreover, petitioner would have this Court ignore the well-settled canon of statutory construction that exceptions must be construed narrowly, the disregard of which is particularly incongruous where Congress has broadly conferred power to the people of Guam to govern their own affairs. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995).

B. Even if this Court were to conclude, however, that ambiguity exists and the Guam Supreme Court's decision is but one of a number of possible constructions of the Act, the Court should defer to the Guam Supreme Court's interpretation here. This Court has repeatedly emphasized that the decisions of territorial courts on matters of purely local concern are entitled to great weight and should not be disturbed except in exceptional situations where egregious error has been committed. This deference extends to the interpretation of Acts of Congress directed toward the local jurisdiction, even though such laws fall within the Court's Article III jurisdiction. *Pernell v.*

Southall Realty, 416 U.S. 363 (1974); *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. 694 (1914).

C. None of petitioner's arguments defeats the deference that the Guam Supreme Court is due. Petitioner's claim that public indebtedness of Guam must be strictly limited "to anticipated taxes and revenues" falters because there is no congressional mandate that borrowing be limited to pre-existing streams of revenue. Had Congress intended such a result, it would have said so, as it had on other occasions. Equally erroneous is petitioner's reliance upon state court constructions of inapposite state constitutional debt limitations. Petitioner demonstrates no more than the obvious: that when a State limits municipal indebtedness to a percentage of assessed property values it expressly says so in the governing law. But petitioner proffers no state constitutional provision analogous to the language at issue here, and certainly no state case imposing a debt limitation that appears nowhere in the state constitution or statute.

Finally, petitioner's public policy arguments, which lack any basis in the text of the statute, must be dismissed. Contrary to petitioner's claims, the borrowing at issue will not overburden future generations. Not only does petitioner overlook the numerous streams of revenue Congress empowered the Guam legislature to obtain, but petitioner ignores the fact that the bonds at issue will refinance the debts of prior administrations at more favorable interest rates and will primarily meet pre-existing governmental obligations.

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION BECAUSE THE *CERTIORARI* PETITION IN THIS COURT WAS UNTIMELY

A. Congress's Elimination Of The Ninth Circuit's Jurisdiction Terminated Its Jurisdiction Over This Case As Of The Effective Date Of The Legislation And Triggered The 90-day Period For Seeking Review From This Court

1. A petition for a writ of *certiorari* for review by this Court in a civil case must be filed within 90 days after entry of the judgment or decree in the "civil action, suit or proceeding." 28 U.S.C. § 2101(c). Petitioner does not dispute (Pet. Br. 16) that the "90-day limit is mandatory and jurisdictional." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). "No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained." Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 349 (8th ed. 2002).

The jurisdictional question posed by this Court when it granted *certiorari* in this case raises two different issues with regard to the running of that filing period. The parties agree that the time for filing a petition for a writ of *certiorari* in this Court was tolled while the petition for a writ of *certiorari* was pending before the Ninth Circuit. *See, e.g., Andrews v. Virginian Ry. Co.*, 248 U.S. 272 (1919) (the time for petitioning this Court for *certiorari* to review the judgment of a state intermediate court is tolled while discretionary review is sought from a higher court in that same state court system).[2]

[2] We use the term "tolling" here to refer to the point in time when the filing period "began to run," *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991), which is not so much "a matter of tolling" in the typical sense because the 90-day period for seeking *certiorari* in this Court restarts in full following review by an intermediate appellate court that has authority to "modify the judgment and alter the parties' rights." *Hibbs*,

(Continued on following page)

But the parties do not agree that that tolling continued after Congress eliminated the Ninth Circuit's jurisdiction over the case. This Court's precedents demonstrate that the tolling ceased as of the date on which the Ninth Circuit was divested of jurisdiction because the Ninth Circuit no longer had jurisdiction to "modify the judgment and alter the parties' rights." *Hibbs v. Winn*, 542 U.S. at 98. Petitioner is therefore wrong in his claim that the period continued to be tolled thereafter, up until the time the Ninth Circuit issued an order dismissing the case for lack of jurisdiction.

2. The Guam Supreme Court entered judgment in this case on July 23, 2003. At that time, federal law provided that decisions of the Guam courts generally would be "governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States." Pub. L. No. 98-454, tit. VIII, § 801, 98

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542 U.S. at 98; *cf. Missouri v. Jenkins*, 495 U.S. 33, 46 (1990) (timely request to intermediate appellate court to exercise its authority to reconsider and alter its decision "suspend[s] the finality" of the judgment sought to be reviewed pending disposition of that request).

Under a typical tolling doctrine, by contrast, a filing period does not restart in full. Rather, "whatever time ran before the clock was stopped" is subtracted from the full period to determine the amount of time remaining for filing. *Ibarra*, 502 U.S. at 4 n.2. Under that scenario, the *certiorari* petition to this Court was untimely even if petitioner were correct that tolling continued until entry of the Ninth Circuit order dismissing the case on March 6, 2006. Eight days had elapsed between the Guam Supreme Court's judgment and petitioner's invocation of the Ninth Circuit's jurisdiction, so that only 82 days of the 90-day filing period in this Court remained, which made the *certiorari* petition due in this Court on May 27, 2006 (a Saturday). Petitioner did not obtain an extension of time until May 31, 2006 (the following Wednesday), to file the petition in July 2006. S. Ct. Docket, No. 06-116. This Court's order granting an extension after the date for filing already has passed does not render a petition timely. *See FEC*, 513 U.S. at 98-99 (holding that "the Solicitor General's 'after-the-fact' authorization does not relate back to the date of the FEC's unauthorized filing so as to make it timely" because "[s]uch a practice would result in the blurring of the jurisdictional deadline"); *see, e.g.*, *Northwest Airlines, Inc. v. Spirit Airlines, Inc.*, 127 S. Ct. 340 (2006) (No. 06-M-7) (motion to direct the Clerk to file a petition for writ of *certiorari* out of time denied).

Stat. 1742 (1984) (codified at 48 U.S.C. § 1424-2). Congress had made one exception to that rule. It provided that "for the first fifteen years" following establishment of the Guam Supreme Court, "the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of *certiorari* all final decisions of the highest court of Guam from which a decision could be had." *Ibid*. Pursuant to this provision, petitioner sought a writ of *certiorari* from the Ninth Circuit on October 1, 2003 to review the Guam Supreme Court decision, which was granted on October 23, 2003.

Congress, however, eliminated the Ninth Circuit's Public Law 98-454 jurisdiction over Guam Supreme Court judgments on October 30, 2004, before the Ninth Circuit issued any decision on the merits in this case. *See* Pub. L. No. 108-378, § 2, 118 Stat. 2208. Petitioner does not dispute that, as the Ninth Circuit correctly determined in *Santos v. Guam*, 436 F.3d 1051, Congress eliminated the Ninth Circuit's jurisdiction over Guam Supreme Court decisions, such as this one, in which it had granted review but had not yet issued a decision at the time the law became effective. Pet. App. 39a. *See also* Pet. Mot. for Extension of Time, at 2 (filed May 24, 2006) (noting that "Congress divested the Ninth Circuit Court of Appeals of jurisdiction of this appeal after the Ninth Circuit had taken this case under advisement but before the Ninth Circuit rendered it's [sic] decision.").[3]

As of that divestiture of Ninth Circuit jurisdiction on October 30, 2004, the Guam Supreme Court's judgment was no longer subject to review by any court that had jurisdiction to alter that judgment, other than this Court.

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[3] Other litigants, involved in decisions from the highest court of the Commonwealth of the Northern Mariana Islands, sought review of a Ninth Circuit ruling that relied on *Santos* to hold that the expiration of Ninth Circuit jurisdiction by force of another law (48 U.S.C. § 1824) applied to cases then pending before that court of appeals. This Court denied review of those Ninth Circuit decisions. *See Oden v. Northern Marianas College*, 440 F.3d 1085 (9th Cir.), *cert. denied*, 127 S. Ct. 108 (2006) (No. 05-1545); *Roberto v. Fejeran*, No. 04-72996 (9th Cir. Apr. 25), *cert. denied*, 127 S. Ct. 257 (2006) (No. 06-115).

Therefore, the period during which the Attorney General was required to file a petition for a writ of *certiorari* to this Court commenced on that date. Just as "the filing of a timely petition for rehearing defers the finality necessary for Supreme Court review until the petition is denied, the judgment is modified, or the power to act upon the petition expires," Stern & Gressman, *supra*, at 161, the granting of review by the Ninth Circuit deferred finality of the Guam Supreme Court only until the Ninth Circuit's power to act on the merits of the case was eliminated.

