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

APPENDIX

Stephen L. Braga*
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3825
stevebraga@law.virginia.edu

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3912

VICTORIA VOOYS, JOSEPH GERACE
d/b/a CANE BAY BEACH BAR
v.
MARIA BENTLEY; CB3, INC.; WARREN MOSLER;
CHRIS HANLEY; CHRISMOS CANE BAY, LLC
Warren Mosler; Chris Hanley;
Chrismos Cane Bay, LLC,
Petitioners

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE VIRGIN ISLANDS
(V.I. S. Ct. Civ. No. 2015-0046)
(V.I. Super. Ct. Civ. No. 2005-00368)

Argued December 12, 2017 before Merits Panel
Argued En Banc February 21, 2018

Before: SMITH, *Chief Judge*, MCKEE, AMBRO,
CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, JR., VANASKIE, SHWARTZ,
KRAUSE, RESTREPO, BIBAS, and SCIRICA,*
Circuit Judges.
(Filed: August 21, 2018)

* Participating as a member of the En Banc Court
Pursuant to 3rd Cir. I.O.P. 9.6.4.

Lee J. Rohn, Esq.
Rhea R. Lawrence, Esq. [ARGUED]
Lee J. Rohn & Associates, LLC
1101 King Street
Christiansted, VI 00820
Counsel for Plaintiffs-Respondents

Stephen L. Braga, Esq.
Laura Cooley (*Third Year Law Student*) [ARGUED]
Tanner Russo (*Third Year Law Student*) [ARGUED]
Alaric Smith (*Third Year Law Student*)
Cole A. Wogoman (*Third Year Law Student*)
University of Virginia School of Law
Appellate Litigation Clinic
580 Massie Road
Charlottesville, VA 22903-1789
Counsel for Defendants-Petitioners

Dwyer Arce, Esq. [ARGUED]
Kutak Rock
1650 Farnam Street
The Omaha Building
Omaha, NE 68102

Edward L. Barry, Esq.
Law Offices of Edward L. Barry
2120 Company Street
Christiansted, VI 00820

John-Russell B. Pate, Esq.
The Pate Law Firm
P.O. Box 890
St. Thomas, VI 00804
Counsel for Amicus Curiae Virgin Islands Bar Association

Andrew C. Simpson, Esq.
Andrew C. Simpson Law Offices
2191 Church Street, Suite 5
Christiansted, VI 00820
Counsel for Amicus Curiae Companion Assurance Company

OPINION

McKEE, *Circuit Judge*

We are asked to grant certiorari review of a decision of the Supreme Court of the Virgin Islands that reinstated contractual claims that arose from the sale of a bar in the islands. The Superior Court of the Virgin Islands dismissed the suit in April of 2015 based on Plaintiffs' failure to post a security bond. The Supreme Court of the Virgin Islands thereafter reversed that decision and reinstated the suit based upon its conclusion that the provision of Virgin Islands law allowing a court to order nonresident plaintiffs to post such a bond violated the Privileges and Immunities Clause of the U.S. Constitution.

Defendants now ask us to reverse the Supreme Court of the Virgin Islands pursuant to our certiorari authority to review that court's final decisions. Congress enacted H.R. 6116 in order to revoke that authority for all "cases commenced on or after" December 28, 2012.[1] We must decide whether "cases," as used in H.R. 6116, was intended to apply

[1] Act of Dec. 28, 2012, Pub. L. No. 112-226, 126 Stat. 1606 (codified at 48 U.S.C. § 1613 and 28 U.S.C. § 1260) [hereinafter *H.R. 6116*].

to all suits initiated in the Superior Court of the Virgin Islands, the court of original jurisdiction, or whether it was intended to apply to appeals from final decisions of the Supreme Court of the Virgin Islands that were filed on or after that date irrespective of when the suit was filed.

We previously addressed this issue in *United Industrial Service, Transportation, Professional and Government Workers of North America Seafarers International Union ex rel. Bason v. Government of the Virgin Islands.*[2] We have granted initial hearing en banc in this matter to revisit the jurisdictional issue we decided in *Bason*. For the reasons set forth below, we now conclude that *Bason* incorrectly interpreted H.R. 6116 as referring to suits filed in the Superior Court of the Virgin Islands on or after December 28, 2012. We now hold that Congress intended for the effective date for H.R. 6116 to apply to the date an appeal from a final decision of the Virgin Islands Supreme Court is filed and not to the date a suit is filed in the Superior Court. Since the petition in this matter was filed after the effective date of H.R. 6116, we hold that we lack jurisdiction to hear this appeal. Accordingly, we will dismiss the petition for certiorari review.[3]

---

[2] *United Indus., Serv., Transp., Prof'l & 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) [hereinafter *Bason*].

[3] Although we conclude that we lack jurisdiction to review the decision of the Supreme Court of the Virgin Islands in this matter, we clearly have jurisdiction to decide the underlying question of our jurisdiction. *See Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (Federal courts have authority "to determine whether or not they have jurisdiction to . . . construe and apply the statute under which they are asked to act.").

I. BACKGROUND

A. Factual and Procedural History

In 2003, Plaintiffs Joseph Gerace and Victoria Vooys purchased Cane Bay Beach Bar, which is situated on the island of St. Croix, U.S. Virgin Islands. In 2005, they sued Defendants Warren Mosler, Chris Hanley, Chrismos Cane Bay LLC, and others in the Superior Court of the Virgin Islands for breach of contract and other claims related to the sale of that business. Plaintiffs resided in the U.S. Virgin Islands from the time they filed their suit until the fall of 2012, when they moved to the U.S. mainland. Their suit was still pending when they relocated. Upon learning that Plaintiffs were no longer Virgin Islands residents, Defendants petitioned the Superior Court for an order requiring Plaintiffs to post a security bond for potential costs pursuant to title 5, section 547 of the Virgin Islands Code.[4] That provision allows defendants to demand that nonresident plaintiffs post a bond to cover potential costs of litigation and allows a court to stay litigation until the bond is paid.[5] The court granted Defendants' request in April of 2013 and ordered Plaintiffs to post a bond of $1,050 each within thirty days of the order.

Defendants moved to dismiss after Plaintiffs failed to meet that deadline.[6] Plaintiffs vehemently opposed the motion, arguing, inter alia, that the Virgin Islands nonresident bond provision was unconstitutional. In April 2015—almost three years after H.R. 6116 became law—the Superior Court

---

[4] V.I. Code Ann. tit. 5, § 547.

[5] *Id.* § 547(a).

[6] *See id.* § 547(d) (enabling court to dismiss an action upon nonpayment of bond).

rejected Plaintiffs' challenge to the constitutionality of the nonresident bond requirement and dismissed the suit.

Plaintiffs appealed to the Supreme Court of the Virgin Islands. In August 2016, that court reversed the decision of the Superior Court and reinstated the complaint. Defendants appealed that decision to this Court and we granted certiorari review in March of 2017. However, after a panel of this Court heard the parties' arguments on the merits, we issued a sua sponte order for initial hearing en banc to reexamine whether Congress intended us to retain certiorari jurisdiction over appeals filed after the effective date of H.R. 6116.

We now hold that our certiorari jurisdiction to review decisions of the Supreme Court of the Virgin Islands does not extend to any appeal that was filed on or after the date that H.R. 6116 became law. Before we discuss the merits of that jurisdictional issue, we will place our decision into its historical context and explain the evolution of our relationship to the Virgin Islands judicial system.

B. Historical Background

1. Virgin Islands Courts and the Third Circuit's Certiorari Jurisdiction

In 1917, the United States purchased what was then the Danish West Indies from Denmark "in exchange for $25 million in gold and American recognition of Denmark's claim to Greenland."[7] Judicial oversight of what became the U.S. Virgin

[7] Robert M. Jarvis, *"A Peculiar Niche": Admiralty Law in the United States Virgin Islands*, 26 J. Mar. L. & Com. 157, 160 (1995); *see* Convention for Cessation of the Danish West

---

Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706. A series of natural, political and social events had made the islands much less attractive and less valuable to Denmark. These included the introduction of steam vessels that no longer needed to "tranship at [St.] Thomas," a "precipitous fall in global sugar prices, . . . droughts, [the] development of the sugar beet in Europe, and an unusually large number of hurricanes." Jarvis, *supra*, at 160. The islands also lost much of their commercial value with the end of slavery. "Although Denmark banned slavery in 1802 . . . , it was not until July 3, 1848 that [the Governor-General of the Danish West Indies] freed the islands' slaves" on what is now celebrated in the Virgin Islands as Emancipation Day. *Id.* at 160 n.12.

Yet while the plan to purchase the Virgin Islands was formulated in 1916, official acquisition came after a long and arduous back-and-forth on the part of the U.S. Government. It began with Secretary of State William H. Seward signing a treaty with Denmark in 1867 for the purchase of St. Thomas and St. John. *Id.* at 160 n.13. Thereafter, the island of St. Thomas was flooded by a "tremendous tidal wave," "[a] terrible earthquake shook it," and opposition to the islands' acquisition grew "after the ratification of the Alaska purchase, [which] added to the avalanche of objections" from Congress. *Id.* However, the Danish Government was now "[s]o anxious" to consummate the sale that it was "ready to add the remaining island of [St. Croix] at a nominal price." *Id.*

> Much discussion, formal and informal, finally resulted in the signature of a Danish-American treaty (January 24, 1902) for the purchase of the islands for $5,000,000. . . . [T]he Senate readily ratified the treaty, but the upper house of the Danish Parliament rejected it by one vote. It was not until 1917 that both governments were able to exchange ratifications of a treaty of purchase; by then, in the atmosphere of war, the price had gone up to the exorbitant figure of $25,000,000.

Id. at 161 n.13 (quoting S. Bemis, *A Diplomatic History of the United States* 399-403, 521 (3d ed. 1950)).

Islands was promptly assigned to the Court of Appeals for the Third Circuit by the Act of March 3, 1917.[8] The pertinent provision—consisting of a mere thirty-five words—provided: "In all cases arising in the . . . West Indian Islands and now reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit . . . ."[9]

Now home to a population of around 100,000, the U.S. Virgin Islands became an unincorporated American territory in 1954.[10] However, the evolution of the islands' legal system and its relationship to the Third Circuit date back much further and are the result of numerous enactments by both the U.S. Congress and the Virgin Islands legislature.[11]

Professor Robert M. Jarvis, who has extensively studied the history of the Virgin Islands, has authored a detailed explanation for how we obtained

---

[8] Act of March 3, 1917, Pub. L. No. 64-389, ch. 171, § 2, 39 Stat. 1132, 1133 (current version at 48 U.S.C. § 1392).

[9] *Id.*

[10] Revised Organic Act, Pub. L. No. 83-517, ch. 558, § 2, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. § 1541(a)). An unincorporated territory is one that is not nearing statehood and whose subjects do not enjoy full constitutional guarantees. *Gov't of Virgin Islands v. Bodle*, 427 F.2d 532, 533 n.1 (3d Cir. 1970). For example, Virgin Islands residents are not permitted to vote in presidential elections, although they are U.S. citizens. *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007). They are represented in Congress by a single non-voting delegate. 48 U.S.C. § 1711.

[11] For a thorough history of Virgin Islands governance from 1906, while they were still a colony of Denmark, to Congress's enactment of the legislation establishing the framework for modern Virgin Islands governance, see the opinion of U.S. District Court Judge Thomas K. Moore in *Ballentine v. United States*, No. Civ. 1999-130, 2001 WL 1242571, at *1-7 (D.V.I. Oct. 15, 2001).

jurisdiction over the islands' courts.[12] According to Professor Jarvis, officials in the U.S. Bureau of Insular Affairs originally "felt that the issue of the USVI appeals should be dealt with *after* the purchase of the islands was complete."[13] The Bureau's Chief, Brigadier General Frank McIntyre, so testified before the Foreign Affairs Committee of the U.S. House of Representatives in 1917:

> The Chairman: What courts have they?
>
> Gen. McIntyre: The courts are very simple. In all the higher cases they have now

---

[12] *See* Jarvis, *supra* note 6, at 166 n.38. Despite numerous inquiries that have been made into the issue, Professor Jarvis admits that the "question of why the Third Circuit, which sits in Philadelphia, was chosen is one that has baffled historians for years." *Id.* However, the most probable explanation is that Delaware Senator Willard Saulsbury, Jr., inserted the language assigning the Virgin Islands to the Third Circuit at the last minute. Senator Saulsbury chaired the Committee on Coast and Insular Survey as well as the Committee on Pacific Islands and Puerto Rico. *Id.* at 167 n.38. His "position put him in line to greatly influence the final wording of any bill. Accordingly, it is very easy to believe that when it came time to decide what to do about appeals from the islands[,] Saulsbury was consulted and, as [Judge Albert Maris of the Third Circuit] suggests, [Saulsbury] recommended the Third Circuit as the best alternative available." *Id.*

As Professor Jarvis explains, "Saulsbury would have been comfortable proposing the Third Circuit," as "he had tried several cases before the court, including a difficult admiralty appeal." *Id.* In any event, the timing of the insertion of the pertinent language—immediately before Easter recess—and the brevity of the key provision reinforces the argument that Senator Saulsbury could have provided for appeals to the Third Circuit with very little fanfare or notice. *See infra* note 17.

[13] Jarvis, *supra* note 6, at 166 n.38.

a provision for appeal to Denmark. For instance the sheriff also exercises the office of judge. They have very few cases that go to Denmark.

Mr. [William S.] Goodwin [D-Ark.]: Are the decrees of the courts in English?

Gen. McIntyre: The records of the courts are written in Danish, and one of the difficulties is that most of the laws are in Danish. A great many of them have not been translated.

The Chairman: It is necessary for us to make some provision for appeals?

Gen. McIntyre: I think not, because, I think, the proposition is simple, and I think that matter can be handled later after there has been a study and report on just exactly what you need.

The Chairman: And this bill gives the President the necessary authority?

Gen. McIntyre: Yes, sir.[14]

---

[14] *Id.* (quoting *Cession of Danish West Indian Islands: Hearings on H.R. 20755 Before the Comm. on Foreign Affairs*, 64th Cong. 33 (1917) (testimony of Brigadier Gen. Frank McIntyre, Chief of U.S. Bureau of Insular Affairs)). For a thorough discussion of the political structure of the Virgin Islands under Danish rule, see *Ballentine*, 2001 WL 1242571, at *1-4.

However, despite General McIntyre's expressed desire to delay resolution of the issue of judicial oversight over the newly acquired islands, the move to grant the Court of Appeals for the Third Circuit that authority was accomplished quickly and by insertion of the above-quoted thirty-five words into the legislation.[15] The legislation was passed less than three weeks after General McIntyre testified.[16]

For Congress, the choice of the Third Circuit may have been much less puzzling then than it appears to be today.

> The First Circuit already was supervising Puerto Rico. The Second Circuit's docket was overwhelmed with cases from New York. The Fourth Circuit, with only two authorized judges, had been considered short-handed for years. The Fifth Circuit, although geographically the closest circuit to the islands, was handling appeals from the District Court in the Panama Canal Zone. . . . [T]he remaining circuits . . . were simply too distant to provide effective oversight. As such, Congress probably felt that there was no reason to wait for the results of the [study General McIntyre suggested be undertaken of the Virgin Islands courts] when the conclusion [Congress] was likely to draw was already clear.[17]

---

[15] Jarvis, *supra* note 6, at 166 n.38; *see* Act of March 3, 1917, ch. 171, § 2, 39 Stat. at 1133 (vesting Third Circuit with judicial authority over Virgin Islands cases).

[16] Jarvis, *supra* note 6, at 166 n.38.

[17] Jarvis, *supra* note 6, at 167 n.38. In addition, the Eleventh Circuit did not yet exist. It was not established until

Moreover, resolution of the issue was no doubt facilitated by the fact that the legislation was introduced on the eve of a congressional recess.[18] As Professor Jarvis explains, "[t]o the extent that Congress considered the matter . . . , the Third Circuit probably seemed like the logical choice."[19] That choice was likely also informed by geographic practicality. With Philadelphia as its seat, judges of the Third Circuit could easily travel to the Virgin Islands, which in those days could be reached by steamer from neighboring New York.[20, 21]

---

nearly fifty years later, in 1981. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994 (codified as amended at 28 U.S.C. § 41).

[18] Jarvis, *supra* note 6, at 166-67 n.38. The bill to assign the Virgin Islands to the Third Circuit came up on March 3, 1917, just one day before the adjournment of the 64th Congress on March 4, 1917. *See* Act of March 3, 1917, ch. 171, § 2, 39 Stat. at 1133.

[19] Jarvis, *supra* note 6, at 166-67 n.38.

[20] *Id.* at 167 n.38 (citing Interview with Albert B. Maris, Circuit Judge, Third Circuit Court of Appeals (Apr. 18, 1984) (transcript available from the Federal Judicial Center)). It is almost certain that there was not great competition for authority over any aspect of the Virgin Islands. The islands were not easy to reach for most circuit courts of appeals and they were not yet economically developed. Jarvis, *supra* note 6, at 168 n.38. "[D]uring the early years of American rule[,] conditions actually worsened, and in 1928 a devastating hurricane swept over the islands." *Id.*

More critically, the judicial system in the Virgin Islands was considered to be "archaic." *A Bill to Provide a Civil Government for the Virgin Islands, and for Other Purposes: Hearings on S. 2786 Before the S. Comm. on Territories and Insular Possessions*, 68th Cong. 6 (1924) [hereinafter *1924 Senate Hearings*] (statement of A. A. Berle, Jr., Counsel for the Virgin Islands Committee and the Virgin Islands branch of the American Federation of Labor). It had been based on "an old Danish system, which even the Danes were about to revise." *Id.*

Accordingly, any move by Senator Saulsbury to place the judicial oversight of the Virgin Islands close to his home state of Delaware would have been met with much more apathy than opposition, and perhaps no small amount of relief.

This began to change when Albert B. Maris was appointed to the Third Circuit. He "was keenly interested" in the Virgin Islands and helped draft the Revised Organic Act, which is discussed below. Jarvis, *supra* note 6, at 168 n.38; *see infra* note 26 and accompanying text. Thereafter, he "oversaw the effort to codify the islands' laws" and subsequently received the Virgin Islands Medal of Honor for his work improving and modernizing the Virgin Islands legal system. Jarvis, *supra* note 6, at 168 n.38.

The relationship between the Third Circuit and the Virgin Islands grew even stronger when President Truman appointed William H. Hastie to our Court. Hastie had been governor of the Virgin Islands and was thereafter appointed to the District Court of the Virgin Islands. With that appointment, he became the first African-American judge of a federal district court. When President Truman appointed him to the Court of Appeals for the Third Circuit, he then became the first African-American judge of a federal circuit court of appeals. Given his service as a Virgin Islands governor and judge, "Hastie was well aware of the problems faced by the islands' fledgling legal system. Thus, throughout his time on the Third Circuit (1949-76), Hastie sought to bring the [C]ourt closer to the islands." *Id.*

[21] Despite the logic of Jarvis's explanation, it is noteworthy that A. Leon Higginbotham, Jr., who was a prominent jurist on this Court and a noted legal historian, had a different theory. Judge Higginbotham believed the choice to assign the Virgin Islands to the Court of Appeals for the Third Circuit was largely the result of the hostile political and racial climate at the time. In an interview for the Lyndon Baines Johnson Library Oral History Project, Judge Higginbotham opined that we were assigned jurisdiction over the Virgin Islands for "[t]he same reason why you have Puerto Rico in the First Circuit, which is Massachusetts." Interview by Joe B. Frantz with A. Leon Higginbotham, Circuit Judge, Third Circuit Court of Appeals, in Philadelphia, PA (Oct. 7, 1976) (transcript available from the Lyndon Baines Johnson Library Oral History

Collection at http://www.lbjlibrary.net/assets/documents/archives/oral_histories/higginbo/higginbo.pdf). Judge Higginbotham explained:

> When the Virgin Islands became a U.S. possession it was then 90 per cent non-white, about 90 per cent black, and the closest circuit to it would be the Fifth, which is Alabama, Mississippi, Louisiana, Georgia, Florida, Texas. With the degree of hostility between whites and blacks it was thought—so I understand, I have no documentation of it—that it would be better to have them in a different circuit. And I believe the same was true of Puerto Rico; the Fourth Circuit, which is Virginia, Maryland, North Carolina, and maybe also South Carolina, or the Fifth were geographically closer.

Id.

However, when viewed in context with then current events, it is not at all certain that legislators would have been concerned about the racial demographics of the Virgin Islands when deciding which Court of Appeals to assign them to. President Woodrow Wilson had already begun segregating the federal government around the time of the U.S.'s annexation of the Virgin Islands. *See* Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44 J. Negro Hist. 158, 161 (1959) (noting that under President Wilson's administration, "[b]y the end of 1913, segregation had been realized in the Bureau of Engraving and Printing, the Post Office Department, the Office of the Auditor for the Post Office, and had even begun in the City Post Office in Washington, D.C."); *id.* (stating that during Wilson's presidency, "[f]ederal segregation was being enacted to keep Negroes and whites apart" while "other steps were taken to appoint Negroes only to menial posts or to restrict them from obtaining Civil Service jobs").

Given this state of affairs, it is at least debatable whether elected representatives would have been as concerned about subjecting the Virgin Island's predominantly black population to the judicial oversight of jurisdictions in the Deep South as Judge Higginbotham's theory assumed. Moreover, as Judge Higginbotham conceded, there is little authority or documentation to support his view.

However, the choice of the Third Circuit was not without criticism. Just seven years later, in 1924, A. A. Berle, Jr., who was counsel for the Virgin Islands Committee and for the Virgin Islands branch of the American Federation of Labor, advocated for a different venue in his testimony before the Senate Committee on Territories and Insular Possessions of the United States.[22] He testified about a congressional commission that had made suggestions for the structure of the government in the Virgin Islands. Specifically, Berle informed the Senate Committee that "[t]he commission . . . believes[] that in the revision of the judicial system of the islands[,] special attention should be given to the establishment of a court of appellate jurisdiction more accessible than the present tribunal (United States [C]ircuit [C]ourt, [T]hird [Circuit], Philadelphia, Pa.)."[23]

Yet as we have explained, there was really no realistic alternative to the Third Circuit and certainly no closer, more practical alternative at the time. The First and Second Circuits were even farther away than the Third and, for the reasons we have explained, the Fifth Circuit, though closer, was simply not a practical choice.[24]

Although the United States acquired the Virgin Islands in 1917, Congress neglected to organize any civilian government there until 1936, when it

---

[22] *1924 Senate Hearings*, *supra* note 19, at 3 (statement of A. A. Berle, Jr.).

[23] *Id.* (parenthetical in original).

[24] *See* Jarvis, *supra* note 6, at 167 n.38 (discussing geographic impracticalities of placing jurisdiction within other circuits).

enacted the Virgin Islands Organic Act.[25] That Act established a legislative body in the Virgin Islands along with municipal councils in Charlotte Amalie, St. Thomas and in Christiansted, St. Croix (which had been the Danish Capital).[26]

However, most of the more intricate details of Virgin Islands governance were not resolved until Congress passed a Revised Organic Act in 1954.[27] That Act "laid the groundwork for the current Virgin Islands court system," including its "trial courts and an appellate court."[28] In particular, it established the

---

[25] *Id.* at 161; *see* Organic Act of the Virgin Islands of the United States (Virgin Islands Permanent Government Act), Pub. L. No. 74-749, ch. 699, 49 Stat. 1807 (1936) (codified as amended at 48 U.S.C. § 1405 *et seq.*).

[26] Jarvis, *supra* note 6, at 161; Organic Act of the Virgin Islands, ch. 699, § 2, 49 Stat. at 1807. Congress had initially established only a temporary government on the Virgin Islands consisting of "a governor appointed by the President . . . with the consent of the Senate, [and providing that the governor] might be an Army or Navy officer. As a matter of custom, [the governor was] always . . . a naval officer, but he was not technically responsible to the Navy . . . nor was he technically responsible to any department of the Government." *1924 Senate Hearings*, *supra* note 19, at 3-4 (statement of A. A. Berle, Jr.).

[27] Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, ch. 558, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. § 1541 *et seq.*).

[28] *Defoe v. Phillip*, 702 F.3d 735, 738 (3d Cir. 2012); *see* Revised Organic Act, ch. 558, §§ 21-26, 68 Stat. at 506-07. A. A. Berle described the difficulties with the Virgin Islands judicial system, as initially constructed following acquisition from Denmark, in his testimony before the Senate Committee on Territories and Insular Possessions in 1924:

> [T]he system is archaic; it is an old Danish system, which even the Danes were about to revise, and one of the particular difficulties of which the islands bitterly

District Court of the Virgin Islands as an Article IV court[29] with "jurisdiction over federal questions, regardless of the amount in controversy, and general original jurisdiction over questions of local law, subject to the exclusive jurisdiction of the local courts over civil actions where the amount in controversy was less than $500"[30] and over criminal actions where the maximum punishment was a fine of $100, imprisonment for six months, or both.[31] Finally, the Revised Organic Act established the District Court of the Virgin Islands as an appellate court charged with reviewing the judgments and orders of the local Virgin Islands courts.[32]

> complain lies in the fact that a man is judged by a police officer, who corresponds roughly with our district attorney; and when he comes up for final trial, this same judge-district attorney prosecutes him.

1924 Senate Hearings, *supra* note 19, at 6 (statement of A. A. Berle, Jr.).

[29] Article IV, Section 3 of the United States Constitution states, in relevant part: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

[30] *Moravian Sch. Advisory Bd. of St. Thomas, V.I. v. Rawlins*, 70 F.3d 270, 272 (3d Cir. 1995); *see* Revised Organic Act, ch. 558, §§ 22-23, 68 Stat. at 506.

[31] Revised Organic Act, ch. 558, §§ 22-23, 68 Stat. at 506. Under the Revised Organic Act, the local Virgin Islands courts also maintained exclusive original jurisdiction over "all violations of police and executive regulations." *Id.* at ch. 558, § 23.

[32] *Id.* at ch. 558, § 22. As originally constituted, judges of the District Court of the Virgin Islands were appointed by the governor, who retained the right to remove them, and apparently did so at will. *1924 Senate Hearings*, *supra* note 19, at 6 (statement of A. A. Berle, Jr., Counsel for the Virgin Islands Committee). See *United States v. Malmin*, 272 F. 785,

Pursuant to a series of amendments to the Revised Organic Act in 1984 (the "1984 Amendments"), the appellate role of the District Court expanded. One such amendment created an Appellate Division of the Virgin Islands District Court, which would appoint three-judge panels to hear appeals from local courts.[33] Final decisions of the Appellate Division could then be appealed to the Court of Appeals for the Third Circuit as a matter of right.[34]

---

792 (3d Cir. 1921), wherein this Court granted a writ of mandamus to restore the position of Judge Lucius J. M. Malmin, a district court judge in the Virgin Islands who had been removed by the governor. The governor had appointed the judge pursuant to a provision of the Colonial Code of the Municipality of St. Croix. *Id.* at 787-88. However, the provision granting the governor that power was set aside in 1920 by President Woodrow Wilson. *Id.* at 788. Shortly following that repeal, the governor nevertheless removed Judge Malmin from the bench and appointed a successor. *Id.* We issued a writ ordering Judge Malmin's reinstatement to the bench and removing the judge whom the governor had appointed to replace him. *Id.* at 792.

[33] *See* Act of Oct. 5, 1984, Pub. L. No. 98-454, title VII, § 705, 98 Stat. 1732, 1739 [hereinafter *1984 Amendment to Revised Organic Act*] (codified at 48 U.S.C. § 1613a(a)) ("Prior to the establishment of [local Virgin Islands] appellate court[s] . . . , the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter prescribed by local law . . . ."); *id.* (codified at 48 U.S.C. § 1613a(b)) ("Appeals to the District Court of the Virgin Islands shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum.").

[34] *Id.* at title VII, § 705, 98 Stat. at 1740 (codified at 48 U.S.C. § 1613a(c)) ("The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final

The 1984 Amendments also provided a mechanism that allowed the Virgin Islands legislature to substantially alter this basic framework. The Amendments granted that legislature power to "divest the District Court of original jurisdiction for local matters by vesting that jurisdiction in territorial courts established by local law for all causes for which 'any court established by the Constitution and laws of the United States does not have exclusive jurisdiction.'"[35] The 1984 Amendments thus laid the groundwork for a "dual system of local and federal judicial review in the Virgin Islands," whereby the Virgin Islands courts could expand their original jurisdiction over both criminal and civil matters.[36] By 1991, the Virgin Islands had "exercised that power, vesting exclusive jurisdiction over local [civil] actions in the Territorial Court of the Virgin Islands—now known as the Superior Court of the Virgin Islands."[37] Thereafter,

---

decisions of the district court on appeal from the courts established by local law.").

[35] *Parrott v. Gov't of the Virgin Islands*, 230 F.3d 615, 619 (3d Cir. 2000) (quoting 48 U.S.C. § 1611(b)); *see 1984 Amendment to Revised Organic Act*, title VII, § 702, 98 Stat. at 1737 (codified at 48 U.S.C. § 1611(b) (1984)) ("The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction.").

[36] *Parrott*, 230 F.3d at 619.

[37] *Defoe*, 702 F.3d at 738; *see* Act of Sept. 5, 1990, No. 5594, § 1, 1990 V.I. Sess. Laws 271 (codified as amended at V.I. Code Ann. tit. 4, § 76(a)) (granting the Superior Court of the Virgin Islands "original jurisdiction in all civil actions regardless of the amount in controversy" and thus divesting the District Court of the Virgin Islands original jurisdiction over purely

"the District Court continued to hear appeals from local trial courts, and it retained concurrent jurisdiction over local crimes that are similar to federal crimes."[38]

This concurrent jurisdiction ended in 1994 when the Virgin Islands legislature vested exclusive jurisdiction over all local crimes with the Superior Court of the Virgin Islands.[39] That court thus became the initial, exclusive arbiter of both local criminal and civil actions.

The District Court of the Virgin Islands continued to serve an appellate function until 2004, when the Virgin Islands legislature exercised the authority Congress had given it in the Revised Organic Act to establish the Supreme Court of the Virgin Islands.[40] The creation of that court "altered the relationship between the federal judiciary and the Virgin Islands court system."[41] In addition to ending the federal district court's appellate

---

local civil matters); *1984 Amendment to Revised Organic Act*, title VII, § 703, 98 Stat. at 1738 ("[T]he District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands . . . .").

[38] *Defoe*, 702 F.3d at 738.

[39] Act of Sept. 30, 1993, No. 5890, § 1, 1993 V.I. Sess. Laws 214 (codified as amended at V.I. Code Ann. tit. 4, § 76(b)); *see 1984 Amendment to Revised Organic Act*, title VII, § 702, 98 Stat. at 1737 (codified at 48 U.S.C. § 1611(b) (1984)).

[40] *See* Act of Oct. 29, 2004, No. 6687, § 1, 2004 V.I. Sess. Laws 179 (codified as amended at V.I. Code Ann. tit. 4, § 2(a)) (designating the Supreme Court of the Virgin Islands as the "court of last resort" pursuant to the power Congress granted the Virgin Islands legislature under section 21(b) of the Revised Organic Act).

[41] *Defoe*, 702 F.3d at 739.

jurisdiction over local decisions,[42] the establishment of the Supreme Court of the Virgin Islands gave rise to our certiorari jurisdiction over final decisions of that court pursuant to the 1984 Amendments to the Revised Organic Act, as codified in 48 U.S.C. § 1613.[43] It also provided for a mechanism for the termination of that certiorari jurisdiction. We explained this in *Pichardo v. Virgin Islands Commissioner of Labor*:

> [U]nder the terms of the Revised Organic Act, for the first fifteen years after the establishment of the Virgin Islands Supreme Court, [the Court of Appeals for the Third Circuit] "shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of the Virgin Islands from which a decision could be had."[44] [The Act] also requires our Court to submit reports to Congress regarding whether the Supreme Court of the Virgin Islands has "developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions."[45]

---

[42] *See* 48 U.S.C. § 1613a(a) (setting forth that the District Court's appellate jurisdiction ends once the Virgin Islands legislature creates its own appellate court).

[43] 48 U.S.C. § 1613 (1994), *amended by* 48 U.S.C. § 1613 (2012); *1984 Amendment to the Revised Organic Act*, title VII, § 704, 98 Stat. at 1739.

[44] 48 U.S.C. § 1613 (1994 version).

[45] *Pichardo v. Virgin Islands Comm'r of Labor*, 613 F.3d 87, 94 (3d Cir. 2010) (quoting 48 U.S.C. § 1613 (1994 version)).

Thus, Congress included an interim reporting obligation in recognition of the possibility that the new Supreme Court of the Virgin Islands "might develop sufficient institutional traditions [to replace our certiorari review with certiorari review by the U.S. Supreme Court] before the fifteen-year mark."[46]

The rate of maturation and sophistication of the Supreme Court of the Virgin Islands is noted in our 2012 opinion in *Banks v. International Rental & Leasing Corp.* (which predated H.R. 6116).[47] There, we certified a controlling question of Virgin Islands law to the Supreme Court of the Virgin Islands pursuant to rules that court had adopted to advise us on questions of local law when appropriate.[48] We did so because "the United States Supreme Court has encouraged federal appellate courts to seek guidance from the highest court of the appropriate jurisdiction if that court has adopted procedures for accepting certified questions of law."[49] In relying on the resulting opinion of the Supreme Court of the Virgin Islands to resolve the issue before us, we commented that the opinion was "commendably thorough and very well reasoned."[50]

---

[46] *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 86 (3d Cir. 2013) (*Kendall I*); *see Defoe*, 702 F.3d at 739-40 (discussing 2012 interim report).

[47] 680 F.3d 296 (3d Cir. 2012).

[48] *Id.* at 298-99; *see* V.I. Sup. Ct. R. 38(a) ("The Supreme Court of the Virgin Islands may answer questions of law certified to it by a court of the United States . . . if there is involved in any proceeding before the certifying court a question of law which may be determinative of the cause then pending in the certifying court and concerning which it appears there is no controlling precedent in the decisions of the Supreme Court.").

[49] *Banks*, 680 F.3d at 298.

[50] *Id.* at 299.

2. Repeal of the Third Circuit's Certiorari Jurisdiction

Pursuant to our obligation to periodically assess its development and maturation, our prior Chief Judge appointed a committee to undertake an in-depth inquiry into the progress and jurisprudence of the Supreme Court of the Virgin Islands.[51] In 2012, that committee issued a glowing assessment. It unanimously concluded that the Supreme Court of the Virgin Islands had demonstrated "sufficient institutional traditions to justify direct review by the Supreme Court of the United States."[52] Accordingly, the committee recommended that Congress eliminate our certiorari jurisdiction in favor of direct review by the U.S. Supreme Court.[53]

Congress quickly acted upon our recommendation. That same year, it passed H.R. 6116, which (as we noted at the outset) replaced our certiorari jurisdiction with direct U.S. Supreme Court certiorari review of "cases commenced on or after" the statute's effective date of December 28, 2012.[54] More specifically, in section 3 of H.R. 6116, Congress specified an "EFFECTIVE DATE" for the

---

[51] Letter from D. Brooks Smith, Circuit Judge, Third Circuit Court of Appeals, to Theodore A. McKee, Chief Circuit Judge 1 (April 18, 2012), http://www.visupremecourt.org/wfData/files/BookletReportof VirginIslandsSupremeCourt.pdf.

[52] Judicial Council of the U.S. Court of Appeals for the Third Circuit, *Report on the Virgin Islands Supreme Court* 17, 23 (2012) [hereinafter *Third Circuit Judicial Council Report*], http://www.visupremecourt.org/ wfData/files/BookletReportof VirginIslandsSupremeCourt.pdf.

[53] *Id*. at 17, 23. Indeed, we later noted that the Supreme Court of the Virgin Islands "passed that test with flying colors." *Kendall I*, 716 F.3d at 86.

[54] *H.R. 6116*, 126 Stat. at 1606-07.

repeal of our jurisdiction as follows: "The amendments made by this Act apply to cases commenced on or after the date of the enactment of this Act."[55]

Thus, as we have already explained, we must now decide if "cases commenced on or after the date of the enactment" refers to all cases filed in the Virgin Islands courts on or after the enactment of H.R. 6116 (as we held in *Bason*) or only to *appeals* from final decisions of the Supreme Court of the Virgin Islands that were commenced on or after that date.

II. DISCUSSION

"The doctrine of *stare decisis* is . . . 'essential to the respect accorded to the judgments of . . . [c]ourt[s] and to the stability of the law.'"[56] Thus, we do not lightly revisit an issue that a panel of this Court has already decided in a precedential opinion. Nevertheless, Federal Appellate Procedure Rule 35 appropriately allows courts of appeals to grant en banc (re)hearing to reconsider prior precedential decisions when a case "involves a question of exceptional importance."[57]

Thus, stare decisis "does not compel us to follow a past decision when its rationale no longer withstands 'careful analysis.'"[58] "If [our] precedent's reasoning was clearly wrong, then stare decisis loses some (though not all) of its force."[59] Indeed, en banc

---

[55] *Id.* at § 3, 126 Stat. at 1607.

[56] *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas,* 539 U.S. 558, 577 (2003)).

[57] Fed. R. App. P. 35(a)(2).

[58] *Gant*, 556 U.S. at 348 (quoting *Lawrence*, 539 U.S. at 577).

[59] *Morrow v. Balaski,* 719 F.3d 160, 180 (3d Cir. 2013) (*en banc*) (Smith, J., concurring) *as amended* (June 14, 2013).

review serves a very important institutional purpose for just that reason. It provides a vehicle by which we can revisit prior decisions when appropriate.

Here, we have decided not only to revisit an issue we have already resolved in a precedential decision, but also to grant an initial en banc hearing on that issue without awaiting a panel decision.

> Initial en banc hearing is extraordinary; it is ordered only when a majority of the active judges who are not disqualified, determines that the case is controlled by a prior decision of the court which should be reconsidered and the case is of such immediate importance that exigent circumstances require initial consideration by the full court.[60]

We have concluded that this case presents such a question and that exigent circumstances warranted initial en banc review.

Given the important role this Court has played in the evolution of the judicial system of the Virgin Islands, the very important institutional issues implicated by the revocation of our certiorari jurisdiction, and the impact our decision will have on thousands of pending cases in the courts of the Virgin Islands, we believe that exigent circumstances justified initial en banc review here.

