

No. 18-709

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In The  
**Supreme Court of the United States**

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

*Petitioners,*

v.

JOSEPH GERACE AND VICTORIA VOOYS,

*Respondents.*

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**On Petition For Writ Of *Certiorari*  
To The Supreme Court Of The Virgin Islands**

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**RESPONDENTS' BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED**

1. Whether this Court has jurisdiction to hear this case where Petitioners have invoked jurisdiction exclusively under 28 U.S.C. § 1254(1) but have not requested writ be issued to a court of appeals, but rather to the V.I. Supreme Court, and Petitioners have failed to demonstrate this Court's jurisdiction under the relevant 28 U.S.C. § 1260.
2. Whether the Virgin Islands Supreme Court correctly held that Virgin Islands statute, 5 V.I.C. § 547, that mandates a stay or dismissal of a case until non-resident plaintiffs pay up to \$3,000 in security for costs upon the demand of a resident defendant, violates the Equal Protection Clause or the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.

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## INTRODUCTION

Petitioners Maria Bentley, Warren Mosler, Chris Hanley, CB3, Inc. and Chrismos Cane Bay, LLC (Petitioners), contend that this Court has jurisdiction under 28 U.S.C. § 1254(1) and review is warranted because the Virgin Islands Supreme Court misapplied constitutional precedent of this Court. Petitioners are incorrect.

Petitioners rely solely on 28 U.S.C. § 1254(1) but have not asked this Court to review any decision from a court of appeals. They seek writ to the Virgin Islands Supreme Court—the highest court in the Virgin Islands. Jurisdiction, if it exists, must be found in 28 U.S.C. § 1260. Under Section 1260, this Court is limited to review of final judgments or the limited cases that are exceptions under this Court’s precedent. However, Petitioners have not cited Section 1260 in their petition. Petitioners have also failed to offer a single argument that the Virgin Islands Supreme Court’s decision is a final judgment or that it meets any exception under this Court’s precedent.

Additionally, there is no compelling reason to grant the petition under this Court’s Rule 10. Indeed, Petitioners admit that they seek writ to “correct the misapplication of [this Court’s] precedent.” Pet. 5. Under this Court’s Rule 10, “[a] petition for a writ of *certiorari* is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>1</sup>

For these and other reasons, the petition for *certiorari* should be denied.

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### STATEMENT OF THE CASE

Over ten years ago, on June 9, 2005 Respondents/Plaintiffs Joseph Gerace and Victoria Vooy, d/b/a Cane Bay Beach Bar, filed this action against Petitioners/Defendants Maria Bentley, David Bentley, CB3, Inc., Warren Mosler, Chris Hanley, and Chrisomos Cane Bay, LLC, seeking civil justice in the local Virgin Islands court system. At the time Respondents filed suit, they resided in the Virgin Islands. Almost eight years after this litigation commenced they were forced to leave the Virgin Islands because the economy had collapsed following the close of the oil refinery, and they needed to seek employment stateside to survive. Pet. App. 52.

On March 1, 2013—over six years ago—Petitioners filed a demand with the Court that these indigent plaintiffs post a cost bond totaling \$6,000 or face dismissal of the lawsuit. Pet. App. 52. Respondents objected to posting the bond and argued that the cost bond statute, 5 V.I.C. § 547: (1) did not apply to their case because they were residents at the time the complaint was filed; (2) cannot be enforced against indigent plaintiffs like them; and (3) violated several

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<sup>1</sup> U.S. Sup. Ct. Rule 10.

provisions of the United States Constitution. Pet. App. 52-53. Respondents filed affidavits to support indigency. Pet. App. 53. The Superior Court ultimately ordered these indigent plaintiffs to post a cost bond of \$1,050 each without conducting an indigence hearing and dismissed their case that had been pending for eight years when they could not post the bond by the trial-court-imposed deadline. Pet. App. 54.

On August 22, 2016, the Virgin Islands Supreme Court reversed the trial court's dismissal of the case for failure to post a cost bond, reinstated the case and remanded for further proceedings. Pet. App. 6, 77-78. The Virgin Islands Supreme Court noted that the Superior Court had committed independent reversible error in failing to properly address all of Respondents' objections and arguments. Pet. App. 56-57. The Virgin Islands Supreme Court also implicitly agreed that the Superior Court committed independent reversible error by failing to conduct an indigence evidentiary hearing which independently would have required a reversal and remand. Pet. App. 61, n.1; Pet. App. 62, n.2. The Virgin Islands Supreme Court, while recognizing the need to decide constitutional issues unnecessarily, concluded that, because the "case has languished for over a decade, including two years without a ruling on a motion to dismiss that gave rise to the appeal," that it would decide Respondents' constitutional arguments that the Superior Court had failed to address. Pet. App. 57. It held that the statute that required the plaintiffs—who resided on the island when the case was filed and during the eight years of

litigation, but who subsequently, due to economic reasons, moved off island—post a bond of up to \$6,000 or face a mandatory stay or discretionary dismissal of the case, violated the Equal Protection and Privileges and Immunities Clauses of the United States Constitution. Pet. App. 77-78.<sup>2</sup>

