

Supreme Court of the United States

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DOCKET NO.12-351

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GEORGE W. CUMMINGS, III, PROGRESSIVE STATE BANK  
and PROGRESSIVE BANCORP, INC.  
Defendants/Petitioners

VERSUS

JOE DOUGHTY  
Plaintiff/Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE 5TH JUDICIAL DISTRICT COURT OF LOUISIANA,  
PARISH OF FRANKLIN

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PLAINTIFF/RESPONDENT  
JOE DOUGHTY'S  
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A CIVIL MATTER

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	1
REASONS FOR DENYING THE PETITION.....	4
A. THE DECISION BELOW INCLUDES NO REASONS FOR JUDGMENT ON THE RECORD .....	5
B. THE DECISION BELOW SHOULD NOT BE CONSIDERED FINAL JUDGMENT PURSUANT TO 28 U.S.C. § 1257(a) .....	8
C. THE DECISION BELOW IS AN INAPPROPRIATE VEHICLE FOR DISCRETIONARY REVIEW OF THIS FEDERAL ISSUE.....	11
 CONCLUSION.....	 14

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Coleman v. Thompson</i> , 501 U.S. 722, 729 (1991).....	12
<i>Cox v. