No. 06-

IN THE

Supreme Court of the United States

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

v.

FELIX P. CAMACHO, GOVERNOR OF GUAM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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. § 1423a (emphasis added), 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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OPINIONS BELOW

The decision of the Supreme Court of Guam (Pet. App. 1a-35a) is unreported, but is available at 2003 WL 21697180. The order of the Court of Appeals for the Ninth Circuit, which at the time possessed jurisdiction to review decisions of the Guam Supreme Court, granting petitioner's petition for a writ of certiorari (Pet. App. 37a) is unreported. The Court of Appeals' order dismissing the case for lack of jurisdiction in light of Congress's shifting of certiorari jurisdiction over decisions of the Guam Supreme Court to this Court (Pet. App. 39a) is unreported.

JURISDICTION

Because this petition seeks review of a decision of the Supreme Court of Guam, this Court has jurisdiction pursuant to 28 U.S.C. § 1257 and 48 U.S.C. § 1424-2 (as amended in 2004). Pet. App. 48a.

The decision of the Guam Supreme Court was issued on July 23, 2003. This petition is nonetheless timely because, at the time of the Guam Supreme Court's decision, the Court of

Appeals for the Ninth Circuit, not this Court, possessed exclusive jurisdiction to review decisions of the Guam Supreme Court, *see* 48 U.S.C. § 1424-2 (2000); *White* v. *Klitzkie*, 281 F.3d 920, 925 (9th Cir. 2002), and petitioner filed a timely petition for certiorari with the Ninth Circuit, which was granted. On October 30, 2004, after the Court of Appeals had granted certiorari and the appeal had been briefed and argued, Congress amended 48 U.S.C. § 1424-2 to shift certiorari jurisdiction over decisions of the Guam Supreme Court from the Ninth Circuit to this Court. But the Ninth Circuit only concluded that the amendment applied to pending cases in January 2006, *see Santos* v. *People of Guam*, 436 F.3d 1051 (9th Cir. 2006), and only dismissed the appeal in this case for lack of jurisdiction on that ground on March 6, 2006. Petitioner promptly filed a timely request for extension of time within which to file a petition for certiorari with this Court on May 24, 2006, which Justice Kennedy granted on May 31.

Although this Court has held that the 90-day time limit for filing certiorari petitions established in 28 U.S.C. § 2101(c) is "mandatory and jurisdictional," *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990), it has recognized that the start of the 90-day period is tolled if the petitioner files a timely petition for rehearing with the court below, the court below decides to grant an untimely rehearing petition, or the court below directs the parties to address whether rehearing should be ordered because each of these acts "raise[s] the question whether the court will modify the judgment and alter the parties' rights," *Hibbs* v. *Winn*, 542 U.S. 88, 97 (2004). Here, petitioner's timely filing of a certiorari petition with the Court of Appeals, the Court of Appeals' grant of certiorari to review the Guam Supreme Court's decision, and the Court of Appeals' retention of the appeal after the amendment of 48 U.S.C. § 1424-2 on October 30, 2004 had the same effect of "'suspend[ing] the finality of the [Guam Supreme Court's] judgment, pending [the Court of Appeals'] further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.'" *Jenkins*, 495 U.S. at 46 (quoting *Department of*

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Banking v. *Pink*, 317 U.S. 264, 266 (1942)). Thus, petitioner's filing of a certiorari petition with the Court of Appeals and the Court of Appeals' granting of the petition should be treated as having the same effect that the filing of a petition for rehearing has on a decision of a Court of Appeals, namely of "suspend[ing]" the underlying judgment now sought to be reviewed. *Jenkins*, 495 U.S. at 46; *cf. Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205-206 (1943); *Pink*, 317 U.S. at 266. While the Court of Appeals, having properly granted certiorari, considered the case, "there [was] no 'judgment' to be reviewed" by this Court, *Jenkins*, 495 U.S. at 46, and the 90-day period established by 28 U.S.C. § 2101(c) should be considered to have been tolled.[1]

STATUTORY PROVISIONS INVOLVED

Section 11 of the Organic Act of Guam states in pertinent part:

> [t]axes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and *when necessary to anticipate taxes and revenues*,

[1] A further consideration supporting a finding that this petition is timely is the presumption recognized by this Court that Congress intends decisions of territorial courts to be subject to review by at least one Article III court. In *Territory of Guam* v. *Olsen*, 431 U.S. 195 (1977), this Court noted that "Congress has consistently provided for appellate review by Art. III courts of decisions of local courts of the Territories. What history there is points to a purpose to create a similar system for Guam." *Id.* at 203-204. Without a "clear signal," *id.* at 203, that Congress intended to permit elimination of review of the Guam courts by any Article III court, this Court was "unwilling to say that Congress made an extraordinary exception in the case of Guam," *id.* at 204. Moreover, the Court noted, "we should hesitate to attribute such a purpose to Congress since a construction that denied Guam litigants access to Art. III courts for appellate review of local-court decisions might present constitutional questions." *Id.*

> 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. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section.

48 U.S.C. § 1423a (first and third emphases added).

Other relevant statutory provisions are set forth in the appendix to this petition. Pet. App. 41a-65a.