Petitioners subsequently filed a petition for writ of *certiorari* with the Third Circuit Court of Appeals based on a prior Third Circuit case that held that it retained jurisdiction over all cases filed in the trial court in the Virgin Islands prior to December 28, 2012. Pet. App. 4.<sup>3</sup> That case was docketed as Case No. 16-3912. The Third Circuit granted the petition for *certiorari* and required the parties to address the jurisdiction issue as well as the merits. After an *en banc* hearing solely on the issue of jurisdiction, the Third Circuit determined that it did not have jurisdiction and dismissed the petition. Pet. App. 4. The Third Circuit did not reach the merits of the Virgin Islands Supreme Court’s opinion. Petitioners do not seek writ to

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<sup>2</sup> The statute provides that “all proceedings in the action shall be stayed until security is given by the plaintiff.” 5 V.I.C. § 547(a).

<sup>3</sup> Respondents objected to the Third Circuit’s jurisdiction to hear the case in their response to the petition. Respondents, simultaneous with their response brief on the merits, filed a motion for initial hearing *en banc* on the issue of jurisdiction. The Third Circuit initially denied Respondents’ motion for initial hearing *en banc*. After oral arguments before a panel of the Third Circuit, the Court *sua sponte* ordered an initial hearing *en banc* on the jurisdiction issue. Pet. App. 4.



the Third Circuit regarding its jurisdictional decision or otherwise challenge that decision.

Despite being notified by the Third Circuit that its participation was necessary because there was a challenge to the constitutionality of a Virgin Islands statute, the Government of the Virgin Islands—the party charged with defending the constitutionality of Virgin Islands statutes—elected not to petition the Third Circuit for a writ of *certiorari* to challenge the Virgin Islands Supreme Court’s holding that § 547 is unconstitutional. The Government also failed to otherwise participate in the Third Circuit proceedings that were initiated by Petitioners.



## REASONS FOR DENYING THE WRIT

### I. Petitioners have failed to establish the basis for *certiorari* jurisdiction.

Petitioners invoke this Court’s jurisdiction pursuant to 28 U.S.C. § 1254(1). Pet. 1. However, they do not seek writ to the Third Circuit Court of Appeals nor ask for review of any issue resolved by that court of appeals. Petitioners ask this Court to issue writ to the Virgin Islands Supreme Court which means this Court’s *certiorari* jurisdiction is derived from 28 U.S.C. § 1260 and constrained to “final judgments.”<sup>4</sup> Petitioners have the burden of establishing *certiorari*

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<sup>4</sup> 28 U.S.C. § 1260; *see also* 28 U.S.C. § 1257 (dealing with *certiorari* jurisdiction over state supreme court decisions and with identical language to Section 1260).

jurisdiction,<sup>5</sup> which requires a “final judgment” of the Virgin Islands Supreme Court.<sup>6</sup> The standards for *certiorari* jurisdiction are different when the writ comes from a state or territorial supreme court, as opposed to a federal court of appeals.<sup>7</sup> The general rule is that a decision from a state or territorial supreme court is “final within the meaning of the United States Supreme Court’s *certiorari*-jurisdiction statute, only when nothing “further remains to be determined by a territorial court, no matter how dissociated from the federal issue that has finally been adjudicated by the highest court of the State.”<sup>8</sup> There are only four recognized “finality” exceptions in connection with review of a state or territorial supreme-court order and Petitioners have failed to show that there is a “final” judgment for this Court to review or even allege that one of the four authorized exceptions to finality applies because they did not address the correct standards for exercising *certiorari* jurisdiction over an order from the highest court of the territory or even cite to the relevant exception cases.

The Virgin Islands Supreme Court reversed the dismissal order and remanded for further proceedings. Pet. App. 77-78. Even assuming the cost-bond issue

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<sup>5</sup> *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 70–71 (1948) (“Appellant, of course, has the burden of affirmatively establishing this Court’s jurisdiction.”).

<sup>6</sup> 28 U.S.C. § 1260.

<sup>7</sup> *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975) (citing 28 U.S.C. § 1257).

<sup>8</sup> *See Cox*, 420 U.S. at 477.

should be viewed separate from the merits for purposes of the collateral-order doctrine—and even analyzing the cost-bond issue as a self-contained “claim” to resolve for purposes of appeal—if Petitioners prevailed on this writ and obtained a reversal on the constitutionality issue, the case would still need to be remanded for a hearing on the indigence issue. *E.g.*, Pet. App. 61, n.1. And even if Petitioners prevailed on the indigence issue and the case was again dismissed—this would prompt another round of appeals on issues wholly unrelated to the merits. This case does not appear to have the contours of finality that would eliminate the risk of this Court issuing an advisory opinion if it were to grant the petition.

