No. _____

In The Supreme Court of the United States

MARIA BENTLEY, WARREN MOSLER, CHRIS HANLEY, CB3, INC., AND CHRISMOS CANE BAY, LLC,

*Petitioner*s,

v.

JOSEPH GERACE AND VICTORIA VOOYS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the Virgin Islands

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Located more than one thousand miles off the coast of mainland United States, defendants who reside in the Virgin Islands may struggle to collect awarded costs against off-island plaintiffs. Cognizant of this potential burden, the Virgin Islands legislature enacted Section 547, which mandates:

> [i]f the plaintiff resides out of the Virgin Islands or is a foreign corporation, the defendant may serve a notice requiring security for the costs which may be awarded against the plaintiff. After the service of such a notice, all proceedings in the action shall be stayed until security is given by the plaintiff.

5 V.I.C. § 547(a).

The question presented is:

Whether a statute requiring a court, upon a defendant's request, to order a non-resident plaintiff to post a minimal security bond for costs violates either the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution or the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

Petitioners, who were Defendant-Appellants in the court below, are Maria Bentley, Warren Mosler, Chris Hanley, CB3, Inc., and Chrismos Cane Bay, LLC.

Respondents, who were Plaintiff-Appellees in the court below, are Joseph Gerace and Victoria Vooys, doing business as Cane Bay Beach Bar.

RULE 29.6 STATEMENT

Neither CB3, Inc. nor Chrismos Cane Bay, LLC has a parent corporation, and no publicly held company owns 10% or more of its stock.

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JURISDICTION

The Court of Appeals for the Third Circuit dismissed the defendant-appellants' petition for a writ of certiorari for lack of jurisdiction on August 21, 2018. *Vooys v. Bentley*, 901 F.3d 172 (3d Cir. 2018). Until that time, the "finality" of the Supreme Court of the Virgin Islands' judgment "remained suspended." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007).[1]

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] According to 28 U.S.C. § 2101(c), a petition for certiorari in the United States Supreme Court must be filed within 90 days of entry of the lower court's judgment. In *Limtiaco*, the Ninth Circuit granted certiorari in a case from the Guam Supreme Court. While the appeal was pending, Congress stripped the Ninth Circuit's jurisdiction over appeals from Guam and shifted it to this Court. This Court granted the petition for writ of certiorari even though it was filed more than 90 days after the opinion of the Guam Supreme Court, finding that the judgment did not become "genuinely final" for purposes of review until the Ninth Circuit dismissed the appeal. 549 U.S. at 487–88. The same procedural circumstances are present here.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions, 4 V.I.C. § 513 and 5 V.I.C. § 547, appear in the appendix. App. 105–08.

STATEMENT OF THE CASE

A. Statutory Background

Title 5, Section 547 of the Virgin Islands Code allows defendants to request that a non-resident plaintiff post a bond for costs awarded following litigation. If a defendant requests a bond, the plaintiff is served with notice. 5 V.I.C. § 547(a). When the plaintiff is served, all proceedings in the action are stayed until the plaintiff pays the security. 5 V.I.C. § 547(a). Courts may dismiss the pending action if the security is not paid within thirty days. 5 V.I.C. § 547(d).

Section 547's application is limited in two ways. First, Section 547(e) caps the amount of a bond at $3,000. Second, Section 547(f) prohibits bond securities for actions commenced in the small claims division of the Superior Court of the Virgin Islands.

Courts may waive the bond requirements for indigent non-resident plaintiffs by allowing them to proceed in forma pauperis upon a showing of indigency. 4 V.I.C. § 513(a).

B. Procedural Background

1. This case stems from a simple contract action concerning the sale and operation of a beach bar in the Virgin Islands. On June 9, 2005, Joseph Gerace

and Victoria Vooys, doing business as Cane Bay Beach Bar, sued Warren Mosler, Chris Hanley, Maria Bentley, and Chrismos Cane Bay, LLC for breach of contract, fraud, and misrepresentation.

At the time of filing, Gerace and Vooys were residents of the Virgin Islands. However, they relocated to the mainland United States in the fall of 2012. Defendant-petitioners feared they might be unable to recover costs against the plaintiffs as a result of their move. On January 31, 2013, they filed a motion requesting that each plaintiff post a $1,000 security bond pursuant to Title 5, Section 547 of the Virgin Islands Code. The Superior Court of the Virgin Islands granted their request on April 15, 2013.

This appeal arises from the dismissal of plaintiff-respondents' complaint for failure to pay that security bond. Plaintiff-respondents failed to pay the bond before the thirty-day deadline, and failed to provide the court with proper documentation to support a showing of indigency to proceed in forma pauperis. Defendant-petitioners moved to dismiss the complaint on May 22, 2013. The court granted the motion to dismiss on April 14, 2015, after considering and rejecting plaintiff-respondents' constitutional challenges to Section 547.

2. Plaintiff-respondents filed a timely appeal in the Supreme Court of the Virgin Islands, renewing their challenge to the constitutionality of Section 547. On August 22, 2016, the court reversed the dismissal and declared the non-resident bond statute

unconstitutional under both the Privileges and Immunities Clause and the Equal Protection Clause.

3. After the Supreme Court of the Virgin Islands invalidated Section 547, the defendant-petitioners timely filed a petition for a writ of certiorari in the Third Circuit. At the time, the case met the Third Circuit's definition for "cases commenced" in the Virgin Islands over which the Third Circuit retained certiorari jurisdiction.[2] The Third Circuit granted review, and the case was argued before a merits panel on December 12, 2017.

4. Without deciding the case on the merits, the Third Circuit issued a sua sponte order for an initial hearing en banc to reexamine whether Congress intended the Third Circuit to retain certiorari jurisdiction over "cases commenced" in the Superior Court of the Virgin Islands after the effective date of H.R. 6116, or only *appeals* commenced before that date from final decisions of the Supreme Court of the Virgin Islands. The Third Circuit, overturning its contrary precedent, held that its certiorari

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[2] The Third Circuit obtained certiorari jurisdiction over the Supreme Court of the Virgin Islands in 1984. 48 U.S.C. § 1613. In 2012, Congress replaced its certiorari jurisdiction with direct U.S. Supreme Court review of "cases commenced on or after" the statute's effective date of December 28, 2012. H.R. 6116. In *United Indus. Serv., Transp., Prof'l and Gov't Workers of N. Am. Seafarers Int'l Union ex rel. Bason v. Gov't of the Virgin Islands*, 767 F.3d 193 (3d Cir. 2014) (*Bason*), the Third Circuit held "cases commenced" referred to *all* cases filed in the Virgin Islands courts on or after the enactment of H.R. 6116 on December 28, 2012.

jurisdiction to review decisions of the Supreme Court of the Virgin Islands extended only to appeals filed before December 28, 2012.

5. Pursuant to *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007), the "finality of the judgment" in the Supreme Court of the Virgin Islands "remained suspended" until the Third Circuit dismissed the petition before it. This petition follows the Third Circuit's dismissal for lack of jurisdiction.

REASONS FOR GRANTING THE PETITION

This petition seeks review of the Supreme Court of the Virgin Island's erroneous holding that a statute duly enacted by the Legislature of the Virgin Islands to protect its residents from costly and frivolous lawsuits is unconstitutional.

Statutes requiring non-resident plaintiffs to post a bond securing the ability of prevailing resident defendants to collect costs and other awards have been enacted in multiple states and territories, as well as the District of Columbia. This petition contests the first and only time that a such a statute has been struck down on federal constitutional grounds. The Supreme Court of the Virgin Islands stands alone in its determination that non-resident bond statutes violate the Privileges and Immunities Clause or the Equal Protection Clause. This Court should take this opportunity to review and correct the misapplication of its precedent, and to rule on the constitutionality of this common procedural safeguard for litigants.