Indeed, the divestiture of Ninth Circuit jurisdiction is an even more significant triggering act for running of the 90-day period for seeking *certiorari* review in this Court than is denial of an initial rehearing petition, because in the latter circumstance, a court retains inherent authority to address the merits through a *sua sponte* rehearing, but no such discretion remains over the merits in the absence of jurisdiction.

Accordingly, petitioner's filing of his *certiorari* petition in this Court more than one year after Congress's elimination of the Ninth Circuit jurisdiction was out of time. After October 30, 2004, the Guam Supreme Court's judgment was no longer the subject of review by a court that could "modify the judgment and alter the parties' rights." *Hibbs,* 542 U.S. at 98. As such, petitioner was subject to the requirement of 28 U.S.C. § 2101(c) to seek review of the Guam Supreme Court's judgment within 90 days of that elimination of Ninth Circuit jurisdiction. The absence of Ninth Circuit jurisdiction to alter the judgment meant that it was subject to review by this Court. *Cf. Market Street Ry. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 552 (1945).

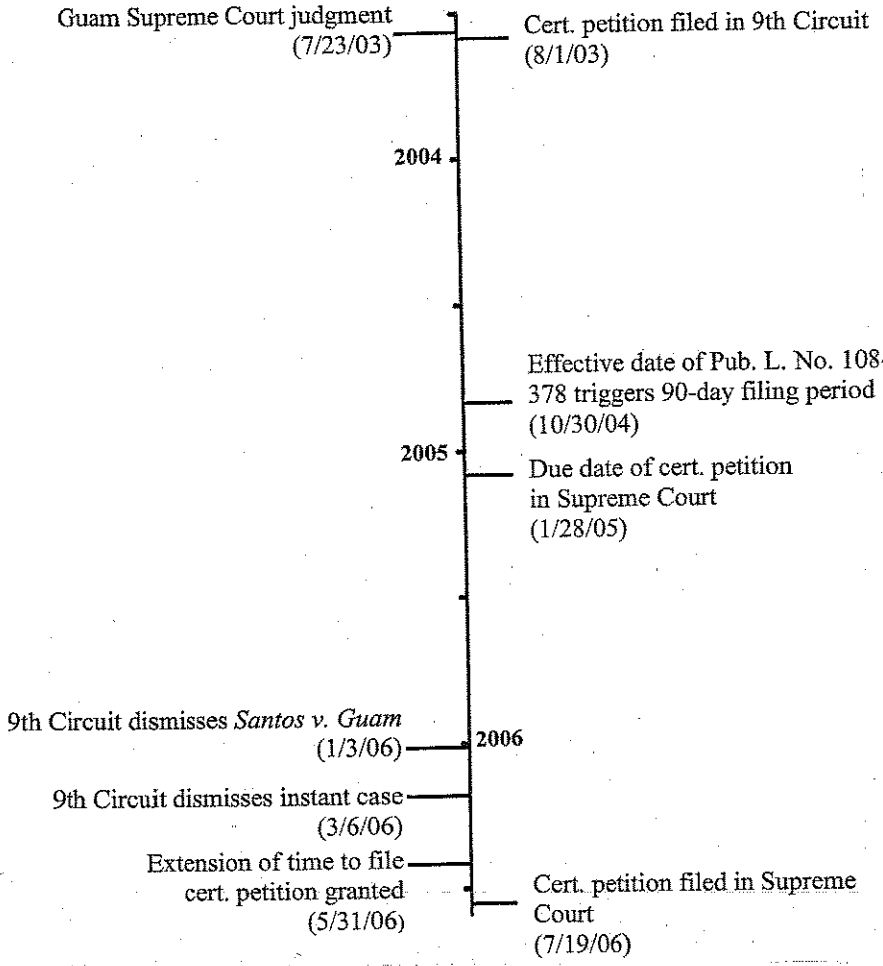
B. The Ninth Circuit's Delayed Order Dismissing The Case Did Not Extend The Time For Seeking This Court's Review Of The Guam Supreme Court Judgment

1. Petitioner contends (Pet. Br. 22) that it was the order of the Ninth Circuit dismissing the case for lack of jurisdiction that "determined that petitioner was no longer

required to pursue his pending appeal before that court" and "triggered the running of Section 2101(c)'s 90-day period for seeking *certiorari* review by this Court." Petitioner asserts that he was precluded from seeking review of the Guam Supreme Court judgment earlier because the Guam Supreme Court judgment somehow was not final until the Ninth Circuit order. Pet. Br. 22 n.6.

Petitioner's argument is without merit because it would allow the delay of an appellate order to repeal a jurisdictional enactment by Congress. The cases on which petitioner relies do not support his argument because, in all of those circumstances, the lower courts maintained jurisdiction to adjudicate the case through a petition for rehearing or a motion for a new trial, something that the Ninth Circuit unquestionably lacked here.

The Ninth Circuit's exercise of ancillary jurisdiction to issue a jurisdictional order of dismissal in this case did not extend the 90-day period for seeking review in this Court of the Guam Supreme Court's judgment. Contrary to petitioner's claim, there was no longer any suspension of finality of the Guam Supreme Court judgment for the reasons discussed further below. Indeed, if petitioner's contrary rule were to apply, there would be no bar 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. That would deny prevailing parties the repose that appellate time limits are intended to provide. *See Matton Steamboard Co. v. Murphy*, 319 U.S. 412, 415 (1943); *FEC*, 513 U.S. at 99. Indeed, in this case petitioner seeks to obtain an additional year of tolling, as consideration of the relevant dates demonstrates in the following timeline:



2. There are several analogous circumstances in which this Court has made clear 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* in this Court if the lower court determines, as the Ninth Circuit did here, that it lacks jurisdiction.

a. *Petition For Rehearing Denied By Operation Of Statute.* In some jurisdictions, state law mandates denial of a rehearing petition upon expiration of a set period of time if the state appellate court has not acted on the petition by that date. In such cases, the time for seeking *certiorari* review in

this Court runs from the date prescribed by law for denial of rehearing, regardless of the date, if any, on which the court ultimately enters its order of denial of rehearing. "A timely petition for rehearing defers finality for [this Court's] purposes until it is acted upon or *until power to act upon it has expired* as here it would appear [by law] to do at the end of the 30-day period." *Market Street Ry. v. Railroad Comm'n of Cal.*, 324 U.S. at 552 (emphasis added). The party who sought rehearing cannot delay seeking review in this Court until it receives a further order of the appellate court. It must file a petition for a writ of *certiorari* within 90 days of the date on which rehearing is denied as a matter of law.

b. *Request For Post-Judgment Relief From A Court That Lacks Power To Grant It.* This Court has held that a state supreme court ruling that that court lacked authority to grant a post-judgment motion did not restart the time for filing a petition for *certiorari* review in this Court, but rather the time ran during the pendency of the post-judgment motion.

In *Isenberg v. Sherman*, 286 U.S. 547 (1932), after the California Supreme Court had denied a petition for rehearing and sent its mandate to the lower court, a party filed a motion to recall the mandate on the ground that the state court's judgment had been granted through mistake of fact, false suggestion, and fraud. Five months later, the California Supreme Court denied the motion because it concluded that the "case must be treated as having been determined finally and no longer within the jurisdiction of this court." *Isenberg v. Sherman*, 7 P.2d 1006, 1010 (Cal. 1932). The party filed a petition for *certiorari* in this Court that was timely if calculated from the date of that last order by the appellate court but not, if calculated from the date of the initial rehearing denial. *See* Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 384, at 772-773 (Richard F. Wolfson & Philip B. Kurland eds. 2d ed. 1951). But this Court denied the petition because "the application for writ of *certiorari* was not made within the time provided by law." 286 U.S. at 547.

c. *Request For Leave To File A Second Petition For Rehearing.* When a party seeks leave to file a second petition for rehearing in a court of appeals, the application requesting such leave does not alter the fact that the time for filing a petition for *certiorari* for review by this Court continues to run, unless the court grants the motion for leave to file the petition. *See Morse v. United States*, 270 U.S. 151, 154 (1926); *Chicago Great Western R. Co. v. Basham*, 249 U.S. 164 (1919). A party who seeks leave to file a second rehearing petition cannot delay seeking review in this Court until it receives a further order of the appellate court denying that request. It must file a petition for a writ of *certiorari* within 90 days of the date on which the court of appeals acted on the initial rehearing request pursuant to this Court's Rule 13.3.[4]

During the pendency of a request for leave to file a second rehearing motion, the party does not, of course, know whether the motion will be granted. Thus, the party cannot know whether the time for petitioning for *certiorari* review in this Court of the judgment will be suspended by a grant of such leave. But it is clear that such uncertainty does not allow the party to wait to learn what the court of appeals decides. Rather, that party must file for *certiorari* in this Court based on the divestment of the court of appeals' jurisdiction that results from the action on the initial rehearing request. This is so even though if the court of appeals ultimately grants leave to seek a second rehearing, the *certiorari* petition will be subject to withdrawal or dismissal as premature.