INTRODUCTION AND STATEMENT

This is a case about maintaining respect for Congressional limitations on territorial governments and ensuring that those governments remain accountable to their own U.S. citizen electorates as well. The case concerns the provision in the Organic Act of Guam, the federal statute that serves as the territory's constitution, which caps the amount of debt the government of Guam can assume in order to prevent government insolvency and to protect the territory's residents from oppressive taxation. Petitioner, the Attorney General of Guam, acting pursuant to his statutory duty to review all government contracts for legality, has refused to approve bond issues authorized by the territorial legislature and respondent Governor that would push the territory's indebtedness above the limit prescribed by Congress in the Organic Act. In a decision that validated the excessive levels of borrowing sought by respondent, the Supreme Court of Guam misinterpreted the debt-limitation provision in contravention of both its text and undisputed purpose. Absent review by this Court, no Article III court will address this important federal question that not only will shape Guam's fiscal future but may also influence the financial health of other territorial governments, which operate under similar federally mandated debt ceilings.

1. Guam, an island of approximately 200 square miles located in the west central Pacific Ocean, is an unincorporated territory of the United States. Acquired in the Spanish-American War, the island was administered by the Navy from 1898 to 1950. *See Ngiraingas* v. *Sanchez*, 495 U.S. 182, 186 (1990). In 1950, Congress enacted the Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*, which serves as Guam's constitution, *see* 48 U.S.C. § 1423a; *Haeuser* v. *Department of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996). The Organic Act defines the structure and powers of Guam's territorial government and guarantees the people of Guam, who are U.S. citizens, the fundamental individual rights enshrined in the Bill of Rights. The Organic Act is designed to secure for the people of Guam the benefits of a democratically accountable local government constrained by the rule of law. *See* S. Rep. No. 81-2109, at 1-2 (1950).

The Governor of Guam is popularly elected to a four-year term. 48 U.S.C. § 1422. The Attorney General of Guam, the territory's chief legal officer, 48 U.S.C. § 1421g(d)(1); 5 Guam Code Ann. § 3102, is also directly elected to a four-year term, 48 U.S.C. § 1421g(d)(2); 5 Guam Code Ann. § 30101(a), and, unlike other executive officials, may not be removed from office by the Governor, 48 U.S.C. §§ 1422, 1421g(d)(2); 5 Guam Code Ann. § 30101 (a), (c). Guam law provides that the Governor may not execute any contracts on behalf of the territorial government without the Attorney General's approval of their legality. 5 Guam Code Ann. § 22601.

Section 11 of the Organic Act empowers the Guam Legislature to enact laws on "all rightful subjects of legislation" not inconsistent with the Organic Act or other federal laws applicable to Guam. 48 U.S.C. § 1423a. It then immediately limits the Guam Legislature's authority in one crucial respect: excessive borrowing. Section 11 specifically mandates that

> [t]axes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for

> purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and *when 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. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section.

48 U.S.C. § 1423a (first and third emphases added).

While Congress strictly limited the amount of debt the territorial government can assume by linking the government's power to incur debt to its power to tax, Congress left the Guam Legislature free to design the details of the territory's taxation system. Consequently, subject to the federal requirement of uniformity, local laws determine what types of property in Guam are taxed and at what rates of assessment. In crafting the local tax structure, the Guam Legislature has opted to exempt certain types of real property from taxation, including government land, land used for educational or religious purposes, and land used in active farming. 11 Guam Code Ann. § 24401. Property is required to be appraised at its full market value, *id.* § 24102(f), and the Department of Revenue and Taxation is required to appraise the taxable property on the island every three years, *id.* § 24306. The assessed or taxable value of real property subject to taxation is set at 35% of its full, appraised value. *Id.* § 24102(f).

2. a. From the early 1990s until recently, Guam's economy suffered a dramatic downturn. The territory's economy has long been driven principally by tourism (especially from Japan) and U.S. military spending. In the early 1990s, the Japanese stock and real estate markets experienced massive declines, which significantly decreased Japanese investment

and tourism in Guam. Military spending in Guam also declined around this time. A series of other, unrelated events—a major earthquake in 1993, two supertyphoons in 1997 and 2002, the 1997 Asian economic crisis, the SARS epidemic, and the September 11, 2001 terrorist attacks—also contributed to the weakening of Guam's economy. In combination, these events have caused a substantial decline in the value of real property on Guam since the early 1990s. One study, for example, calculates that the value of real property on Guam depreciated an average of 81% between 1990 and 2002. *See* W. Nicholas Captain, *Property Information: A Guam Case Study*, Real Estate Issues, Winter 2003, at 18.

b. In 2003, the Guam Legislature concluded that the territorial government had insufficient revenue in its General Fund to pay certain obligations. Pet. App. 2a. (*In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam*, 2003 WL 21697180 (Guam July 23, 2003), attached at Pet. App. 1a-35a.). On April 28, 2003, the Legislature passed Public Law 27-19, which authorized the Governor to issue bonds in an amount not to exceed $418,309,857. Pet. App. 2a. The law earmarked $218,309,857 of the borrowing for General Fund expenditures, including tax refunds, utility payments to the Guam Power Authority, retirement fund payments, withholding payments, general fund vendor payables, and public school repairs. *Id.*; 5 Guam Code Ann. § 1512(a), (m). The law specified that the remaining $200 million in borrowed funds were to be used to pay the debt service on bonds issued a decade earlier. Pet. App. 2a.

Before the Governor could enter into any contracts to issue bonds pursuant to Public Law 27-19, he was required to obtain approval of the contracts' legality from petitioner Attorney General. 5 Guam Code Ann. § 22601. On May 14, 2003, petitioner sent a letter to the Governor and the Speaker of the Legislature indicating that he would not approve any contract to issue bonds pursuant to Public Law

27-19. Pet. App. 3a. Petitioner determined that the borrowing would be illegal on two grounds.

