No. 21–_____

In the Supreme Court of the United States

SAVE CORAL BAY, INC.,

Petitioner,

v.

ALBERT BRYAN, JR., IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE VIRGIN ISLANDS AND SUMMER'S END GROUP, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE VIRGIN ISLANDS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1974, the United States transferred the submerged lands surrounding the U.S. Virgin Islands to the Territory "to be administered in trust for the benefit of the people." 48 U.S.C. § 1705(a). The Virgin Islands fulfills its obligations as trustee through the Coastal Zone Management Act, 12 V.I.C. § 901 *et seq*. ("CZMA"). Any proposed development of submerged lands requires a "CZMA permit" issued only after an agency/public review process. The permit cannot be approved if there will be "significant adverse environmental effects." 12 V.I.C. § 911(c)(2).

In 2019, the Governor of the Virgin Islands approved a CZMA permit that authorized the construction of a mega-yacht marina. The same day, he bypassed the CZMA agency/public review process and modified the permit to authorize, among other things, *additional* submerged land development. The Virgin Islands Legislature ratified the modified permit one year later. Petitioner challenged the modification/ratification; but, the Virgin Islands Supreme Court held (1) the ratification acted as a valid repeal of the CZMA as applied to the permittee, and (2) the judiciary was powerless to review the action.

The question presented, which implicates an ongoing federal-territorial court conflict as to whether the Supremacy Clause applies to the territory, is:

> When a territory enacts a law that contravenes a duty imposed by federal law, must the territory's judiciary look beyond whether the law was properly enacted and determine whether it violates federal law?

CORPORATE DISCLOSURE

Save Coral Bay, Inc. is a non-profit corporation whose mission is to advocate for the proper stewardship of the natural resources and environment of Coral Bay, St. John, U.S. Virgin Islands. It represents the interests of approximately 500 St. John residents and visitors, including fishermen who use Coral Bay, residents who live aboard boats in Coral Bay and landowners along the shoreline of Coral Bay. No publicly-owned company owns more than 10% of Save Coral Bay, Inc.

RELATED CASES

Save Coral Bay, Inc. v. Albert Bryan, Jr., et al., Case No. ST-20-CV-298, Superior Court of the Virgin Islands. Judgment entered May 12, 2021.

Save Coral Bay, Inc. v. Albert Bryan, Jr., et al., S.Ct. Civ. No. 2021-0017, Supreme Court of the Virgin Islands. Judgment entered March 30, 2022.

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The decision of the Supreme Court of the Virgin Islands is published at 2022 VI 7, available at 2022 WL 960822, and reproduced at App.1a.

JURISDICTION

The Supreme Court of the Virgin Islands affirmed the dismissal of Petitioner's action in a final judgment entered on March 30, 2022. App.12a. This Court has jurisdiction under 28 U.S.C. § 1260 to review a final judgment of the Supreme Court of the Virgin Islands by "writ of certiorari . . . where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to . . . laws of the United States . . . ."

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The relevant statutory provisions are reproduced in the appendix to the petition. App.26a.

STATEMENT OF THE CASE

A. INTRODUCTION

In 1974, Congress enacted the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a), and transferred title to the submerged lands surrounding the Virgin Islands, Guam, the Northern Mariana Islands and American Samoa to their respective territorial governments. It did so, however, with a caveat: these submerged lands were to be held by the territorial governments in trust for the benefit of their citizens.

The Virgin Islands initially addressed its obligations as trustee by adopting the Trustlands, Occupancy and Alteration Control Act, Act of Jan. 24, 1975 (Act. No. 3667) (repealed). By 1978, however, it realized that more protection was needed and the legislature replaced the Trustlands, Occupancy and Alteration Control Act with the Virgin Islands Coastal Zone Management Act ("CZMA"), 12 V.I.C. § 901, *et seq*.