I. The Lower Court's Determination That Section 547 Violates The Privileges And Immunities Clause Conflicts With This Court's Precedent

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. VI, § 2. It is applicable to the Virgin Islands by statute. 48 U.S.C. § 1561. The purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

But this "norm of comity" does not apply to every activity. *Austin v. New Hampshire*, 420 U.S. 656, 660–61 (1975). Instead, the force of the Clause comes to bear "[o]nly with respect to 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity," or those that pertain to the "maintenance or well-being of the Union." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). Indeed, legislatures enjoy "considerable leeway in analyzing local evils and prescribing appropriate cures." *Id.* at 400 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

The ambit of the Clause includes the fundamental right of access to courts. *See, e.g.*, *United States v. Georgia*, 546 U.S. 151, 162 (2006). But a "right of access" does not imply a perfectly

symmetrical right of access for residents and non-residents. *See, e.g.*, *McBurney v. Young*, 569 U.S. 221, 231 (2013) ("The Privileges and Immunities Clause does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage."). Instead, this Court has found requiring non-residents to satisfy reasonable requirements before proceeding with a claim in a foreign court is not "'hostile to [their] fundamental rights.'" *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553, 561–62 (1920) (quoting *Blake v. McClung*, 172 U.S. 239, 256 (1898)).

The Supreme Court of the Virgin Islands erred by finding Section 547 violates the Privileges and Immunities Clause. Courts employ a two-step inquiry to determine whether discrimination against a non-resident violates the Clause. *United Building & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218 (1984). A court will first determine if the law "burdens one of those privileges and immunities protected by the clause." *Id.* But even if the court finds the law burdens the rights of non-residents, it will then consider whether "there is a 'substantial reason' for the difference in treatment." *Id.* at 222 (quoting *Toomer*, 334 U.S. at 396). Courts afford states "considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer*, 334 U.S. at 396. If a substantial reason for the difference in treatment exists, the court will uphold the law.

Section 547 does not burden a non-resident plaintiff's right of access to courts in the Virgin Islands because its bond requirement does not materially interfere with their pursuit of relief. Alternatively, even if the Court finds the statute burdens a fundamental right of access, the Virgin Islands has a substantial reason to require non-resident security bonds. The Supreme Court of the Virgin Islands erred by ruling otherwise.

A. Non-Resident Security Bonds Do Not Burden A Plaintiff's Fundamental Right Of Access To Courts

Section 547's bond requirement does not burden a non-resident's right of access to Virgin Islands courts because it is a reasonable enforcement safeguard that may be waived upon proof of indigency.

Historically, securities have "generally been required of a non-resident, but not of a resident citizen" when seeking relief in a foreign court. *Canadian Northern*, 252 U.S. at 561. Section 547 operates within this legal tradition. The bond provided for in Section 547 is held by the court as a security. It is not a "fee" that a non-resident plaintiff must pay in order to access the court. Instead, the court holds the bond as a security. If costs are awarded against the plaintiff at the conclusion of the suit, the court can use the bond to enforce its judgment. But the court will return the bond if the plaintiff prevails or costs are not awarded.

Section 547 also sets a reasonable maximum for the bond's amount. The statute permits a bond of up to $1,000 for the first defendant. 5 V.I.C. § 547(c)(1). The court may require up to $500 for each additional defendant, but the amount may not exceed a total of $3,000. 5 V.I.C. § 547(e). The bond "shall not apply to an action commenced in the small claims division of the Superior Court," 5 V.I.C. § 547(f), and indigent plaintiffs who proceed in forma pauperis need not pay the bond to file suit. 4 V.I.C. § 513.

In order to satisfy the Privileges and Immunities Clause, the Virgin Islands need only provide a non-resident "access to [its] courts . . . upon terms which in themselves are *reasonable* . . . for the enforcing of any right he may have, even though they may not be technically and precisely the same in extent as those accorded resident citizens." *Canadian Northern*, 252 U.S. at 562. Rather than "slam[ming] the courthouse door" on non-residents, the Virgin Islands security bond requirement is a reasonable, time-honored practice. *McBurney*, 569 U.S. at 231. Statutes similar to the one struck down by the court below are currently a matter of law in multiple jurisdictions, including Guam. *See, e.g.*, Ark. Code § 16-68-301(a); Colo. Rev. Stat. § 13-16-101; D.C. Code § 15-703; 7 Guam Code § 26616; Nev. Rev. Stat. § 18.130.

