No. 13-1247

IN THE

United States Court of Appeals for the Third Circuit

UNITED INDUSTRIAL, SERVICE, TRANSPORTATION, PROFESSIONAL AND GOVERNMENT WORKERS OF NORTH AMERICA SEAFARERS INTERNATIONAL UNION, ON BEHALF OF ERNEST BASON,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent.

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

S. Ct. Civ. No. 2011-0115

BRIEF OF *AMICUS CURIAE* SUPREME COURT OF THE VIRGIN ISLANDS IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes and Bills

Virgin Islands Statutes

Court Rules and Promulgation Orders

Legislative History

Law Reviews and Treatises

Other Authorities

I. INTERESTS OF *AMICUS CURIAE*

The Supreme Court of the Virgin Islands is the court of last resort for the U.S. Virgin Islands, and "in it shall be reposed the supreme judicial power of the Territory." V.I. CODE. ANN. tit 4, § 21(a). 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 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)). The court, through its Chief Justice, "has general oversight of the judicial branch of the Government of the Virgin Islands." 4 V.I.C. § 31(d)(3).

Unquestionably, it would be inappropriate for the Supreme Court of the Virgin Islands to brief this Court on the merits of this case, *i.e.*, the relationship between 24 V.I.C. § 374(a) and 3 V.I.C. § 113(a). Likewise, the interests of the Virgin Islands Judiciary are not affected by this Court's determination as to whether the death of Ernest Bason deprives this Court of its Article III jurisdiction, except to the extent that the absence of Article III jurisdiction may warrant refraining from interpreting Public Law 112-226 as part of this case.

Nevertheless, the Supreme Court of the Virgin Islands possesses a very real

interest in appearing in this matter, through its independent counsel,[1] to advocate that this Court give effect to the clear text and intent of Public Law 112-226, previously H.R. 6116, and cease the continuing federal oversight of the Virgin Islands Judiciary that Congress has elected to abolish. In this sense, the Virgin Islands Judiciary has more than an *amicus curiae* interest, as this Court's decision may undermine the Supreme Court's role as the final arbiter of Virgin Islands law, leaving this Territory as the only United States jurisdiction where a federal court—and not the courts established by local law—has final say on issues of local law.

II. ARGUMENT

A. This Court Should Refrain From Interpreting Public Law 112-226

Subject-matter jurisdiction "refers to the courts' statutory or constitutional power to adjudicate the case." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). The Supreme Court of the United States has held that "Article III [of the U.S.

[1] Pursuant to Virgin Islands law, the Attorney General of the Virgin Islands is only mandated to "represent the executive branch of the Government of the Virgin Islands before the courts in all civil proceedings." 3 V.I.C. § 114(a)(1). Additionally, since the Attorney General has appeared as counsel for the Executive Branch in this matter, and the interests of the Judicial Branch are unrelated to the merits and therefore distinct from those of the Executive Branch, independent counsel is necessary both to ensure that the interests of the Judicial Branch and the administration of justice in the Virgin Islands are appropriately asserted, and to prevent an actual or perceived conflict of interest in the event this case were to one day return to the Virgin Islands Supreme Court.

Constitution] generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (citing *Steel Co.*, 523 U.S. at 101-02). The U.S. Supreme Court has not required that a federal court address threshold jurisdictional issues in any particular order. But while it has described this leeway as allowing a federal court to "choose among threshold grounds for *denying* audience to a case on the merits," *id.* at 585 (emphasis added), it has also reversed a decision of this Court where it considered and decided a difficult jurisdictional question as a matter of first impression when it was clear that the case must be dismissed under well-established *forum non conveniens* grounds:

> This is a textbook case for immediate *forum non conveniens* dismissal. The District Court's subject-matter jurisdiction presented an issue of first impression in the Third Circuit… and was considered at some length by the courts below.... And all to scant purpose: The District Court inevitably would dismiss the case without reaching the merits…. [W]here subject-matter or personal jurisdiction is difficult to determine… the court properly takes the less burdensome course.

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 435-36 (2007); *see also Ruhrgas*, 526 U.S. at 586-88 (emphasizing that federal courts should avoid making jurisdictional rulings that impact state court proceedings when the court otherwise clearly lacks subject-matter jurisdiction).

In this case, the Court first analyzed Public Law 112-226 in extensive detail, ultimately concluding that it retains certiorari jurisdiction over decisions of the

Virgin Islands Supreme Court. Afterwards, however, the Court concluded, based on binding precedent,[2] that "Bason's death clearly moots any reinstatement claim on his behalf," thus rendering it without Article III jurisdiction. *UIW-SIU v. Gov't of the V.I.*, 746 F.3d 115, 133 (3d Cir. 2014) (citing *Scott v. Univ. of Del.*, 601 F.2d 76, 81 n.8 (3d Cir. 1979)). By interpreting Public Law 112-226 despite finding a "clear" absence of Article III jurisdiction pursuant to rote application of binding precedent, the Court engaged in precisely the sort of analysis the U.S. Supreme Court has cautioned federal courts against: resolving a complex jurisdictional issue of first impression when doing so is not necessary to the disposition of the case. *See Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) ("In general, courts should think hard, and then think hard again, before turning small cases into large ones."). Rather than essentially issuing an advisory opinion on the meaning of Public Law 112-226, this Court should refrain from addressing this issue, and leave the interpretation of Public Law 112-226 for a more appropriate case presenting a live controversy between the parties.[3]

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[2] *See* 3d Cir I.O.P. 9.1 (2010) ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel.").

[3] The unusual method through which the opinion resolved this appeal has collateral effects that may impact other pending cases. Since the Court held that it has statutory jurisdiction notwithstanding Public Law 112-226, but lacks Article III jurisdiction due to Bason's death, neither the appellant nor the appellee possesses

B. Public Law 112-226 Divests this Court of Jurisdiction Over This Case

In its opinion, this Court concluded that the phrase "cases commenced" in section 3 of Public Law 112-226 "carries a broader meaning referring to the filing of a complaint in the [Virgin Islands] Superior Court." 746 F.3d at 126. "Cases commenced" in this context, however, is subject to only one reasonable interpretation. Section 1 of Public Law 112-226 is titled "Direct Review by U.S. Supreme Court of Decisions of Virgin Islands Supreme Court," and section 2 codifies a procedure for attaining that review. Consequently, it is not clear why section 3 would not simply refer back to the "direct review" of Virgin Islands Supreme Court decisions referenced in sections 1 and 2, *i.e.*, a certiorari petition or other initiating document filed with the U.S. Supreme Court that seeks review of a Virgin Islands Supreme Court decision. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997) (turning to "[t]he broader context provided by other sections of the statute" for guidance in determining meaning of a word); *Bell v. Reno*, 218 F.3d 86, 91 (2d Cir. 2000) ("It is well established that the title of a statute or section is an indication of its meaning.") (citing *INS v. Nat'l Ctr. for Immigrants'*

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an incentive to seek review of the Court's interpretation of Public Law 112-226 with either the en banc Third Circuit or the U.S. Supreme Court, since the ultimate result—dismissal—would remain the same. Nevertheless, since future panels of this Court will be bound by this Court's interpretation of Public Law 112-226, *see* 3d Cir I.O.P. 9.1, litigants in live cases, who ordinarily would have an incentive to litigate the meaning of the "cases commenced" language, will be foreclosed from doing so.

Rights, Inc., 502 U.S. 183, 189 (1991)).

Nevertheless, despite the title of Public Law 112-226 and the context in which "cases commenced" appears, the Court concluded that "cases commenced" referred to the filing of a complaint in the Superior Court—a position advocated by neither the appellant nor the appellee in their principal briefs.[4] At the very least, this demonstrates that the Court should have treated this language as ambiguous. *United States v. Gibbens*, 25 F.3d 28, 34 (1st Cir. 1994) ("A statute is ambiguous if it reasonably can be read in more than one way."); *Taylor v. Cont'l Grp. Change in Control Severance Pay Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991) ("A term is ambiguous if it is subject to reasonable alternative interpretations.").

"When the language of a statute is ambiguous, we look to its legislative history to deduce its purpose." *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003). The opinion, however, did not do so, even though every member of Congress that commented on the legislation was unequivocal about its purpose. Representative Howard Coble, the Chair of the Committee on the Judiciary's Subcommittee on Courts, Commercial and Administrative Law, to which Public

[4] In its principal brief, the appellant did not address the meaning of "cases commenced," but instead argued that this court possessed jurisdiction because the Virgin Islands Supreme Court had issued its decision on November 26, 2012, one month before Public Law 112-226 went into effect. In its brief, the appellee argued that "cases commenced" refers to certiorari petitions. It is only in its reply brief that the appellant stated, in passing, that "this appeal was commenced on June 7, 2011." (Reply Br. 1.)

Law 112-226—then H.R. 6116—had been referred, stated that "H.R. 6116 adopts the third circuit recommendation" and "simply authorizes the U.S. Supreme Court to review, at its discretion, *all final judgments* rendered by the Virgin Islands Supreme Court."[5] Representative Robert Scott likewise stated that "this bill simply implements the recommendation of the third circuit judicial council," and that "H.R. 6116 effectuates the third circuit's recommendations by deleting from the Revised Organic Act both the provisions granting appellate jurisdiction to the third circuit and the reporting requirement."[6] Representative Scott further stated that the drafters of H.R. 6116 had received "input… from the U.S. Supreme Court" and had slightly altered the bill in response to that institution's comments, and indicated that the bill was intended to provide for direct review in the same manner provided to the Guam Supreme Court.[7] Delegate Donna Christensen, the sponsor of H.R. 6116, stated that the purpose of the bill was to "mak[e] the Virgin Islands Supreme Court just like every other high court in the States and territories."[8] Finally, Delegate Eni Faleomavaega also stated that H.R. 6116 "simply puts into

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[5] 158 CONG. REC. H6353 (statement of Rep. Coble) (emphasis added).

[6] *Id.* (statement of Rep. Scott).

[7] *Id.*

[8] *Id.* at H6354 (statement of Del. Christensen).

legislation a decision vetted by the judicial council of the third circuit."[9]

As described by these members of Congress, the Third Circuit Judicial Council Report recommended that Congress "consider legislation providing 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," and at no point recommended that the Third Circuit retain certiorari jurisdiction over any subset of cases.[10] Moreover, it is so widely acknowledged as to not require citation that no other state or territorial court of last resort is in any way subject to the certiorari jurisdiction of a federal court of appeals. When the Subcommittee Chair, sponsor, and other legislators stated that the purpose of the bill was to implement the Report's recommendations by making the Virgin Islands Supreme Court like every other state or territorial supreme court, there is no question that they intended for the U.S. Supreme Court to exercise certiorari jurisdiction over *all* certiorari petitions and other proceedings not yet filed.

The actions of the U.S. Supreme Court following the passage of Public Law 112-226 provide further support for the proposition that "cases commenced" refers to certiorari petitions filed with that Court. When the U.S. Supreme Court disposes

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[9] *Id.* at H6355 (statement of Del. Faleomavaega).

[10] Report of the Judicial Council of the United States Court of Appeals for the Third Circuit on the Virgin Islands Supreme Court, http://www.visupremecourt.org/wfData/files/BookletReportofVirginIslandsSupremeCourt.pdf, *archived at* http://perma.cc/MZ2Z-64NJ.

of a certiorari petition without considering the claims in the petition on the merits, it specifies in its final order that the certiorari petition is "dismissed" rather than "denied."[11] *See* Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727, 732 (2005) ("'Dismissed' is the appropriate word in decretal language when an appeal is dismissed as untimely, or because the judgment or order appealed from is not final and no basis exists for appeal from a non-final order.").

Since the enactment of Public Law 112-226, litigants have sought review of

[11] *See, e.g.*, *Villegas v. Texas*, __ S. Ct. __, 2014 WL 2011598, at *1 (May 19, 2014) ("The petition for a writ of certiorari is dismissed as moot."); *Riley v. Delaware*, 134 S. Ct. 1951 (2014) ("Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of certiorari to the Supreme Court of Delaware dismissed. See Rule 39.8."); *Hargrove v. United States*, 133 S. Ct. 1862 (2013) ("The petition for writ of certiorari was dismissed today pursuant to Rule 46 of the Rules of this Court."); *Garcia v. Texas*, 133 S. Ct. 21 (2011) ("Petition for writ of certiorari to the Court of Criminal Appeals of Texas dismissed as moot."); *Smith v. Parke*, 518 U.S. 1031 (1996) ("Petition for writ of certiorari to the United States Court of Appeals the Seventh Circuit dismissed for want of jurisdiction."); *Lonchar v. Thomas*, 515 U.S. 1154 (1995) ("Petition for a writ of certiorari to the Supreme Court of Georgia dismissed for want of jurisdiction."); *F.D.I.C. v. Corman Constr., Inc.*, 508 U.S. 958 (1993) ("The petition for writ of certiorari is dismissed for want of jurisdiction."); *Draper v. Ohio*, 498 U.S. 916 (1990) ("The petition for a writ of certiorari is dismissed for want of jurisdiction."); *Patterson v. South Carolina*, 482 U.S. 902 (1987) ("The petition for a writ of certiorari is dismissed for want of jurisdiction."); *SHARE v. Bering*, 479 U.S. 1050 (1987) ("The petition for a writ of certiorari is dismissed for want of jurisdiction."); *Moreland v. Poss*, 474 U.S. 807 (1985) ("Petition for writ of certiorari to the Supreme Court of Georgia is dismissed for want of a final judgment."); *Horine v. Oregon*, 466 U.S. 934 (1984) ("The petition is dismissed for want of a final judgment."); *Mianecki v. Second Judicial Dist. Ct. of Nevada*, 464 U.S. 806 (1983) ("The petition for writ of certiorari is dismissed for want of a final judgment.").

five Virgin Islands Supreme Court decisions by filing certiorari petitions with the U.S. Supreme Court. In all five cases, the U.S. Supreme Court *denied* the certiorari petitions, rather than dismissing them for lack of jurisdiction,[12] even though all involved criminal charges that were initially brought in the Virgin Islands Superior Court prior to December 28, 2012.

While it is well-established that "denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *Teague v. Lane*, 489 U.S. 288, 296 (1989), it is equally well-established that the U.S. Supreme Court considers its jurisdiction in *every* case that comes before it, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 305-06 (1962), and that jurisdiction is not a merits question. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 253 (2010) (distinguishing between jurisdictional and merits questions). Had the U.S. Supreme Court concluded that it lacked jurisdiction over those five petitions, it would have, consistent with its institutional practices, noted the absence of jurisdiction in its final orders, rather than simply denying certiorari. Therefore, by holding that the Third Circuit, and not the U.S. Supreme Court, possesses jurisdiction over pre-

[12] *See Connor v. Virgin Islands*, 134 S. Ct. 793 (2013) ("Petition for writ of certiorari to the Supreme Court of the Virgin Islands denied."); *Philip v. Virgin Islands*, 134 S. Ct. 798 (2013) (same); *Ward v. Virgin Islands*, 134 S. Ct. 516 (2013) (same); *DeGroot v. Virgin Islands*, 134 S. Ct. 441 (2013) (same); *Najawicz v. Virgin Islands*, 134 S. Ct. 178 (2013) (same). Notably, despite the U.S. Supreme Court already denying certiorari, the defendant in *Najawicz* has filed a certiorari petition with the Third Circuit, which remains pending with the Court.

December 28, 2012 cases, this Court effectively overruled the U.S. Supreme Court's determination that it had jurisdiction over those five petitions.

Moreover, this Court, while heavily relying on opinions interpreting AEDPA and other unrelated statutes,[13] ignored that "cases commenced" is a phrase frequently employed by the U.S. Supreme Court to refer to the filing of new proceedings with that Court. For instance, when the U.S. Supreme Court revises its procedural rules, the Court issues an order stating the effective date of those rules, and provides that those rules "shall govern all proceedings in *cases commenced* after that date."[14] The U.S. Supreme Court has never turned to the date a complaint was filed in a federal district court to determine whether to apply an amended rule, for unquestionably the phrase "cases commenced," when used in

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[13] It is not clear how AEDPA and the supplemental jurisdiction and removal statutes are relevant to this case. Since supplemental jurisdiction and removal are concepts applicable solely to trial courts, the phrase "civil action commenced" is clearly referring to the filing of a trial court complaint. And since AEDPA contains some provisions that apply to trial courts and others that apply only to appellate courts, it is not surprising that Congress used the phrase "appellate cases commenced" to distinguish between a trial court requirement and an appellate court requirement.

[14] *See, e.g.*, *Order of April 19, 2013*, http://www.supremecourt.gov/ctrules/041913zr.pdf, *archived at* http://perma.cc/RS9J-R43G; *Order of January 12, 2010*, http://www.supremecourt.gov/orders/courtorders/011210zr.pdf, *archived at* http://perma.cc/QL24-CUCL; *Order of July 17, 2007*, 2007 WL 8097218 (U.S. July 17, 2007); *Order of March 14, 2005*, http://www.supremecourt.gov/orders/courtorders/031405pzr.pdf, *archived at* http://perma.cc/RH4M-7NN4.

the context of procedural rules governing the U.S. Supreme Court, refers to proceedings initiated with the U.S. Supreme Court. *See, e.g.*, *Zatko v. California*, 502 U.S. 16 (1991) (applying amended Supreme Court Rule 39 to certiorari petitions where lower court decisions had been issued prior to July 1, 1991 effective date).

In its opinion, this Court emphasized that "Congress could have provided that H.R. 6116 applies to 'appellate cases commenced' or 'certiorari proceedings commenced'…." 746 F.3d at 126. But since Public Law 112-226 concerns the jurisdiction of the U.S. Supreme Court, and the U.S. Supreme Court was consulted with respect to the language used in this legislation, it should come as no surprise that Congress used the phrase "cases commenced" in Public Law 112-226 when referring to proceedings initiated in the U.S. Supreme Court—in line with the manner in which the U.S. Supreme Court has consistently used that phrase. Furthermore, not all cases arising from the Virgin Islands Supreme Court will involve an appeal or a certiorari petition; for example, one litigant recently filed a petition for writ of mandamus with this Court to compel action from the Virgin Islands Supreme Court. *See In re Morton*, 491 Fed. Appx. 291, 295 (3d Cir. 2012) (denying petition for writ of mandamus directed to the Virgin Islands Supreme Court). Importantly, a mandamus proceeding is not an "appeal," but an original proceeding. *Madden v. Myers*, 102 F.3d 74, 77 (3d Cir. 1996). By using the

phrase "cases commenced"—the same phrase used by the U.S. Supreme Court to refer to its entire docket, which consists of certiorari proceedings, appeals as of right, and original proceedings for mandamus and other extraordinary writs—Congress clearly sought to use all-inclusive language to capture all possible scenarios through which the U.S. Supreme Court might be asked to review a Virgin Islands Supreme Court decision. *See* 16B Charles Alan Wright et al., *Extraordinary Writ Review of State Courts*, FED. PRAC. & PROC. JURIS. § 4018 (3d ed. 2012) (summarizing U.S. Supreme Court's original jurisdiction over mandamus and other writs directed towards state courts of last resort).

Not only did this Court not consider the U.S. Supreme Court's longstanding construction of "cases commenced" in holding that the language in Public Law 112-226 refers to the filing of a complaint in the Virgin Islands Superior Court, but the Court also did not take into account that less than half of the cases filed with the Virgin Islands Supreme Court in Fiscal Year 2012 were appeals,[15] with the remainder consisting of original proceedings for mandamus and other writs, attorney discipline, and bar governance matters, any of which may be the subject of a certiorari petition upon issuance of a final judgment. Further, the Virgin Islands Superior Court often acts as an intermediate appellate court, hearing

[15] 2012 Annual Report, United States Virgin Islands Courts and Judicial System, http://www.visupremecourt.org/wfdata/files/anlrprt.pdf, *archived at* http://perma.cc/LP5E-BHFX.

appeals from administrative agencies. *See, e.g., Pichardo v. V.I. Comm'r of Labor*, 613 F.3d 87, 90 (3d Cir. 2010). Since appeals of cases initiated by complaints filed in the Virgin Islands Superior Court do not constitute even a majority of the Virgin Islands Supreme Court's caseload, it is not clear why Congress would tie the effective date of Public Law 112-226—and the appealability of *all* final judgments of the Virgin Islands Supreme Court, regardless of origin—to the date a complaint is filed in the Superior Court.

Additionally, when interpreting a statute, a court must always "take account of the specific context in which that language is used, and the broader context of the statute as a whole," in order to "avoid constructions that produce odd or absurd results or that are inconsistent with common sense." *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (citing *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454 (1989)). The approach adopted by the Court, where the date a complaint is filed in the trial court triggers review by either the Third Circuit or the U.S. Supreme Court, is the quintessential odd or absurd result that should be avoided. Prior to Public Law 112-226, 48 U.S.C. § 1613 provided that the Third Circuit would automatically lose certiorari jurisdiction over all cases upon the passage of fifteen years following the establishment of the

Virgin Islands Supreme Court, *i.e.*, January 28, 2022.[16] However, under the Court's interpretation of Public Law 112-226, the Third Circuit would retain certiorari jurisdiction *after* January 28, 2022, so long as a complaint was filed with the Superior Court prior to December 28, 2012. Given that, to this day, cases filed as early as the 1980s remain pending in the Virgin Islands local court system, it is all but certain that many cases filed before December 28, 2012, will remain eligible for certiorari review after January 28, 2022. Under this approach, no mechanism exists to truly end the Third Circuit's oversight of the Virgin Islands Judiciary, an absurd result given that the stated purpose of Public Law 112-226—when first recommended by the Third Circuit Judicial Council and later considered by Congress—was to end such oversight.

Even if this Court were to hold in a later case that certiorari jurisdiction over all Virgin Islands Supreme Court cases would still be lost on January 28, 2022—since the former statutory provisions would still apply to the pre-December 28, 2012 cases—the result would be no less absurd. The former 48 U.S.C. § 1613 provided that the Third Circuit Judicial Council must submit a report to Congress

[16] *See Oden v. Northern Marianas College*, 440 F.3d 1085, 1090 (9th Cir. 2006) (holding Ninth Circuit automatically lost jurisdiction over certiorari petitions from the Northern Mariana Islands Supreme Court, established on May 2, 1989, on May 1, 2004, regardless of when notice of appeal had been filed). The Virgin Islands Supreme Court "officially assumed appellate jurisdiction over appeals from the Superior Court on January 29, 2007." *Hypolite v. People*, 51 V.I. 97, 101 (V.I. 2009).

every five years to evaluate the Virgin Islands Supreme Court's suitability for direct review by the U.S. Supreme Court. The "cases commenced" effective date, however, applies to all the provisions of Public Law 112-226, including the deletion of the reporting requirement. So if this Court remains of the belief that Public Law 112-226 only applies to Virgin Islands Superior Court cases filed on or after December 28, 2012, while the former section 1613 applies to those filed prior to that date, it would seem that the Third Circuit Judicial Council will be required to continue issuing a report every five years—but only with respect to the pre-December 28, 2012 cases. Surely this could not have been Congress's intent in enacting Public Law 112-226.

The bifurcated certiorari arrangement mandated by the Court's decision also seriously undermines the administration of justice in the Virgin Islands by confusing litigants and judges as to which court is the final arbiter of Virgin Islands local law. One Superior Court judge, relying on the now-vacated opinion, has already held that "the U.S. Court of Appeals for the Third Circuit [is] the Court of last resort in this jurisdiction in all cases commenced prior to December 28, 2012."[17] Since not all judges process cases with the same dispatch, the Virgin Islands Supreme Court concurrently hears appeals in cases where the complaints

[17] *Hodge v. V.I. Telephone Corp.*, Super. Ct. Civ. No. 298/2012, __ V.I. __, 2014 WL 1508493, at *3 (V.I. Super. Ct. Apr. 11, 2014).

were filed before and after December 28, 2012. Thus, the Virgin Islands Supreme Court may issue opinions in two appeals on the same day—one where the trial court complaint was filed prior to December 28, 2012, and the other after—involving the same issue of local law. Under the Court's construction of Public Law 112-226, one opinion would be reviewable by the Third Circuit, and the other would be unreviewable.[18] If the Third Circuit grants certiorari and reverses in the matter in which it retains jurisdiction, would local Virgin Islands courts then be bound by that decision even in cases filed after December 28, 2012? Or would two sets of Virgin Islands substantive law proceed in parallel—one for Superior Court matters filed prior to December 28, 2012, in which the Third Circuit is the final arbiter of Virgin Islands local law, and another for those filed after December 28, 2012? And if the Third Circuit decision is binding even on these later cases and, upon the passage of time, is found to be wrongly decided, what mechanism would there be to set it aside, given that the U.S. Supreme Court would lack certiorari jurisdiction over matters of local law?

Unquestionably, Congress, in enacting a law providing for direct review of Virgin Islands Supreme Court decisions by the U.S. Supreme Court, could not have intended to create such a two-tiered system, or to set up a potential conflict

[18] As this Court acknowledged, section 2 of Public Law 112-226 limits the U.S. Supreme Court's certiorari jurisdiction over the Virgin Islands Supreme Court only to cases implicating federal law. 746 F.3d at 124 (citing 28 U.S.C. § 1260).

between federal and local courts as to the final arbiter of Virgin Islands local law. In fact, it seems clear that Congress intended to prevent such a conflict by giving the Virgin Islands Supreme Court final say on all matters of Virgin Islands local law—the same authority possessed by every other state and territorial court of last resort. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'").