The CZMA established a baseline permitting process for the development of land adjacent to the territory's coast, 12 V.I.C. § 910. It also recognized the Territory's submerged lands as "trust lands," 12 V.I.C. § 902(dd), and created an enhanced permitting process for these trust lands. 12 V.I.C. § 911. This enhanced process included heightened standards applicable to any proposed development that included development of submerged lands. 12 V.I.C. § 911(c). Further, it added three provisions applicable only to CZMA permits relating to submerged (trust) lands:

1. the territory's governor had to approve the permit, 12 V.I.C. § 911(e);
2. the legislature had to ratify the governor's approval, *id.*; and
3. the governor was given an emergency power to "modify or revoke any [CZMA] permit that includes development . . . of trust lands or submerged or filled lands . . . [if] such action . . . is necessary to prevent significant environmental damage to coastal zone resources." 12 V.I.C. § 911(g).

But what happens when (1) the governor improperly exercises his emergency power and modifies a submerged lands CZMA permit in a manner that is contrary to the territory's duties as trustee of the submerged lands and (2) the legislature then ratifies that specific CZMA permit in the form of an Act that is then signed by the governor? The Virgin Islands Supreme Court held that because the *formalities* for enacting legislation were properly followed, the legislation effectively repealed the CZMA as applied to the CZMA permit in question. Therefore, the court held the judiciary was powerless to review the governor's pre-ratification violation of the CZMA. Thus, even if the governor's action breached the federally imposed duty to administer submerged lands in trust for the people, the decision below renders that action unreviewable.

This case raises issues of (1) the role of the territory's judiciary when an otherwise validly enacted territorial law is contrary to an obligation imposed by federal law and (2) the supremacy of federal law in a territory of the United States.

B. BACKGROUND

1. *Summers End Group seeks a permit.* Coral Bay is a small harbor on the eastern—and more remote—part of St. John, U.S. Virgin Islands. In April 2014, Summers End Group LLC ("SEG") filed two separate applications for CZMA permits seeking to develop a large marina complex in Coral Bay, St. John. One permit application sought authorization to develop a 145-slip marina, a mooring field with 75-moorings, and a fuel station, on 27.5 acres of territorial submerged

lands. App.3a. The other permit application requested approval of construction on seven parcels of land of shore-side support facilities for the marina, along with restaurants, retail establishments and offices. App.2a.

Ultimately, the Virgin Islands Coastal Zone Management Committee approved SEG's applications and issued both CZMA permits. Several organizations appealed the permits to the Virgin Islands Board of Land Use Appeals ("BLUA"), raising a number of issues relating to SEG's compliance with the CZMA. On June 6, 2016, BLUA ordered that the two permits be consolidated but otherwise affirmed the decision below. App.3a.

More than three years later, the permits still had not been consolidated and sent to the governor for approval (as required by 12 V.I.C. § 911(e)). On December 3, 2019, SEG wrote the governor and asked him to modify the submerged land permit to reflect the consolidation; however, it also asked him to modify it to reflect changes to the project that had been made in the intervening years, "including the removal of two of the seven parcels, a reduction of parking spaces, the removal of a 56-seat restaurant and one mega-yacht slip, and the inclusion of a shoreline boardwalk." App.4a.[1]

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[1] SEG's letter requesting the modification is found at page APPX-50 of the joint appendix filed in the Virgin Islands Supreme Court (hereinafter "VI-APPX"). That appendix can be downloaded from the Virgin Islands Supreme Court's website at https://usvipublicaccess.vicourts.org/documents/2ff7e97209e49469afe1f44eec8a4f39dab577a3bcfab132624810143b842144/download (or tinyurl.com/3tn68d6k) (last accessed June 25, 2022).

Two weeks later, the CZM Committee consolidated the permits and signed off on them. *Id*. Two days later, on December 18, 2019, the governor approved the consolidated permit. *Id*. That same day, however, the governor invoked his emergency powers under 12 V.I.C. § 911(g) to modify the permit, asserting that it was necessary to modify the permit—a permit he had literally just approved—to prevent significant environmental damage. The modification was "largely in the manner requested by SEG." *Id*. The governor forwarded the consolidated permit with his modifications to the Virgin Islands Legislature for ratification. App.5a.

