No. 18-709

In The Supreme Court of the United States

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

Petitioners,

v.

JOSEPH GERACE AND VICTORIA VOOYS,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

REPLY BRIEF FOR PETITIONERS

Petitioners Maria Bentley, Warren Mosler, Chris Hanley, CB3, Inc., and Chrismos Cane Bay, LLC (collectively "Petitioners") submit this reply brief to address certain points raised in the Respondents' Brief in Opposition ("Resp. Br.") to Petitioners' petition for a writ of certiorari. The Supreme Court of the Virgin Islands' decision below represents the only time that the "time-honored method of [judicial] procedure" imposing non-resident cost bond requirements has failed to pass constitutional muster. *Canadian No. Ry. Co. v. Eggen*, 252 U.S. 553, 561 (1920). It has, thus, created a self-evident conflict with this Court's precedent and with the federal courts correctly applying that precedent over time. This Court should take this opportunity to put a quick end to this "thumb in the eye" from the territorial court concerning its Privileges and Immunities and Equal Protection jurisprudence. And it should promptly reaffirm the constitutionality of this common procedural safeguard for litigants.

We invoke this Court's jurisdiction under 28 U.S.C. § 1260.[1]

[1] In our petition for a writ of certiorari, we mistakenly invoked jurisdiction under 28 U.S.C. § 1254(1). Respondents have correctly indicated that the relevant statute for the Court's jurisdiction is 28 U.S.C. § 1260, which we hereby invoke instead.

I. The Judgment From The Supreme Court Of The Virgin Islands Satisfies The Finality Requirement Necessary For This Court's Review

This Court has jurisdiction over the instant case because it is a "[f]inal judgment" within the meaning of 28 U.S.C. § 1260. Generally, a judgment is "final" only if "nothing further remains to be determined" by the courts of the Virgin Islands, "no matter how dissociated from the [ ] federal issue that has finally been adjudicated."[2] *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). But in making jurisdictional determinations, "finality is to be given a 'practical rather than a technical construction.'" *Id.* at 478 n.7 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

There are at least four instances where "finality" is satisfied despite the fact that further proceedings are pending. *Id.* at 477. These include cases where: (1) there are further proceedings to come in state court but the federal issue is conclusive or the outcome is certain; (2) the federal issue has been finally decided by the state court but will survive and will require decision regardless of the state-court proceedings; (3) the state court decision

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

on the federal claim is final and further proceedings on the merits are to come but later review of the federal issue cannot be had; and (4) the federal issue has been finally decided and further proceedings are pending but the party seeking review may prevail on a nonfederal issue—rendering review by the appellate court on the federal issue unnecessary, and where reversing the state court on the federal issue would preclude further litigation on the relevant cause of action. *Cox*, 420 U.S. at 479–83. These exceptions have been applied to final judgments arising from the Supreme Court of the Virgin Islands. *Defoe v. Phillip*, 702 F.3d 735, 741 (3d Cir. 2012).[3]

This case falls squarely within the third exception from *Cox*: later review of the issue of the constitutionality of non-resident cost security bonds cannot be had. Although trial court proceedings will continue to adjudicate the merits of the underlying claim, the Supreme Court of the Virgin Islands has definitively resolved this pre-trial constitutional issue. If this Court does not review this finding now, Petitioners will have no opportunity to seek review of it later, regardless of the ultimate outcome of the merits.

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[3] *Defoe* was decided in 2012, a mere week before 28 U.S.C. § 1260 came into effect. Therefore, that case was decided based on the Third Circuit's certiorari jurisdiction over the Supreme Court of the Virgin Islands. But 28 U.S.C. § 1260 adopts 28 U.S.C. § 1257(a) verbatim, only specifying "Supreme Court of the Virgin Islands" when § 1257(a) references state courts. "When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

With respect to finality, this case is indistinguishable from *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). In that case, a state pharmacy board rejected an application for a permit to operate a pharmacy for the applicant's failure to comply with a state statute. *Id.* at 158. The North Dakota Supreme Court later deemed the statute unconstitutional and remanded the case to the board for further consideration of the application. *Id.* Despite the possibility that the pharmacy board might yet reject the application on other grounds, the Court found that it had jurisdiction to review the North Dakota court's determination because of the strong possibility that any review of the constitutionality of the statute would be mooted by further proceedings. *Id.* at 163.