Finally, the cases cited by the Court in its vacated opinion do not support its conclusion that "cases commenced" refers to the date a litigant filed a complaint with the Superior Court. The Court observed that

> the Government and the Union commenced their respective Virgin Islands Superior Court actions in 2011, and the Virgin Islands Supreme Court, in turn, did not render its own decision until November 2012. We find it improbable that H.R. 6116 was ever meant to strip this Court of certiorari jurisdiction when the enactment date of this legislation fell right in the middle of the applicable time period for filing a certiorari petition with this Court.

746 F.3d at 130. However, the Court did not consider that, in passing section 13 of Public Law 86-3, which divested the Ninth Circuit of its jurisdiction over the Supreme Court of Hawaii, Congress explicitly provided that it would retain jurisdiction not only over appeals already filed, but those not yet taken:

> Parties shall have the same rights of appeal from and appellate review of final decisions of… the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, *whether or not an appeal therefrom shall have been perfected prior to such admission*, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall

> have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to… a court of the State, as may be appropriate.

73 Stat. 4, 10 (emphasis added); *see Duarte v. Bank of Hawaii*, 287 F.2d 51, 52 (9th Cir. 1961) (noting the Ninth Circuit's continuing jurisdiction to review Hawaii Supreme Court decisions pursuant to section 13 of Public Law 86-3).

It is well-established that Congress is presumed to be familiar with existing law when it legislates. *Cannon v. Univ. of Chicago*, 447 U.S. 677, 699 (1979). Previously, each time Congress sought to preserve a federal court's jurisdiction over a territorial court, it has explicitly done so. For example, in providing for direct review of Puerto Rico Supreme Court decisions by the U.S. Supreme Court, Congress specified that the First Circuit would retain jurisdiction over appeals already taken. Pub. L. No. 87-189, § 3. When it divested the District Court of the Virgin Islands of its appellate jurisdiction over the Virgin Islands Superior Court, Congress expressly stated that the District Court would not lose jurisdiction over any appeal then pending. 48 U.S.C. § 1613a(d). It did the same with Hawaii, not just with appeals already taken, but also those that had not yet been perfected. Pub. L. No. 86-3, § 13. Yet it did not do so with Guam, resulting in the immediate transfer of jurisdiction from the Ninth Circuit to the U.S. Supreme Court, even in those cases that were fully briefed, argued, and simply awaiting issuance of a decision. *Santos v. Guam*, 436 F.3d 1051, 1053 (9th Cir. 2006).

This Court distinguished the *Santos* case by stating that, shortly thereafter, the U.S. Supreme Court, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), "rejected the theory that jurisdiction-stripping provisions apply retroactively in the absence of an express reservation for pending cases," and thus implicitly rejected the reasoning of *Santos*. 746 F.3d at 125. However, the Court did not acknowledge *Limtiaco v. Camacho*, 549 U.S. 483 (2007), decided after *Hamdan*, in which the U.S. Supreme Court fully agreed with the Ninth Circuit's holding in *Santos*, and concluded that it possessed jurisdiction over the certiorari petition after the Ninth Circuit's dismissal pursuant to *Santos*.[19] In other words, *Hamdan* cannot be read for the broad proposition relied upon by this Court, given that the U.S. Supreme Court unanimously endorsed *Santos* itself a year later in *Limtiaco*;[20] had the U.S. Supreme Court believed that *Hamdan* overruled *Santos*, it would not have accepted jurisdiction over the *Limtiaco* certiorari petition, but instead remanded the matter

[19] In *Limtiaco*, the Attorney General of Guam filed a certiorari petition with the Ninth Circuit, which was granted. 549 U.S. at 486. Before the Ninth Circuit ruled on the merits of the appeal, Congress passed the amendments stripping the Ninth Circuit of its certiorari jurisdiction. *Id.* After the Ninth Circuit issued its *Santos* opinion, it dismissed the Guam Attorney General's petition pursuant to that decision. *Id.* The Attorney General sought certiorari with the U.S. Supreme Court, which granted certiorari, held in its opinion that it and not the Ninth Circuit possessed jurisdiction over the matter, and proceeded to address the merits. *Id.* at 488.

[20] While ostensibly a 5-4 decision, the four justices writing separately stated that they "join Part II of the Court's opinion," 549 U.S. at 492 (Souter, J.), in which the jurisdictional question was discussed, thus making that U.S. Supreme Court's endorsement of *Santos* unanimous.

to the Ninth Circuit for a disposition on the merits. Thus, at least in the context of statutes involving federal oversight of territorial courts, it is clear that the U.S. Supreme Court has not departed from its longstanding rule that jurisdiction-stripping statutes must contain an explicit "reservation as to pending cases" in order to have them remain subject to the former procedure. *Bruner v. United States*, 343 U.S. 112, 116-17 (1952) ("Th[e] rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court.").

Clearly, the Guam amendment interpreted in *Santos* and *Limtiaco* differs from Public Law 112-226, in that the Guam enactment was completely silent on an effective date while Public Law 112-226 contains the "cases commenced" language. To the extent this difference is significant, it is easy to reconcile: having seen that the Ninth Circuit and the U.S. Supreme Court interpreted the absence of an effective date as mandating dismissal of pending certiorari petitions, Congress included the "cases commenced" language to allow the Third Circuit to retain jurisdiction over those certiorari petitions already filed before the passage of Public Law 112-226—and to resolve those cases in which it had already granted certiorari but had yet to issue a decision—while requiring all litigants who had not yet filed certiorari petitions to instead file them with the U.S. Supreme Court.

C. This Court Lacks Supervisory Authority Over the Virgin Islands Judiciary

The appellant, in its petition for rehearing, requests that this Court vacate the opinion rendered by the Supreme Court of the Virgin Islands pursuant to the doctrine set forth in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). However, as the appellant acknowledges, the *Munsingwear* case originated in the federal system, and the *Munsingwear* Court explicitly states that it has adopted such a rule pursuant to its "supervisory power over the judgments of the lower federal courts," which it correctly describes as a "broad" power. *Id.* at 40 (citing 28 U.S.C. § 2106). Significantly, the U.S. Supreme Court still maintains that the *Musingwear* rule applies to "the federal system." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *Munsingwear*, 340 U.S. at 39), and the U.S. Supreme Court has never extended the rule to cases originating in state courts. On the contrary, the U.S. Supreme Court has repeatedly declined to vacate a state court decision when a certiorari proceeding has become moot, electing instead to simply dismiss the certiorari petition.[21]

[21] *See, e.g., Jordan v. Ohio*, 543 U.S. 952 (2004) ("Petition for writ of certiorari to the Supreme Court of Ohio dismissed as moot."); *Anderson v. Kentucky*, 515 U.S. 1155 (1995) ("It appearing that petitioner died April 6, 1994, the writ of certiorari is dismissed as moot."); *Attorney General of New Jersey v. First Family Mortgage Corp. of Florida*, 487 U.S. 1213 (1988) ("The writ of certiorari to the Supreme Court of New Jersey is dismissed as moot."); *Michigan v. Shabaz*, 478 U.S. 1017 (1986) ("On writ of certiorari to the Supreme Court of Michigan. The order entered March 31, 1986, granting the petition for a writ of certiorari is vacated. The petition for a writ of certiorari is dismissed as moot."); *Tiverton Board of License*

Although the appellant asserts that "the Supreme Court of the United States has applied the *Munsingwear* vacatur to appeals from decisions of the highest state courts," (Pet. 5), the three cases cited do not support this broad proposition. While *Massachusetts v. Oakes*, 491 U.S. 576, 585 (1989), appears to extend *Munsingwear* to state court cases, the portion of the decision that the appellant cites is from Justice O'Connor's four justice plurality opinion, which does not represent the holding of the majority of the Court. Rather, it is Part I of Justice Scalia's opinion concurring in the judgment, the only position that garnered the support of five justices, that is the controlling opinion in that case. *See Martin v. Commonwealth*, 96 S.W.3d 38, 52-53 (Ky. 2003) (noting that the portion of the plurality opinion in *Oakes* discussing mootness is not controlling); *accord Marks v. United States*, 430 U.S. 188, 193 (1977).

Admittedly, the remaining two cases, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *Bus Employees v. Wis. Emp't Relations Bd.*, 340 U.S. 416 (1951), provide some support for the appellant's position. Neither decision, however,

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Comm'rs v. Pastore, 469 U.S. 238, 240 (1985) (dismissing certiorari petition as moot without disturbing decision of Rhode Island Supreme Court); *Aikens v. California*, 406 U.S. 813, 814 (1972) (dismissing certiorari petition as moot, but not granting petitioner's motion for remand or otherwise disturbing California Supreme Court decision); *Ditson v. California*, 372 U.S. 933 (1963) ("[U]pon the prior suggestion of mootness, the petition for writ of certiorari to the Supreme Court of California is dismissed."); *Scott v. California*, 364 U.S. 876 (1960) ("Upon the suggestion of counsel for petitioner of the death of petitioner, the petition for writ of certiorari to the Supreme Court of California is dismissed as moot.").

states that the *Munsingwear* rule is being extended to state courts; rather, both opinions simply provide that the state court opinion is being vacated, without any legal analysis. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("We do not view these cases as controlling precedent…. [U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions." (citing *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37–38 (1952))). In fact, the *DeFunis* opinion appears to contradict itself in this regard, in that while it states that the judgment is being vacated, it also states that "there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, *now that the Supreme Court of Washington has spoken*," 416 U.S. at 319 (emphasis added), implying that it intended for the Supreme Court of Washington's opinion to continue to have binding effect. In any case, the absence of any legal reasoning to support extending *Munsingwear* vacatur—a doctrine grounded in the U.S. Supreme Court's supervisory power over the lower federal courts—to state courts, over which the U.S. Supreme Court has repeatedly, and explicitly, emphasized it cannot regulate pursuant to its supervisory powers,[22] combined with the U.S. Supreme

[22] *See, e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345 (2006) (the U.S. Supreme Court lacks supervisory authority to require state courts to suppress evidence obtained in violation of the Vienna Convention); *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States."); *Victor v. Nebraska*, 511

Court's consistent practice over the past several decades of not vacating state court decisions as moot, strongly indicates that *Munsingwear* and its progeny do not apply to state court decisions. *L.A. Tucker Truck Lines*, 344 U.S. at 38; *Webster v. Fall*, 266 U.S. 507, 511 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (collecting cases).