First, the new borrowing would bring the territorial government's indebtedness above the level permitted by the debt-limitation proviso in Section 11 of the Organic Act. Petitioner Attorney General explained that the phrase "aggregate tax valuation" in the proviso should be understood to refer to the assessed value of property used for purposes of taxation (which at present is fixed by law at 35% of appraised value) rather than the full, appraised value. Petitioner's view accorded with the position adopted several years earlier by the Legislative Counsel, the Legislature's own internal legal adviser. Pet. App. 8a; 2 Guam Code Ann. § 1112 (providing for Legislative Counsel).

Second, even if the Legislature were to rely on appraised value, petitioner opined, it was improper for the Legislature to use the 2002 tax roll to determine that value. Guam law requires a reappraisal of property values every three years, *see* 11 Guam Code Ann. § 24306, but the government had not carried out an appraisal since 1993, *see* Pet. App. 3a. Petitioner acknowledged that the territory's Board of Equalization had made some adjustments to the tax rolls in each of the intervening years, but he noted that property values had declined significantly since 1993 because of the island's major economic downturn and that the 2002 tax roll did not fully reflect this depreciation.

After a further exchange of letters, the Legislature responded on June 25, 2003 by enacting Public Law 27-21, which did two things intended to validate after the fact the borrowing authorized by Public 27-19. Pet. App. 3a. First, Public Law 27-21 expressed the Legislature's view that the phrase "aggregate tax valuation" in the Organic Act's debt-limitation provision should be understood to mean "one hundred percent (100%) of the appraised value of the property on Guam." *Id.* Second, it provided that when the territorial government fails to conduct the triennial appraisals otherwise required by law, the "last completed" appraisal, regardless of how old, "as supplemented by the annual adjust-

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ments" by the Board of Equalization shall be the appraisal used for purposes of taxation. Pet. App. 9a. Because the Legislature's expression of its view concerning the meaning of the Organic Act had no legal significance, *see id.* at 10a, Petitioner continued to refuse to give his approval to any contracts needed to undertake the borrowing authorized under Public Law 27-19.

3. On July 1, 2003, the Governor filed an original declaratory judgment action in the Supreme Court of Guam pursuant to 7 Guam Code Ann. § 4104, which permits the Governor to seek a binding determination of a question of law affecting the operation of the executive branch that is "a matter of great public interest [when] the normal process of law would cause undue delay." *See also In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 WL 187459 (Guam Feb. 7, 2002). The members of the supreme court are appointed by the Governor with the advice and consent of the Legislature and serve ten-year terms. 7 Guam Code Ann. §§ 3103(a), 6101(a). The Governor asked the supreme court to determine whether the borrowing authorized by Public Law 27-19 violated the Organic Act's debt-limitation provision and whether the use of a tax roll unmoored to a recent appraisal as a means of calculating the debt limit was permissible. On the same day that the Governor filed the action, the supreme court invited petitioner to intervene.

The next day, July 2, the court held a "status hearing" at which petitioner contended that determining the propriety of reliance on the 2002 tax roll would require factfinding that the court did not appear to be in a position to undertake. The court declined to establish a procedure for factfinding and established an expedited briefing schedule. The parties were required to file their opening briefs in five days, on July 7, their opposition briefs the next day, and their reply briefs the day after that at 10:00 a.m. The court heard oral argument on July 9, the day after receiving reply briefs.

The supreme court issued its decision on July 23. It concluded that the bonds authorized under Public Law 27-19 did not violate the Organic Act's debt-limitation provision. Pet. App. 2a. The court interpreted the phrase "aggregate tax valuation" in the Organic Act's debt-limitation proviso as referring to full, appraised value rather than the assessed value used for purposes of taxation. The court took the view that "tax valuation" must mean "appraised value" because "all taxes on property must necessarily be based, in the first instance, upon appraised values of the property," *id.* at 14a, though it had to acknowledge elsewhere in the opinion that tax-exempt as well as taxable property was valued in the appraisal process, *id.* at 34a. The court also considered particularly significant the fact that the debt-limitation provision in the Virgin Islands Organic Act used the phrase "aggregate assessed valuation" rather than "aggregate tax valuation." *Id.* at 12a. The court reasoned that if Congress had intended to refer to assessed value in the Guam Organic Act, it would have used the word "assessed" rather than "tax." *Id.*

The court then considered the meaning of the term "property" in the Guam debt-limitation provision. Pet. App. 15a-19a. Having rejected the importance of the link between taxing capacity and the debt limit in interpreting the phrase "aggregate tax valuation," the court now relied on just that consideration in rejecting respondent Governor's position that "property" could include property that is exempt from taxation. *Id.* at 18a-19a. It would be unwise to calculate the debt limit based on non-taxed property, the court explained, because this property does not generate tax revenue. *Id.* The court acknowledged that its reasoning in interpreting the word "property" might be thought to be inconsistent with its analysis of the meaning of the phrase "aggregate tax valuation." *Id.* at 18a n.9.

The court next concluded that the government could use the 2002 tax roll to calculate the current debt limit, even though the government had not conducted the triennial appraisals mandated by Guam law to create the tax roll. Pet.