If this Court does not review the decision of the Supreme Court of the Virgin Islands on the constitutionality of Section 547 at this time, Petitioners will be left without any effective remedy because any question as to the constitutional validity of requiring bond for costs from non-resident plaintiffs *prior* to litigation will become moot once the litigation concludes.

Finally, Respondents allege that the Supreme Court of the Virgin Islands "*implicitly* agreed that the Superior Court committed independent reversible error" when it failed to conduct an indigency hearing pursuant to the Respondent's arguments. Resp. Br. at 3 (emphasis added). But the record does not support this conclusion. In fact, Respondents waived any indigency argument by failing to file a motion to proceed *in forma pauperis*, and the Superior Court dismissed the claim on procedural grounds. Pet. App. at 54–55. Any

suggestion that the Supreme Court of the Virgin Islands relied upon or "implicitly agreed" that there were grounds for independent reversible error is without merit.

Finally, if this Court reversed the Virgin Islands Supreme Court on the constitutional issues presented, the case would be dismissed. This case presents final issues ready for review.

II. This Decision Jeopardizes The Continuation Of A Common Procedural Safeguard

Respondent correctly reminds the Court that its review is discretionary. Resp. Br. at 10. But Respondent's failure to meaningfully engage with the merits arguments set forth in the petition for writ of certiorari should not persuade the Court that this case does not present a compelling question of law worthy of the Court's review. It does.

Here, a territorial court of last resort "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. Rule 10(b). The Virgin Islands stands alone in rewriting federal constitutional law in a manner that erroneously calls into question the laws of several states and territories. *See, e.g.*, Ark. Code § 16-68-301(a); Colo. Rev. Stat. § 13-16-101; D.C. Code § 15-703 (constitutionality affirmed in *Landise v. Mauro*, 141 A.3d 1067 (D.C. 2016); 7 Guam Code § 26616; Nev. Rev. State. § 18.130. This Court should bring the law of the Virgin Islands back into line with the unanimous authorities in the other jurisdictions that have considered the issue, and

conclusively decide that non-resident bond requirements are constitutional under both the Privileges and Immunities Clause and the Equal Protection Clause.

The purpose of 5 V.I.C. § 547 is to protect residents of the Virgin Islands from "the costs of frivolous and vexatious lawsuits" because of the "reality and hardship a Virgin Islands litigant defendant may have in attempting to collect costs from a non-resident plaintiff off-island." Br. for V.I. Gov. at 9. This "substantial reason" for the disparity in treatment between residents and non-residents satisfies the Privileges and Immunities Clause. Similarly, the non-resident cost bond statute is rationally related to the territorial legislature's legitimate governmental purpose, and so should have survived under the lower court's Equal Protection analysis. Without correction, this precedent could jeopardize this important litigation practice and cause unnecessary doctrinal confusion.

CONCLUSION

Respondents' principal argument in opposition to this petition is to self-servingly downplay the decision below as no big deal and, therefore, as presenting no "compelling reason" for this Court's review under Rule 10. Resp. Br. at 1. Respondents quote Rule 10's admonition that "[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" to this end. *Id*. at 1-2. But this case does not present any such "mere error correction" as Respondents suggest. *Id*. at 10. We are not seeking review of any

"factual findings" or any "properly stated rule of law." To the contrary, we are seeking review of a strikingly *improper* analysis of fundamental constitutional law.

The petition for a writ of certiorari should be granted.

Stephen L. Braga[4]
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
stevebraga@law.virginia.edu

[4] Counsel of record expresses his great appreciation to third-year law students Kendall Burchard and Thomas Howard for their substantial assistance with this reply.