A year later, on December 21, 2020, the legislature passed Bill No. 33-0428, which ratified the permit. *Id*. On December 31, 2020, the governor signed the bill, which thereupon became Act No. 8407. Act of Dec. 31, 2020, VI LEGIS 8407 (2020), 2020 V. I. Laws Act 8407, (B. 33-0428). App.5a.

2. *Trial court proceedings*. On July 21, 2020 (before the legislature voted to ratify the permit), Petitioner filed a complaint in the Superior Court of the Virgin Islands, seeking declaratory and injunctive relief because the modification was contrary to law. App.5a.

After Act 8407 became law, Petitioner amended its complaint to reflect that event. In its amended complaint, Petitioner asserted,[2] *inter alia*,

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[2] This case comes before the Court following the affirmance of an order granting a pre-answer motion to dismiss the case. Therefore, the allegations of Petitioner's First Amended Complaint are taken as true on appeal. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds, *Harlow v.*

- the governor's modification did not prevent significant environmental damage caused by the permitted activity and actually worsened the development's environmental impact, VI-APPX-34–35 (¶¶32–37);
- the modification to add the boardwalk authorized construction upon submerged (trust) lands without any environmental review, VI-APPX-32 (¶¶24 and 38(c));
- the removal (via the governor's modification) of two parcels of land from the development would cause a "major reduction in storm water management capability [which] will result in significant degradation of Coral Bay's water quality," VI-APPX-35 (¶¶36–37); and
- there had been no environmental assessment of the changes approved by the modification. VI-APPX-33 (¶¶21, 27–28).

SEG filed a pre-answer motion to dismiss the amended complaint. SEG argued that the Act mooted any challenge to the legality of the governor's modification. App.5a.

On May 12, 2021, the Superior Court granted SEG's motion and dismissed the action. App.14a.

3. *Virgin Islands Supreme Court proceedings.* Petitioner appealed the Superior Court decision to the Virgin Islands Supreme Court on May 22, 2021. That court held that the legislature was not bound by the acts of a prior legislature and had the authority to

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Fitzgerald, 457 U.S. 800 (1982).

change the CZMA as long as it followed the requirements for enacting legislation (as set forth in Section 8(a) of the territory's Revised Organic Act, 48 U.S.C. § 1574(a), App.27a). Thus, the court concluded that "it is irrelevant whether the procedure set forth for modification of permits in the [CZMA] was followed, since the 33rd Legislature was entitled to pass, and Governor Bryan entitled to sign into law, new legislation, whether generally or limited to a specific permit." App.11a. Consequently, the court concluded that Petitioner's claims challenging the governor's non-compliance with the CZMA were moot and affirmed the decision of the Superior Court.

REASONS FOR GRANTING THE PETITION

A. The decision below impedes the effectiveness of a federal statute and can only be corrected by this Court.

CZMA permits for the development of submerged lands are the *only* permits that must go through the extra steps of gubernatorial approval and legislative ratification. 12 V.I.C. § 911(e). These extra steps help to ensure the Virgin Islands fulfills the duty federal law (48 U.S.C. § 1705(a)) imposes upon the territory to administer the territory's submerged lands in trust for the people.

The decision below eviscerates these additional precautions because, rather than safeguarding trust lands, it turns the ratification process into a procedure for bulletproofing defective permits from judicial review. Under the decision below, any permit that has been approved by the CZMA Committee in violation of the law is protected from challenge once the legislature

has ratified the permit. Rather than acting as additional checks on the administrative process to ensure the trust lands are properly administered, the ratification process becomes a means to "launder" a "dirty" permit and insulate it from challenges.

The situation that occurred in the instant case is a perfect example of how federal law is impeded by the Virgin Islands Supreme Court's decision. As alleged in the First Amended Complaint, the governor's modification included, *inter alia*, authorization to construct a shoreline boardwalk on submerged (trust) lands and changes that would degrade the water quality of Coral Bay without any professional review to determine whether, and how, the changes would affect the submerged trust land. Petitioner asserted that the modification violated the CZMA. But, the Virgin Islands Supreme Court held that because the legislature had enacted legislation to ratify the permit and modification, the CZMA was effectively amended (as applied). The court held that even if the governor's actions were in contravention of the CZMA, they were beyond judicial review because of the ratification. The decision vitiates the territorial judiciary's role in enforcing the federally mandated duty to hold submerged lands in trust for the people.

The ruling below affects every permit for submerged (trust) lands in the territory. And, because the ratification process must occur for every single permit involving the development of trust lands (and only in the case of development of trust lands), it creates a process that automatically "bulletproofs" every single permit: Any part of the proposed development that fails to comply with the CZMA—even

if the failure results in a breach of the territory's federally imposed obligation to administer submerged lands in trust for the people—is automatically unreviewable by the courts because the final stage of the process is the ratification that, according to the decision below, effectively repeals the CZMA as it applies to the permit in question. Consequently, the decision below prevents the territorial judiciary from reviewing the territory's compliance with its federally imposed duty as a trustee of submerged lands.

The Virgin Islands Supreme Court was within its rights to decide—as an issue of territorial law—that the ratification legislation repealed the CZMA as it applied to the SEG permit, *But*, the result of that ruling is to impede the protection of the territory's trust lands, contrary to the congressional mandate. That is a step too far. Only this Court can correct that error.

B. The decision below is of fundamental legal significance involving the balance of federal-territorial power and conflicts with this Court's decisions regarding the supremacy of federal law.

The Virgin Islands Supreme Court held that the ratification of the CZMA permit was a validly enacted law that repealed the CZMA as applied and thereby put the violations of the CZMA beyond judicial review. As noted, the decision effectively prevents the territorial judiciary from determining whether *any* submerged lands CZMA permit is consistent with the territory's federal obligation to administer submerged lands in trust—because once the legislature has

ratified the permit, the opinion below mandates the conclusion that the permit is no longer reviewable in the territory's courts.[3] But, as this Court recognized in *Haywood v. Drown*, 556 U.S. 729, 736 (2009), "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." In *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) this Court gave its "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980). *See also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340–41 (1816) (holding that state court judges "were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land'").

The above decisions involve the duties of *state* courts to uphold federal law. Although this Court has never directly extended the rule to *territorial* courts, it has recognized that Article IV, § 3, cl.2 gives Congress plenary power over the country's territories. *District of Columbia v. Carter*, 409 U.S. 418, 430 (1973). Further, it held that Congress has granted territories of the United States "powers of self-government *consistent*

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[3] Among many duties, a trustee of public lands "has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, *including via legislative enactments or executive action*." *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 656, 83 A.3d 901, 957 (2013) (emphasis added) (applying Pennsylvania law).

with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress" in *Clinton v. Englebrecht*, 80 U.S. 434, 441(1871) (emphasis added).

Despite the above authority, a conflict—and confusion—has developed between the federal courts in the territory and the Virgin Islands Supreme Court over the application of the Supremacy Clause to the territory. This case provides an excellent opportunity to resolve the conflict and confusion.

Within the past year, the Virgin Islands Supreme Court concluded that it is "well-established that 'the Supremacy Clause has no direct role in a conflict between federal law and territorial law' because the Virgin Islands draws its sovereignty from Congress under Article IV of the United States Constitution and exercises powers that have been directly delegated to it by Congress." *Miller v. People*, 75 V.I. 322, 329 n.6, 2021 VI 18, ¶7 n.6, 2021 WL 4847527 *4 n.6 (2021) (quoting *Bryan v. Fawkes*, 61 V.I. 416, 438, 2014 WL 5409110, *8 (2014)). *See also Woodrup v. People*, 63 V.I. 696, 721–22, 2015 WL 6158107, *11 (2015) (same conclusion); *accord Virgin Islands v. Clark*, 53 V.I. 183, 194–96, 2010 WL 1923797, *5–7 (V.I. Super. May 12, 2010) (holding that the Supremacy Clause does not apply to the territory).