App. 19a-26a. The court acknowledged that the territorial legislature's post-hoc effort in Public Law 27-21 to relax the triennial appraisal requirement by allowing reliance on tax rolls could have only prospective effect and so could not be used to support the legality of borrowing authorized before its enactment. *Id.* at 21a-22a. But the court nonetheless held that reliance on the 2002 tax roll was proper. The court determined that Guam law mandates triennial appraisals only for purposes of taxation, not for purposes of calculating the debt limit. *Id.* at 22a. The court placed the burden on petitioner to demonstrate that the system used to calculate the values in the tax roll through individual adjustments to the 1993 appraisal levels was arbitrary or capricious and found that petitioner had failed to carry that burden in the one week he had been given to present materials to the court. *Id.* at 25a-26a.

Finally, the court applied its interpretation of the meaning of the debt-limitation proviso to the particular facts of the 2003 borrowing bill and Guam's existing debts. According to the 2002 tax roll, the court found, the total appraised value of taxable property on Guam was $11.1493 billion. Pet. App. 34a. That meant the debt cap stood at $1.11493 billion. *Id.* The court found that the territorial government's existing "public indebtedness" was $378 million. *Id.* On this view, adding the $418,309,857 of debt authorized by Public Law 27-19 would bring the territory's debt to just below $800 million, well within the court's understanding of the cap's level. *Id.* at 34a-35a.

Relying on the figures from the 2002 tax roll, petitioner's interpretation of the debt-limitation proviso would have meant a debt cap of $390.3 million, 35 percent of the $1.11493 billion ceiling calculated by the court. Thus, accepting the court's determination of existing public indebtedness at $378 million, some of the very first bonds issued under authorization in Public Law 27-19 would have pushed the territorial government's indebtedness above the congressionally mandated limit.

4. Petitioner promptly sought review of the Guam Supreme Court's decision before the Court of Appeals for the Ninth Circuit, which at the time possessed jurisdiction to review Guam Supreme Court decisions by writ of certiorari pursuant to 48 U.S.C. § 1424-2 (2000) (Pet. App.47a-48a). The Ninth Circuit granted the petition. *Id.* at 37a. In addition to questioning the Guam Supreme Court's definition of "aggregate tax valuation" in the Organic Act's debt-limitation provision, petitioner challenged the expedited process used by the Guam Supreme Court and its resort to factfinding. The parties submitted full briefing, and the court heard oral argument on May 24, 2004.

On October 30, 2004, Congress amended 48 U.S.C. § 1424-2, shifting certiorari jurisdiction over decisions of the Supreme Court of Guam from the Ninth Circuit to this Court. Act of Oct. 30, 2004, Pub. L. No. 108-378, § 2, 118 Stat. 2206, 2208. On March 6, 2006, the Ninth Circuit dismissed the appeal for lack of jurisdiction on the ground that Congress's removal of the Ninth Circuit's certiorari jurisdiction over the Guam Supreme Court applied to pending appeals. Pet. App. 39a.

5. On May 24, 2006, petitioner requested an extension of time within which to file a petition for certiorari with this Court, which Justice Kennedy granted on May 31, setting the deadline for filing this petition as July 19.

REASONS FOR GRANTING THE PETITION

Petitioner seeks review because the Guam Supreme Court misinterpreted an important provision of federal law—the debt-limitation proviso in the Guam Organic Act—in a way that authorizes levels of public borrowing that may threaten the solvency of the Guam government. The Guam Organic Act limits Guam's "public indebtedness" to "10 per centum of the aggregate tax valuation of the property in Guam." 48 U.S.C. § 1423a (emphasis added). The Guam Supreme Court's equation of "tax valuation" with appraised value, *i.e.*, actual market value, rather than assessed value, defies the debt-limitation provision's plain terms by reading

the word "tax" out of the provision and undermines the provision's purpose, which, as the federal District Court of Guam has explained, is "to benefit the taxpayer by restraining the government's propensity to incur debts and to saddle future generations of taxpayers with those debts." *Guam Tel. Auth.* v. *Rivera*, 416 F. Supp. 283, 287 (D. Guam 1976).

Review by this Court is particularly warranted for three reasons. First, because the question presented concerns one of the core powers of a territorial government—its ability to borrow—and the effectiveness of a limitation on that power established by Congress, the question is of great public importance. *See Territory of Alaska* v. *American Can Co.*, 358 U.S. 224, 225 (1959) (petition "granted in view of the fiscal importance of the question to [the territory of] Alaska"); *Puerto Rico* v. *Rubert Hermanos, Inc.*, 309 U.S. 543, 544 (1940) ("The question here in controversy is a matter of great importance to Puerto Rico and involves the power of its legislature to enforce Congressional policies affecting the Island. We therefore brought the case here on a writ of certiorari."). Second, while the resolution of the question will directly affect only the powers of the Guam government, the question is not one of merely local concern. The problem of fiscal crises brought on by excessive borrowing is one that has regularly afflicted other territorial governments. Third, absent review by this Court the important federal question presented will not be addressed by any Article III court, and indeed will have been resolved by the territorial supreme court without even the benefit of significant guiding precedents from any Article III courts. *Cf. Territory of Guam* v. *Olsen*, 431 U.S. 195, 201-202, 204 (1977) (expressing reluctance to interpret Guam Organic Act in way that would permit elimination of review of territorial court decisions by at least one Article III court and suggesting that such elimination would raise constitutional concerns).

I. THE GUAM SUPREME COURT'S DECISION UNDERMINES A CONGRESSIONALLY MANDATED RESTRICTION ON THE POWERS OF THE GUAM GOVERNMENT

The Guam Supreme Court's interpretation of the Organic Act's debt-limitation provision ignores its plain language and disregards its central purposes of keeping territorial government spending and taxation in line and of ensuring that the territorial legislature and respondent governor remain democratically accountable for their fiscal policy decisions.