For example, in *Gypsy Oil Co. v. Escoe*, 275 U.S. 498 (1927), a party's first petition for rehearing in a state appellate court was denied. It sought leave to file a second

[4] This Court's Rule 13.3 which defines the point at which the time to file a petition for writ of *certiorari* begins to run, is based on the Court's "traditional and virtually unquestioned practice" under Section 2101(c) and its predecessors and analogues. *United States v. Dieter*, 429 U.S. 6, 8 n.3 (1976); *see, e.g., Jenkins*, 495 U.S. at 46 (citing *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)).

petition for rehearing in the state appellate court. Although that application initially was endorsed "granted," the state appellate court entered a formal order almost two months later denying leave to file the second rehearing petition. The party then filed a petition for a writ of *certiorari* in this Court. The *certiorari* petition was out-of-time if the time for filing was calculated from the denial of the first petition for rehearing, but timely if calculated from the denial of leave to file the second petition.

This Court held that the *certiorari* petition was untimely because "further suspension [of the time] cannot be obtained by the mere presentation of a motion for leave to file a second petition for rehearing." *Id*. at 499; *see Jurisdiction of the Supreme Court*, *supra*, § 43, at 76 (time not tolled "[for] second petition for rehearing which the highest state court has denied leave to file," citing *Clark v. Alabama*, 311 U.S. 688 (1940)); *see also id*. § 384, at 769 ("the period in which to apply to the Supreme Court" is not tolled "by a petition for rehearing *subsequently* stricken as violating the rules of the state court," citing *Doss v. Illinois*, 320 U.S. 762 (1943)).

d. *Seeking Leave To File Untimely Petition For Rehearing*. This Court has also held that an untimely petition for rehearing does not toll the time for filing a petition for *certiorari* in this Court unless the lower court subsequently grants leave to file the out-of-time petition.

In *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942), a party argued that its motion to file an out-of-time petition for rehearing in the court of appeals should have tolled the time to seek *certiorari* review in this Court on the theory that, while the court was considering the out-of-time rehearing petition, the underlying order was no longer final. This Court rejected the argument that a court's "consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing [was] sufficient to resurrect the original order," even when "examination of the grounds of the petition for rehearing is equivalent to a reexamination of this basis of the original decree." *Id*. at 150. Instead, the

Court concluded that "examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order" unless it is clear that the court "refus[ed] to modify the original order" and did not simply "refus[e] to allow the petition for rehearing." *Id*. at 150-151; *see also Bernards v. Johnson*, 314 U.S. 19, 31 (1941) ("An order denying a petition for rehearing or review which is dismissed because the petition was filed out of time, without reconsideration of the merits, does not extend the time for appeal from the original order."). *Compare Young v. Harper*, 520 U.S. 143, 147 n.1 (1997) (holding time for seeking *certiorari* was tolled when court of appeals exercised its authority to permit a petitioner to file a late petition for rehearing).

Thus, as this Court explained in a case in which an application for rehearing (apparently analogous to a Federal Rule of Civil Procedure 60(b) motion) was filed in a bankruptcy court *after* the time for appealing to the circuit court had passed: "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal." *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937).[5]

[5] A similar body of law exists to determine whether a petitioner has complied with the requirement in 28 U.S.C. § 1257(a) and its predecessors that state court judgments must be "rendered by the highest court of a State in which review could be had" before *certiorari* can be sought to this Court. This Court has consistently held it is not enough for a person aggrieved by an intermediate state court to show this Court that there was no case law interpreting whether a higher state appellate court had jurisdiction at the point in time at which he sought further review from this Court. Thus, in *Gotthilf v. Sills*, 375 U.S. 79 (1963), a party appealed a judgment from an intermediate New York appellate court to New York's Court of Appeals, but his appeal was dismissed by that court because that court determined that it lacked jurisdiction because the judgment was not final under state law. This Court ultimately dismissed the case on the ground that the party was not seeking review of a judgment rendered by the highest state court in

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The circumstances of the instant case are directly analogous to these prior precedents. Once Congress eliminated the Ninth Circuit's jurisdiction to alter the Guam Supreme Court's judgment in this case, the Guam Supreme Court order was subject to review in this Court and the 90-day time under Section 2101(c) for filing a *certiorari* petition commenced. The delay in the Ninth Circuit subsequently entering an order of dismissal for want of jurisdiction did not extend the time for filing.

C. Petitioner Had Actual Knowledge That The Ninth Circuit Had No Jurisdiction After October 30, 2004, And He Had Ample Means To Protect His Ability To File A Timely *Certiorari* Petition In This Court

Petitioner suggests (Pet. Br. 22) that, until the Ninth Circuit entered its order of dismissal for lack of jurisdiction in this case, he was uncertain whether Congress had divested that court of jurisdiction and thus tolling should be deemed to continue until that date. As just demonstrated, however, this Court's decisions have long contemplated that a party may not know until after a lower court issues a ruling whether the time for seeking *certiorari* review in this Court is running or has been tolled.

In any event, adoption of a contrary rule in the instant case would not benefit petitioner because there is no basis for tolling inasmuch as petitioner not only had

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which review could be had because, in this Court's judgment, petitioner could have sought review from the state Court of Appeals through a different procedural means. *Id*. at 80. This was so even though, as the dissenters noted, the question of state appellate jurisdictional law was a novel one at the time the case was in the state court system. *Id*. at 82 (Douglas, J., dissenting) ("The determination of the Court of Appeals * * * came as a surprise."); *see also*, *e.g.*, *Fisher v. Perkins*, 122 U.S. 522, 525 (1887) (holding that newly enacted Kentucky law governing appeals permitted further review in state court system and thus petitioner had not established "affirmatively on the face of the record that a decision in this suit could not have been had" in a higher state court).

actual knowledge of the Ninth Circuit's lack of jurisdiction as of October 30, 2004, he also represented in filings in other cases in both that court and this Court during the relevant time period that jurisdiction had been eliminated by Congress as of that date. Petitioner was fully aware of his opportunity to seek further review by this Court during that period and there is no basis for excusing his failure to do so.

1. Petitioner acknowledged in court filings, during the 90-day *certiorari* filing period, that the Ninth Circuit's jurisdiction over Guam Supreme Court decisions had been eliminated on October 30, 2004

Petitioner, who is the Attorney General of Guam, filed briefs in both the Ninth Circuit and in this Court that demonstrated that he understood that the Ninth Circuit was divested of jurisdiction over decisions from the Guam Supreme Court as of October 30, 2004, the effective date of Public Law 108-378. Yet, petitioner took no steps for more than a year thereafter to file a *certiorari* petition in this Court in this case. Under the circumstances, petitioner cannot colorably claim that he "has been pursuing his rights diligently." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (standard for equitable tolling).

Petitioner was counsel for respondent in *Santos v. Guam*, 436 F.3d 1051, the only other case from the Guam Supreme Court that appears to have been awaiting decision in the Ninth Circuit on October 30, 2004, when Congress divested that court of jurisdiction to review Guam Supreme Court decisions. After enactment of Public Law 108-378, the parties briefed the jurisdictional question in the *Santos* case and petitioner was aware that that ruling would govern the instant case as well because the Ninth Circuit entered an order on December 15, 2004, to that effect. Pet. App. 49a.

In his jurisdictional brief filed in the *Santos* case on December 27, 2004, petitioner proffered two alternative

views of the effect of the law. Petitioner's primary contention was that:

> under the holding of *Bruner v. United States*[, 343 U.S. 112 (1952)], Public Law 108-378 upon its effective date ousted [the Ninth Circuit] of jurisdiction to review the Guam Supreme Court decision in this case. [The Ninth Circuit] must remand this case to the Guam Supreme Court in accordance with that fact.

Guam's Supplemental Brief Re: Jurisdiction, at 3, *Santos v. Guam*, No. 03-70472 (9th Cir.).

Petitioner took no actions, however, to have the instant case remanded to the Guam Supreme Court. Moreover, when the Ninth Circuit rejected his request to remand in *Santos*, petitioner did not seek further review in this Court of that Ninth Circuit ruling.

Petitioner also appeared to argue in *Santos*, in the alternative, that Public Law 108-378 should not apply to cases "currently pending in the Superior Court of Guam, the Supreme Court of Guam and the Ninth Circuit Court of Appeals" because the litigants in those cases would lose a substantive right to have the decision of the Guam Supreme Court reviewed by the Ninth Circuit and could not "tailor their litigation strategy" accordingly. *Id*. at 7-8.

Before the Ninth Circuit's ruling in *Santos*, however, petitioner had taken actions that recognized that that alternative argument regarding cases then pending in the Supreme Court of Guam and Ninth Circuit could not prevail. On January 29, 2005, a month after he filed his brief on jurisdiction in *Santos*, petitioner filed a petition for a writ of *certiorari* in this Court in *Guam v. Pacificare Health Insurance Co. of Micronesia, Inc.*, No. 04-1074 (docketed Feb. 7, 2005). Petitioner there sought review of a case in which the Guam Supreme Court had entered judgment on September 20, 2004 (before elimination of Ninth Circuit jurisdiction), and had denied a motion for rehearing on November 11, 2004 (after elimination of Ninth Circuit jurisdiction). Petitioner made no suggestion, as he could be read to have done in his supplemental brief

in *Santos*, that the Ninth Circuit might have jurisdiction over the case because it already was pending in the Guam Supreme Court on the effective date of Public Law 108-378. Instead, petitioner stated that this Court had "jurisdiction to grant this Petition pursuant to 28 U.S.C. § 1257(a) as applied to the territory of Guam by 48 U.S.C. § 1424-2 as amended by Section 2 of P.L. 108-378, effective on October 30, 2004." *Id*. at 1.

Petitioner was even clearer in his petition for a writ of *certiorari* filed in this Court in *Moylan v. A.B. Won Pat Guam International Airport Authority*, No. 04-1480 (docketed May 10, 2005). Petitioner there sought this Court's review of a case that had been argued before the Guam Supreme Court in October 2004, but was not decided by the Guam Supreme Court until February 2005. Petitioner explained to this Court as follows:

> Prior to October 30, 2004, a petition for writ of certiorari from a final judgment of the Supreme Court of Guam would have been filed in the Ninth Circuit U.S. Court of Appeals. Section 22B of the Organic Act of Guam, 48 U.S.C. § 1424-2, was amended by Section 2 of Public Law 108-378, 118 Stat. 2206, 2208 (Oct. 30, 2004), which terminated the Ninth Circuit['s] review by certiorari of decisions of the Supreme Court of Guam. While this Court has always been the court of last resort, it is now the only federal court with jurisdiction to review decisions from local Territorial courts of Guam interpreting questions arising under federal law.

Id. at 1-2.

Yet, at the end of January 2005 (by which time petitioner had filed his *Santos* brief and *Pacificare Health* petition), petitioner did not file a timely petition for a writ of *certiorari* in this Court to review the Guam Supreme Court judgment in this case. Petitioner let the 90-day

period following October 30, 2004, pass without even a protective filing of a *certiorari* petition in this Court.[6]

2. Petitioner's current attack on the integrity of the Guam Supreme Court does not excuse his failure to file a timely *certiorari* petition in this Court

Petitioner urges this Court to extend its tolling doctrines because, he insinuates, the Guam Supreme Court is not sufficiently independent. Pet. Br. 23-24. He suggests that Congress would not have intended that cases such as this "slip through the cracks" and escape Article III review. As discussed above, however, petitioner had more than ample time to seek review in this Court. It is his own failure to act in a timely manner that precludes further review in this case at this juncture. In any event, this Court should reject his challenge to the independence of the Guam Supreme Court.

Congress's elimination of the Ninth Circuit's jurisdiction over Guam Supreme Court decisions reflected a clear confidence that the Guam judiciary had been following the rule of law and had shown such a commitment so as to no longer need the additional intermediary review of the Ninth Circuit. Congress's determination was based in part on a recommendation from the Ninth Circuit itself to this effect. Congress had

[6] To the extent petitioner's claim regarding the uncertain effect of Public Law 108-378 on the Ninth Circuit's jurisdiction was ever colorable, that certainty was clearly established when the Ninth Circuit issued its decision in the *Santos* case on January 3, 2006. Petitioner did not seek further review in *Santos*. He also did not file a brief or make any effort before the Ninth Circuit panel in this case to distinguish the two cases for purposes of jurisdiction, and there is no distinction. Measuring the time for *certiorari* from 90 days after the decision in *Santos*, petitioner's *certiorari* petition to this Court would have been due on April 3, 2006, almost two months before he sought and received an extension of time within which to file a *certiorari* petition in this Court, and well before petitioner filed his petition on July 19, 2006. *See* note 2, *supra*.

required the Judicial Council of the Ninth Circuit to issue a report, after study of the Guam Supreme Court's first five years' of operation, regarding whether the Guam Supreme Court had "developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States." Pub. L. No. 98-454, tit. VIII, § 801, 98 Stat. 1742 (1984).

The Ninth Circuit Judicial Council reviewed *all* of the decisions of the Guam Supreme Court and interviewed members of the Guam Supreme Court, Guam executive officials, Guam legislative officials, and members of the Guam bar. The Judicial Council concluded that (1) the Guam Supreme Court deserved "high marks for its opinions," which were "comparable" in quality "to opinions of the supreme courts of the states in the Ninth Circuit;" (2) "on issues of local law," opinions of the Guam Supreme Court had "been 'reasonable and fair;' " and (3) the Guam Supreme Court had "properly recognized and deferred to federal constitutional and statutory law, as any state court of last resort would do." Judicial Council of the Ninth Circuit, *Report to the Senate Committee of Energy and Natural Resources and the House Committee on Natural Resources on the Supreme Court of Guam* 7, 25, 28 (2001). The Council opined that "the decisional process [of the Guam Supreme Court] does not merit any special treatment on review" and suggested that Congress consider "shortening or eliminating the 15-year oversight review responsibility of the Ninth Circuit Court of Appeals and affording direct review by the United States Supreme Court." *Id*. at 25, 27.[7]

[7] Petitioner's reference (Pet. Br. 23-24) to discussions of political interference with the Guam Supreme Court's "jurisdiction" misconceives the locus of that political debate in Guam at that time. It was not about whether to abolish the Guam Supreme Court or limit judicial review. Instead, as the Ninth Circuit Judicial Council explained to Congress, the division was "over administrative control. One group favor[ed] the Supreme Court being supreme not only in deciding cases, but also in the sense of being at the apex of all judicial administration decisions. The other side grant[ed] the Supreme Court authority to decide legal issues, but [held]

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Indeed, before petitioner lost the instant case in the Guam Supreme Court, he had been a champion of that court. After he informed the Governor and Speaker of the Guam Legislature in 2003 that he would not sign the bonds, petitioner expressly recommended that they seek a declaratory judgment from the Supreme Court of Guam. J.A. 26a; *see also* J.A. 29a (after meeting between petitioner, the Vice-Speaker of the Legislature, the Guam Lieutenant Governor, and bond counsel, petitioner sent a second letter to the Speaker of the Guam Legislature and to the Governor "again request[ing] that [they] immediately authorize a petition be brought before the Supreme Court of Guam for declaratory judgment relief" to resolve the validity of Public Law 27-19); *id.* at 30a (petitioner stating that he was prepared "to apply before the High Court on behalf of the People if you are reluctant to do so yourselves to finally resolve this important issue," and noting that "[a]ttorneys [sic] opinions do not give the finality which the High Court can provide"); *id*. at 33a (after the Governor indicated that he would file an application with the Guam Supreme Court for a declaratory judgment, petitioner offered to help draft the application).

3. Article III court review was fully available to petitioner, who did not timely pursue it

Petitioner had ample opportunity to preserve this Court's jurisdiction over the instant case.

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that each court (Supreme and trial) should have its own administrative responsibility without interference from the other." Judicial Council, *supra*, at 18. The Guam Supreme Court's administrative authority over lower Guam courts does not suggest a lack of an independent judiciary. For example, in the federal courts, it is the Judicial Council of each circuit that is charged with making "all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1).

First, petitioner could have filed a petition for a writ of *certiorari* within 90 days of Congress's elimination of the Ninth Circuit's jurisdiction over the case on October 30, 2004. Even if petitioner had been uncertain about the effect of the law on this case, the proper course was for him to file such a petition at least as a protective measure. If it had turned out that somehow jurisdiction had not been eliminated, this Court could have dismissed that petition as premature.

That is how this Court handles cases involving appeals from three-judge federal district courts under federal statutes that sometimes require that an appeal be taken to this Court, and sometimes to a court of appeals. The division of authority is often confusing and leads litigants to file appeals in the wrong court. Because of the absence of tolling when the jurisdiction of the wrong court is invoked, the Court recognizes this procedure that parties can use to ameliorate that legitimate confusion. When an appeal is taken to this Court where it was supposed to have gone first to the court of appeals, this Court dismisses the appeal to this Court whenever a timely notice of appeal has been filed with the court of appeals or if the time to take an appeal has not yet expired. *See, e.g., Wilentz v. Sovereign Camp, WOW*, 306 U.S. 573, 582 (1939); *Jurisdiction of the Supreme Court*, *supra*, § 203, at 365-366.[8]

Second, petitioner could have requested that the Ninth Circuit vacate the judgment and remand the case to the Guam Supreme Court so that it could re-enter its judgment and facilitate the filing of a timely *certiorari* petition to this Court, but petitioner made no such request

[8] In such a protective petition, petitioner could have argued in the alternative that this Court had jurisdiction to hear the case immediately pursuant to 28 U.S.C. § 2101(e), which permits a party to apply for a writ of *certiorari* to this Court "at any time" "before judgment has been rendered in the court of appeals." *Cf. Turner v. City of Memphis*, 369 U.S. 350 (1962) (after holding that the Court lacked jurisdiction to hear appeal from three-judge district court, granting *certiorari* before judgment to the court of appeals on the protective appeal that had been taken to it).

in this case.[9] This is an alternative course of action deemed appropriate by this Court when a party files an appeal from a three-judge district court within the statutorily prescribed period but to the wrong court, and this Court vacates the lower court judgment so that the lower court can re-enter judgment and the party can file a timely notice of appeal from that judgment to the correct court. *See, e.g.*, *Franklin v. Lawrimore*, 516 U.S. 801 (1995); *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *Jurisdiction of the Supreme Court*, *supra*, § 203, at 366. This Court, however, will not apply that procedure when the failure to seek review in the correct court is a "simple failure * * * to follow the clear commands" of a governing statute. *Donovan v. Richland County Ass'n. for Retarded Citizens*, 454 U.S. 389, 390 (1982).

Such relief is not available from this Court in this case at this time, however, because an *untimely* petition to this Court cannot empower it to facilitate the creation of an order that could have been timely reviewed in this Court. Otherwise the time limits in Section 2101(c) would be subject to this Court's complete discretion and would no longer be jurisdictional. *Cf. FEC*, 513 U.S. at 99 (criticizing proposed rule that would give Solicitor General "unilateral power to extend the 90-day statutory period for filing certiorari petitions by days, weeks, or as in this case, even months" because it "would result in the blurring of the jurisdictional deadline"). Furthermore, as in *Donovan*, the commands of Public Law 108-378 were clear to petitioner and thus he would not be entitled to such relief, even if it were available.

Notably, this Court has never suggested, as petitioner urges here, that the time for filing an appeal is tolled

[9] Petitioner's request in the *Santos* litigation that the Ninth Circuit "remand this case to the Guam Supreme Court," Guam's Supplemental Brief Re: Jurisdiction, at 3, *Santos v. Guam*, No. 03-70472 (9th Cir.), may have be an oblique request for such a remedy. Neither party in that case sought this Court's review of the Ninth Circuit's denial of that request.

during the pendency of an appeal to a court that determines it lacks jurisdiction. To the contrary, the Court expressly stated that a subsequent appeal from a three-judge district court's judgment would be untimely if taken from the judgment first incorrectly appealed to this Court. *See Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 392 (1934) ("By mistakenly appealing directly to this Court, appellants have lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired."); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 19 (1934) ("relief cannot be afforded by treating the decree of the District Court as appealable to the Circuit Court of Appeals * * * as the time for appeal to that Court has expired"); *Donovan*, 454 U.S. at 390 ("Appellants' proper course of conduct was to file a direct appeal [to the Supreme Court] from the decision of the District Court. At this time, however, such relief is foreclosed by 28 U.S.C. § 2101(a).").

II. THE GUAM SUPREME COURT'S RULING ON THE DEBT-LIMITATION PROVISION IS CONSISTENT WITH THE TEXT, HISTORY, AND PURPOSE OF THE ORGANIC ACT OF GUAM AND WARRANTS DEFERENCE

The merits of this dispute involve the straightforward construction of Section 11 of the Guam Organic Act, 48 U.S.C. § 1423a.

A. The Guam Supreme Court's Decision Is Consistent With The Plain Meaning Of The Organic Act

1. The Guam Supreme Court correctly held that the Guam Organic Act contains no limitation based upon the "assessed" value of the property on Guam

Congress enacted the Guam Organic Act in 1950 to confer United States citizenship on Guamanians and to establish the government of Guam vested, *inter alia*, with

the power to establish a popularly elected legislature and the powers to tax and borrow. This was a very dramatic change from the pre-existing governmental structure under which the people of Guam had been subject to the plenary authority of a United States naval governor.[10]

With respect to borrowing, Section 11 of the Organic Act of Guam specifically provides, in relevant part:

> [W]hen necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam.

48 U.S.C. § 1423a. The Guam Supreme Court correctly held that the limitation means that "the allowable public indebtedness under Section 11 is to be ascertained with reference to the appraised value of the property on Guam, as reflected on the certified tax roll in effect at the time the debt is incurred." Pet. App. 2a. The Court held that the Guam legislature thus may borrow no more than 10 percent of the appraised value of taxable property on Guam, *id.* at 7a-19a, which under Guam law is the actual market value of the land. *See* 11 G.C.A. § 24102(f) ("appraised value means the amount at which property would be taken in payment of a just debt from a solvent debtor"). This sensible reading tracks the language of the statutory provision, provides understanding to each statutory term, and neither omits nor adds meaning to any words of the statute.

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[10] Prior to the Organic Act, the island and its people were under the complete and unqualified control of the Navy as provided in an 1898 Executive Order of President McKinley. Providing a Civil Government for Guam, S. Rep. No. 81-2109 at 1, 15 (1950). A succession of naval governors exercised all legislative, executive, and judicial authority over the island. They "revoked all existing laws, rewrote and promulgated new ones, created courts, acted as judges, levied, collected, and disbursed revenues, and, in general, directed the fiscal, economic, and political well-being of the Guamanians according to their own best judgment." *Ibid*.

Had Congress intended the Guam legislature's borrowing power to be limited to 10 percent of the *assessed* valuation of the property on Guam, as petitioner suggests, Congress knew full well how to say so and would have done so. Pet. App. 13a. The Guam Supreme Court exposed the flaw in petitioner's argument in this regard when it explained that "[t]he Virgin Islands' [debt-limitation] provision was enacted a mere 10 months prior to the enactment of Section 11," and Congress provided there "that 'no public indebtedness of the government of the Virgin Islands shall be incurred in excess of 10 per centum of the *aggregate assessed valuation* of the taxable property in the islands.'" *Id.* at 12a (quoting 48 U.S.C. § 1403) (emphasis in original). The Guam Supreme Court reasoned that Congress's decision to use the term "aggregate tax valuation of the property" in the Guam Organic Act instead of "aggregate assessed valuation of taxable real property," as employed in the Virgin Islands Organic Act, demonstrates that Congress did not intend the Guam government's "debt limit * * * to be based on the *assessed* valuation of property." *Ibid.* (emphasis in original).

Moreover, the Guam Supreme Court held that Congress's use of the term "tax" in Section 11 must have had meaning, and concluded that "it is clear that the debt limit is to be based on the value of property being taxed." *Id.* at 17a. The court thus noted that, "[b]y specifying that the tax valuation is to be used, there would be no need to then say that the debt limit is to be based on the taxable property." *Ibid.*

2. Standard rules of statutory construction support the Guam Supreme Court's comparison to other federal territorial laws and construction of the Guam Organic Act

a. Petitioner, in effect, suggests that the absence of the term "assessed" in the debt-limitation provision was merely congressional oversight. Pet. Br. 30-31. But this Court "ordinarily resist[s] reading words or elements into

a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997); *see also Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended.").

To be sure, in some instances, such as the Virgin Islands Organic Act example which the Guam Supreme Court readily distinguished, Congress *has* limited territorial borrowing (or the borrowing of municipalities of territories) to some percentage of the aggregate *assessed* value of taxable property in the territory. *See* Pub. L. No. 94-241, art. I, § 607, 90 Stat. 263 (1976) (approving constitution of the Northern Mariana Islands which limits borrowing to the "ten percentum of the aggregate assessed valuation"); Ch. 339, § 55, 31 Stat. 151 (1900) (limiting borrowing in Hawaii to a percentage of the "assessed value of taxable property").[11]

But this express limitation based upon "assessed" value or valuation is neither universal nor without purpose. Indeed, petitioner fundamentally ignores that Congress has employed often distinct language for the different territories, and acceptance of petitioner's proposition would require this Court to conclude that Congress believed there was no difference between any of the territories. Such a ruling would not only ignore the plain language of the various federal territorial laws, but it would fail to account for their different social and legal histories.