The lower court's determination to the contrary should be reversed.

B. Even If The Right Of Access To Courts Is Burdened, The Virgin Islands Has A Substantial Reason To Enact Section 547

The Privileges and Immunities Clause "is not an absolute . . . it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. "If there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920). But if "such reasons do exist" and "the degree of discrimination bears a close relation to them," the laws will be upheld. *Toomer*, 334 U.S. at 396.

The purpose of non-resident security bond statutes is "to discourage non-meritorious suits by nonresidents and to avoid a situation in which a successful defendant . . . is compelled to file suit in a foreign jurisdiction in order to collect costs awarded him [in his home state]." *Landise v. Mauro*, 141 A.3d 1067, 1076 (D.C. 2016) (internal quotations omitted). Federal courts of appeals have recognized these valid purposes behind similar non-resident bond requirements for courts in both Puerto Rico and Guam.

The First Circuit described the purpose of Puerto Rico's Rule 304 as "to ensure that a prevailing party will be able to collect a judicial award of costs, expenses, and attorneys' fees from a non-resident

litigant." *Murphy v. Ginorio*, 989 F.2d 566, 568 (1st Cir. 1993) (discussing the importance of the non-resident bond requirement, although finding it inapplicable to an insolvent plaintiff). Similarly, the Ninth Circuit found that Guam's rule "assur[ing] collection of costs from non-residents who may be in the continental United States at the time of judgment is . . . a perfectly reasonable provision" for the reasons stated in Part I, A, *supra*. *Russell v. Cunningham*, 233 F.2d 806, 811 (9th Cir. 1956).

Like the rules and laws passed in other jurisdictions before it, the purpose of 5 V.I.C. § 547 is "to prevent prevailing resident defendants from having to go off-island to enforce an award for costs against a nonresident plaintiff." *Davis v. Allied Mortg. Capital Corp.*, 53 V.I. 490, 503 (2010) (internal citations omitted). As the government recognized in its brief to the Virgin Islands Supreme Court, the statute also "seeks to protect residents of the Virgin Islands from the costs of frivolous and vexatious lawsuits." Brief for V.I. Gov. at 9. "[G]iven the reality and hardship a Virgin Islands litigant defendant may have in attempting to collect costs from a non-resident plaintiff off-island," the government argued, "there is a substantial reason for the difference in treatment of residents and non-residents and the difference bears a substantial relationship to the Territory's objective." *Id.*

The Supreme Court of the Virgin Islands erred by failing to properly weigh the Territory's "perfectly valid reasons" in passing Section 547. *Toomer*, 334

at 396. The Court should have granted the Virgin Islands legislature "considerable leeway in analyzing local evils and prescribing appropriate cures." *Id*. By limiting its consideration to the Territory's interest in preventing residents from having to go off-island to enforce a judgment, the court neglected this Court's mandate to discern whether a "close relationship" existed between the discriminatory law and its justifications.

II. The Lower Court's Determination That Section 547 Violates The Equal Protection Clause Also Conflicts With This Court's Precedent

The Equal Protection Clause of the Fourteenth Amendment protects against illegitimate government discrimination. But it does not prohibit legislation that draws permissible distinctions for legitimate purposes. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

The Virgin Islands Supreme Court should not have subjected Section 547 to strict scrutiny because it does not infringe upon a fundamental right or distinguish on the basis of a suspect classification. Instead, the court below should have employed rational basis scrutiny to evaluate Section 547, which requires only that a statute be rationally related to a legitimate governmental purpose.

Like other non-resident plaintiff security bond statutes, Section 547 easily satisfies the requirements of rational basis scrutiny. Protecting residents against frivolous litigation and the burden of collecting costs from off-island plaintiffs is rationally accomplished by imposing a cost bond on non-resident plaintiffs.