A. The Guam Supreme Court's Interpretation Conflicts with the Wording of the Guam Organic Act

Interpretation of the debt-limitation provision must of course begin with the words of the provision themselves. *See, e.g., Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The Guam Organic Act authorizes the Guam Legislature to issue bonds and other obligations "when necessary to anticipate taxes and revenues . . . *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. By interpreting "aggregate tax valuation" to mean appraised value, that is, full market value, the Guam Supreme Court read the crucial modifier "tax" out of the debt-limitation provision and so violated the well-established canon that wherever possible, courts must "construe a statute to give every word some operative effect." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

If Congress had intended to set the debt ceiling with reference to the full value of all property on Guam, it could simply have said "aggregate valuation." Instead, it included the qualifier "tax," with the evident purpose of tying the level of permissible indebtedness to the valuation of property used for purposes of taxation, that is, the assessed value. *Cf. Duncan* v. *Walker*, 533 U.S. 167, 169, 174-175 (2001) (holding that a statute referring to "State post-conviction or other collateral review" did not apply to federal habeas corpus review because reading the statute oth-

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erwise would render the modifying term "State" insignificant and thus fail to fulfill the Court's duty "to give effect, if possible, to every clause and word of a statute"). In most jurisdictions, as Congress would certainly have been aware, the value of property for purposes of taxation is set considerably below the full or appraised value. *See, e.g.*, Ga. Code Ann. § 48-5-7(a) (providing "taxable tangible property shall be assessed at 40 percent of its fair market value"); *Breslow* v. *School Dist.*, 182 A.2d 501, 504 (Pa. 1962) ("It is a matter of common knowledge that in nearly every township, county and city in Pennsylvania, property is assessed for tax purposes lower than its market value."). That pattern was predictably followed in Guam. *See* 11 Guam Code Ann. § 24102(f) (defining "value" of real property for purposes of taxation as 35% of appraised value). Linking the permissible level of public indebtedness to the value of property used for imposing taxes has the clear effect of keeping the territorial government's borrowing in line with its ability to repay the debt through tax revenues.

The Guam Supreme Court's error is thrown into relief by state supreme court decisions interpreting debt-limitation provisions lacking a qualifier such as "tax" or "assessed" before the word "value" or "valuation." In construing these unqualified debt-limitation clauses, state high courts have consistently taken the absence of a qualifying adjective as a clear indication that full appraised value rather than assessed value was intended. In *Board of Education* v. *Passey*, 246 P.2d 1078 (Utah 1952), for example, the Utah Supreme Court had to interpret a constitutional debt ceiling that limited municipal borrowing to four percent of "the value of the taxable property" in the municipality. The defendant school board clerk refused to sign bonds issued by the board, claiming that doing so would violate the constitutional restriction because the amount of the bond issue exceeded four percent of the assessed value of the property in the municipality. The Utah Supreme Court rejected the clerk's view, reasoning that in the constitutional debt cap "[t]he word 'value' is not limited or qualified by any adjectives. It does not read 'assessed value' or specify any other

particular kind of value. The word 'value' standing by itself can have only one meaning, *viz.* the full worth or actual value—not a fractional share thereof." *Id.* at 1079. Other courts have followed the same sensible logic. *See Hansen* v. *City of Hoquiam*, 163 P. 391, 392 (Wash. 1917); *N.W. Halsey & Co.* v. *City of Belle Plaine*, 104 N.W. 494, 495-497 (Iowa 1905). Just as the absence of a qualifier before "valuation" indicates legislative intent to tie a debt restriction to full, that is, appraised, value, the presence of a qualifier such as "tax" (or "assessed") shows a legislative intent that the debt limit be tied to the typically lower assessed value used for purposes of taxation.

The Guam Supreme Court suggested that it was not ignoring the significance of the word "tax" altogether because, in its view, that term could be understood to limit the types of property upon whose value the debt limit was to be calculated to taxable property. *See* Pet. App. 17a-19a. But if Congress had intended the word "tax" (or rather "taxable") to qualify the meaning of "property" rather than defining the kind of valuation from which the debt limitation must be calculated, it could easily have made its intention clear by placing "taxable" before "property" rather than "tax" before "valuation." The use of the term "taxable property" in that way is common enough in state constitutional debt caps, *see, e.g.*, Ga. Const. of 1983, art. IX, § V, ¶ I(a) ("The debt incurred by any . . . political subdivision of this state . . . shall never exceed 10 percent of the assessed value of all taxable property within such . . . subdivision . . . ."); Wyo. Const. of 1889, art. 16, § 5 (same), and the same term appears in the debt-limitation provision in the Virgin Islands Organic Act, which, as the Guam Supreme Court stressed, was enacted by Congress just the year before the Guam Organic Act, *see* Pet. App. 12a. The Guam Supreme Court offered no explanation (or legislative history evidence) for the roundabout locution its interpretation would attribute to the Guam Organic Act's drafters.