The U.S. Supreme Court's refusal to extend the *Munsingwear* vacatur rule to state court decisions is consistent with its repeated holdings that it lacks supervisory authority to regulate the practices of state courts. Although the Virgin Islands is not a state, Congress has declared in the Revised Organic Act that

> The relations between the courts established by the Constitution or laws of the United States and the courts established by local law with respect to *appeals*, *certiorari*, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.

48 U.S.C. § 1613 (emphases added). In fact, the U.S. Supreme Court has declined to exercise supervisory authority even over the federal District Court of the Virgin

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U.S. 1, 17 (1994) (the U.S. Supreme Court "ha[s] no supervisory power over the state courts" that would forbid use of a constitutional, but not ideal, jury instruction); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

Islands on matters that reflect territorial interests. *Barnard v. Thorstenn*, 489 U.S. 546, 551-52 (1989). And while this Court, to the extent it maintains certiorari jurisdiction, may set aside decisions it finds manifestly erroneous, it has acknowledged that it lacks plenary supervisory authority over the Virgin Islands Judiciary. *Addie v. Kjaer*, 737 F.3d 854, 866 (3d Cir. 2013) (referring to the Third Circuit's "former supervisory capacity" prior to creation of Virgin Islands Supreme Court); *People of the V.I. v. John*, 654 F.3d 412, 415 (3d Cir. 2011) ("[I]t is plain that Congress intended for this court's certiorari jurisdiction vis-à-vis the Virgin Islands Supreme Court to mirror the United States Supreme Court's certiorari jurisdiction vis-à-vis any of the fifty state courts of last resort.").

The Supreme Court of the Virgin Islands has held that the courts comprising the Virgin Islands Judicial Branch are not Article III courts, and that the cases and controversies requirements of Article III are not jurisdictional as applied to Virgin Islands local courts.[23] These decisions are consistent with other state courts of last resort, which have also declined to treat the cases and controversies limitation found in Article III as jurisdictional.[24] It has always been the expectation that,

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[23] *See, e.g., Tip Top Constr. Corp. v. Gov't of the V.I.*, S. Ct. Civ. No. 2014-0006, __ V.I. __, 2014 V.I. Supreme LEXIS 26, at *9 n.2 (V.I. Apr. 11, 2014) (ripeness); *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564 (V.I. 2012) (standing); *Vazquez v. Vazquez*, 54 V.I. 485, 489 n.1 (V.I. 2010) (mootness).

[24] *See, e.g., Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 309 P.3d 1289, 1292 (Ariz. 2013); *Gregory v. Shurtleff*, 299 P.3d 1098, 1102 (Utah

"now that the Virgin Islands has established an insular appellate court[, it] will begin developing indigenous jurisprudence." *Defoe v. Phillip*, 702 F.3d 735, 743 (3d Cir. 2012) (quoting *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 361 n.3 (3d Cir. 2007)); *see also BA Props. Inc. v. Gov't of the V.I.*, 299 F.3d 207, 212 (3d Cir. 2002) ("[The] Virgin Islands Supreme Court… would essentially have the final word on the interpretation of local Virgin Islands law."). To impose onto the local Virgin Islands court system the requirements of Article III, when the courts of the Virgin Islands are not Article III courts and the Virgin Islands Legislature has not limited their jurisdiction to live cases and controversies, is not only inconsistent with the treatment afforded by the U.S. Supreme Court to state courts, but would further inhibit the Virgin Islands from developing its own indigenous legal system independent of the federal system.

III. CONCLUSION

This Court should refrain from interpreting Public Law 112-226 if it concludes that Bason's death deprives it of Article III jurisdiction. To the extent this Court nevertheless decides this question, it should give effect to the clear congressional intent that "cases commenced" refer to certiorari petitions or similar initiating documents filed with the U.S. Supreme Court. In any event, this Court should hold that it lacks supervisory authority to require the Virgin Islands

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2013); *Nini v. Mercer County Cmty. Coll.*, 995 A.2d 1094, 1105 (N.J. 2010).

Judiciary to comply with the cases and controversies requirements of Article III when doing so has no basis in Virgin Islands law.

June 2, 2014

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, Anthony Michael Ciolli, Counsel for *Amicus Curiae*, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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1. This *amicus curiae* brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), in that it contains 6,996 words, including headings, footnotes, and quotations but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Third Circuit Local Appellate Rule 29.1(b).

2. This *amicus curiae* brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Office 2010 and is set in 14-point sized Times New Roman font.

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I hereby certify that on June 2, 2014, electronic copies of the foregoing Brief of *Amicus Curiae* were served on all CM/ECF Filing Users through the CM/ECF system, and that a courtesy paper copy was sent via USPS mail, first class postage prepaid, to counsel to the following parties:

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