In the Virgin Islands, for example, there was a history of insufficient tax revenues due to a mix of local and Danish tax laws. *Ricardo v. Ambrose*, 211 F.2d 212, 216

[11] Petitioner also renews, without any elaboration, his argument that the use of the term "assessed valuation" in the law governing the Virgin Islands was the result of a mere "perfecting amendment." Pet. Br. 31-32 n.11. The offered amendment was far from a mere perfecting amendment, because it would have substantively altered the language to "aggregate tax valuation of real and personal property," H.R. Rep. No. 81-682, at 2, 3 (1949), which is plainly different from "aggregate assessed value of the taxable real property," 48 U.S.C. § 1403. *See* Br. in Opp. at 20 n.8.

(3d Cir. 1954). Congress thus imposed significant oversight on the Virgin Islands taxation system (including taxation on "actual value," 48 U.S.C. § 1401a), and, when authorizing the Virgin Islands government to issue bonds, mandated "[t]hat the government of the Virgin Islands * * * shall be obliged to levy and collect sufficient taxes for servicing any of the outstanding bonds, even if such taxation is required at a rate in excess of or in addition to the tax or tax rate of 1.25 per centum of the assessed value." Pub. L. No. 81-418, § 1, 63 Stat. 940-941 (1949) (codified at 48 U.S.C. § 1403). As such, petitioner is wrong to suggest that "it was necessary for Congress to insert the word 'assessed' before valuation in the debt-limitation proviso in order to make clear that the debt ceiling was tied to the assessed value of property, not its full, appraised value." Pet. Br. 31. Congress meant *precisely* that, to ensure that the Virgin Islands would raise taxes on the assessed value of property to service any outstanding debts. 48 U.S.C. § 1403. No such provision exists in the Guam Organic Act, and this Court should not read any such limitation into it.[12]

[12] The history of the Virgin Islands differs substantially from that of Guam, in which all local laws were repealed in 1898. Due to the problematic tax scheme in the Virgin Islands, Congress enacted 48 U.S.C. §§ 1401a to 1401e, to establish a uniform system of assessment and taxation, and accomplished this goal by mandating that "all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property," 48 U.S.C. § 1401a. By requiring that taxes be imposed on the actual value of property, Congress ensured that there would be tax uniformity so that different types of property could not be taxed at different tax rates (through different assessed values), and provided greater means for the Virgin Islands government to meet revenue demands. Accordingly, this system explicitly provided for a 1.25 percent tax rate on the "assessed value" of property in the Virgin Islands. *Id.* § 1401b ("[T]he tax on real property * * * shall be at the rate of 1.25 per centum of the assessed value.").

There thus can be little surprise that, a few years later in 1949, Congress would then impose a debt limitation based upon the "assessed" valuation of taxable property in the Virgin Islands – a term directly linked to the 1.25 percent tax rate of the Virgin Islands under 48 U.S.C. § 1401b – and require that the Virgin Islands raise the tax rate on the "assessed" valuation of

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When Alaska was a territory, by contrast, Congress imposed a debt limit on Alaska municipalities of "10 per centum of the aggregate taxable value" of the property of the municipal corporation, without any reference to any "assessed" value. Pub. L. No. 74-626, § 1, 49 Stat. 1388 (1936). The legislative history of that act confirms that Congress intended that law to constitute "[a] limitation of 10 percent of the total value of the taxable property," H.R. Rep. No. 74-2290, 74th Cong. 1 (1936), and that this construction was "in harmony" with a similar limitation then existing in Puerto Rico, *id.* at 2, which employed the same language as used in the Guam Organic Act, Pub. L. No. 53-797, § 3, 44 Stat. 1418 (1927) ("aggregate tax valuation of its property"); Ch. 191, § 38, 31 Stat. 77, 86 (1900) ("[N]o public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."); *see also* Pub. L. No. 51-42, § 1, 42 Stat. 145 (1921) (limitation in the Philippines to "7 per centum of the aggregate tax valuation of its property at any one time").

The Guam Supreme Court gave that precise interpretation to the near-identical language of the Guam Organic Act. Such action can hardly be described as an oversight against this backdrop of comparable legislation.

b. Petitioner also would have this Court ignore the well-settled canon of statutory construction that exceptions must be construed narrowly. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993). In particular, in light of Congress's contemporaneous delegation of power to the people of Guam to elect a legislature with a broad mandate supporting self-governance within Guam, the

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such property when conferring on the Virgin Islands the power to borrow, 48 U.S.C. § 1403. Congress thereby ensured that the Virgin Islands would actually raise taxes, by referring to the assessed value, before taking on any debt, a circumstance not present in Guam.

debt limitation of the Organic Act must be "read 'narrowly in order to preserve the primary operation of th[at] [policy].'" *City of Edmonds*, 514 U.S. at 732 (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)); *Cf. Puerto Rico v. Shell Co.*, 302 U.S. 253, 261 (1937). That reading is even more necessary and significant when core governmental powers, such as the power to tax and borrow, are being limited, so that ambiguity must be read in favor of the territorial government. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'") (quoting L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)).

B. The Guam Supreme Court's Interpretation Of The Guam Organic Act Is Entitled To Substantial Deference

1. The Governor submits that, for the reasons discussed elsewhere in this brief and set forth at length in the Guam Supreme Court's detailed opinion, the Guam Supreme Court reached a complete and reasoned construction of Section 11. Pet. App. 1a-36a. *Even if* this Court were to conclude, however, that ambiguity exists and that the Guam Supreme Court's decision is but one of a number of possible constructions of the Act, this Court should defer to the Guam court's interpretation of Section 11. *Pernell v. Southall Realty*, 416 U.S. 363 (1974) (finding the Court "bound" by the local D.C. Court of Appeals' interpretation of a federal law of purely local concern).

This "Court has repeatedly emphasized that the decisions of territorial courts on matters of purely local concern are entitled to great weight and should not be disturbed except for cogent reasons." *Jurisdiction of the Supreme Court, supra*, § 367 at 730 (footnotes omitted). Such deference applies even as it relates to an interpretation of federal law, if the law relates to a matter of purely local concern. *Ibid.*; *see also Pernell*, 416 U.S. at 369 (reviewing decision of the local D.C. Court of Appeals interpreting congressionally enacted law);

Santa Fe Central Ry. Co. v. Friday, 232 U.S. 694, 700 (1914) (reviewing decision of the Supreme Court of the Territory of New Mexico interpreting federal Organic Act and other federal laws relating to the jurisdiction of territorial court); *see also Hall v. C&P Telephone Co.*, 793 F.2d 1354 (D.C. Cir. 1986) (deferring to local D.C. Court of Appeals' interpretation of federal law applicable solely to the District of Columbia).

In *Pernell*, for example, this Court explained that it has long deferred to "decisions of the courts of the District [of Columbia] involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." 416 U.S. at 366. This deference extends to the "interpretation of Acts of Congress directed toward the local jurisdiction," *id.* at 367, even though such laws, "like other federal laws, admittedly come within this Court's Art. III jurisdiction," *id.* at 368; *see also Santa Fe Central Ry. Co. v. Friday*, 232 U.S. at 700. The *Pernell* Court emphasized that its deference was supported by Congress's decision to alter the District of Columbia's judicial system so that the decisions of the local D.C. Court of Appeals were "made reviewable by this Court in the same manner that [the Court] review[s] judgments of the highest courts of the several States," as opposed to having local laws reviewed by lower federal courts. *Pernell*, 416 U.S. at 367.

The circumstances present in *Pernell* likewise exist in the instant dispute because the Guam Supreme Court is organized in a manner similar to the local D.C. Court of Appeals. Significantly, Congress has consistently and repeatedly taken steps to support the creation of the Guam Supreme Court. When this Court held, in *Territory of Guam v. Olsen*, that the Organic Act of 1950 did not authorize the Guam Legislature's creation of "a local Supreme Court having the power of ultimate review of cases involving local matters," 431 U.S. 195, 202 (1977), Congress reacted by amending the Organic Act so that "the legislature of Guam may in its discretion establish an appellate court" with "jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive

jurisdiction." Pub. L. No. 98-454, tit. VIII, § 22A(a)-(b), 98 Stat. 1732 (1984).[13] Congress mandated that the "relations" between federal courts, including this Court, and the local court of Guam "shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings." *Id.* § 22B. As previously discussed, *see* pages 11-13 *supra*, even though the Ninth Circuit was to maintain intermediate *certiorari* jurisdiction over that appellate court temporarily for 15 years, *see ibid.*, Congress eliminated that provision years early, so that only this Court now maintains review of the Guam Supreme Court's decisions, *see* Pub. L. No. 108-378, § 2, 118 Stat. 2208. Congress based its decision on the findings of the Ninth Circuit Judicial Council's report, which attested to the quality and ability of the Guam Supreme Court during the period in which the case below was decided. *See* pages 24-26 *supra*.[14]

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[13] The Ninth Circuit Judicial Conference endorsed the congressional action and explained how authorization to Guam to create its own court would constitute "recognition of autonomy for the territory to structure its own system and * * * an expression of congressional confidence." *A Bill to Implement the Recommendations of the Interim Report of the Northern Mariana Islands Commission on Federal Laws and To Amend the Organic Act of the Virgin Islands and the Organic Act of Guam, and for Other Purposes, and a Bill to Repeal Certain Provisions of Law Relating to the Territories and Insular Possessions of the United States: Hearings on S. 1366 and S. 1367 Before the Senate Subcomm. on Energy Conservation & Supply of the Comm. on Energy & Natural Resources*, 98th Cong. 371 (1983) (statement of Anthony M. Kennedy, then-Ninth Circuit Judge).

[14] Because Congress removed the Ninth Circuit's *certiorari* jurisdiction based upon the well-grounded institutional traditions established by the Guam Supreme Court, it is of no moment that the Guam Supreme Court's decision issued prior to the removal of the Ninth Circuit's *certiorari* jurisdiction. Indeed, petitioner's suggestion that the Guam Supreme Court is entitled to less deference under such circumstances because the ruling below occurred *prior* to Congress's removal of the Ninth Circuit's *certiorari* jurisdiction is really an argument that the court of appeals should have retained jurisdiction over petitioner's appeal. Of course, this Court lacks jurisdiction to address the question of the Ninth Circuit's continuing jurisdiction over this case because petitioner did not

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2. It cannot be disputed that Section 11 is a matter of purely local concern to Guam. Section 11 by its own terms pertains only to the powers of the Guam government; accordingly, the Guam court's interpretation here does not alter the meaning of the borrowing authority of *any* other state, local, or territorial government. As such, the instant dispute is indistinguishable from *Pernell*, where this Court deferred to the local D.C. Court of Appeals' construction of a *federal* law applicable only to the District of Columbia, and *Santa Fe Central Ry. Co. v. Friday*, where this Court deferred to the Supreme Court of the Territory of New Mexico's interpretation of two *federal* laws, including the New Mexico Organic Act. *Pernell*, 416 U.S. at 367; *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. at 699-700.[15]

3. Under *Pernell*, *Santa Fe Central Ry. Co. v. Friday*, and the numerous other instances where a territorial court's ruling is under review, the deference that this Court confers is far from insignificant. The Court requires that a decision below that is plainly grounded in "local law matters," not be reversed "'save in exceptional situations where egregious error has been committed.'" *Pernell*, 416 U.S. at 369; *see also Santa Fe Central Ry. Co v. Friday.*, 232 U.S. at 700 ("We should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong, instead of thinking it, as we

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seek a writ of *certiorari* seeking this Court's review of the judgment of dismissal. S*ee Western Union Tel. Co. v. Hughes*, 203 U.S. 505 (1906).

[15] Petitioner argues that *Pernell* is inapplicable to the Guam Supreme Court because "it has never been cited as supporting deference to the decisions of the courts of non-incorporated territories such as Guam." Reply Br. Supp. Pet. at 4 n.1. But that argument ignores that the *Pernell* Court relied upon a long-standing rule of deference. *See, e.g*, *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. at 700. This principle of deference to territorial courts on local issues has extended not only to incorporated territories, but also to unincorporated ones. *Waialua Ag. Co. v. Christian*, 305 U.S. 91, 109 (1938); Stanley K. Laughlin, Jr., *The Laws of United States Territories and Affiliated Jurisdictions* § 6.5, at 89 (1995) (Hawaii as an unincorporated territory).

do, plainly right."); *Whalen v. United States*, 445 U.S. 684, 707 (1980) (Rehnquist, J. dissenting) (deferring so long as the opinion on local law is "defensible");[16] *cf. Waialua Ag. Co. v. Christian*, 305 U.S. 91, 109 (1938) ("Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii").

No such "exceptional situation" or "egregious error" warrants reversal here. At worst, the Guam Supreme Court chose one plausible interpretation of the statute over another (we submit, a far less plausible interpretation). But, the Guam Supreme Court's interpretation needs to be no more than plausible to warrant deference from this Court in these circumstances, *Pernell*, 416 U.S. at 366 (holding that the D.C. Court of Appeals' interpretation of federal law was far from infallible and that an "argument" could be made that the D.C. court's decision was incorrect), which is a low bar that the Guam Supreme Court's extremely probable construction clearly passes.

In short, the justification for deference here is virtually indistinguishable from the rationale present in this Court's precedents. Congress has mandated that the Supreme Court of Guam is an independent, co-equal branch of government with broad powers over the territory's judicial branch. 48 U.S.C. § 1424-1. Failure to accord the Guam Supreme Court's ruling such deference in the instant dispute would constitute a strikingly negative indictment by this Court as to the Guam Supreme Court's judicial independence and ability to follow the rule of law.[17]

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[16] In *Whalen*, the Court concluded that "customary deference" to the lower court's "construction of local federal legislation is inappropriate with respect to the statutes involved, for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction." *Id.* at 688. No similar federal constitutional issue, or issue of broad federal implication, is commingled with the statutory issue present in the instant dispute.

[17] Indeed, the absence of any deference would not only significantly undermine the Guam judicial system and confidence of the people of

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C. Petitioner's Attempt To Defeat The Guam Supreme Court's Interpretation Ignores The Plain Meaning Of The Statute And Accords The Guam Supreme Court No Deference

1. Petitioner's view of the Guam Organic Act imposes a limitation that appears nowhere in the text of the statute

a. Petitioner attempts to defeat the judgment of the Guam Supreme Court by proffering a construction of the statute that artificially lowers the Guam legislature's borrowing authority without any basis in the statutory text for that interpretation. Petitioner manufactures this interpretation by relying on current Guam tax law rather than on the Organic Act.

Specifically, Guam law now imposes a 0.25 percent tax rate on the assessed property values in Guam, viz., 35 percent of the property's actual appraised value as determined by the government's tax assessor. 11 G.C.A. §§ 24102(f), 24103, 24306. Seizing upon this current aspect of territorial law, petitioner argues that the Guam statute dictates the amount of borrowing allowable under the Organic Act, and does so by requiring that the federal borrowing limit be calculated from the "assessed" value of taxable property. But the term "assessed" appears nowhere in the debt limitation provision of the Organic Act.

b. Petitioner also contends that public indebtedness of Guam is strictly limited "to anticipated taxes and revenues," Pet. Br. 25-26, but that is a red herring.[18] He

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Guam that their elected legislature possesses basic powers necessary for self governance, but it also would be particularly incongruous when compared to the deference – be it *Chevron* or *Skidmore* – that courts accord Article I adjudicative bodies. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Indeed, the Guam Supreme Court is expressly contemplated by the Organic Act to be "the highest court of the judicial branch of Guam." 48 U.S.C. § 1424-1.

[18] On numerous occasions (Pet. Br. 19, 27, 34), petitioner argues that the debt must be repaid from "tax revenues" rather than in

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concedes that there is no congressional mandate that borrowing be limited to pre-existing streams of revenue. *Id.* at 25 ("[B]orrowing by the Guam Legislature is permissible only when the Legislature determines that the debt incurred can be retired from existing or reasonably *anticipated sources of tax revenue*.") (emphasis supplied). Had Congress wanted to impose a cap based upon *actual* revenues, it easily could have done so, as it has on other occasions. *See* Pub. L. No. 90-120, tit. II, § 201, 81 Stat. 340 (1967) (limiting the "aggregate indebtedness of the District [of Columbia] to * * * 6 per centum of the general revenue of the District").

Moreover, petitioner's argument overlooks the fact that Congress gave the government of Guam far more sources of revenues than just property taxation. Congress granted the legislature the power to tax "internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions." 48 U.S.C. § 1423a. In addition, the Guam Organic Act provides that "[t]he income-tax laws in force in the United States of America * * * shall be held to be likewise in force in Guam" but the revenues from such taxes are not payable to the United States, rather they are "payable to the government of Guam." 48 U.S.C. § 1421i(a)-(b).[19]

Accordingly, property taxes are far from the only source of revenue that the government of Guam may "anticipate." In fact, Guam historically has not relied upon property taxes as its major source of revenues. *See, e.g.*, Governor of Guam, *1956 Annual Report to the Secretary of the Interior* 49 (in 1956, property taxes accounted for 1.6 percent of Gaum tax revenues, $170,864 out of $10,575,090).

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anticipation of "taxes *and* revenues." This error artificially ignores significant sources of income other than taxes that Guam has available to retire public debt.

[19] The Organic Act also permits "the Legislature of Guam * * * [to] levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam." 48 U.S.C. § 1421i(a).