The link between the Guam Organic Act's debt limitation provision and valuation of property for purposes of

taxation is drawn not only by the presence of the word "tax" immediately before the word "valuation," but also by the introductory phrase allowing borrowing only "when necessary to anticipate taxes and revenues." 48 U.S.C. § 1423a. That phrase emphasizes that borrowing by the Guam Legislature is permissible only when the Legislature determines that the debt incurred can be paid off from existing or reasonably anticipatable sources of tax revenue. *See, e.g.*, *Hodges* v. *Crowley*, 57 N.E. 889, 892 (Ill. 1900); *cf. Wein* v. *State*, 347 N.E.2d 586, 591 (N.Y. 1976). If public indebtedness must be paid off from tax revenue, it only makes sense that the level of indebtedness should be tied to the level of taxation imposed on property, not to the value of the property itself. The establishment of that link is precisely what the debt-limitation proviso's reference to "aggregate tax valuation" accomplishes.

The Guam Supreme Court refused to interpret the qualifier "tax" as setting Guam's public borrowing ceiling with reference to the assessed value of property on Guam in significant part because the debt-limitation provision in the Virgin Islands' Organic Act includes the word "assessed" rather than "tax" before "valuation." *See* Pet. App. 12a. The Virgin Islands' provision was enacted just a year before Guam's, and the court reasoned that Congress would not have used the word "assessed" in one organic act and "tax" in the other if it had intended both terms to mean "assessed." *Id.* As the decisions by state supreme courts interpreting unqualified debt-limitation provisions suggest, the presence of either qualifier, whether "tax" or "assessed," is more significant than the particular qualifier chosen, in demonstrating that the legislature intended to restrict borrowing by tying it to the valuation of property used for purposes of taxation rather than full or appraised value. But, in any event, the Guam Supreme Court's comparison of the Guam and Virgin Islands provisions ignores the evolution of the Virgin Islands Organic Act. Once that evolution is taken into account, Congress' use of different qualifiers in the two organic acts only demonstrates their equivalence, not their divergence.

In 1949 Congress amended the Virgin Islands Organic Act to authorize the Virgin Islands government, for certain purposes, to issue bonds "*Provided*, That no public indebtedness . . . shall be incurred in excess of 10 per centum of the aggregate assessed valuation of the taxable real property in . . . the Virgin Islands." 48 U.S.C. § 1403; *see id.* § 1574(b)(ii)(A). But unlike the Guam Act, the Virgin Islands Organic Act, which was originally enacted in 1936, contained from the start a separate provision 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; *see Bluebeard's Castle, Inc.* v. *Government of the V.I.*, 321 F.3d 394, 396 (3d Cir. 2003).[2] Because of this separate federal requirement, if the debt-limitation provision added to the Virgin Islands Act in 1949 had defined the limitation with reference to "aggregate tax valuation," that might well have been understood to mean actual value. Thus, in the Virgin Islands Act, 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.[3] When Congress enacted the Guam Or-

[2] The provision states that "[f]or the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property and the rate in each municipality of such islands shall be the same for all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put." 48 U.S.C. § 1401a. Congress established this requirement because prior to this time land in the Virgin Islands had been appraised for tax purposes at different rates based on the particular use of the land. *Bluebeard's Castle*, 321 F.3d at 401. Uncultivated land in particular had been taxed at a low rate, thus creating a disincentive to development of much land on the islands. *Id.*

[3] Indeed, the bill containing the Virgin Islands debt-limitation provision had originally used the phrase "aggregate tax valuation." The House committee that considered the bill amended the phrase to use the word "assessed" in response to a recommendation from the Department of the Interior. But the change was characterized as simply a "perfecting

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ganic Act the following year, there was no similar need to use the word "assessed." The adjective "tax" could be used to achieve the same result.

B. The Guam Supreme Court's Interpretation Undermines the Purpose of the Debt-Limitation Provision

The Guam Supreme Court's interpretation flies in the face not only of the debt ceiling's terms but also of its core purpose: to keep borrowing by the Guam Legislature within limits tied to the legislators' willingness to impose taxes on the people who elect them. By fixing that link in Guam's federal constitution, the debt-limitation proviso ensures that the Legislature cannot engage in levels of borrowing that would threaten the territorial government's solvency. It prevents the Legislature from excessively postponing the enactment of taxes needed to keep the government within its means and thus throwing onto the backs of future taxpayers oppressive levels of taxation. And, perhaps most fundamentally, the debt-limitation proviso thereby ensures that the members of the Legislature (and the Governor) remain accountable to people who elect them and whom they serve.

In all these respects, the Guam Organic Act's borrowing cap resembles its state constitutional counterparts. As state supreme courts have repeatedly held, those state constitutional limitations, like the Guam proviso, are intended "to prevent the creation of excessive municipal debt and to protect taxpayers from the consequent oppression of burdensome, if not ruinous, taxation." *City of Hartford* v. *Kirley*, 493 N.W.2d 45, 51 (Wis. 1992); *see* 15 McQuillin, *The Law of Municipal Corporations* § 41:1 (3d ed. 2005) (constitutional debt limits established "as a limit to taxation and as a protection to taxpayers; to maintain municipal solvency") (footnote omitted). They serve "to prevent municipalities from

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amendment," *i.e.*, one not designed to change the statute's intended meaning. H.R. Rep. No. 81-682, at 2, 3 (1949).

loading the future with obligations to pay for things the present desires, but cannot justly afford, and, in short, to establish the principle that, beyond defined limits, they must pay as they go." *Keller* v. *City of Scranton*, 49 A. 781, 782 (Pa. 1901); *see City of Hartford*, 493 N.W.2d at 51 ("seeks to impose the burden of debt repayment upon those who create the obligations, not upon future generations"); 15 McQuillin, §41:3 (same). They aim to restrain "the lust of a greedy and overindulgent . . . government." *Allen* v. *Van Buren Township*, 184 N.E.2d 25, 31 (Ind. 1962).