Even if the Virgin Islands Supreme Court was correct to apply heightened scrutiny, Section 547 should still survive review. Heightened scrutiny requires a tighter fit between a law and its aims than does rational basis scrutiny. Yet Section 547 also satisfies this test. It is narrowly tailored to achieve an important government objective because of limitations to its application.

A. The Supreme Court Of The Virgin Islands Should Have Applied Rational Basis Scrutiny To Section 547

When analyzing a statute under the Equal Protection Clause, a court should subject legislation to rational basis scrutiny unless the statute infringes upon the "exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Fourteenth Amendment "does not require absolute equality or precisely equal advantages." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

The court below identified access to courts as a fundamental right infringed by Section 547, and

applied heightened scrutiny to invalidate it on equal protection grounds. App. 73–77. This was an error. The court should have evaluated Section 547 under rational basis scrutiny, because it does not meaningfully infringe upon access to the courts.

Access to the courts is, without a doubt, a fundamental right protected by the Constitution. *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). However, Section 547 does not infringe on this right in any meaningful way. Cases dealing with the due process right of access to the courts have long recognized that access need not be entirely equal; instead, an opportunity to be heard must be provided only "within the limits of practicability." *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); *see also Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). "The question is not one of absolutes, but of degrees." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (declining to require states to provide court-appointed counsel for discretionary appeals).

Court costs are regularly associated with litigation. Like most courts, the Virgin Islands accommodates indigent litigants to ensure that cost does not prohibit them from bringing suit. As discussed in Part I, *supra*, the Virgin Islands Code authorizes indigent parties to proceed in forma pauperis. 4 V.I.C. § 513. It also establishes a maximum bond of $1,000 for the first defendant, and up to $500 per additional defendant, not to exceed $3,000 total. 5 V.I.C. § 547(e). Section 513 protects

indigent plaintiffs from being effectively kept out of court by Section 547, while Section 547 by its own terms ensures that the court will not impose an unreasonable cost on non-resident plaintiffs.

These accommodations mean that Section 547 does not infringe on the right of access to the courts. Instead, the bond it imposes is a procedural protection for defendants in the Virgin Islands. Island territories have unique concerns, and as mentioned above in Part I, B, *supra*, federal district courts in both Puerto Rico and Guam have seen fit to enact similar protections, and have equivalent non-resident bond requirements. D.P.R.L.R. 304; 7 Guam Code § 26616.

Section 547 does not implicate any of the limited number of suspect classifications recognized by this Court (race, national origin, alienage, gender, and non-marital parentage). *Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)). Nor does it infringe on the fundamental right of access to the courts in a material way. Section 547 should therefore be subjected only to rational basis scrutiny. *Nordlinger*, 505 at 10. Both the First and Ninth Circuits have accepted this argument, and subjected similar non-resident bond statutes to rational basis scrutiny. *See, e.g.*, *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir. 1976) (applying rational basis scrutiny to statute requiring non-domiciliary plaintiffs to post security for costs); *Clopper v. Merrill Lynch Relocation Mgmt., Inc.*, 812

F.2d 1116, 1123 (9th Cir. 1987) (applying rational basis scrutiny to statute requiring attorneys for non-resident plaintiffs to post a cost bond security).

B. Section 547 Satisfies Rational Basis Scrutiny

Rational basis scrutiny is deferential to the legislature and easy to satisfy. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993) (citations omitted). Additionally, "[o]n rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

In the First and Ninth Circuits, non-resident cost bond statutes have satisfied rational basis scrutiny. In *Hawes*, the First Circuit was confronted with a challenge to Puerto Rico's non-resident cost bond statute. In upholding the law, the court explained:

> The apparent purpose behind Rule 5, which is based on the reasonable assumption that domiciliaries are more likely than

> nondomiciliaries to own assets within the district, is to enforce an award of costs against a nondomiciliary who may be in the continental United States at the time of judgment. This seems a perfectly reasonable provision.

Hawes, 535 F.2d at 145.