As we have noted, we first decided the issue we revisit today in *Bason*, a decision we issued shortly after H.R. 6116 became law. The "threshold question[]" there was "whether [the Court of Appeals

---

[60] 3d Cir. I.O.P. 9.2 (2018) (emphasis added).

for the Third Circuit] retain[s] certiorari jurisdiction over proceedings that were filed in the Virgin Islands courts before the date of enactment of H.R. 6116."[61] More precisely, we defined the issue as "whether 'cases commenced' carries a broader meaning referring to the filing of a complaint in the Superior Court or a narrower meaning referring to the filing of a certiorari petition in this Court."[62]

We concluded that "cases commenced," as used in H.R. 6116, encompassed initial "proceedings filed in the Virgin Islands courts," e.g., complaints filed in the Superior Court of the Virgin Islands.[63] Our conclusion rested on the traditional understanding that a case is "commenced when it is first brought in an appropriate court."[64] We reasoned that had Congress "indeed meant to strip this Court of certiorari jurisdiction over proceedings already filed in the Virgin Islands courts before the enactment date of the legislation," it would have used clearer language to do so, just as it did when it divested the Court of Appeals for the First Circuit of its jurisdiction over final decisions of the Supreme Court of Puerto Rico.[65]

---

[61] *Bason*, 767 F.3d at 201.

[62] *Id.* at 205-06 (quoting *Kendall I*, 716 F.3d at 87).

[63] *Id.* at 206.

[64] *Id.* (internal quotation marks omitted) (citing *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094 (10th Cir. 2005))

[65] *Id.* at 206-07; *see* Act of Aug. 30, 1961, Pub. L. No. 87-189, § 3, 75 Stat. 417 (1961) (current version at 28 U.S.C. § 1258) (specifying that the repeal of jurisdiction of the First Circuit Court of Appeals over cases from the Supreme Court of Puerto Rico "shall not deprive the Court of Appeals for the First Circuit of jurisdiction to hear and determine appeals taken to that court . . . before the effective date of this Act"); *see also* discussion *infra*, Part II.B.2.

Shortly after *Bason*, we briefly addressed the same jurisdictional question in *Fahie v. Virgin Islands*.[66] Like *Bason*, *Fahie* came to us on a writ of certiorari to the Supreme Court of the Virgin Islands.[67] In addition to the briefing provided by the parties there, the Virgin Islands Bar Association filed an amicus brief "challenging our jurisdiction to consider th[e] matter at all."[68] The jurisdictional issue identified in *Fahie* was identical to the one that is now before this en banc Court:

> The operative question [was] whether [H.R. 6116] revokes jurisdiction over cases commenced in the Superior Court on or after December 28, 2012, or whether the law only revokes jurisdiction over cases that have commenced in our Court (through a petition for writ of certiorari) on or after that date.[69]

That question was key because "the case against Fahie commenced in the Superior Court in November 2011, but was not the subject of a petition [for certiorari] to us until 2016," four years after H.R. 6116 became law.[70]

As in *Bason*, we began our jurisdictional analysis in *Fahie* by noting that the Revised Organic Act had given us, "for a limited time, certiorari jurisdiction over all final decisions of the highest court of the

---

[66] 858 F.3d 162 (3d Cir. 2017).
[67] *Id.* at 164.
[68] *Id.*
[69] *Id.* at 167.
[70] *Id.* at 168.

Virgin Islands from which a decision could be had."[71] But we explained that *Bason* had already decided that "cases commenced" referred to "all cases commenced in the Superior Court [on or] after December 28, 2012."[72] In a footnote that foreshadowed this appeal, we added that "[e]ven if we were to agree that *Bason* was wrongly decided, we are not at liberty to overturn the holding without en banc review because it is not dicta."[73]

A. The Meaning of "Cases Commenced"

H.R. 6116 did not define "cases commenced." *Bason* therefore focused on the need to construe undefined terms in a statute "in accordance with [their] ordinary or natural meaning."[74] In doing so,

---

[71] *Id.* at 167 (citing 48 U.S.C. § 1613 (1994 version)); *see 1984 Amendment to Revised Organic Act*, title VII, § 704, 98 Stat. at 1739.

[72] *Fahie*, 858 F.3d at 168.

[73] *Id.* at 168 n.8. In *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671 (V.I. 2015), a 2015 opinion written by Justice Maria M. Cabret, the Supreme Court of the Virgin Islands suggested similar reservations about the result we reached in *Bason*. There, the court observed:

> President Barack Obama signed H.R. 6116 into law, ending the Third Circuit's certiorari jurisdiction 10 years early. Despite this, the Third Circuit recently held that the effective date of this legislation . . . referenced the date a case was commenced by filing a complaint in the Superior Court of the Virgin Islands, as opposed to the date a case is commenced in the Third Circuit seeking a writ of certiorari to the Supreme Court of the Virgin Islands.

Id. at 689 n.10 (citing *Bason*, 767 F.3d at 206).

[74] *United States v. Brown*, 740 F.3d 145, 149 (3d Cir. 2014) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)), *cited with approval by Bason*, 767 F.3d at 206.

we first pointed to precedent from the U.S. Supreme Court and several of our sister circuit courts of appeals and observed that "[t]he term 'case' has *generally* been understood to include judicial proceedings of any kind."[75] We then equated "cause" with "case," noting that they "are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action."[76] Accordingly, we deduced that "cases commenced" in H.R. 6116 referred to "case[s] or cause[s] of action . . . 'when [they are] first brought in an appropriate court.'"[77]

In conducting our analysis, we acknowledged the Virgin Islands government's argument that, based on U.S. Supreme Court precedent as well as "the alleged purpose" of H.R. 6116, the phrase "cases commenced" should be defined as the filing of a certiorari petition.[78] However, we dismissed that argument without much discussion.[79] Yet as the U.S. Supreme Court has instructed, "[i]t is contrary to the spirit of the . . . law itself to apply a rule founded on

---

[75] *Bason*, 767 F.3d at 206 (emphasis added).

[76] *Id.* (quoting *Hohn v. United States*, 524 U.S. 236, 241 (1998)) (ellipsis in original) (internal quotations omitted).

[77] *Id.* (citing *Pritchett*, 420 F.3d at 1094); *see also, e.g.*, *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005) ("In California, as in the federal courts, a suit is 'commenced' upon filing.").

[78] *Bason*, 767 F.3d at 206.

[79] *See id.* at 209 (declining to find the U.S. Supreme Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), controlling because *Slack* "did not discuss whether there may be a meaningful difference between . . . an open-ended and unmodified provision [like H.R. 6116] and a provision that refers, for instance, to 'appellate cases commenced'"); *id.* at 209 (distinguishing *Slack* because, unlike H.R. 6116, the habeas provisions at issue there "did not divest one court of its jurisdiction and confer such jurisdiction on another court").

a particular reason to a case where that reason utterly fails."[80] Our reliance on the *generally accepted* meaning of "cases" rather than focusing on the reason the legislation was enacted or the specific context in which the word was used in H.R. 6116, resulted in our adopting a definition that was not sufficiently tethered to, or informed by, congressional purpose.

We now conclude that the decision of the U.S. Supreme Court in *Slack v. McDaniel* should have more sharply focused and guided our inquiry in *Bason*. In *Slack*, the Court had to decide whether a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[81] amending 28 U.S.C. § 2253, a habeas corpus statute, applied to a request for a "Certificate of Appeal" (COA) from a district court's denial of a habeas petition.[82] The Court noted that it had already held in 1997 in *Lindh v. Murphy*[83] that "AEDPA's amendments to 28 U.S.C. § 2254, the statute governing entitlement to habeas relief in the district court, applied to cases filed after AEDPA's effective date."[84] Slack argued that the relevant AEDPA provision did not apply to him because his habeas petition had been "commenced in the [d]istrict [c]ourt pre-AEDPA," i.e., before AEDPA imposed new requirements for habeas petitions.[85] The Court disagreed. It held that AEDPA did apply

---

[80] *Patton v. United States*, 281 U.S. 276, 306 (1930) (quoting *Reno Smelting Works v. Stevenson*, 21 P. 317, 320 (Nev. 1889), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970).

[81] 28 U.S.C. § 2253(c) (1994 ed., Supp. III).

[82] *Slack*, 529 U.S. at 481.

[83] 521 U.S. 320 (1997).

[84] *Slack*, 529 U.S. at 481 (citing *Lindh*, 521 U.S. at 327).

[85] *Id.*

because Slack had filed his COA request after AEDPA was enacted.[86] The analysis turned on the fact that the provision Slack's argument relied upon pertained to "proceedings in the district courts while [28 U.S.C. § 2253, the controlling provision, was] directed to proceedings in the appellate courts."[87]

Slack thus informs our resolution of the meaning of "cases commenced" in H.R. 6116. As the Court there explained, "[w]hen Congress instructs . . . that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court."[88] The Court further explained that "[w]hile an appeal is a continuation of the litigation started in the trial court, it is a distinct step. We have described proceedings in the courts of appeals as 'appellate cases.' Under AEDPA, an appellate case is commenced when the application for a COA is filed."[89]

Similarly, H.R. 6116 was enacted to address certiorari review of decisions of the Supreme Court of the Virgin Islands.[90] The interpretation of "cases commenced" in H.R. 6116 must therefore focus on appellate cases—cases on certiorari review. Our analysis in *Bason* was unduly influenced by reliance on trial-level cases and trial-level process.[91] The

---

[86] *Id.* at 482.

[87] *Id.* at 481.

[88] *Id.* at 482.

[89] *Id.* at 481-82 (citations omitted).

[90] *Cf. Bason*, 767 F.3d at 209 ("[B]ecause [H.R. 6116] is supposedly directed to proceedings in the Third Circuit, it would purportedly then apply to proceedings initiated in the Third Circuit after H.R. 6116's date of enactment.").

[91] *See id.* at 207. This portion of *Bason* cited, for example, the provision vesting federal district courts with supplementary

resulting conclusion was insufficiently informed by the legislative purpose of H.R. 6116 and thus inconsistent with the U.S. Supreme Court's analysis in *Slack*.[92]

B. Similar Jurisdictional Repeals

Interpreting "cases commenced" in H.R. 6116 as the filing of a petition for certiorari review, as opposed to the filing of a complaint, is consistent with Congress's termination of the certiorari jurisdiction other circuit courts of appeals

---

jurisdiction in the Judicial Improvements Act of 1990, Pub. L. No. 101-650, title III, § 310, 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1367) ("The amendments made by this section shall apply to *civil actions* commenced on or after the date of the enactment of this Act." (emphasis added)); the removal jurisdiction provision of the Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(b), 100 Stat. 633, 637 (1986) (codified as amended at 28 U.S.C. § 1441) ("The amendment made by this section shall apply with respect to *claims in civil actions* commenced in State courts on or after the date of the enactment of this section." (emphasis added)); and the provision governing the district courts' removal jurisdiction and interlocutory appeals in class action proceedings in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (codified as amended at 28 U.S.C. § 1332) ("The amendments made by this Act shall apply to *any civil action* commenced on or after the date of enactment of this Act." (emphasis added)). *Bason*, 767 F.3d at 207.

[92] We emphasize that our analysis here is not intended to necessarily provide guidance on statutes other than H.R. 6116. This includes, but is not limited to, those analogous provisions in the Antiterrorism and Effective Death Penalty Act of 1996, codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., and 34 U.S.C.; the Federal Rules of Appellate Procedure; the Third Circuit Local Rules; the Third Circuit Internal Operating Procedures; the Federal Rules of Civil Procedure; and district-level statutes, such as those embodied in the Class Action Fairness Act, codified at 28 U.S.C. §§ 1453 and 1711-1715.

temporarily had over the supreme courts of other U.S. territories.

1. Guam

Congress gave the Court of Appeals for the Ninth Circuit temporary jurisdiction over appeals from the Supreme Court of Guam in 1984.[93] The relevant statute provided:

> [F]or the first fifteen years following the establishment of the [Supreme Court of Guam], 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. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions.[94]

Thus, like our own jurisdiction over the Supreme Court of the Virgin Islands, certiorari jurisdiction of the Court of Appeals for the Ninth Circuit over the Supreme Court of Guam was meant to sunset after fifteen years or until the judicial council of that

---

[93] Act of Oct. 5, 1984, Pub. L. No. 98-454, title VIII, § 801, 98 Stat. 1732, 1742 (current version at 48 U.S.C. § 1424-2).

[94] *Id.*

circuit determined that Guam had "developed sufficient institutional traditions to justify direct review by the [U.S.] Supreme Court."[95]

Yet in 2004, before the expiration of fifteen years, Congress amended the law to revoke the jurisdiction of the Court of Appeals for the Ninth Circuit, just as it revoked our certiorari jurisdiction in H.R. 6116.[96] However, in contrast to H.R. 6116, in the case of Guam, Congress failed to provide an effective date for the legislation rescinding certiorari jurisdiction. The amendment simply struck language that had authorized the Court of Appeals for the Ninth Circuit to exercise certiorari review over final decisions of the Supreme Court of Guam:

> Section 22B of the Organic Act of Guam (48 U.S.C. 1424–2) is amended by striking ": *Provided*, That [for the first fifteen years following the establishment of the appellate court authorized by section 22A(a) of this Act, 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. . . .[97]]" and all that follows through the end and inserting a period.[98]

---

[95] *Id.*

[96] *See* Act of Oct. 30, 2004, Pub. L. No. 108-378, § 2, 118 Stat. 2206, 2208 (current version at 48 U.S.C. § 1424-2) (striking language in § 1424-2 regarding certiorari jurisdiction of the Court of Appeals for the Ninth Circuit).

[97] Act of Oct. 5, 1984, title VIII, § 801, 98 Stat. at 1742.

[98] Act of Oct. 30, 2004, § 2, 118 Stat. at 2208.

The Court of Appeals for the Ninth Circuit had to interpret the scope of that repeal just two years later in *Santos v. Guam*.[99] There, a certiorari petition had been filed, calendared, and argued in the Ninth Circuit prior to the repeal.[100] The court therefore had to determine "whether the jurisdiction previously granted [to the Court of Appeals for the Ninth Circuit], and existing at the time certiorari was granted, . . . evaporated upon the enactment date of the repeal, or . . . continued to exist until the pending appeal could be decided."[101]

As the Court of Appeals explained, "Congress [had] amended the distribution of appellate jurisdiction in the Territory of Guam without expressing an intent as to the effective date of its new statute."[102] In resolving the issue, the court looked to the U.S. Supreme Court's 1952 ruling in *Bruner v. United States*.[103] The court read that case to explain that "when a jurisdictional statute under which an action had been properly filed was repealed, without any reservation as to pending cases, all such pending cases were to be dismissed."[104] Because there was "no principled distinction between *Bruner*'s jurisdiction-withdrawing statute" and the one revoking certiorari authority over appeals from the Supreme Court of Guam, the court reasoned that Congress must have intended the revocation of jurisdiction to apply to all

---

[99] 436 F.3d 1051 (9th Cir. 2006).

[100] *Id.* at 1052.

[101] *Id.*

[102] *Id.* at 1053.

[103] 343 U.S. 112 (1952).

[104] *Santos*, 436 F.3d. at 1052 (citing *Bruner*, 343 U.S. at 115-17).

cases as soon as it became law.[105] Accordingly, the court concluded "Congress had taken away [its] power to hear" and "to decide the case."[106] Thus, to the extent it is relevant to our inquiry, *Santos* counsels in favor of broadly interpreting jurisdictional repeals that do not contain a savings clause.

This case, is of course, different because Congress *did* specify the date that H.R. 6116 was to become effective: December 28, 2012.[107] Defendants thus argue that "Congress uses specific language to *exempt* cases already filed in the appellate court divested of jurisdiction."[108] They suggest that since the appeals process for this case began in the Virgin Islands courts before H.R. 6116 became effective, and since Congress did not specifically exclude appeals pending on its effective date, the repeal occasioned by H.R. 6116 does not apply here. However, that argument fails to address the meaning of "cases commenced" in H.R. 6116. Thus, to accept it, we would have to ignore the teachings of *Slack* and thereby judicially amend H.R. 6116 by reading "cases commenced on or after December 28, 2012" out of the statute. We decline to do so.

2. Puerto Rico

We are similarly unpersuaded by attempts to analogize H.R. 6116 to the revocation of certiorari jurisdiction that the Court of Appeals for the First Circuit had over final decisions of the Supreme Court of Puerto Rico.

---

[105] *Id.* at 1053.

[106] *Id.*

[107] H.R. 6116, § 3, 126 Stat. at 1607.

[108] Pet'r's' Suppl. Br. 7.

Congress gave the Court of Appeals for the First Circuit temporary certiorari jurisdiction over appeals from the Supreme Court of Puerto Rico in 1948.[109] Unlike the Revised Organic Act provision pertaining to decisions of the Supreme Court of the Virgin Islands or the statute giving the Court of Appeals for the Ninth Circuit jurisdiction over decisions of the Supreme Court of Guam, the law vesting the Court of Appeals for the First Circuit with jurisdiction over the Supreme Court of Puerto Rico contained no sunset provision. Rather, it stated, in relevant part:

> The court[] of appeals for the First . . . Circuit[] shall have jurisdiction of appeals from all final decisions of the supreme court[] of Puerto Rico . . . in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs.[110]

Nevertheless, Congress enacted legislation in 1961 that repealed that certiorari jurisdiction. That legislation simply stated:

> Section 1293 of title 28, United States Code, is repealed: *Provided,* That such repeal shall not deprive the Court of Appeals for the First Circuit of jurisdiction to hear and determine

---

[109] Act of June 25, 1948, ch. 646, § 1293, 62 Stat. 929, 929 (previously codified at 28 U.S.C. § 1293) (repealed 1961).

[110] *Id.*

> appeals taken to that court from the Supreme Court of Puerto Rico before the effective date of this Act.[111]

Thus, Congress expressly included a savings clause preserving certiorari authority "over *appeals* taken to that Court from the Supreme Court of Puerto Rico before the effective date of [the] Act."[112]

In *Bason*, we focused on that distinction. We explained:

> When Congress stripped the [Court of Appeals for the] First Circuit of its jurisdiction over the Puerto Rico Supreme Court, it expressly stated that "such repeal shall not deprive the Court of Appeals of jurisdiction to hear and determine appeals taken to that court from the Supreme Court of Puerto Rico before the effective date of this Act."[113]
>
> . . . .
>
> In H.R. 6116, Congress took a different approach . . . . Instead of enacting an exception reserving our jurisdiction over "pending appeals" (or even "pending cases"), Congress chose to make it clear that it is the jurisdiction-stripping (and jurisdiction-conferring) legislation itself that only applies to "cases commenced" on or after the enactment date.[114]

---

[111] Act of June 25, 1948, ch. 646, § 1293, 62 Stat. 929, 929 (previously codified at 28 U.S.C. § 1293) (repealed 1961).

[112] *Id.* (emphasis added).

[113] *Id.*

[114] *Bason*, 767 F.3d at 206-07.

Thus, Defendants now understandably argue that Congress's failure to similarly limit H.R. 6116 to "appeals" commenced on or after the effective date must mean that Congress did not intend any such limitation. In other words, Defendants argue that Congress must have meant "cases" in the generally understood sense. That definition would presumptively include any litigation (i.e., "case") commenced by filing a complaint in the Superior Court of the Virgin Islands after December 28, 2012, the date H.R. 6116 became effective. However, as we have already explained, that argument ignores the U.S. Supreme Court's guidance regarding how we should interpret "cases" in a statute applying only to appeals. As the Court explained in *Slack*, an appeal *is* its own "case" for purposes of such statutes.[115] Therefore we will no longer assume Congress used "cases" in H.R. 6116 as that word is generally understood.[116] Moreover, aside from *Bason*, no federal appellate court has interpreted the effective date of a certiorari-stripping statute as an implicit jurisdictional reservation of appellate jurisdiction over cases at the trial level, absent specific language to that effect.