Aware of these holdings, the Guam Supreme Court at least acknowledged the debt-limitation proviso's purpose of keeping excessive borrowing in check. *See* Pet. App. 6a-7a. But it went on to disregard that fundamental purpose in reaching its view of the proviso's meaning. The Guam Supreme Court's interpretation leaves the territorial Legislature free to engage in much greater borrowing—with the present assessment rate of 35%, nearly three times as much borrowing—as would the interpretation urged by petitioner. And the Guam Supreme Court's reading leaves the level of borrowing untethered to the Legislature's willingness to impose taxes on voters. It is telling in this regard that when the Legislature, apparently displeased with petitioner's unwillingness to approve the excessive borrowing authorized by Public Law 27-19, sought to validate that borrowing, it enacted in effect an advisory law expressing its view that the phrase "aggregate tax valuation" in the debt-limitation should be interpreted to mean 100% of appraised value. *See id.* at 3a. The Legislature could have achieved the intended result of raising the debt ceiling by raising the assessment rate for property taxation from 35% to some higher figure. But doing so would have required taking responsibility with voters for subjecting a greater portion of their property to taxation. In evading acceptance of that responsibility, the Legislature was engaging in just the sort of behavior the debt ceiling was intended to prevent.

The purpose of the debt-limitation proviso, in short, is "to place restraints upon the Governor and Legislature [in

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order to] promote fiscal responsibility." *Guam Tel. Auth.*, 416 F. Supp. at 287. To the extent the terms of the proviso are ambiguous, they should be read to serve that core Congressional goal. Instead, the Guam Supreme Court's decision subverts it.

C. The Importance of the Debt-Limitation Proviso's Purpose of Promoting Fiscal Restraint Is Highlighted by the Experience of Other Territories

Guam is one of three U.S. territories with federal organic acts, along with Puerto Rico and the Virgin Islands. Recent fiscal crises experienced by the governments of Guam's fellow territories highlight both the more general significance of territorial debt-limitation provisions and the importance of interpreting such provisions in accord with their central purpose of restraining excessive borrowing.

The Puerto Rican government endured a fiscal crisis when it hit a borrowing limit at the beginning of the year. *See, e.g., Puerto Rico: Trouble on "Welfare Island"*, The Hamilton Spectator, May 27, 2006.[4] On May 1, 2006, the governor shut down nonessential government operations for two weeks, furloughing 90,000 public employees, after failing to reach agreement with the legislature on how to fund a $740 million budget deficit. The government only resumed operations when it secured a $741 million emergency loan from the Government Development Bank to be repaid by some combination of a new sales tax and existing revenues. *See, e.g.*, Marion Barbel, *Loan Deal Struck to Bail Puerto Rico Out of Financial Crisis*, Global Insight, May 11, 2006. In the wake of the government shutdown, Moody's cut the rating of $25 billion in Puerto Rico general obligation bonds to one level above junk status. *See* Manuel Ernesto Rivera, *Deal to end Puerto Rico shutdown hangs on approval of bailout legislation*, Associated Press, May 13, 2006.

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[4] *Available at* http://www.hamiltonspectator.com/NASApp/cs/ContentServer?pagename=hamilton/Layout/Article_Type1&c=Article&cid=1148681735320&call_pageid=1024322466723 (last visited July 18, 2006).

A compromise fiscal reform bill was signed into law in mid-May that calls for cutting up to $350 million in government spending in 2007. Negotiations are under way to overhaul the tax system to bring in an additional $300 to $400 million in revenues. *See* Adam L. Cataldo, *Puerto Rico OKs Up to $350M in Spending Cuts*, The Bond Buyer, May 30, 2006, at 1. The emergency loan and fiscal reform bill, however, may "not address the structural deficiencies at the root of the budget impasse." *Loan Deal Struck to Bail Puerto Rico Out of Financial Crisis*, *supra*.

The Virgin Islands has also struggled to keep its borrowing within legal bounds. In 1999, the Virgin Islands Fiscal Recovery Task Force warned that if the territorial government did not change its ways, its annual deficit could soon reach over $140 million. *See* Virgin Islands Fiscal Recovery Task Force, *5 Year Plan for Fiscal Recovery*, Pt. 1, § I.A.[5] The Task Force predicted that the island's debt would balloon from $300 million at the end of that fiscal year to $700 million by the 2004 fiscal year. *Id.* In fact, by 2004 the island's debt had reached $1 billion, more than 60% of the Islands' gross domestic product. *See House Panel Votes To Create CFO For Virgin Islands*, Nat'l J. Cong. Daily, July 14, 2004; CIA, *The World Factbook*.[6]

One of the territorial government's responses to this financial crisis was to try to borrow more money. In 1997, then-governor Roy Schneider sought permission to borrow $105 million to fund tax rebates owed to thousands of Virgin Islands residents. *See Virgin Islands governor seeks new loans to pay off old debts*, Associated Press, Sept. 15, 1997. In 1999, the territorial government sought amendments to its organic act that would permit it to issue an additional

[5] *Available at* http://64.233.161.104/search?q=cache:GGOxrJcgpeQJ:www.usvi.org/oit/5yrplan/part%2520i%2520-%2520section%2520i_general%2520fund_pages%2520i-1%2520through%2520i-40.htm+&hl=en&gl=us&ct=clnk&cd=1 (last visited July 18, 2006).