## **II. This Court does not review misapplication of a properly stated rule of law under Rule 10.**

There is no compelling reason to grant the petition under this Court’s Rule 10. Petitioners admit that they seek writ to “correct the misapplication of [this Court’s] precedent.” Pet. 5. Under this Court’s Rule 10, “[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>9</sup> Here, where Petitioners admit that they seek review to “correct” the Virgin Islands Supreme Court’s purported “misapplication” of this Court’s precedent, this Court should deny the petition as “error correction

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<sup>9</sup> U.S. Sup. Ct. Rule 10.

. . . is outside the mainstream of the Court’s functions and . . . not among the ‘compelling reasons’ . . . that govern the grant of *certiorari*.”<sup>10</sup>

**III. There is no conflict with this Court’s precedent and insufficient development in the lower courts to warrant review.**

Petitioners’ sole contention that review is warranted is that the Virgin Islands Supreme Court’s decision conflicts with this Court’s precedent. Pet. 6, 12. There is no conflict with this Court’s precedent. Petitioners fail to cite a single case where this Court has examined whether a state or territorial statute that requires a nonresident plaintiff post a cost bond solely on the demand of a resident defendant or face dismissal of their case—regardless of the meritorious nature of the claims that are brought—violates the Equal Protection or Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution.

The case cited by Petitioners, *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 (1920), presents no real conflict because the issue in that case was the application of a state statute that imposed out-of-state limitations periods on claims that “arise” outside the state as

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<sup>10</sup> *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (concurring opinion) (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) (“[E]rror correction . . . is outside the mainstream of the Court’s functions and . . . not among the ‘compelling reasons’ . . . that govern the grant of *certiorari*.”)).

a matter of that state's substance law.<sup>11</sup> *Canadian Northern* did not, in fact, issue a ruling on the constitutionality of a nonresident cost-bond statute. Thus, *Canadian Northern* is not controlling precedent.

Yes, there are decisions upholding federal court rules imposing a nonresident bond in federal courts, but the facts of those cases demonstrate a significant difference from this matter. For example, in *Murphy v. Ginorio*, 989 F.2d 566, 569 (1st Cir. 1993), cited by Petitioners, the First Circuit Court of Appeals noted a list of mandatory factors that must be considered before a nonresident bond may be imposed on a nonresident plaintiff, including: “plaintiff’s probability of success on merits, and background and purpose of suit; reasonable extent of security to be posted, if any, viewed from defendant’s perspective; and reasonable extent of security to be posted, if any, viewed from nondomiciliary plaintiff’s perspective.”<sup>12</sup> No such factors were considered by the trial court here or are codified in the relevant Virgin Islands statute. Further, the Court in *Murphy v. Ginorio*, without ever evaluating the constitutionality of the rule, still noted the chilling effect the rule could potentially have on access to courts.

Additionally, District of Puerto Rico Local Rule 304 is markedly different than the statute at issue here because that rule does not mandate a stay and specifically cautions that “[t]his rule shall be liberally interpreted in favor of the plaintiff so as not to preclude

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<sup>11</sup> See *id.* at 558.

<sup>12</sup> *Id.* at 569; see also District of Puerto Rico Local Rule 304.

*his right to sue through excessive bond requirement.*” No such clarification in favor of a nonresident plaintiff’s rights to sue is contained in the Virgin Islands statute at issue here.

*Certiorari* review is discretionary and generally not appropriate for mere error correction. This Court routinely denies *certiorari* petitions even in important cases involving hotly contested federal issues. Review on writ of *certiorari* is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons to grant *certiorari*.

Moreover, the Virgin Islands Supreme Court correctly concluded that § 547 restricts access to courts, which is a fundamental right, and that § 547 did not employ the “least restrictive means” to accomplish any valid legislative purpose embodied by § 547. Pet. App. 73. The Virgin Islands Supreme Court also correctly concluded that § 547, *as written*, violated the Equal Protection and Privileges and Immunities Clause. Pet. App. 71-77. But even if this Court were inclined to disagree, Petitioners failed to show that the Virgin Islands Supreme Court has decided any specific issue in a way that impermissibly conflicts with applicable decisions of this Court or other appellate courts. Petitioners failed to show that: there is a split of authority between the local courts and the federal courts to resolve whether this specific statute is constitutional; there are contrary decisions from this Court that address this specific statute; or that enforcement of the statute at issue here is anything other than a matter solely of local concern. This Court should not accept

*certiorari* for mere error correction—even if it thinks an error has been committed—which Petitioners have not shown.



**CONCLUSION**

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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