C. Practical Effects

Moreover, although we cited in *Bason* our Court's statement in a previous case that we should not "blindly" construe undefined statutory terms, we did not heed that admonition.[117] We did not consider whether "the whole legislation, . . . the circumstances surrounding [H.R. 6116's] enactment,

---

[115] *See Slack*, 529 U.S. at 482.

[116] *See id.* at 481 ("While an appeal is a continuation of the litigation started in the trial court, it is a distinct step.").

[117] *Bason*, 767 F.3d at 206 (citing *Brown*, 740 F.3d at 149).

or . . . the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."[118] We realize, of course, that our interpretation of a statute should not unduly focus on its impact on pending litigation. However, the practical consequences of a given interpretation can help inform an inquiry into congressional intent. As the U.S. Supreme Court instructed in *Griffin v. Oceanic Contractors, Inc.*, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[119] It is therefore appropriate

---

[118] *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

[119] 458 U.S. 564, 575 (1982); *see also Comm'r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) ("[I]n interpreting a statute, [a court has] 'some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.' But it is otherwise 'where no such consequences [would] follow and where . . . it appears to be consonant with the purposes of the Act.'" (ellipses and alteration in original) (citations omitted) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)); *In re Magic Restaurants, Inc.*, 205 F.3d 108, 116 (3d Cir. 2000) ("Even where the express language of a statute appears unambiguous, a court must look beyond that plain language where a literal interpretation of this language would thwart the purpose of the overall statutory scheme, would lead to an absurd result, or would otherwise produce a result 'demonstrably at odds with the intentions of the drafters.'" (citation omitted) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)); *United States v. Schneider*, 14 F.3d 876, 880 (3d Cir.1994) ("It is the obligation of the court to construe a statute to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose.").

to consider "the specific context in which that language is used, and the broader context of the statute as a whole," if we are to "avoid constructions that produce 'odd' or 'absurd results' or that are 'inconsistent with common sense.'"[120]

H.R. 6116 was enacted for the sole purpose of rescinding our certiorari jurisdiction over appeals from the Supreme Court of the Virgin Islands. As noted earlier, the Revised Organic Act established a maximum period of fifteen years for us to exercise certiorari review.[121] That window was created to allow the new Supreme Court of the Virgin Islands to "develop[] . . . institutional traditions" sufficient to justify direct U.S. Supreme Court review.[122]

A committee of our Court found that the Supreme Court of the Virgin Islands had demonstrated such sufficiency in less than fifteen years,[123] and within a year of our Judicial Council unanimously approving that committee's report, Congress enacted H.R. 6116 in recognition of that

---

[120] *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (internal quotations omitted) (quoting *In re Price*, 370 F.3d 362, 369 (3d Cir. 2004)); *see also Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 374-75 (3d Cir. 2012) ("In analyzing whether the statutory language is unambiguous, 'we take account of the specific context in which that language is used, and the broader context of the statute as a whole.'" (quoting *Disabled in Action of Pa.*, 539 F.39 at 210)).

[121] *See* 48 U.S.C. § 1613 (1994 version); *see also* 158 Cong. Rec. H6354 (daily ed. Nov. 14, 2012) (statement of Rep. Bobby Scott) ("The Revised Organic Act specifically grants the [T]hird [C]ircuit appellate jurisdiction *for the first 15 years* of the Virgin Islands Supreme Court's existence." (emphasis added)).

[122] *1984 Amendment to Revised Organic Act*, title VII, § 704, 98 Stat. at 1739.

[123] *Third Circuit Judicial Council Report*, *supra* note 51, at 23.

finding. This was a momentous occasion in the history of the Virgin Islands judicial system. One congresswoman characterized H.R. 6116 as a "historic milestone" demarcating "the verge of accomplishing the final goal of making the U.S. Virgin Islands Supreme Court just like all other [s]tate supreme courts."[124] Perpetuating our certiorari review by extending it to all suits initiated in the Virgin Islands judicial system before H.R. 6116 was enacted is contrary to our recognition of the institutional competence of the Supreme Court of the Virgin Islands and the excellence of its jurisprudence.

Linking the "commence[ment]" of an appeal from the Supreme Court of the Virgin Islands to the filing of a complaint for purposes of our certiorari authority retains that authority beyond the fifteen years Congress originally set for it. The Virgin Islands Bar Association has represented without contradiction that, as of 2014, there were over 6,000 pending cases in the Virgin Islands courts, each taking an average of ten years for adjudication.[125] There is therefore a mounting backlog of cases in the Virgin Islands courts.[126]

This very case illustrates the likelihood that a large number of the now-pending cases will not be

---

[124] 158 Cong. Rec. H6354-55 (daily ed. Nov. 14, 2012) (statement of Del. Donna Christian-Christensen).

[125] *See Fahie*, 858 F.3d at 167 n.6.

[126] Amicus Companion Insurance Company urges that to the extent there is any "backlog" in the Virgin Islands courts, it is an apocryphal one. Br. of Amicus Curiae Companion Ins. Co. 2-3. Yet it is undeniable, even with the data Companion provides, that the "backlog" is increasing. *See id.* at 3 (showing increases in the V.I. judiciary caseload in 2016 over both 2014 and 2015).

resolved for years to come. This complaint was filed in 2005, but the claims only reached the Supreme Court of the Virgin Islands on appeal in 2015, ten years later. The Supreme Court of the Virgin Islands issued its decision in this case a year later, in 2016, and we granted the petition for certiorari in 2017, nearly twelve years after the case had originally been filed. It is therefore highly likely that interpreting H.R. 6116 to include all suits filed before H.R. 6116's effective date of December 28, 2012, would extend our certiorari review over a significant number of cases through at least December 2022. Not only would this be ten years past the effective date of H.R. 6116, but it would also be eighteen years after the creation of the Supreme Court of the Virgin Islands and a full three years beyond the fifteen-year period Congress initially set for our certiorari jurisdiction to end. Yet, it is beyond dispute that Congress intended H.R. 6116 to terminate our certiorari review, not prolong it.

We are, of course, aware of the concern expressed in *Bason* that it would be unjust for us *not* to retain jurisdiction over cases filed in the Superior Court of the Virgin Islands before the effective date of H.R. 6116 given the parties' expectations before that legislation was enacted.[127] However, we question the reasonableness of any such expectations. As we have already noted, H.R. 6116

---

[127] *See Bason*, 767 F.3d at 210 ("[L]ike litigants who filed their certiorari petitions before December 28, 2012, parties who were in the midst of litigating a proceeding in the Virgin Islands courts could have reasonably expected that they would have the right to file a petition for certiorari with the Third Circuit and, at the very least, possibly obtain further review with respect to questions of Virgin Islands law (which would otherwise not be available in the Supreme Court).").

contained no express savings clause or other instruction as to non-appellate cases commenced before H.R. 6116's effective date. Moreover, nothing in the Revised Organic Act, the 1984 Amendments thereto, or subsequent enactments of the Virgin Islands legislature gave anyone reason to believe that our certiorari jurisdiction would continue until a given appeal is ultimately decided. Rather, our certiorari jurisdiction was always to be of relatively short duration.

Moreover, as we have explained, the Revised Organic Act clearly provided for our certiorari jurisdiction to end well before the fifteen years Congress initially allowed for its exercise.[128] Attorneys and litigants therefore had no reason to assume that we would continue to have authority to review any final order of the Supreme Court of the Virgin Islands until their case was ultimately resolved. That was particularly true after the passage of H.R. 6116.[129] In addition, litigants were

---

[128] *1984 Amendment to Revised Organic Act*, title VII, § 704, 98 Stat. at 1739; 48 U.S.C. § 1613 (1994 version).

[129] Amicus Companion Insurance Company wishes to obtain review of an adverse decision by the Supreme Court of the Virgin Islands that is based on Virgin Islands law. Companion Ins. Co. Br., at v. It states that a "key factor" in its decision to appeal the case through the Virgin Islands courts "was the availability of potential certiorari review by this Court if the V.I. Supreme Court's decision was adverse." *Id.* at vi.

Companion's reliance on our certiorari review was misplaced for two reasons. First, the very passage of H.R. 6116—having occurred six years ago confirms Congress's conclusion that the Virgin Islands judiciary warrants treatment "just like every high court in the States and territories," 158 Cong. Rec. H6354 (daily ed. Nov. 14, 2012) (statement of Del. Christensen), and state supreme courts are the final arbiters of matters of state law.

forewarned because, even before H.R. 6116 was enacted, Congress had amended similar statutory schemes in order to divest other federal circuit courts of appeals of jurisdiction to review even pending appeals from the local courts of other U.S. territories.[130, 131]

Second, we have long held that we defer to the Supreme Court of the Virgin Islands in matters of local law because that "best ensures that [we] can perform the role given to us by Congress[] to nurture the development of 'sufficient institutional traditions to justify direct review by the Supreme Court of the United States.'" *Pichardo*, 613 F.3d at 97 (quoting 48 U.S.C. § 1613 (1994 version)). Our very infrequent grants of certiorari review have rarely resulted in reversals in the area of local law. We have overturned or vacated a decision of the Supreme Court of the Virgin Islands only *twice* since that court was created. Neither of those cases appears to have impacted local jurisprudence. Once was in *Bason* itself, which we now overturn. *Bason*, 767 F.3d at 214-16 (vacating the opinion of the court to the extent it addressed the moot issue of the reinstatement of the deceased petitioner). The second instance occurred in the very limited context of a contained local political dispute. *In re Kendall*, 712 F.3d 814, 816 (3d Cir. 2013) (*Kendall II*) (reversing the court's convictions of a judge of the Superior Court of the Virgin Islands for indirect criminal contempt after he published a judicial opinion chastising the court).

[130] *See* Act of Oct. 30, 2004, § 2, 118 Stat. at 2208 (transferring certiorari jurisdiction over decisions of the Supreme Court of Guam from the Court of Appeals for the Ninth Circuit and to the U.S. Supreme Court); *Santos*, 436 F.3d at 1053-54 (deciding, pursuant to Act of Oct. 30, 2004, § 2, 118 Stat. at 2208, that the Court of Appeals for the Ninth Circuit had no further jurisdiction to review decisions of the Supreme Court of Guam, including those that had been pending at the time of enactment).

[131] Our holding is also consistent with our general avoidance of retroactivity in interpreting statutes. Absent clear congressional intent to the contrary, we normally interpret statutes with the presumption that they do not apply

IV. CONCLUSION

In *Bason*, we acknowledged that the Supreme Court of the Virgin Islands had "succeeded in developing sufficient institutional traditions to justify . . . direct review" by the U.S. Supreme Court.132 Not only have we recognized that court's maturity and commended its development and jurisprudence, but our Third Circuit Judicial Council also recommended that our jurisdiction be withdrawn and that the Supreme Court of the Virgin Islands "enjoy the same relationship with the Supreme Court of the United States as do the highest courts of the several States." 133

For all the reasons that we have stated, we now hold that H.R. 6116 terminated our jurisdiction over all certiorari petitions from final decisions of the Supreme Court of the Virgin Islands if those petitions were filed on or after December 28, 2012. Having determined that we are without jurisdiction to review this case, we will dismiss the petition for writ of certiorari

---

retroactively, i.e., to cases pending on the date of the law's enactment. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006). But as we clarified in *Kendall I*, this presumption against retroactivity does not apply to H.R. 6116 because such a "jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Kendall I*, 716 F.3d at 87 (quoting *Hamdan*, 548 U.S. at 577).

BIBAS, *Circuit Judge*, dissenting.

The majority reads H.R. 6116 as providing that the *filing* of a certiorari petition commences a case and so deprives us of jurisdiction over that case. I cannot agree. Under the majority's interpretation, we have certiorari jurisdiction over final judgments of the Supreme Court of the Virgin Islands—up until the moment a litigant asks us to exercise that jurisdiction. That is not what H.R. 6116 says.

"A civil action is commenced by filing a complaint with the [trial] court," not by filing a certiorari petition. Fed. R. Civ. P. 3. The case is the entire civil action, not just the certiorari stage. As the majority's legislative survey illustrates, Congress distinguishes among "cases," "appeals," and "writs of certiorari." And it does so in statutes generally, appellate statutes, appellate statutes governing territorial jurisdiction, and statutes (going back to 1917) governing jurisdiction over the Virgin Islands.

Nor can I agree that *Bason*'s reading would perpetuate our certiorari jurisdiction beyond the fifteen years specified by Congress. If H.R. 6116 applies to a case, then our jurisdiction over that case ends immediately. I see no way to read the statute that would preserve our jurisdiction beyond "fifteen years following the establishment" of the Supreme Court of the Virgin Islands. 48 U.S.C. § 1613 (1994).

I would also not venture into the quicksand of legislative history, or speculate about legislative purpose. The text is clear. And *stare decisis* is a weighty concern, both generally and for litigants in the pipeline who relied on *Bason*. So I would adhere to *Bason*'s reading of H.R. 6116 and hold that we have jurisdiction here.

I respectfully dissent.

BLD-149 March 2, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
C.A. No. **16-3912**

VICTORIA VOOYS; ET AL., Petitioners
v.
MARIA BENTLEY; ET AL.

(V.I. S. Ct. Civ. No. 2015-0046)
(V.I. Super. Ct. Civ. No. 2005-00368)

Present: AMBRO, GREENAWAY, JR. and SCIRICA, Circuit Judges

Submitted are:

(1) Petitioners' petition for a writ of certiorari;
(2) Respondents' brief in opposition thereto; and
(4) Petitioners' reply brief
in the above-captioned case.

Respectfully,
Clerk
MMW/EGL/nmr

O R D E R

Petitioners' petition for a writ of certiorari is granted. See 3d Cir. L.A.R. 112.1(a) (2010). Certiorari is granted on whether the Virgin Islands Supreme Court correctly or erroneously concluded that 5 V.I.C. § 547 violates the Privileges and Immunities Clause of Article IV, Section 2, of the

United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. We note that respondents, in opposing certiorari, argue that this Court lacks jurisdiction to review the Virgin Islands Supreme Court's decision. Our grant of certiorari does not represent a determination that this Court has such jurisdiction. That determination will be made by the Panel of the Court that considers this appeal on the merits. The parties are directed to address this Court's jurisdiction in their briefs.

By the Court,
s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: March 23, 2017

NMR/cc: Rhea R. Lawrence, Esq.
Lee J. Rohn, Esq.
Stephen L. Braga, I, Esq.
Pamela R. Tepper, Esq.

For Publication

IN THE SUPREME COURT OF THE
VIRGIN ISLANDS

S. Ct. Civ. No. 2015-0046
Re: Super. Ct. Civ. No. 368/2005 (STX)

JOSEPH GERACE, VICTORIA VOOYS
D/B/A CANE BAY BEACH BAR,
Appellants/Plaintiffs,
v.

MARIA BENTLEY, CB3, INC., WARREN
MOSLER, CHRIS HANLEY, and
CHRISMOS CANE BAY, LLC,
Appellees/Defendants.

On Appeal from the Superior Court of the
Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W.L. Willocks
Argued: November 10, 2015
Filed: August 22, 2016

BEFORE: RHYS S. HODGE, Chief Justice;
MARIAM. CABRET, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

Lee J. Rohn, Esq.
Rhea R. Lawrence, Esq. (Argued)
Law Offices of Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellants,

Mark W. Eckard, Esq. (Argued)
Hamm Eckard, LLP
St. Croix, U.S.V.I.
Joel H. Holt, Esq.
Law Offices of Joel H. Holt
St. Thomas, U.S.V.I.
Attorneys for Appellees Warren Mosler, Chris Hanley, & Chrismos Cane Bay, LLC,

Maria Bentley
Amherst, N.Y.
Pro se,

Pamela R. Tepper, Esq.
Michael Mouridy, Esq.
Department of Justice
St. Thomas, U.S.V.I.
Attorneys for Interested Party Government of the Virgin Islands.

OPINION OF THE COURT

HODGE, Chief Justice.

Appellants Joseph Gerace and Victoria Vooys appeal from the Superior Court's April 16, 2015 opinion, which dismissed their complaint for failure to post a cost bond under title 5, section 547 of the Virgin Islands Code. For the reasons that follow, we reverse.

I. BACKGROUND

On June 9, 2005, Gerace and Vooys sued Maria Bentley, David Bentley, CB3, Inc., Warren

Mosler, Chris Hanley, and Chrismos Cane Bay, LLC for numerous causes of action, including breach of contract. Five years after filing their complaint, Gerace and Vooys voluntarily moved to dismiss David Bentley when he died while the litigation was pending, which the Superior Court permitted in a May 5, 2010 Order. When they filed the complaint, both Gerace and Vooys resided in the Virgin Islands. However, seven years after filing suit, both Vooys and Gerace left the Virgin Islands to reside in the United States mainland. On January 31, 2013, Chrismos Cane Bay, Mosler, and Hanley demanded that Gerace and Vooys post $6,000 as security – representing $1,000 for each plaintiff as to each defendant who made the request – in accordance with 5 V.I.C. § 547, which provides, in pertinent part, that

> [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.

V.I. CODE ANN. tit 5, § 547(a).

On March 1, 2013, Vooys and Gerace filed a "Motion to Waive or in the Alternative Reduce Demand for Security Costs," which stated that they "cannot afford the security bond," (J.A. 44), that the case should not be stayed or dismissed because it "has been pending for over seven (7) years" and

doing so would "violate[] fundamental principles of fair play and justice" as well as "constitutional due process rights guaranteed by the 14th Amendment." (J.A. 45.) Moreover, Gerace and Vooys maintained that they "continually resided on St. Croix from the time of the filing of their Complaint until [2012] when the dire economic condition on the island forced [them] to leave the island in search of employment." (*Id.*) Their filing was accompanied by affidavits in which they both averred to lacking sufficient funds to post a security bond. Chrismos Cane Bay, Mosler, and Hanley filed a reply on March 6, 2013, which, among other things, characterized Vooys and Gerace's claim of not being able to pay as "self-serving." (J.A. 53.)

The Superior Court, in an April 18, 2013 order, mandated that "each Plaintiff shall pay security for costs of $175.00 separately for each of the six named Defendants for ... a total Security for Cost of $1050.00 for Plaintiff Joseph Gerace and $1050.00 [f]or Plaintiff Victoria Vooys separately totaling $2100.00." (J.A. 56 (emphases in original).) The order further directed Gerace and Vooys to each deposit $1050.00 with the Superior Court within thirty days.

Gerace and Vooys did not a post a bond by this deadline. On May 22, 2013, Chrismos Cane Bay, Mosler, and Hanley moved to dismiss the case because section 547 provides that "[t]he court may dismiss the action if security is not given within 30 days after the service of a notice requiring security." 5 V.I.C. § 547(d). On June 4, 2013, Vooys and Gerace opposed the motion on numerous grounds, including that section 547: (1) did not apply to this case since they were residents at the time the complaint was

filed; (2) cannot be enforced against an indigent plaintiff; and (3) violated the separation-of-powers doctrine embodied in the Revised Organic Act of 1954, as well as several provisions of the United States Constitution. In their June 6, 2013 reply, Chrismos Cane Bay, Mosler, and Hanley did not respond to the merits of any of these arguments, instead contending that their "response to the motion to dismiss should be stricken, or just simply ignored," because Vooys and Gerace had never filed a "timely motion to reconsider" the Superior Court's April 18, 2013 order. (J.A. 97.) On August 5, 2013, the Government of the Virgin Islands – which had not been a party to the case – filed a response that took no position on whether Vooys and Gerace's complaint should be dismissed, but defended the constitutionality of section 547.