Just three weeks after the Virgin Islands Supreme Court rendered its decision in *Miller*, the District Court of the Virgin Islands, after acknowledging that the Third Circuit had reached inconsistent decisions on the

application of the Supremacy Clause to the territory,[4] concluded that the Supremacy Clause was the source for applying the preemption doctrine in the territory. *Nat'l Lab. Rels. Bd. v. Gov't of Virgin Islands*, Case No. 1:20-cv-0007, 2021 WL 4990628 at *6 n.3 (D. Virgin Islands Oct. 27, 2021).

The District Court of the Virgin Islands has also noted the conflict between the federal judiciary and the territorial judiciary: "To the extent that the Supreme Court [of the Virgin Islands] subscribes to the view that the Supremacy Clause does not apply in the Virgin Islands, this Court respectfully disagrees." *Payne v. Fawkes*, Case No. 1:14-cv-0053, 61 V.I. 652, 668–69, 2014 WL 5548505, *7–8 (D. Virgin Islands Nov. 3, 2014) (responding to the Virgin Islands Supreme Court's decision in *Bryan*, 61 V.I. at 430, 2014 WL 5409110 at *3). *See also Nelson v. Fawkes*, Case No. 1:18-cv-0017, 2018 WL 3132592, *3 (D. Virgin Islands June 25, 2018) (again rejecting the Virgin Islands Supreme Court's decision in *Bryan*).

As the District Court of the Virgin Islands noted, if the Supremacy Clause did not apply to the territory, "one would have to conclude that the Framers of the Constitution intended to provide greater autonomy to

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[4] Compare the dueling-dicta cases of *St. Thomas--St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 237–38 (3d Cir. 2000) (finding that the Supremacy Clause was the source for applying the preemption doctrine in the Virgin Islands) with *Lewis v. Alexander*, 685 F.3d 325, 346 n.18 (3d Cir. 2012) (stating in dicta that "the Supremacy Clause has no direct role in a conflict between federal law and territorial law" and describing its contrary statement in *St. Thomas–St. John Hotel & Tourism Ass'n* as dicta).

territories acquired by the United States than to states—an unlikely proposition." *Payne*, 61 V.I. at 669, 2014 WL 5548505, at *8. Only this Court can resolve the conflict regarding the application of the Supremacy Clause to the territory. The issue is fairly presented as part of the Question Presented and this case presents a good opportunity for the Court to resolve it.[5]

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[5] There are a number of ways to resolve the issue. In 1917, when the territory was acquired by the United States in the Convention between the United States and Denmark for cession of the Danish West Indies, 39 Stat. 1706, 1917 WL 19044 (Jan. 25, 1917), Section 1891 of the Revised Statutes of the United States, App.26a, provided: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States." Although Rev. Stat. § 1891 was repealed in 1933 *see* Act of Mar. 3, 1933, ch. 202, § 1, 47 Stat. 1429, once the Constitution has been formally extended by Congress to a territory, neither Congress nor the territorial legislature may enact laws inconsistent with the Constitution. *Downes v. Bidwell*, 182 U.S. 244, 271 (1901). Thus, the Supremacy Clause, U.S. Const. art. VI, cl. 2, applies to the territory notwithstanding the repeal of Rev. Stat. § 1891.

If the Supremacy Clause does not apply, Section 8(a) of the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1574(a), App.27a, which authorizes the territorial legislature to enact laws that are "not inconsistent with the laws of the United States made applicable to the Virgin Islands" is an alternative basis for recognizing the supremacy of federal law in the Territory. However, as the Superior Court of the Virgin Islands observed in *Clark*, 53 V.I. at 202, 2010 WL 1923797, at *11 (V.I. Super. May 12, 2010), there are arguably substantive differences if the Supremacy Clause does not apply and 48 U.S.C. § 1574(a) provides the basis for the supremacy of federal law.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of the Virgin Islands. Alternatively, the Court should grant the petition, summarily vacate the decision below, and remand with instructions to remand the case to the Superior Court to consider whether the governor's modification, and the legislature's ratification, of the CZMA permit was contrary to the territory's obligations as trustee of submerged lands under the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a).

Respectfully submitted,

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