Indeed, that remains the case today, where revenues are overwhelmingly derived from income taxes. *See* U.S. Department of the Interior, Office of Insular Affairs, *A Report on the State of the Islands* 62 (1996) (for 1990, property taxes generated $7,759,000 in revenue out of $429,164,000 in total taxes received).

In light of these various streams of revenue, it would have made little sense for Congress to limit Guam's indebtedness, where such borrowing may anticipate taxes and revenues, to only the assessed value of taxable property. Indeed, the fallacy of petitioner's argument is underscored by the fact that, if this Court were to adopt petitioner's view, the Guam legislature would be required always to maintain some property tax in order to borrow, *even though* the other sources of revenues are more than sufficient to "anticipate" taxes and revenues sufficient to repay the debt.

For example, under petitioner's view, it might violate the Organic Act for the legislature to impose a sales taxes and correspondingly reduce property taxes by lowering the assessed valuation of the property, if doing so would push the government's pre-existing debt above Section 11's debt limit. This might be the case even if the modification to the tax system was revenue neutral or generated more income for the government. More significantly, because, as petitioner concedes, Congress has "not mandate[d] a particular method of valuation" by the Guam government (Pet. Br. 26), Guam could construct a taxation scheme whereby the assessed value of the property was 150 percent of the actual value of the property, *cf. Bluebeard's Castle, Inc. v. Government of the Virgin Islands*, 321 F.3d 394, 398 (3d Cir.) (assessed value of the property being almost $50 million greater than the claimed actual value), *cert. denied*, 540 U.S. 823 (2003), with a tax rate correspondingly reduced so as to not levy any additional property taxes on the electorate. The result of this system would be revenue neutral, but it would vastly increase the ability of the government to borrow. As such, it is petitioner's construction of Section 11 that fails to provide a real limit on borrowing to "anticipate[d]" taxes and revenues. The more logical conclusion (and one which is consistent with the plain meaning of the statute) is that

Congress established a maximum borrowing limit without regard to the manner in which the local government taxed the property on the Island.

What Congress's debt ceiling in Guam ensures, by looking to the aggregate tax valuation of property, is that Guam has the necessary means to repay its bonds by exercising its full property tax powers. But Congress has not obligated the Guam legislature to use this particular method of taxation where the Guam legislature determines there is a superior method of generating revenue to repay the bonds.

c. Petitioner argues that the Guam Supreme Court's construction reads the term "tax" out of "aggregate tax valuation of the property in Guam." Pet. Br. 26. Petitioner asserts that, had Congress intended to measure the debt limit by the full market value of property subject to taxation, it would have phrased the language of Section 11 differently.

Petitioner attempts to support this argument by reliance on state court constructions of state constitutional debt limitations, but he identifies no state law provision employing the same language as used in the Guam Organic Act. Pet. Br. 27-29. Petitioner's cases, instead, merely demonstrate that where a state constitution limits indebtedness by its explicit terms to the "assessed" valuation of property, those terms prevail, *see Johanson v. Independent Sch. Dist. No. 23 of Anoka County*, 73 N.W.2d 126, 129 (Minn. 1955); *see also* Br. in Opp. at 20-21 (citing cases), and that where a state constitution includes no such limitation to the "assessed" value, the actual value is used to calculate the debt ceiling, *see, e.g.*, *Board of Education v. Passey*, 246 P.2d 1078 (Utah 1952).

Indeed, in making this argument, petitioner concedes, as he must, that not all state jurisdictions limit the borrowing powers of municipalities to a percentage of the assessed value of property. In many of the cases upon which petitioner relies, the state court held that the debt limitation was a percentage of the actual value of the property, even though the municipality taxed only a lower assessed valuation. *See Passey*, 246 P.2d at 1078; *N.W.*

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). Thus, it is hardly incongruous, as petitioner suggests (Pet. Br. 32-35), for the Guam debt limitation to be imposed on the actual value of property, even though the property taxes are paid on a lower assessed valuation.[20]

Furthermore, it is petitioner, not the Governor and legislature, who fails to give meaning to the term "tax" in Section 11. Petitioner ignores that Section 11 expressly treats the terms "tax" and "assess" differently. The plain language of Section 11 of the Organic Act empowers the Guam legislature to impose "[t]axes and assessments." 48 U.S.C. § 1423a.[21] Congress thus gave the government what it viewed to be two separate powers, to tax and to assess, and required only that the legislature do so in a "uniform[ ]" manner. But, with respect to borrowing, Congress limited indebtedness with reference to only one – *i.e.*, 10 percent of the "tax" valuation of the property, not 10 percent of the "assessed" valuation of the property. *Ibid.* Under petitioner's reading of Section 11, these two powers – to tax and to assess – would be identical, making a key term in Section 11 superfluous.

Accordingly, in the instant dispute, the text of the Guam Organic Act is controlling, and the Guam Supreme Court properly construed the provision. As this Court has consistently held, "[t]he starting point for our interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). "When the

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[20] Petitioner overstates the meaning of *Passey*. *See* Br. in Opp. at 21. There, the court concluded that the fact that the "value" of the property was to be ascertained from the assessment did not mean that the state constitution limited municipal borrowing to the assessed value of property. *Passey*, 246 P.2d at 1079.

[21] The full text of the provision, which immediately precedes Section 11's borrowing provision, reads: "Taxes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the government of Guam as may be uniformly provided by the Legislature of Guam * * *." 48 U.S.C. § 1423a.

words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The Guam Supreme Court followed these principles, and this Court should affirm its interpretation.[22]

2. Public policy supports the Governor's interpretation and petitioner's contrary argument is based on a misunderstanding of the Guam government's revenue sources

As a last resort, petitioner discards all textual arguments and contends that, based on his own view of public policy, the Guam government's borrowing must be limited to 10 percent of the assessed valuation of property in order to benefit taxpayers by restraining government expenditures. Pet. Br. 32-35.

Absent clear language from Congress, there is no basis, however, to read the debt limitation in Section 11 so narrowly. As previously discussed, petitioner fundamentally ignores the numerous sources of taxation and revenues available to the Guam government, almost all of which are entirely unrelated to property taxation. *See* pages 41-43 *supra*.

Moreover, petitioner's reliance on cases construing municipal debt limits is unwarranted. *See* Pet. Br. 33-35 (citing state court cases). A municipal government's primary source of revenue is property taxes. *See City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204, 208 & n.4 (1970) (noting most municipal revenues are derived from property taxes). Limiting a municipality's borrowing to a

[22] Petitioner suggests that the Guam legislature once adopted the Attorney General's interpretation of Section 11. Pet. Br. 7. That view, however, was held only by an internal legal advisor, Br. in Opp. App. 3a, and petitioner ignores the fact that the Guam Superior Court expressly rejected that interpretation in 1989, *id.* at 17a.

percentage of the *assessed* value of property (which, in any event, only some States do, *see* pages 43-44 *supra*) thus may ensure that the municipal government will be able to repay its indebtedness. But such a limitation has little meaning to a government, such as Guam's, that has broad powers and numerous divergent streams of revenues.

The practical implications of the Attorney General's argument are significant. Much of the bond amount authorized by the Guam Legislature is designed to refinance pre-existing debt from prior Administrations at more favorable terms (thus to lower outstanding obligations) and to inject money owed (such as personal income tax refunds) into the economy. Specifically, the issued bonds are to be used by the government to pay income tax refunds, utility expenses to the Guam Power Authority, retirement fund obligations, withholding tax, general fund vendors, public school repairs, and to "fund an escrow to pay debt service on all or a portion of the Government of Guam General Obligation Bonds, 1993 Series A at matched maturity." Not only are these amounts well within the means of the government to repay, *see* pages 41-43 *supra*, but they hardly constitute care-free spending that will burden future generations on Guam.

Without the ability to issue these bonds, the Guam government will be ill-equipped to meet important government obligations. This would be a particularly incongruous result where Guam, which is well on the road to full economic recovery due to increased tourism and a renewed presence of the United States military, needs the ability to reasonably borrow to fuel future economic growth. *See* First Hawaiian Bank, *Economic Forecast: Guam Outlook Brighter Than In Several Years* 1-2, 8-12 (2006-2007). At bottom, petitioner seeks to do no more than exercise a "legal" veto on legislation with which petitioner disagrees as a matter of policy. That result is nowhere contemplated by the Organic Act, and it would undermine important public policies enacted by the Guam government. Petitioner, by proffering an overly restrictive interpretation of Section 11, undermines the power of the Guam government, restrains the ability of Guamanians

to govern their local affairs, and threatens the economic well-being of all residents of the Island.

CONCLUSION

For the reasons set forth above, the writ of *certiorari* should be dismissed for lack of jurisdiction. In the alternative, the judgment of the Supreme Court of Guam should be affirmed.

Respectfully submitted,

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DECEMBER 18 2006