[6] *Available at* https://www.cia.gov/cia/publications/factbook/geos/vq.html (last visited July 18, 2006).

$130 million in tax-exempt bonds, assuring Congress that the government would pursue reforms that would balance the budget by 2003. *Hearing Before the S. Comm. On Energy & Natural Res.*, 106th Cong. (Oct. 14, 1999) (statement of Ferdinand Aranza, Dir. of the Office of Insular Affairs, Dep't of the Interior). From 1999 to 2001, the government borrowed another $300 million from private lenders to refinance the deficit. *Hearing Before the H. Appropriations Interior Subcom.*, 107th Cong. (May 2, 2001) (statement of the Hon. Donna M. Christensen). In 2001, it requested that $45 million in outstanding FEMA disaster relief loans be forgiven, again assuring Congress that the deficit would soon be a thing of the past. *Id.*

The Virgin Islands territorial government has recently taken some steps—raising taxes, imposing a hiring freeze, encouraging private economic development, and making the island a more attractive tourist destination—that appear to have succeeded in bringing its budget back into balance. But pressure for additional borrowing may well emerge again soon. *See, e.g.*, Tim Fields, *PFA OKs bonds to refinance debt, add library and roads*, Virgin Islands Daily News, June 8, 2006.[7]

II. This Case Presents a Case Or Controversy Within the Meaning of Article III

Although petitioner and respondent are both officials in the Guam Government, this case presents a case or controversy within the meaning of Article III of the Constitution because it is "the kind of controversy courts traditionally resolve," and the setting assures "that concrete adverseness which sharpens the presentation of issues." *United States* v. *Nixon*, 418 U.S. 683, 697 (1974).

Even in cases involving the federal executive branch, this Court has repeatedly taken the view that the "mere assertion of a claim of an 'intrabranch dispute,' without more,

[7] *Available at* http://www.virginislandsdailynews.com/index.pl/article?id=17591799 (last visited July 18, 2006).

has never operated to defeat federal jurisdiction." *Nixon*, 418 U.S. at 693. Article III courts "must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States* v. *ICC*, 337 U.S. 426, 430 (1949). Those principles apply with even greater force where, as here, each party is independently elected to his office, *see* 5 Guam Code Ann. § 30101(a), petitioner Attorney General may not be removed from office by respondent Governor, *see* 48 U.S.C. § 1421g(d)(2); 5 Guam Code Ann. § 30101(c), and local law gives each official an independent, and thus potentially conflicting, authority over a matter of great public significance, the approval of government contracts, including for public borrowing, *see* 5 Guam Code Ann. § 22601.

This dispute is the kind of controversy courts traditionally resolve. Federal courts, including this Court, have, with some regularity, heard cases in which executive agencies or officials have appeared on opposite sides of the dispute. *See, e.g.*, *IRS* v. *FLRA*, 494 U.S. 922 (1990); *Secretary of Agric.* v. *United States*, 347 U.S. 645 (1954); *TVA* v. *EPA*, 278 F.3d 1184, 1193-1195 (11th Cir. 2002), *cert. denied sub. nom. Leavitt* v. *TVA*, 541 U.S. 1030 (2004) (collecting decisions). They have done so particularly when, as here, the executive official challenging the position of the chief executive was insulated from removal by the chief executive. *See TVA*, 278 F.3d at 1193-1194 (collecting decisions). And state courts have regularly considered suits pitting attorneys general against other executive officials, including governors, justiciable when the contending officials disagreed over the constitutionality of state laws. *See, e.g., People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1227-1231 (Colo. 2003) (attorney general versus secretary of state); *State ex rel. Condon* v. *Hodges*, 562 S.E.2d 623, 626-629 (S.C. 2002) (attorney general versus governor); *State ex rel. Douglas* v. *Thone*, 286 N.W.2d 249, 254-256 (Neb. 1979) (attorney general versus governor). The Guam Organic Act, a federal enactment, is the equivalent of the Territory's constitution. *See* 48 U.S.C. § 1423a; *Haeuser*, 97 F.3d at 1156.

This case is marked by concrete adverseness because the independently elected petitioner Attorney General and respondent Governor "advocate genuinely conflicting views" regarding the interpretation of the Guam Organic Act's borrowing-limitation provision, *TVA*, 278 F.3d at 1197, and local law gives them the authority to endow those conflicting views with concrete effects by making the issuance of government contracts contingent on the approval of both officials, *see* 5 Guam Code Ann. § 22601. Thus, since petitioner argues that federal law precludes respondent from issuing the authorized bonds, and respondent insists no such impediment exists, "valuable legal rights ... will be directly affected to a specific and substantial degree by the decision of the question of law." *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 262 (1933).[8]

[8] Moreover, even if it were not clear that Article III was satisfied when the dispute began, the binding effect of the Guam Supreme Court's decision constrains petitioner's exercise of his statutory obligation to review bond issuance contracts for legality and thus makes all the clearer the concreteness of the dispute presented to this Court. *See Asarco* v. *Kadish*, 490 U.S. 605, 612-624 (1989) (Article III determination turns on state of dispute at time of petition to this Court, including effect of lower court decision on parties, not on state of dispute at some earlier time).

CONCLUSION

This case presents an important (and rare) opportunity for this Court to ensure that the limitations Congress has imposed on a territorial government are correctly understood and carefully observed. Doing so will promote both the fiscal stability of Guam and the accountability of its government to the U.S. citizens it serves.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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