Likewise, the Ninth Circuit in *Clopper* upheld the distinction between residents and non-residents in Oregon's cost bond statute, recognizing that "[d]espite modern uniform agreements on enforcement and recognition of foreign judgments and summary procedures in the federal courts, we cannot say that all heightened difficulty in reaching a non-resident's assets has disappeared." *Clopper*, 812 F.2d at 1123 (citations omitted).

The purpose of Section 547, as recognized by the Supreme Court of the Virgin Islands, was to "prevent prevailing resident litigant defendants from having to leave the Virgin Islands to enforce an award for costs against non-resident plaintiffs." App. 58. The Virgin Islands are located more than one thousand miles off the coast of the mainland United States, and welcomes a high volume of temporary visitors. The elevated risk of frivolous litigation and the difficulty potentially associated with collecting an award for costs from non-resident plaintiffs motivated the Virgin Islands Legislature to pass this statute. *Davis*, 53 V.I. at 503. Surely, the protection of residents against frivolous litigation and the inability to collect awards for cost is a legitimate government purpose, and Section 547 is

rationally related to the pursuit of that aim. Accordingly, Section 547 should have easily satisfied rational basis scrutiny, and the lower court's decision should be overturned.

C. Even If Section 547 Should Have Been Subjected To Heightened Scrutiny, It Should Still Survive

Even if it were appropriate to apply strict scrutiny to Section 547, the court below still should have upheld the statute. Strict scrutiny requires that a classification be narrowly tailored to further a compelling government interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Protecting the ability of defendants to collect costs from off-island plaintiffs, particularly those who flee from the island after initiating frivolous litigation, is a compelling government interest. *Howlett v. Rose*, 496 U.S. 356, 380 (1990) ("A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law.").

The Supreme Court of the Virgin Islands found Section 547 to be both over- and under-inclusive. *See* App. 73–75. In reality, the statute is neither—at least not to the degree that it would run afoul of strict scrutiny.

The court below reasoned that Section 547 is over-inclusive because non-residents may have assets on-island. *Id.* While this may be true, it ignores the difficulties inherent in proceeding

against parties not present in a remote jurisdiction, as well as the fact that residency is the most practicable way to identify those without assets on-island.

The court below also characterized Section 547 as under-inclusive because it requires only non-resident plaintiffs to post the bond as opposed to both non-resident plaintiffs and defendants. App. 74. However, the legislature was concerned with uncollectible costs stemming from frivolous litigation, not just uncollectible costs in general. App. 58. It was therefore appropriate to limit the applicability of Section 547 to plaintiffs. *Cf. Patrick v. Lyndon Transport Inc.*, 765 P.2d 1375, 1381 (Alaska 1988) (Matthews, C.J., dissenting) (arguing that Alaska's non-resident bond statute is not fatally over-inclusive or under-inclusive with respect to Alaska's equal protection clause because there are no better means to distinguish between cooperative and uncooperative plaintiffs).

Section 547 is narrowly tailored because it distinguishes on the most practical grounds for identifying plaintiffs against whom collection will be difficult. As previously discussed, its applicability is limited to ensure it does not unduly restrict access to courts. The amount of the bond that courts can require is limited, and indigent plaintiffs can proceed in forma pauperis. 5 V.I.C. § 547(e); 4 V.I.C. § 513. The Virgin Islands legislature used the least restrictive means possible by distinguishing on the basis of a plaintiff's residency. It could not know in

advance which plaintiffs, having commenced possibly frivolous litigation, are likely to go off-island at the conclusion of litigation and leave no assets to satisfy an award of costs. Accordingly, even if strict scrutiny is to be applied to Section 547, the statute satisfies such scrutiny and does not violate the Equal Protection Clause.

III. This Court's Review Is Needed

This Court must overturn the Virgin Islands Supreme Court's application of the Privileges and Immunities Clause and the Equal Protection Clause in this case. If this Court were to allow the decision of the court below to stand, it would represent a departure from the traditional analysis of laws under both of these constitutional provisions.

This Court should reverse the determination of the court below and hold—just as every federal court to look at similar statutes has done—that non-resident bonds are constitutionally permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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