Nearly two years later, the Superior Court issued an April 16, 2015 opinion that dismissed Vooys and Gerace's complaint "as to all Defendants," even though only Mosler, Hanley, and Chrismos Cane Bay had sought dismissal. *Gerace v. Bentley*, 62 V.I. 254, 270 (V.I. Super. Ct. 2015). The Superior Court did not directly analyze Vooys and Gerace's constitutional claims, but rather conducted a broad survey of United States jurisdictions and ultimately concluded that the statute was valid "because the majority of jurisdictions hold that nonresident security cost bond statutes are constitutional." *Id.* at 269. The Superior Court further concluded that Vooys and Gerace failed to demonstrate that they were indigent because even though they "submitted affidavits stating that they are without sufficient funds to pay the amount of security costs demanded," those "affidavits were insufficient

because they were attached to the Motion to Waive or Reduce the Demand." *Id.* According to the Superior Court, Gerace and Vooys were required to "file[] a motion for leave to proceed *in forma pauperis* together with affidavits." *Id.* The Superior Court never ruled on Vooys and Gerace's claim that section 547 did not apply to them because they were residents at the time they filed their complaint, or that section 547 was inconsistent with the separation-of-powers implicit in the Revised Organic Act.

Gerace and Vooys timely filed their notice of appeal with this Court on May 14, 2015. After the parties filed their briefs, this Court, in a July 22, 2015 order, recognized that Gerace and Vooys had renewed their challenge to the constitutionality of section 547 on appeal, and invited the Government to file a brief pursuant to Supreme Court Rule 22(n). The Government accepted the invitation, and filed a brief defending the statute's validity. Although all parties were given the opportunity to respond to the Government's brief, only Gerace and Vooys did so.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law." 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because the Superior Court's April 16, 2015 opinion dismissed all of Vooys and Gerace's

claims as to all defendants, it is a final judgment within the meaning of section 32(a). *Joseph v. Daily News Publishing Co., Inc.,* 57 V.I. 566, 578 (V.I. 2012) (collecting cases).

This Court exercises plenary review of the Superior Court's application of law, while its factual findings are reviewed only for clear error. *Allen v. HOVENSA, L.L.C.,* 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas-St. John Bd. of Elections v. Daniel,* 49 V.I. 322, 329 (V.I. 2007)).

B. Applicability of Section 547

In their appellate brief, Gerace and Vooys renew their argument that 5 V.I.C. § 547 is invalid under the Revised Organic Act and the United States Constitution. However, before considering their constitutional claims, we must first address their claim that section 547 is inapplicable to this case, since a favorable ruling on that issue would render any constitutional analysis unnecessary. *Murrell v. People,* 54 V.I. 338, 347 (V.I. 2010) ("[C]ourts possess 'an obligation ... to avoid deciding constitutional issues needlessly.'" (quoting *Christopher v. Harbury,* 536 U.S. 403, 417 (2002))).

Gerace and Vooys maintain that section 547 cannot apply to their case because they were unquestionably Virgin Islands residents at the time they filed their complaint, and only changed their residency years into the litigation. While Gerace and Vooys expressly made this argument in their opposition to the motion to dismiss, the Superior Court did not rule on this claim in its April 16, 2015 opinion. "As this Court has previously emphasized, a court can never exercise its discretion to simply

ignore a claim that a party has brought squarely before it." *Bryan v. Fawkes,* 61 V.I. 416,476 (V.I. 2014) (citing *Garcia v. Garcia,* 59 V.I. 758,771 (V.I. 2013)); *accord, Austin-Casares v. Safeco Ins. Co. of America,* 81 A.3d 200,208 n.11 (Conn. 2013) ("[A] trial court abuses its discretion when it fails to exercise its discretion."). This failure to address an argument – even on a question of law to which this Court owes the Superior Court no deference – itself constitutes grounds for reversal. *Gov't of the VI v. Connor,* 60 V.I. 597, 604 (V.I. 2014). However, given that this case has languished in the Superior Court for a decade, including two years without a ruling on the motion to dismiss that gave rise to this appeal, this Court, in order to expedite a final resolution and in the interest of judicial economy, shall address this issue – which involves a pure question of law – in the first instance. *Vanterpool v. Gov 't of the VI,* 63 V.I. 563, 586 (V.I. 2015) (collecting cases). *See also, e.g., Anthony v. Independent Ins. Advisors, Inc. ,* 56 V.I. 516, 534 (V.I. 2012) (court construes motion requesting relief filed in Superior Court, but not expressly ruled upon, as implicitly denied when the Superior Court enters a final judgment dismissing all of the movant's claims and closing the case).

As Gerace and Vooys concede in their brief, section 547 "is silent ... on whether it applies retroactively to plaintiffs who move after the case is commenced." (Appellant's Br. 8.) They argue, however, that this Court should "give the statute its narrowest possible construction" because it "serves almost no legitimate purpose." *(Id.)* To support this argument, they rely on a decision of the United States District Court of the Virgin Islands which harshly criticized section 547 as a matter of policy:

The statute requires non-resident plaintiffs to deposit security for costs in the event the resident defendant prevails and is awarded costs. Resident plaintiffs are not required to make such deposits. As resident plaintiffs are capable of refusing to pay an award for costs, the provision is not broadly aimed at preventing such refusals. As resident plaintiffs can be compelled to pay only through executions on the award, the provision is not broadly aimed at eliminating the need for a prevailing defendant to return to court to enforce his award. In this context, the true distinction between a resident and non-resident plaintiff is that if the former refuses to pay an award, the defendant can enforce that award here in the Virgin Islands, while if the latter refuses to pay the award, the defendant must go off-island to enforce his judgment. Thus 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 non-resident plaintiff.

Neither the court or the legislature has been willing to apply 5 V.I.C. § 547 to effectuate its purpose. . . . It seems apparent that the court is unwilling to require plaintiffs to deposit the large sum that would truly act as security from having to resort to an off-island court. The legislature has not raised the $300.00 mandatory amount in at least 23 years, creating the inference that it too is unwilling to require the amount required for actual security. The

> unwillingness of both the court and the legislature is understandable: the requirement of a deposit from each nonresident plaintiff which is large enough to be actual security seems a high price to pay in order to avoid the infrequent situation in which a prevailing defendant must go off-island to enforce his judgment.
>
> . . . . The question then is: how to apply a statute whose purpose is apparently in disrepute or at least not fully endorsed by either the legislature or the court? In this situation, only a narrow construction of the statute is appropriate.

Ingvoldstadv. Estate ofYoung, 18 V.I. 346, 348-49 (D.V.I. 1981).

We disagree. It is true that statutes that restrict access to the courts should be strictly construed. *See, e.g., North Tex. Production Credit Ass 'n v. McCurtain County Nat '! Bank,* 222 F.3d 800, 818 (lOth Cir. 2000) (quoting *In re Adoption of K. MS.,* 997 P.2d 856, 857 (Okla. Ct. App. 1999)); *Mississippi Wood Preserving Co. v. Rothschild,* 201 F.2d 233, 236 (5th Cir. 1953); *In re Marriage of Lin,* 170 Cal. Rptr. 3d 34, 36 (Cal. Ct. App. 2014). However, the rules of statutory construction only apply if a statute is actually ambiguous, and thus a statute will not be strictly construed if it is otherwise clear and its terms do not support a restrictive interpretation. *See, e.g. , People v. Baxter,* 49 V.I. 384, 388 (V.I. 2008); *Corber v. Xanodyne Pharmaceuticals, Inc.,* 771 F.3d 1218, 1226 n.8 (9th Cir. 2014); *In re Jenkins ' Estate,* 355 P.2d 729, 732 (Or. 1960);

Davis v. Rahkonen, 332 N.W.2d 855, 857 (Wis. Ct. App. 1983). *See also, e.g. , Jenkins v. Mehra,* 704 S.E.2d 577, 583 (Va. 2011) ("[l]f the language of a statute is unambiguous, courts may not interpret the language in a way that effectively holds that the [Legislature] did not mean what it actually expressed.").

While Gerace and Vooys frame their argument in terms of giving section 547 "the narrowest possible construction," (Appellant's Br. 8), in effect they are asking this Court to disregard the plain language of the statute simply because the Court may disagree with its purpose. This is tantamount to requesting that this Court rewrite or amend the Virgin Islands Code. *In re Reynolds,* 60 V.I. 330, 337 n.7 (V.I. 2014) (citing *Robles v. HOVENSA, LLC,* 49 V.I. 491, 499 (V.I. 2008)). Regardless of the merits of section 547 as a matter of policy, the fact remains that section 547 is not ambiguous. The meaning of the phrase "[i]f the plaintiff resides out of the Virgin Islands," 5 V.I.C. § 547(a), is clear on its face. And while the Legislature did not include a limitations period on when a defendant may request security, this does not create an ambiguity as to when a demand for security may be filed; rather, the fact that the statute is silent is strong evidence that the Legislature intended for such a demand to be made at any time. *See, e.g., Goldsberry v. Frank Clendaniel, Inc.,* 101 A.2d 805, 806 (Del. Super. Ct. 1953) (holding defendant may file a motion for security for costs "at any time" when statute and court rule "is silent as to the time for making the application"); *see also In re 2000-2001 Dist. Grand Jury,* 97 P.3d 921, 924 (Colo. 2004) ("If ... a statute can be construed and applied as written, the

legislature's silence on collateral matters is not this court's concern."). Consequently, the Superior Court committed no error to the extent it implicitly concluded that section 547 applied to the underlying matter notwithstanding the fact that Gerace and Vooys left the Virgin Islands after filing their complaint.

C. Constitutionality of Section 547

Because we reject their claim that section 547 does not apply to a plaintiff who ceases being a Virgin Islands resident after a complaint is filed, this Court cannot provide Gerace and Vooys with full and complete relief without considering their constitutional claims.[1] For the reasons that follow,

---

[1] In their appellate brief, Vooys and Gerace also argue that the Superior Court erred when it dismissed their case for failure to post a cost bond in accordance with section 547 without considering their claim that they were indigent and eligible to proceed without prepayment of costs or posting of security pursuant to 4 V.I.C. § 513(a). However, the Superior Court held no evidentiary hearing and made no factual findings as to indigence, but rejected their indigence claim on a purely procedural ground; specifically, that Vooys and Gerace failed to file a motion to proceed *informa pauperis*. Consequently, even if we were to agree with Vooys and Gerace that the Superior Court erred when it failed to consider their ability to post security, this Court could only provide partial relief in the form of ordering the Superior Court to hold an evidentiary hearing on remand to permit Vooys and Gerace to prove that they are indigent. *See, e.g., In re Ruben,* 825 F.2d 977, 987 (6th Cir. 1987); *Leser v. United States,* 335 F.2d 832, 834 (9th Cir. 1964). Notably, after conducting such a hearing, the Superior Court, depending on what evidence is presented to it, could very well conclude that Vooys and Gerace are not indigent, and sustain its earlier dismissal. Because a holding that section 547

we conclude that section 547 does not violate the separation of powers doctrine, but hold that the statute is invalid under the Equal Protection Clause of the Fourteenth Amendment as well as the Privileges and Immunities Clause found in Article IV, Section 2 of the United States Constitution.[2]

1. Invalidity Under the Revised Organic Act

The Revised Organic Act of 1954, 48 U.S. C. §§ 1541 *et seq.,* "divides the power to govern the territory between a legislative branch, 48 U.S.C. § 1571, an executive branch, *id.* § 1591, and a judicial

---

violates the Revised Organic Act or the United States Constitution would render the statute unenforceable regardless of whether or not Vooys and Gerace are indigent, we must consider those claims prior to any other claim that would provide only lesser relief. *See, e.g. , V.I. Narcotics Strike Force v. Gov 't of the V.I.,* 60 V.I. 204, 212 (V.I. 2013); *Gov 't of the V.I. v. Ambrose,* 453 Fed. App'x 157, 160 (3d Cir. 2011). For the same reason, the fact that the Superior Court erred when it ordered Vooys and Gerace to post a security bond with respect to David Bentley – who had been voluntarily dismissed as a defendant on May 6, 2010 – and Maria Bentley and CB3-who never filed a demand for security in accordance with section 547 – does not preclude consideration of the constitutional claims, since the effect of the error would be to reduce the amount of the bond from $1,050 per plaintiff to $525.

[2] Gerace and Vooys also argue that section 547 violates the Due Process Clause of the Fifth Amendment, in that "[a] statute that conditions access to courts on the payment of a filing fee or other costs may violate the due-process rights of indigent litigants." (Appellants' Br. 20.) However, as noted above, the Superior Court made no finding as to whether Gerace and Vooys are in fact indigent, or possess the means to post a security bond. In the absence of such a finding, it is not possible for this Court to review their challenge under the Fifth Amendment's Due Process Clause.

branch, *id.* § 1611," reflecting that "Congress 'implicitly incorporated the principle of separation of powers into the law of the territory.'" *Kendall v. Russell,* 572 F .3d 126, 135 (3d Cir. 2009) (quoting *Smith v. Magras,* 124 F.3d 457, 465 (3d Cir. 1997)). Section 21(c) of the Revised Organic Act provides that "[t]he rules governing the practice and procedure of the courts established by local law . . . shall be governed by local law or the rules promulgated by those courts." 48 U.S.C. § 1611(c).

In this case, the Superior Court recognized that "[t]itle 5, section 547 of the Virgin Islands Code is procedural, not substantive," in that it "does not affect the rights of the parties" but rather "involves a procedure to be followed by a non-resident plaintiff, if that plaintiff files a lawsuit in this jurisdiction." *Gerace,* 62 V.I. at 257 (citations omitted). In their appellate brief, Gerace and Vooys maintain that section 547 violates the separation-of-powers principle implicit in the Revised Organic Act because "[n]othing in (48 U.S.C.] § 1611(c) grants the Legislature the express authority to make 'local law' with respect to civil procedure, which is an express and inherent judicial function." (Appellants' Br. 16.) "Moreover," Gerace and Vooys argue that "nothing in the ROA expressly or implicitly authorizes the Legislature to make procedural rules that substantively or materially conflict with court-promulgated rules of procedure." *(Id.)* Rather, they contend that "local statutory law that is 'substantive' is the inherent province of the Legislature, while local 'procedural law' is the exclusive province of the judiciary." *(Id.)* According to Gerace and Vooys, the Superior Court's rules 'govern the practice and procedure in the [Superior C]ourt,'" (Appellants' Br.

19 (quoting SUPER. CT. R. 1)), and "the 'stay' and 'dismissal' provisions of § 547 directly interfere with, and contradict, how cases are 'commenced' under [Superior Court] Rules 3 and 8, processed under the discovery rules 26-37, and the circumstances under which a case may be involuntarily dismissed under Rule 4l(b) [of the Federal Rules of Civil Procedure]." (Appellants' Supp. Br. 2-3.)

As a threshold matter, Gerace and Vooys are mistaken in their premise that the Legislature lacks any authority whatsoever to promulgate procedural rules. The Revised Organic Act, by its own terms, provides that "[t]he rules governing the practice and procedure of the courts established by local law ... shall be governed by *local law or the rules promulgated by those courts."* 48 U.S.C. *§* 1611(c) (emphases added). This Court has previously held that this provision, by its own terms, vests both the Virgin Islands Judiciary and the Virgin Islands Legislature with authority to promulgate procedural rules, while only permitting the Legislature to establish substantive rules. *Phillips v. People,* 51 V.I. 258, 275 (V.I. 2009); *Gov't of the V I v. Durant,* 49 V.I. 366, 373 (V.I. 2008) (citing *In re Richards,* 213 F.3d 773, 783-84 (3d Cir. 2000)).

Nevertheless, this Court has not yet addressed the question of how to resolve a conflict between a procedural rule promulgated by the Legislature and a procedural rule promulgated by the Virgin Islands Judiciary. Although the Legislature – subject to the authority of Congress under the territorial clause of the United States Constitution – possesses the exclusive right to codify substantive law, the Revised Organic Act clearly provides the Legislature and the Judiciary with concurrent authority to promulgate

procedural court rules. As Gerace and Vooys correctly note in their brief, the overwhelming majority of other jurisdictions where the legislature and the judiciary have been vested with concurrent authority to promulgate procedural rules have held that conflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved in favor of the judiciary. *See, e.g., Hickson v. State,* 875 S.W.2d 492, 493 (Ark. 1994) ("Statutes are given deference only to the extent that they are compatible with our rules, and conflicts which compromise these rules are resolved with our rules remaining supreme." (citing *State v. Sypult,* 800 S.W.2d 402, 404 (Ark. 1990))); *State v. Griffith,* 539 P.2d 604, 610 (Idaho 1975) ("[A]s part of the rule-making power possessed by this Court, ... the Court may by rule ... make inapplicable procedural statutes which conflict with our present court system." (citations omitted)); *Winsberry v. Salisbury,* 74 A.2d 406, 414 (N.J. 1950) ("We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure, and administration as such."); *Waples v. Yi,* 234 P.3d 187, 191 (Wash. 2010) ("If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters."); *accord, Adams v. Rubinow,* 251 A.2d 49, 56 (Conn. 1968) ("The rule-making power of the [legislature] with respect to the lower courts can, and preferably should, be delegated to the Supreme Court as it has been, at least as to practice and procedure.").

Gerace and Vooys, however, are incorrect that any conflict exists between the Virgin Islands

Legislature and the Virgin Islands Judiciary in this instance. Even if this Court were to assume – without deciding – that Gerace and Vooys are correct that "the 'stay' and 'dismissal' provisions of § 547 directly interfere with, and contradict," the rules promulgated by the Superior Court, (Appellants' Supp. Br. 2-3), Gerace and Vooys incorrectly presume that the Superior Court may exercise the Virgin Islands Judiciary's authority to promulgate procedural rules that may overrule those enacted by the Legislature.

Although the Revised Organic Act provides that "[t)he rules governing the practice and procedure of the courts established by local law ... shall be governed by local law or the rules promulgated by those courts," 48 U.S.C. § 1611(c), the fact that Congress used the plural "courts" to grant *concurrent* rulemaking authority does not mean that it intended for every Virgin Islands court to exercise *co-equal* rulemaking authority. *Accord, City of Palm Bay v. Wells Fargo Bank, NA.,* 114 So.3d 924, 929 (Fla. 2013) ("[C)oncurrent power does not mean equal power."); *Ex parte Dep 't of Mental Health,* 511 So.2d 181, 185 (Ala. 1987) ("[C)oncurrent jurisdiction does not mean co-equal jurisdiction."); *In re William T,* 218 Cal. Rptr. 420, 425-26 (Cal. Ct. App. 1985) ("[C)oncurrent jurisdiction does not make the jurisdiction coequal.").

"[W]ithin every judicial system in the United States,' including the Virgin Islands, 'courts are arranged in a pyramid,' with 'trial courts at its base' and a single court at the top with ultimate authority."' *Connor,* 60 V.I. at 604 (quoting Richard K. Greenstein, *Why the Rule of Law?,* 66 La. L. Rev. 63, 71 (2005)). In such a hierarchical system, the

trial court lacks the authority to take any action that conflicts with those established by a higher court or state statute. *Vanterpool,* 63 V.I. at 583 & n.10; *see Elkins v. Superior Court,* 163 P.3d 160, 166 (Cal. 2007) ("A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law."); *Gilbert v. Decker,* 299 S.E.2d 65, 66 (Ga. Ct. App. 1983) ("[I]f the application of the local court rule contravenes a statute, the local rule must yield to the statute."); *People v. Williams,* 207 N.W.2d 180, 186 (Mich. Ct. App. 1973) (holding trial court rule "lack[s] validity in the face of the statute" because "[o]nly the Michigan Supreme Court has the power to modify the provisions of a legislative enactment" relating to "the practice and procedure" of Michigan courts); *Goetz v. Harrison,* 457 P.2d 911, 912 (Mont. 1969); *State ex ref. Chambers v. Hall,* 96 N.E.2d 225, 226 (Ind. 1951); *accord, Ebersole v. Southeastern Pa. Transp. Auth.,* Ill A. 3d 286, 290 n.2 (Pa. Commw. Ct. 20 15) ("It goes without saying that the Superior Court may not overrule our Supreme Court."); 1 THE WORKS OF JAMES WILSON 495 (Robert G. McCloskey ed., 1967) ("According to the rules of judicial architecture, a system of courts should resemble a pyramid .... [O]ne supreme tribunal should superintend and govern all others .... [Otherwise] different courts might adopt different and even contradictory rules ...").

It is an inherent power of any court of last resort to develop procedural rules of general applicability for the entire judicial branch, such as the rules of evidence, even if such rules contradict those adopted

by a lower court. *See State v. DeJesus,* 953 A.2d 45, 66 (Conn. 2009) (holding that statute granting the Superior Court of Connecticut the authority to establish rules of evidence could not divest the Supreme Court of Connecticut "of its long-standing inherent common-law adjudicative authority over evidentiary law"); *accord, Banks v. Int 'l Rental & Leasing Corp.,* 55 V.I. 967, 980 (V.I. 2011) ("[W]e can find no authority for the proposition that the Legislature possesses the authority to adopt a statute which not only completely deprives this Court of the ability to exercise its supreme judicial power to shape the common law, but delegates that power to the American Law Institute and to the governments of other jurisdictions."). In contrast, a trial court may generally not adopt general practice and procedural rules unless authorized by the court of last resort. *See, e.g., In re Holcombe,* 63 V.I. 800, 843 (V.I. 2015) (concluding that all rules and regulations affecting the Virgin Islands Bar must be approved by this Court because this Court possesses exclusive authority to regulate the Virgin Islands Bar); *State v. Obeta,* 796 N.W.2d 282, 287 (Minn. 2011) (the Supreme Court of Minnesota "ha[s] the inherent judicial authority to regulate and supervise the rules that govern the admission of evidence in the lower courts"); *Bergeron ex rei. Perez* v. *O'Neil,* 74 P.3d 952, 962 (Ariz. Ct. App. 2003) ("[A] court lacks inherent authority to issue an order that either supersedes or supplements the explicit provisions of a supreme court procedural rule unless it first adopts a local rule and receives approval of that rule from the supreme court."); *Griffith,* 539 P.2d at 610 ("[T]his Court has the inherent authority ... to make rules governing procedure in the lower courts of this

state."). This is because although judicial power may be vested in both a trial court and a court oflast resort, the exercise of judicial power by a trial court is limited by the power vested in a court of last resort by virtue of its higher position in the judicial hierarchy. *See Banks,* 55 V.I. at 979 (holding that the Superior Court may exercise its judicial power to determine the common law "to the extent not bound by precedent" from the Supreme Court); *see also Plaut* v. *Spendthrift Farm, Inc.,* 514 U.S. 211, 218-19 (1995) (holding that a federal court's exercise of its judicial power to decide cases is "subject to review only by superior courts in the Article III hierarchy.").

Congress is aware of the existence and vitality of state governments. *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 530 (1945). Thus, Congress certainly intended for section 2l(c) of the Revised Organic Act to be read and interpreted consistent with the universal understanding of this hierarchical relationship between courts in a single judicial branch. *Cf Rivera-Moreno* v. *Gov't of the VI,* 61 V.I. 279, 298 (V.I. 2014) ("[W]hen Congress adopted the Revised Organic Act with its habeas corpus provision, it intended that the right in this Territory be interpreted consistent with the common law understanding of the writ at the time of its enactment."). To hold otherwise would require us to conclude that Congress, despite intending for the Revised Organic Act to serve as the basic charter of government for the Virgin Islands, *Todmann* v. *People,* 57 V.I. 540, 546 (V.I. 2012) (citing *Brow* v. *Farrelly,* 994 F.2d 1027, 1032 (3d Cir. 1993)), intended to cause chaos, confusion, and uncertainty in the law by conferring concurrent and coequal authority to multiple entities. *See*

International Ass'n of Machinists, AFLCIO v. Central Airlines, Inc., 3 72 U.S. 682, 690 (1963).

In the Virgin Islands, this Court serves as the court of last resort in which the supreme judicial power of the Territory is vested. *See* 4 V.I. C. § 2 ("The judicial power of the Territory is vested in ... the court of last resort ... 'The Supreme Court of the Virgin Islands.'"); 4 V.I.C. § 21 ("The Supreme Court of the Virgin Islands is established pursuant to section 21(a) of the Revised Organic Act of the Virgin Islands . . . and in it shall be reposed the supreme judicial power of the Territory."). Consequently, when the Legislature established this Court as the court of last resort for the Virgin Islands in accordance with section 21(a) of the Revised Organic Act, the Superior Court was divested of its authority to unilaterally adopt procedural rules that would override duly-enacted Virgin Islands statutes without the approval of this Court.

In this case, the Legislature adopted section 547 as one of the original provisions of the Virgin Islands Code, and this Court has not promulgated any contrary rule. In fact, this Court has expressly held that no rule promulgated by the Superior Court may be interpreted so as to overturn a procedural statute enacted by the Legislature. *Sweeney v. Ombres,* 60 V.I. 438, 441-42 (V.I. 2014) ("We have repeatedly instructed that Superior Court Rule 7 does not vest litigants or the Superior Court with a license to ignore Virgin Islands statutes.") (collecting cases). Thus, to the extent that there is any inconsistency between section 547 and the rules promulgated by the Superior Court, our precedent, as well as the plain language of the Revised Organic Act, compel that the statute control. Consequently, the

Legislature did not violate the separation of powers doctrine when it enacted section 547.

2. Invalidity Under the United States Constitution

Having concluded that section 547 does not violate separation of powers principles, we now turn to Vooys and Gerace's claim that the statute violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.[3] According to Gerace and Vooys, "the statute on its face discriminates against non-residents and . . . the purpose of the statute is suspect and does not further any real goal other than denying indigent, non-resident plaintiffs access to courts in claims against defendants located in the territory." (Appellants' Br. 23.) In other words, they maintain that "[t]he statute on its face and as applied denies non-resident plaintiffs equal protection under the law because it treats non-residents differently for irrational, impermissible, or suspect reasons, and it also treats plaintiffs and defendants differently because defendants are not required to post cost bonds." *(Id.)*

To support their claim, Vooys and Gerace primarily rely on *Patrick v. Lyndon Transport, Inc.,*

---

[3] The Revised Organic Act of 1954 provides that these provisions of the United States Constitution apply to the Virgin Islands as if the Virgin Islands were a state. 48 U.S.C. § 1561 ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands . . . and shall have the same force and effect there as in the United States or in any State of the United States: . . . article IV, section 1 and section 2, clause 1; . . . the second sentence of section 1 of the fourteenth amendment.").

765 P.2d 1375, 1380 (Alaska 1988), which interpreted the equal protection clause of the Alaska Constitution to hold that "a bond requirement for only nonresident plaintiffs is not sufficiently related to the purpose of providing security for cost and attorney fee awards to defendants." However, because the Alaska Supreme Court reached this decision based on an interpretation of the Alaska Constitution, rather than the Fourteenth Amendment, its value even as persuasive authority is questionable, since this Court must follow, as binding precedent, decisions of the United States Supreme Court that interpret the United States Constitution. *See Chesapeake & 0. Ry. Co. v. Martin,* 283 U.S. 209,221 (1931).

The United States Supreme Court has held that when a statute infringes upon an economic interest, equal protection is satisfied so long as the government shows that the statutory classification is rational. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 461-63 (1981). However, if a statute infringes on a fundamental right, the government must establish that the statutory classification furthers a compelling state interest utilizing the least restrictive means available. *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), *overruled in part on other grounds,* 415 U.S. 651 (1974).

In its brief in defense of section 547's validity, the Government argues that "section 547 does not infringe on a fundamental right," and that it "ha[s] a rational basis for its enactment: to protect citizens in the Virgin Islands in collecting costs awarded against an off-island defendant after a suit ends and such costs are awarded." (Gov't Br. 8.) The Government ignores, however, that section 547

clearly restricts access to Virgin Islands courts for non-resident plaintiffs, since the failure to post a security bond may result in (1) all proceedings being automatically stayed; and (2) dismissal if the bond has not been paid within thirty days. Significantly, the United States Supreme Court has repeatedly held that access to the courts is a fundamental right. *See, e.g., United States v. Georgia,* 546 U.S. 151, 162 (2006) ("the fundamental right of access to the courts"); *Tennessee v. Lane,* 541 U.S. 509,533 (2004) (same); *Lewis v. Casey,* 518 U.S. 343,346 (1996) (same); *Bounds v. Smith,* 430 U.S. 817,828 (1977) (same). Consequently, because section 547 burdens a fundamental right, it is not sufficient for the Legislature to have a rational basis to enact section 547; instead, section 547 must further a compelling governmental interest and must represent the least restrictive means of doing so. *See McCullen v. Coakley,* _U.S. _, 134 S. Ct. 2518, 2530 (2014); *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 31, 50-51 (1973).

Assuming – without deciding – that section 547 furthers a compelling governmental interest, section 547 clearly does not satisfy the least restrictive means test. When the Legislature burdens a fundamental right with a statute, the Legislature "may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 578 (1993) (Blackmun and O'Connor, JJ., concurring). To the extent the Legislature intended to make it easier for Virgin Islanders to collect a cost

award, the statute is overinclusive because residency status bears little relationship to the difficulty of being able to collect a cost award; after all, a number of non-residents may own property or assets in the Virgin Islands, and thus easily be able to satisfy a cost award, while certain residents may possess very few assets in the Virgin Islands but have substantial assets in other jurisdictions. *See Patrick,* 765 P.2d at 1379. Moreover, the statute may be underinclusive by requiring only non-resident plaintiffs to post a bond. Notably, the Virgin Islands fee-shifting statute provides for a prevailing party – whether plaintiff or defendant – to recover costs and attorney's fees except in non-frivolous personal injury cases. 5 V.I.C. § 541(a)-(b). Thus, if the Legislature is concerned that a Virgin Islands resident may have difficulty collecting a cost award entered against a non-resident, there appears to be little justification for having the bond requirement apply only to non-resident plaintiffs, since non-resident defendants may also be liable for costs.

We recognize that the underinclusiveness of section 547 could potentially be justified by rationalizing that a non-resident plaintiff has voluntarily availed himself or herself of the local court system in the Virgin Islands, while a non-resident defendant may be forced into litigation in a Virgin Islands court against his or her will. However, that rationale cannot withstand scrutiny under the Privileges and Immunities Clause. The United States Supreme Court has explained that 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. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

Hicklin v. Orbeck, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia,* 75 U.S. 168, 180 (1869)). To determine whether the Privileges and Immunities Clause has been violated, a court must determine whether (1) the government discriminates against non-residents regarding a fundamental right, and (2) if so, whether there is a substantial reason for the difference in treatment that bears a substantial relationship to the State's objective. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 284 (1985); *Baldwin v. Fish & Game Comm 'n of Montana,* 436 U.S. 371, 388 (1978).

In its April 16, 2015 opinion, the Superior Court relied on an 1897 case decided by Pennsylvania's trial court for the broad proposition that non-resident bond statutes do not violate the Privileges and Immunities Clause because they "do not interfere with the privileges and immunities of non-residents, but places them on equal footing with resident plaintiffs regarding payment of costs." *Gerace,* 62 V.I. at 259 (citing *Kilmer v. Groome,* 6 Pa.

D. 540 (Pa. Ct. Com. Pl. 1897). It also cited to other cases from the late 19th century to support this broad proposition. *Gerace,* 62 V.I. at 262-63 & nn.34-37 (citing *Holt v. Tennallytown & R. Ry. Co. ,* 31 A. 809, 810 (Md. 1895) and *Cummings v. Wingo,* 10 S.E. 107, 110 (S.C. 1888)).

Because these cases were determined well before the United States Supreme Court established its modem privileges-and-immunities jurisprudence, they have little – if any – persuasive value. For example, the South Carolina Supreme Court in *Cummings* based its decision on the fact that the Privileges and Immunities Clause refers to "citizens" while its bond statute discriminated against "non-residents," with "resident" and "citizen" constituting different concepts. 10 S.E. at 110. The United States Supreme Court, however, subsequently held "that the terms 'citizen' and 'resident' are 'essentially interchangeable' ... for purposes of analysis of most cases under the Privileges and Immunities Clause." *United Bldg. & Const. Trades Council of Camden Cnty. v. Mayor & Council ofCity ofCamden,* 465 U.S. 208,216 (1984) (quoting *Austin v. New Hampshire,* 420 U.S. 656, 662 n.8 (1975)).

The United States Supreme Court has held that "[t]he privileges and immunities clause ... requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens," *McKnett v. St. Louis & SF. Ry. Co.,* 292 U.S. 230, 233 (1934) (citations omitted), thus satisfying the first factor of the two-factor privileges and immunities inquiry. Significantly, the Superior Court was incorrect to rely on those cases for the proposition that section 547 simply "places [non-resident plaintiffs] on equal

footing with resident plaintiffs regarding payment of costs." *Gerace,* 62 V.I. at 259. No provision of Virgin Islands law mandates that a resident plaintiff post a cost bond upon the demand of a defendant. Significantly, nothing in the Virgin Islands Code authorizes that a resident plaintiffs complaint be dismissed simply for failing to post a cost bond that had been previously ordered. Rather, these penalties are only assessed against non-resident plaintiffs. Because the clear purpose of the statute is "discrimination against nonresidents and favoritism and protectionism on behalf of residents" with respect to the fundamental right of access to the Virgin Islands court system, the statute is invalid under the Privileges and Immunities Clause. *Morris v. Crown Equipment Corp.,* 633 S.E.2d 292, 299 (W.Va. 2006).

For these reasons, we hold that section 547 violates both the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution. Consequently, we reinstate Vooys and Gerace's complaint with respect to all defendants.

III. CONCLUSION

For the foregoing reasons, we conclude that section 547 applied to the underlying matter and that it does not violate the separation of powers principles inherent in the Revised Organic Act, but that the statute is nevertheless unconstitutional under both the Equal Protection Clause and the Privileges and Immunities Clause. Accordingly, we reverse the Superior Court's April 16, 2015 opinion dismissing Vooys and Gerace's complaint, vacate the

April 18, 2013 order setting a cost bond, and remand the case to the Superior Court for further proceedings.

Dated this 22nd day of August, 2016.

BUY THE COURT:

/S/
RHYS S HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/
Deputy Clerk

Dated August 22, 2016

FOR OFFICIAL PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

SX-05-CV-368
ACTION FOR DAMAGES
JURY TRIAL DEMANDED

JOSEPH GERACE AND VICTORIA VOOYS
*D/B/*A CANE BAY BEACH BAR, PLAINTIFFS,

v.

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

Counsel:

Attorney for Plaintiffs
LEE ROHN, ESQ.
1101 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820

Attorney for Defendants
JOEL HOLT, ESQ.
Quinn House
2132 Company St., Suite 2
Christiansted, st. Croix
U.S. Virgin Islands 00820

Pro Se Defendants

MARIA BENTLEY AND CB3, INC.
42 Hancock Terrace
Amherst, NY 14226

MEMORANDUM OPINION

Willocks, J.

THIS MATTER is before the Court on Defendants' Warren Mosler, Chris Hanley, and Chrismos Cane Bay, L.L.C.,(hereinafter "Defendants") Motion to Dismiss for Failure to Post Bond filed on May 22, 2013. Plaintiffs Joseph Gerace and Victoria Vooys (hereinafter "Plaintiffs") responded on June 4, 2013. For the following reasons, the Court will grant the Defendants' motion.

BACKGROUND

On June 8, 2005, Plaintiffs Joseph Gerace (hereinafter "Gerace") and Victoria Vooys (hereinafter "Vooys") filed a Complaint alleging breach of contract, misrepresentation, fraud, defamation and reckless infliction of emotional distress with regards to a transaction involving the lease, operation, equipment and trade name of Cane Bay Beach Bar (hereinafter "Cane Bay"). Plaintiffs purchased the business from Defendant Maria Bentley (hereinafter "Bentley") and CB3, Inc. (hereinafter "CB3") on July 1, 2003. The business was located on property purchased by Chrismos Cane Bay, LLC. (hereinafter "Chrismos"). Chrismos is a Virgin Islands Limited Liability Corporation of which Defendants Warren Mosler (hereinafter

"Mosler") and Chris Hanley (hereinafter "Hanley") are members.

In the Fall of 2012, Plaintiffs sold their business and moved off island. On January 31, 2013, Defendants filed a motion to demand $6,000 in security costs pursuant to Title 5, Section 547 of the Virgin Islands Code (hereinafter "5 Y.I.C. §547"). In response, Plaintiffs filed a motion on March 1, 2013 asking for the security costs to be waived or reduced along with affidavits stating Plaintiffs' inability to pay security costs. The Court notes that the motion and affidavits were not accompanied by any supporting documents (full financial disclosure), showing in detail, the Plaintiffs' inability to give security.

On April 18, 2013, the Court Ordered Plaintiffs to post $2,100.00 in a reduced security bond for this matter within thirty (30) days. On May 22, 2013, Defendants Mosler, Hanley and Chrismos filed a motion to dismiss for failure to post bond. *Pro se* Defendants Bentley and CB3 did not join Mosler, Hanley, and Chrismos' motion to dismiss. Plaintiffs opposed the motion to dismiss in the form of a constitutional attack on 5 V.I.C. §547 on June 4, 2013. Pursuant to Federal Rule of Civil Procedure 5.1[1], on August 7, 2013, the Government of the Virgin Islands responded to Plaintiffs' constitutional challenges finding that the statute did not violate the U.S. Constitution or any other law. To date, Plaintiffs have not complied with this Court's April 18, 2013 Order to post bond.

---

[1] The Federal Rules of Civil Procedure are made applicable to the Superior Court through Superior Court Rule 7.

DISCUSSION

Title 5, section 547 of the Virgin Islands Code requires nonresident plaintiffs to deposit security for costs in the event the resident defendant prevails and is awarded costs.[2] Resident plaintiffs are not required to make such deposits.[3] The statute's requirements are similar to procedures implemented in Guam,[4] Puerto Rico, and the majority of states. The purpose of this section is to prevent prevailing resident defendants from having to leave the Virgin

---

[2] *Ingvoldstad v. Estate of Young,* 18 V.I. 346, 348 (D.V.I. 1981).

[3] *Id.*

[4] **7 Guam Code Annotated (G.C.A.) § 26616. Nonresident Plaintiff May be Required to Give Security for Costs.**
When the plaintiff in an action or special proceeding resides out of the Territory of Guam, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of Three Hundred Dollars ($300.00). A new or additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed.
7 Guam Code Annotated (G.C.A.) § 26617. Action may be Dismissed if Security is Not Given.
After the lapse of thirty (30) days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed.

Islands to enforce an award for costs against a nonresident plaintiff.[5]

Title 5, section 547 of the Virgin Islands Code is procedural, not substantive.[6] As a result, this law does not affect the rights of the parties.[7] It involves a procedure to be followed by a non-resident plaintiff, if that plaintiff files a lawsuit in this jurisdiction.[8] Here, Plaintiffs refuse to post bond and instead, attack the constitutionality of the statute.

Pursuant to Title 5, Section 547 (d) of the Virgin Islands Code, the court *may* dismiss the action if security is not given within 30 days after the service of a notice requiring security or an order requiring new or additional security. In the case at bar, it has been almost two years since this Court ordered Plaintiffs to post bond. There is no consistency in past decisions that show whether courts favor dismissal for failure to pay security to costs.[9] The statute's language is permissive-empowering courts with wide discretion to dismiss the case procedurally for failure to post bond or hear the case on the merits.

---

[5] *Ingvoldstad,* 18 V.I. at348.

[6] *Mossman v. Moran,* 2004 U.S. Dist. LEXIS 14267, 9, 2004 WL 1664010 (D.V.1. June 1, 2004). *See also Lawrence v. Alberto-Culver USA, Inc.,* 2006 U.S. Dist. LEXIS 43005, 1, 2006 WL 1788552 (D.V.1. June 20, 2006).

[7] *Collum v. Scott Harrington* & *Caribbean Seafood Indus.,* 37 V.l. 3, 5 (V.I. Terr. Ct. 1997).

[8] *Id.*

[9] *See, e.g., Ingvoldstad,* 18 V.I. at 348.

The Constitutionality of Title 5 of the Virgin Islands Code Section 547

In the present matter, the issue is whether this Court should grant the Defendants' motion to dismiss for failure to post security for costs. As such, the Court will analyze the constitutionality of Title 5, Section 547 of the Virgin Islands Code by looking at (1) the treatment of similar statutes by the Third Circuit; (2) similar legislation in all Federal Circuits and (3) the constitutionality of similar statutes in other jurisdictions. Finally, the Court will address whether Plaintiffs have made a proper showing of indigence under Title 4, Section 513 of the Virgin Islands Code.

The Third Circuit

Requiring nonresident plaintiffs to give security for costs is a time-honored practice within the Third Circuit. Security cost bond statutes for nonresident plaintiffs have been required since the inception of the United States Constitution.[10] The practice of

[10] The court in *Kilmer v. Groome,* 1897 WL 3399 (Pa. Com. PI. 1897) noted that the constitution of the United States went into operation on the first Wednesday of March, 1789. Three years later, in *Shaw v. Wallis,* 1 Yeates, 176, the Supreme Court of [Pennsylvania] entered a rule upon a non-resident plaintiff to give security for costs. *See also Sharp v. Buffington,* 2 W. & S. 454; *Dalton v. Bateson,* 1892 WL 3093 (Pa. Com. PI. 1892); *Gillen v. City of Wilmington,* 16 Del. 154,42 A. 430, 430 (Super. Ct. 1895); *JL. Mott Iron Works v.* S. *Faith* & *Co.,* 1899 WL 3728 (Pa. Com. PI. 1899); *Sheehan v. La Belle Co., 92* N.J.L 315, 315, 105 A. 449,450 (Sup. Ct. 1918); *Ownbey v. Morgan,* 256 U.S. 94, 41 S. Ct. 433, 65 LEd. 837 (1921); *Marino v. Shiff Realty Co.,* 164 A. 577,577 (N.J.Com.PI. 1933); *Gabrielle v. Masselli,* 197 A. 415,416 (N.J. Sup. Ct. 1938); *Goldsberry v.*

requiring of nonresident plaintiffs security for costs, is usually regulated by rule of court.[11] The court, in its discretion, may refuse to require the plaintiff to give security for costs.[12] Also, security for costs may be required where the plaintiff has removed from the state during the pendency of the suit.[13]

Statutes requiring security for costs aim to protect residents from frivolous suits commenced by nonresident plaintiffs, and to secure the payment of their taxed costs in the event the plaintiff is unsuccessful.[14] A non-resident plaintiff is not required to give security if by reason of poverty, he is unable to do so.[15] Courts refuse to allow an indigent plaintiff to be denied justice.[16]

Frank Clendaniel, Inc., 48 Del. 275, 276, 101 A.2d 805, 805 (Super. Ct. 1953); *Kearney v. Baptist,* 159 A. 405, 432 (N.J. Cir. Ct. 1932) (a nonresident plaintiff would be required to give security for costs, even though one or more of them be resident); *Jones v. Knauss,* 33 N.J. Eq. 188, 188 (Ch. 1880) (However, in New Jersey, a non-resident plaintiff will not be required to give security for costs, if he is joined with a resident plaintiff.); *Speakman v. Int'l Pulverizing Corp.,* 182 A. 481, 481 (Ch. 1936); *Howell v. Justice of Peace Court No.* 16, CIVA 07 A-03-001, 2007 WL 2319147 (Del. Super. July 10, 2007).

[11] *Trenton Rubber Co. v. Small,* 3 Pa. Super. 8, 11 (1896).

[12] *Id.*

[13] *Newman v. Landrine,* 14 N.J. Eq. 291 , 292 (Ch. 1862) (Court required security for costs where at the commencement of the suit plaintiff resided in the state then subsequently moved to another state.). *See also Sharp v. Buffington,* 1841 Pa. LEXIS 247, 1, 2 Watts & Sergo 454 (Pa. 1841) (A plaintiff who removes to another state, after the institution of the suit, must give security for costs.).

[14] *Lawrence V. Commercial Cas. Ins. Co.,* 37 A.2d 683, 683 (N.J. Sup. Ct. 1944) (internal quotation marks omitted).

[15] *Willis V. Willis,* 1911 WL 4229 (Pa. Com. PI. 1911).

[16] *Id.* (It is a less hardship for a successful defendant to lose his costs than for a poor plaintiff to be denied justice.)

In the Third Circuit, statutes requiring non-resident parties to give security for costs, are constitutional.[17] Courts have held that such statutes do not interfere with the privileges and immunities of non-residents, but places them on equal footing with resident plaintiffs regarding the payment of costs.[18]

The First Circuit[19]

Puerto Rico, New Hampshire,[20] Rhode Island,[21] and Massachusetts[22] have similar statutes requiring

---

[17] *Nease V. Capehart,* 15 *W Va.* 299; *Haney V. Marshall,* 9 *Md.* 194; *Conley V. Woonsocket,* 11 *R.* 1. 147; *see Oatman V. Bond,* 15 *Wis. 20); Hanmer V. Mangles, 12M.* & *W* 313; *Habgood v. Paul, 8Ir.* C. *L. App. xxxiii.; Smith V. Sanford, 3Ir. Jur.* 253; *see Cole's Case,* 28 *Ala. 50; Smith V. Etches,* 1 *Hem.* & *M 7J* 1; *Adams V. Waters, 50 Ind.* 325,' *Haney V. Lundie, 58 Ala. 100,' Ring V. Nettles, 3Ir. Eq. 53).*

[18] *Kilmer v. Groome,* 1897 WL 3399 (Pa. Com. PI. 1897).

[19] Maine does not have a similar statute.

[20] *Dewey v. Stratford,* 40 N.H. 203 , 203 (1860) (A non-resident petitioner must give security for costs, if insisted upon by the petitioner); *see also Gookin v. Upham,* 22 N.H. 38, 38 (1850); *see also Gale v. French,* 16 N.H. 95,96 (1844) (Revised Statutes, chap. 191 , sec. 7, which empowers the court, upon good cause shown, to order reasonable security for costs to be furnished. In the construction of this statute, this court has held, that the mere poverty or insolvency of the plaintiff did not of itself furnish sufficient ground for granting such an order.).

[21] *Rosenfeld v. Swarts,* 22 R.I. 315, 47 A. 690, 691 (1900) (Statutory provisions relating to surety for costs from resident suitors are not mandatory ... upon a refusal to comply with the order of the court the action or suit shall be dismissed . But the court may extend the time for giving surety ...); *see also Pratt v. Fenner,* 8 R.I. 40,41 (1864);

[22] *F eneley v. Mahon ey,* 38 Mass. 212, 213 (Mass. 1893). (The court has discretion to require an insolvent resident plaintiff, when reasonable, to post security.).

plaintiffs to give security for cost. As previously noted, 5 V.I.C. §547 is similar to statutes in the majority of states. The statutes in Puerto Rico and New Hampshire apply only to nonresident plaintiffs. However, the statutes in Rhode Island and Massachusetts are distinguished because the court has discretion to require a resident plaintiff to give security.

The Puerto Rico court addressed an Equal Protection challenge to the statute on the basis that the law burdened the right to travel.[23] The Court held that the bond requirement is justified and does not offend the equal protection clause as infringing the fundamental right to travel since it either promotes a compelling state interest or because it is not a penalty on a constitutional right to travel. Moreover, the requirement does not offend the privileges and immunities clause.[24]

Regarding the statute's application, the First Circuit refers to the rule as "a scalpel, to be used with surgical precision as an aid to the even-handed administration of justice, not a bludgeon to be employed as an instrument of oppression."[25] In other words, while recognizing the legitimate interest served by the rule, courts have emphasized that it must be carefully applied to avoid depriving a plaintiff, who may have few financial resources but a

---

[23] *See Kreitzer v. Puerto Rico Cars, Inc.,* 417 F. Supp. 498, 506 CD.P. R. 1975).

[24] *Id.*

[25] *Santa Molina v. Urban Renewal and Hous. Corp. ,* 14 Official Translations of the Supreme Court of Puerto Rico 382, 385, 114 P.R. Dec. 382,385 (P.R.1983) (inferring the lawmaker's intention to open the doors of courthouses to poor litigants).

legitimate claim, of the opportunity to have a court decide his claim on the merits.[26]

In Rhode Island, courts have held that security for costs are constitutional and may be obtained from both resident and nonresident plaintiffs.[27] Statutory provisions for surety of costs are not mandatory.[28] The Supreme Court of Rhode Island refused to dismiss a suit where plaintiff's noncompliance with an order to post surety was because of poverty.[29] The Court required plaintiff to submit an affidavit along with supporting documents.[30]

The Second Circuit

In the Second Circuit,[31] New York, COIll1ecticut, and Vermont all have statutes requiring nonresident

---

[26] *See Murphy v. Ginorio,* 989 F.2d 566, 568-69 (1st Cir. 1993) (citing *Aggarwal v. Ponce Sch. of Medicine,* 745 F.2d 723, 728 (1st Cir.198)).

[27] *See Conley v. Woonsocket Inst. for Sav.,* II R.I. 147, 147 (1875) (Gen. St. C. 195, §§ 26, 27, authorizes a court of common pleas to require security for costs from a resident as well as from a nonresident plaintiff, for his apparent want of property to satisfy the costs; and his suit may be dismissed for failure to give such security on order.).

[28] *Rosenfeld v. Swarts,* 22 R.I. 315, 47 A 690, 691 (1900).

[29] *See Spalding v. Bainbridge,* 12 R.I. 244, 244-45 (1879) (To dismiss the suit in such a case would practically amount to a denial of justice and would be inconsistent with the Constitution. Constitution of R. I. Art. 1, § 5.).

[30] *Id* n15.

[31] In certain actions New York also has provisions containing narrow exceptions which expressly grant the court discretion whether to require the plaintiff to give security for costs. *See* "Statute regarding security for costs as mandatory or permitting exercise of discretion," 84 AL.R. 252 (Originally published in 1933).action by an administrator, *Gedney v.*

plaintiffs to give security for costs. New York provisions are mandatory and give the defendant an absolute right to security for costs.

The Fourth Circuit

In the Fourth Circuit, Maryland, North and South Carolina,[32] Virginia,[33] and West Virginia all

---

Purdy (1872) 47 N.Y. 676; *Tolman v. Syracuse,* B. & N.Y. R. Co. (1883) 92 N.Y. 353; *Pursley v. Rodgers (1899). See* "Statute regarding security for costs as mandatory or permitting exercise of discretion," 84 AL.R. 252 (Originally published in 1933); *see also Janssen v. City o/New York,* 42 F. Supp. 380, 380 (E.D.N.Y. 1941) (The granting of an order for security for costs is mandatory and not discretionary.); *see also Smith v. Spencer,* 182 Misc. 767,769, 45 N.Y.S.2d 242, 245 (Sup. Ct. 1943). *In re Marineau,* 118 Vt. 261, 265, 108 A.2d 402,405 (1954). *See also Colony v. Maeck,* 8 Vt. 114. *See also In re Hall's Will,* 56 N.Y.S.2d 813, 814 (Sur. 1945) (the court's conclusion was based upon an analysis of former Civil Practice Act Section 1522 (presently *CPLR 850 l)* which specifically provided "if there are two or more plaintiffs, the defendant cannot require security for costs to be given unless he is entitled to require it of all the plaintiffs. "); *Ten Broeck v. Reynolds,* 1856 WL 6212, at 462 (N.Y. Sup. Ct. 1856); *Vollmeke v. Nielson,* 13 Conn. Supp. 9, 11 (Super. Ct. 1944); *Colony* at 115 (The recognizances spoken of at a common law were either for the purpose of giving precedence in payment, to serve as evidence and to operate as liens. In all those cases a precedent debt, duty [etc.] existed on the part of the recognizor. They could not be taken when the right to enforce them depended on a contingency.); *see also Young v. Shaw,* 1814 WL 716 (Vt. Feb. 1814).

[32] *Garrett v. Niel,* 49 S.C. 560, 27 S.E. 512, 513 (1897) (describes the form of compliance for taking security); *Wilson v. Muehlberger,* 158 S.C. 58, 155 S.E. 230 (1930) (Undertaking as security for costs, required to be given by nonresident plaintiff, must be both witnessed and approved by clerk of court. Civ. Code 1922, § 2141 (See Code 1942, § 3597); Circuit Court Rule 10.); *See also Lamborn v. Merchants Grocery Co.,* 157 S.C. 150, 154 S.E. 94, 95 (1930).

have statutes requiring nonresident plaintiffs to give security for costs. In 1856, a Maryland statute[34] requiring nonresident plaintiffs to give security for costs was challenged as unconstitutional within Article 4, Section 2 of the United States Constitution as impairing the privileges and immunities of citizens of other states.[35] However, the court upheld the statute as constitutional.[36]

South Carolina courts struck down a constitutional attack of a statute requiring nonresident plaintiffs to pay security for costs which was challenged on privilege and immunities grounds.[37] The court reasoned that security for costs is required of a party, not because he is a citizen of another state, but only because he is a nonresident of this state. The requirement would apply as well to a citizen of this state, who was a non-resident at the

---

[33] In Virginia, nonresident plaintiffs are required to give security for costs or damages. Upon a defendant's motion or if plaintiff fails to comply with the order, the action may be dismissed. The manifest purpose of statutes requiring a nonresident plaintiff to give security for costs and damages, is to insure to the defendant and to the officials of the court the payment of costs which may be awarded against a nonresident plaintiff against whom the court has no means of enforcing a collection. *Outlaw* v. *Pearce,* 176 Va. 458, 458, **II** S.E.2d 600, 602 (1940).

[34] Act 1801, c. 74, § 9, providing that a plaintiff who removes from the state after the institution of his suit may be required to furnish security for costs, is not unconstitutional. *Holt v. Tennallytown* & *R. Ry. Co.,* 81 Md. 219, 31 A. 809, 810 (1895).

[35] *Id.*

[36] *See also Haney v. Marshall,* 9 Md. 194, 199 (1856) (Forty years later, the court upheld *Holt,* declaring that requiring nonresident plaintiffs to give security for costs is not unconstitutional.).

[37] *Cummings v. Wingo ,* 31 S.C.427, 10S.E.107, 110 (1888).

time, as it would to a citizen of another state not residing here.[38]

The Fifth Circuit

Jurisdictions in the Fifth Circuit, Louisiana, Mississippi, and Texas,[39] vary in the application of state statutes requiring security for costs. For instance, Louisiana may require security for costs from either a resident or nonresident plaintiff.[40] Texas courts may order security from any party.[41] Whereas the Mississippi statute requiring security

---

[38] *Tedars v. Savannah River Veneer* Co~, 25 S.E.2d 235, 242 (1943) (internal quotations marks omitted); *Mintz v. Frink,* 6 S.E.2d 804, 807 (1940); *Miller's Adm'r v. NO/folk* & *W. R. Co.,* 47 F. 264, 266-67 (C.C.W.D. Va. 1891); *see also Van Gunden v. Virginia Coal* & *Iron Co.,* 52 F. 838 (4th Cir. 1892); (citing *Stewart v. Sun, and Same v. Tribune,* 36 Fed. Rep. 307, 307 (C.C.S.D.N.Y. 1888» (There are no words of restriction in this statute that preclude a non-resident poor person from its privileges.).

[39] In lieu of a bond for costs, the party required to give the same may deposit with the clerk of court or the justice of the peace such sum as the court or justice from time to time may designate as sufficient to pay the accrued costs. Tex. R. Civ. P. 146.

[40] *Tatum v. Toledo Scale Co.,* 187 So. 835,837 (La. Ct. App. 1939); *Salmon v. Martin,* 164 So. 345,347 (La. Ct. App. 1935) (Surety on bond, required by court to indemnify defendant for expert witness fees, providing that surety would be liable if plaintiff did not pay fees held liable where fees were not paid by plaintiff.).

[41] *Clanton v. Clark,* 639 S.W.2d 929, 931 (Tex. 1982); *Mosher v. Tunnell,* 400 S.W.2d 402 (Tex.Civ.App.-Houston 1966, writ refd n.r.e (The trial court had dismissed the case because plaintiff had failed to comply with the court's order to make a bond for cost in the sum of $2,000.); *Dilmore v. Russell,* 519 S.W.2d 278, 279 (Tex. Civ. App. 1975).

for costs applies specifically to nonresident plaintiffs.[42]

The Sixth Circuit

The Sixth Circuit,[43] Kentucky, Michigan, Ohio, and Tennessee, requires nonresident plaintiffs to

---

[42] *Overstreet v. Davis,* 24 Miss. 393,394 (Miss. Err. & App. 1852); *Wright v. Stanford,* 57 So. 289 (1912) ("If the security be not given the suit shall be dismissed and execution issued for the costs that have accrued; but the court may, on cause shown, extend the time for the giving of the security.").

[43] *Hopkins v. Chambers,* 23 Ky. 254, 255 (1828); *see also Ingles v. Hume,* 42 Ky. 33 , 33 (1842); *Van Hooser v. Atkinson,* 181 S.W. 610, 610 (1916); *Portsmouth Foundry & Mach. Works v. Iron Hills F. & M Co. ,* 74 Ky. 47, 48 (1875); *Wheeler v. Meyer,* 55 N.W. 688, 688 (1893) (Plaintiffs, being nonresidents, were required to give security for costs.) ; *see also Zapalski v. Benton,* 444 N.W.2d 171 (1989).

Mich. Ct. R. 2.109

(A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion.

(B) Exceptions. Subrule (A) does not apply in the following circumstances:

(1) The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond. MCR 2.109.

Hall v. Harmony Hills Recreation, Inc., 463 N. W.2d 254, 258 (1990); *Balahoski v. Kent Circuit Judge,* 219 N.W. 597 (Mich. 1928), and *Lott v. Hirsch,* 70 N.W.2d 818 (1955); see also Mich. Ct. R. 2.504(B)(1) «the court may involuntarily dismiss a plaintiffs claim only if it has given the party a reasonable opportunity to comply with the order.). *See Goodenough v.*

give security for costs before the commencement of any action. In Kentucky, the court held that the statute is not unconstitutional, as an unfair discrimination between nonresident defendants, who appeal, and resident defendants.

Burton, 109 N.W. 52 (Mich. 1906); *Balahoski,* 219 N.W. at 597 (Whether a party was given a reasonable opportunity to comply with an order to furnish a security bond will, of course, depend on the circumstances of each case, e.g., the amount of bond ordered relative to the party's financial resources and the availability of bond during the period the party has to obey the order.); *Spoor Personal Representative of the Estate of JAMES* 1. *LEWIS v. Chuhran,* 2006 Mich. App. LEXIS 1803,4, 2006 WL 1568810 (Mich. Ct. App. June 8, 2006); *See Wells v. Fruehauf Corp.* , 428 N.W.2d 1, 6 (1988) (The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond."); *see also Wells v. Fruehauf Corp.,* 428 N.W.2d 1,6 (Mich. Ct. App. 1988).

Hull v. Burson, 61 Ohio St. 283, 286, 56 N.E. 18, 19 (1899). *See also Devine v. Detroit Trust Co.,* 52 Ohio App. 446,452,3 N.E.2d 1001, 1003 (1935)(a nonresident of the county is required to give security for costs); *see also McKenzie v. Horr, 15* Ohio St. 478,481 (1864) ([the surety)] shall be bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought, or in any other to which it may be carried, and for the cost of the plaintiffs witnesses, whether the plaintiff obtain judgment or not.); *Standard Pub. Co. v. Bartlett,* 1880 WL 6802 (Ohio Dist. June 1880); *Standard Pub. Co. v. Bartlett,* 1880 WL 6802 (Ohio Dist. June 1880); *Burson v. Mahoney,* 65 Tenn. 304, 306 *(1873); Woolfolk v. Woolfolk,* 69 S.W.2d 1089, 1090 (1934) (citing *Deaton v. Mulvaney,* 69 Tenn. 73, 75 (1878) (A party is not required to give security for his own costs.); *see also Locke v. McFalls,* 35 Tenn. 674,676 (1856).

Bracken v. Dinning, 131 S.W. 19, 19-20 (1910); *see also Paducah Hotel Co. v. Dennis Long* & *Co.,* 17 S. W. 853 (Ky. 1891).

The Seventh Circuit

In the Seventh Circuit,[44] Wisconsin, Illinois and Indiana require nonresident plaintiffs to give security for costs in order to commence an action. Similar to 5 V.I.C. §547, upon failure to furnish security, the court may dismiss the action.

The Eighth Circuit

The Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, also prescribes a security requirement for nonresident plaintiffs.

---

[44] *Stark v. Small,* 39 N .W. 359, 360 (Wis. 1888) ("Every justice of the peace shall, in all civil actions, either before or after the process shall issue, require the plaintiff, if a non-resident of the county, to give security for costs, and may in his discretion require a like security of all other plaintiffs; and if the plaintiff refuse or neglect to give such security, when required, the action shall be dismissed."); *Smith v. Lockwood,* 34 Wis. 72, 76 (1874) (in all cases nonresident plaintiffs shall give such security before process shall issue.); *Sheldon v. Nick & Sons,* 165, 33 N.W.2d 260, 262 (Wis. 1948) (the penalty prescribed for failing to file the required security for costs is the dismissal of the action.); *Kettelle v. Wardell,* 2 Ill. 592, 593 *(1839); Clark v. Quackenboss,* 28 Ill. 112, 112 (1862)(security for costs ... was limited to the costs of that court); *Plaff v. Pac. Express Co"* 95 N.E. 1089, 1091 (1911); *Morrow v. Hoskins,* 297 N.E.2d 754, 755 (1973); *Cox v. Hunt,* 1 Blackf. 146, 146 (Ind. 1821); *Hunt v. Butcher,* 5 Blackf. 341, 341 (Ind.1840); *Harding v. Griffin,* 7 Blackf. 462, 462 (Ind. 1845); *Freeman v. Hukill,* 4 Blackf. 9 (Ind. 1835) (where security is not given according to the order, to file a bond for costs the case should be dismissed).

The Ninth Circuit

In the Ninth Circuit,[45] Arizona,[46] California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam all have nonresident security bond statutes. However, the security requirement is waived if the party properly files for indigent status.[47]

Alaska is the only state to hold that security bond statutes for nonresidents are unconstitutional.[48] Alaska's statute mandates the following:

---

[45] *Union Iron Works v. Vekol Min.* & *Mill. Co.,* 89 P. 539 (Ariz. 1907); *Kimball v. Phoenix Newspapers,* 289 P .2d 193, 194 (Ariz. 1955); *see also United Bank* & *Trust Co. v. Jones,* 249 P. 747, 748 (Ariz. 1926); *Richfield Oil Corp. v. La Prade, 105* P.2d 1115, 1117 (Ariz. 1940). *Poa v. Rice,* 26 Haw. 112 (1921); *Clune v. Sullivan,* 56 Cal. 249 (Cal. 1880); *Duff v. Eardley,* 187 P. 1081, 1082 (Idaho 1920); *Neidhart v. Collins,* 271 P. 321, 322 (Idaho 1928); *Brazell v. Cohn,* 81 P. 339, 341 (Mont. 1905); *State ex reI. Langan v. Dist. Court of Seventeenth Judicial Dist. in & for Valley Cnty",* 107 P.2d 880, 881 (Mont. 1940); *State v. Second Judicial Dist. Court in & for Washoe Cnty.,* 15 P.2d 682, 683 (Nev. 1932); *Borders Elec. Co. v. Quirk,* 626 P.2d 266, 267 (Nev. *1981); Brion v. Union Plaza Corp.,* 763 P.2d 64, 65 (Nev. 1988). *Jordan v. La Vine,* 15 P. 281, 281 (Or. 1887); *Robinson v. Haller,* 36 P. 134 (Wash. 1894); *see also Swift v. Stine,* 19 P. 63, 64 (Wash. 1888); *Warnock v. Seattle Times Co.,* 294 P.2d 646, 647 (Wash. 1956).

[46] Beginning January 1, 2015, Arizona Rule of Civil Procedure, rule 67(d) will be stricken and nonresidents will no longer be required to give security for costs.

[47] *Alshafie v. Lallande,* 89 Cal. Rptr. 3d 788, 795, 800-01 (Cal. App. 2d Dist. 2009) (One party's economic interest in receiving its costs of litigation should it win cannot be used to deny an indigent his fundamental right of access to the courts.) (citing *Baltayan v. Estate* of *Getemyan,* 110 Cal. Rptr. 2d 72, 74 (Cal. App. 2d Dist. 2001).

> AS § 09.60.060. Security for costs where plaintiff a nonresident or foreign corporation
> When the plaintiff in an action resides out of the state or is a foreign corporation, security for the costs and attorney fees, which may be awarded against the plaintiff, may be required by the defendant, if timely demand is made within 30 days after the defendant discovers that the plaintiff is a nonresident. When required, all proceedings in the action shall be stayed until an undertaking executed by one or more sufficient sureties is filed with the court to the effect that they will pay the costs and attorney fees which are awarded against the plaintiff, for not less than $200. A new or an additional undertaking may be ordered by the court upon proof that the original undertaking is insufficient in amount or security. Alaska Stat. Ann. § 09.60.06

The Alaska statute differs with that of the Virgin Islands in that Alaska has a rule that prescribes a formula for computing attorney's fees for the prevailing party.[49]

---

[49] *Patrick v. Lynden Transp., Inc.,* 765 P.2d 1375, 1380 (Alaska 1988) (We recognize that statutes requiring security bonds of nonresidents currently exist in a number of states ... Generally, however, these states do not have a rule comparative to Alaska Civ. R. 82, which allows and prescribes a formula for computing attorney's fees for the prevailing party.).

The Tenth Circuit

In the Tenth Circuit, Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, an action brought by a nonresident plaintiff cannot proceed without the filing of a cost bond once a defendant moves to compel such a filing under the statute unless a proper filing of indigent status is made.[50]

---

[50] *Hytken v. Wake,* 68 P.3d 508, 510 (Colo. App. 2002); *Cf. Neidhart v. Collins,* 271 P. 321 (Idaho 1928) (A nonresident plaintiff's neglect or refusal to file such a bond thus is equivalent to failure or neglect to prosecute.). *See, e.g., Ecker v. Town of West Hartford,* 530 A.2d 1056 (Conn . 1987) (discussing dismissal for " failure or neglect to prosecute"); *Laffey v. City of New York,* 417 N.E.2d 1248 (N.Y. 1980). *Walcott v. Dist. Court, Second Judicial Dist.,* 924 P.2d 163, 166 (Colo. 1996) (Statute requiring dismissal of action if nonresident plaintiff "neglects or refuses" to file cost bond did not apply to nonresident plaintiff who was unable to file cost bond because she was indigent.).

Hardesty v. Ball, 26 P. 959, 960 (Kan. 1891); *Farmer v. Warner,* 68 P. 1127, 1127 (Kan. 1902); *see also Simpson v. Rice, Friedman & Markwell Co.,* 22 P. 1019, 1020 (Kan. 1890); *Eastman v. Godfrey,* 15 Kan. 341, 343 (1875); *Bearup v. Coffey,* 55 P. 289, 289 (N.M. 1898) ("If any person wishing to institute a suit, or having done so, shall make oath that he is too poor to pay costs, he shall have any and all process of the court free of charge. "); *see also Montoya v. McManus,* 362 P .2d 771, 773-74 (N.M. 1961); *Fowler v. Fowler,* 82 P. 923, 926 (Okla. 1905); *Capitol Fin. Co. v. McNealy,* 63 P .2d 940, 942 (Okla. 1936) (The provisions of the Civil Code ... requiring the plaintiff to give security for costs before the summons shall issue in any civil action brought in the district court, are neither jurisdictional nor mandatory as to the time such security may be given, and the court in the exercise of a sound discretion may permit a plaintiff to give such bond after a motion by the defendant to quash the summons."); *Forbes v. Delta Land & Water Co.,* 193 P. 1097 (Utah 1920) (internal quotation marks omitted) (The statute says that, if a bond be not furnished when duly requested by defendant, where plaintiff is a

The Eleventh Circuit

Alabama, Florida, and Georgia require nonresidents to give security for costs before the commencement of the suit.[51] However, Florida is distinguished from all the other states because in the event the plaintiff fails to post the statutory cost bond, plaintiff's counsel must stand in the absent surety's shoes-so that plaintiff's counsel is personally liable for the costs adjudged in the cause against the plaintiff, but only up to and including the maximum amount of the unremitted cost bond.[52]

---

nonresident of the state, the action may, on motion be dismissed.); *Castle v. Delta Land* & *Water Co.,* 197 P. 584, 585 (Utah 1921)(citation omitted); *Hansen v. Salt Lake Cnty.,* 794 P.2d 838, 840 (Utah 1990) (We calU10t construe the statute as meaning that the dismissal must apply to all defendants, including those who are not demanding security and who, by their nonaction, manifest their intent to waive a bond for costs.).

[51] *Jacott v. Hobson,* 11 Ala. 434 (1847); *see also Davis v. Harris,* 101 So. 458, 460 (Ala. 1924) (The suit may be dismissed if the nonresident fails to provide security.); *Weeks v. Napier,* 33 Ala. 568, 569 (1859); *Consumers' Roofing Co. v. Littlejohn,* 152 So. 31,32 (Ala. 1933); *Achord v. Osceola Farms Co.,* 52 So. 3d 699, 701 (Fla. Dist. Ct. App. 2010); *Hudgins v. Hudgins,* 185 S.E. 870 (Ga. 1936); *Martin v. Armour Packing Co.,* 35 S.E. 632, 633 (Ga. 1900) (if the deposit is not made before the filing of the suit, the suit may be dismissed).

[52] Section 57.011 of the Florida Statutes (1987) states: When a nonresident plaintiff begins an action or when a plaintiff after beginning an action removes himself or herself or his or her effects from the state, he or she shall file a bond with surety to be approved by the clerk of $100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days' notice to plaintiff (during which the plaintiff may file such bond), move to dismiss

The District of Columbia Circuit

The District of Columbia Circuit also requires nonresident plaintiffs to give security for costs.[53]

Based on the analysis above, an overwhelming majority of jurisdictions hold that cost bond statutes are constitutional. In the matter *sub judice,* Title 5, Section 547 of the Virgin Islands Code is a procedural measure which a non-resident plaintiff must follow in order to maintain a lawsuit in this jurisdiction.[54] Here, Plaintiffs have failed to comply with the Order dated April 18, 2013 requiring Plaintiffs to post a security bond within thirty days. Almost two years have passed since Plaintiffs were ordered to post a reduced security bond. The Court

---

the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney. *Lady Cyana Divers, Inc. v. Carvalho,* 561 So. 2d 612, 613 (Fla. Dist. Ct. App. 1990).

[53] *Lovering v. Heard,* 15 F. Cas. 1003 (C.C.D.D.C. 1806) (A resident of Alexandria, Va., suing in Washington, D. C., in the federal courts, though both cities were then in the District of Columbia, was required to give security for costs as a nonresident, the cities being in different counties and states.). *See also Roberts v. Reintzelt.* 20 F. Cas. 911 (C.C.D.D.C. 1821) (If the plaintiff reside out of the District, and the person for whose use the suit is entered upon the docket remove from the District, the court will order the plaintiff to give security for costs.); *Guarantee Sav., Loan & lnv. Co. v. Pendleton,* 14 App. D.C. 384, 385 (D.C. Cir. 1899); *Bond v. Carter Hardware Co. ,* 15 App. D.C. 72, 76 (D.C. Cir. 1899); *Costello v. Palmer,* 20 App. D.C. 210, 217, (D .C. Cir. 1902).

[54] *Collum,* 37 V.I. at 5 (Terr. V.l. June 5, 1997) ("The matter of the increased bond does not affect the rights of the parties. Rather, it involves a procedure to be followed by a non-resident plaintiff, if that plaintiff endeavors to maintain a lawsuit in this jurisdiction.").

has discretion to dismiss the action if plaintiff fails to furnish security costs.

Plaintiff's Indigent Status Under Title 4, Section 513 of the Virgin Islands Code

Next, the Court will consider whether plaintiff properly filed for indigent status. Under Title 4, Section 513 of the Virgin Islands Code, any party who wishes to be given indigent status must file a motion for leave to proceed *in forma pauperis* together with an affidavit and other documentation showing in detail the party's inability to pay fees and costs or to furnish security costs. The affidavit shall state the nature of the action, [or] defense ... and affiant's belief that he is entitled to redress.[55]

Here, Plaintiffs do not have indigent status. In the present case, Plaintiffs only filed a Motion to Waive or Reduce the Demand. Plaintiffs submitted affidavits stating that they are without sufficient funds to pay the amount of security costs demanded. However, the affidavits were insufficient because they were attached to the Motion to Waive or Reduce the Demand. Therefore, the Court construed the affidavits as support for the Motion to Waive or

---

[55] 4 V.I.C. § 513 . Proceedings in forma pauperis

(a) Any court in the Virgin Islands may authorize the commencement, prosecution, or defense of any action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs, or security therefor, by a citizen of the United States who makes affidavit that he is unable to pay the fees and costs or to give security therefor. The affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Reduce the Demand. Plaintiffs never properly filed a motion for leave to proceed *informa pauperis* together with affidavits and supporting financial documents demonstrating Plaintiffs' insolvency in accordance with Title 4, Section 513 of the Virgin Islands Code.

CONCLUSION

The Court finds that Plaintiffs have not followed the proper procedure required of all nonresidents in order to maintain suit in this jurisdiction. Plaintiff never furnished security for costs in accordance with Title 5, Section 547 of the Virgin Islands Code. In addition, Plaintiffs' reasons for failing to give security for costs are without merit because the majority of jurisdictions hold that nonresident security cost bond statutes are constitutional. Moreover, Plaintiffs never properly filed for *in forma pauperis* status in accordance with Title 4, Section 513 of the Virgin Islands Code. Therefore, the case will be dismissed as to all Defendants. An Order consistent with this Opinion will be entered by the Court.

Dated: April 14, 2015

/s/
HAROLD L. WILLOCKS
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court
By: /s/
Deputy Clerk
Dated: 4/15/15

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 16-3912

VICTORIA VOOYS, JOSEPH GERACE
d/b/a CANE BAY BEACH BAR
v.
MARIA BENTLEY; CB3, INC; WARREN MOSLER;
CHRIS HANLEY; CHRISMOS CANE BAY, LLC

Warren Mosler; Chris Hanley; Chrismos Cane Bay, LLC,
Petitioners

(V.I. Super. Ct. Civ. No. 2005-00368)
(V.I. S. Ct. Civ. No. 2015-0046)

ORDER FOR INITIAL HEARING EN BANC

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and SCIRICA*, *Circuit Judges*

A majority of the active judges who are not disqualified in the above captioned case have determined that the case is controlled by a prior decision of the court which should be reconsidered. Accordingly, the Court en banc shall hear oral argument at a time that is convenient to the Court.

BY THE COURT,
s/ D. Brooks Smith
Chief Judge
Date: December 29, 2017

NMR/arr/cc: RRL; LJR; SLB; LC; TR; DA' ELB; JBP

*Will participate as a member of the en banc court pursuant to 3d Cir. I.O.P. 9.6.4.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
June 27, 2017
ECO-033
No. 16-3912

VICTORIA VOOYS, JOSEPH GERACE
d/b/a CANE BAY BEACH BAR

v.

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

Warren Mosler; Chris Hanley; Chrismos Cane Bay, LLC, Petitioners

(V.I. Super. Ct. Civ. No. 368/2005 & V.I. S. Ct. Civ. No. 2015-0046)

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, Circuit Judges

1. Motion by Respondents for Initial Hearing En Banc to Determine this Court's Subject Matter Jurisdiction.

Respectfully,
Clerk/nmr

ORDER

The foregoing Motion by Respondents for Initial Hearing En Banc is DENIED.

By the Court,
s/ D. Brooks Smith
Chief Judge

Dated: August 16, 2017

NMR/cc: Dwyer Arce, Esq.
Edward L. Barry, Esq.
Stephen L. Braga, Esq.
Rhea R. Lawrence, Esq.
John-Russell B. Pate, Esq.

V.I.C. § 513

§ 513 Proceedings in forma pauperis

(a) Any court in the Virgin Islands may authorize the commencement, prosecution, or defense of any action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs, or security therefor, by a citizen of the United States who makes affidavit that he is unable to pay the fees and costs or to give security therefor. The affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any proceeding in forma pauperis in the Superior Court, the fees of the reporter for transcripts shall be paid by the government of the Virgin Islands under the same circumstances as the fees of the reporter of the district court are paid by the United States in like proceedings under section 753 of Title 28 of the United States Code.

(c) The officers of the court shall issue and serve all process, and perform all duties, in proceedings under subsection (a) of this section. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may appoint an attorney to represent any person unable to employ counsel. The court may

dismiss the action if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the action, as in other cases, but the United States or the government of the Virgin Islands shall not be liable for any of the costs thus incurred. If the United States or the government of the Virgin Islands has paid the cost of a stenographic transcript for the prevailing party, the same shall be taxed in favor of the United States or the government of the Virgin Islands.

5 V.I.C. § 547

§ 547 Security for costs

(a) If 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.

(b) Upon proof that the original security is insufficient, the court may order that new or additional security be given.

(c) Security shall be given under this section either (1) after notice by filing with the clerk an undertaking with sufficient sureties to the effect that they will pay such costs as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of $1000; or (2) pursuant to court order by making a deposit with the clerk such additional sum as the Court may direct.

(d) The court may dismiss the action if security is not given within 30 days after the service of a notice requiring security or an order requiring new or additional security.

(e) Whenever more than one defendant is named, the undertaking shall be increased not to exceed $500 for each additional defendant in whose favor such undertaking is ordered, not to exceed a total of $3,000.

(f) This section shall not apply to an action commenced in the small claims division of the Superior Court.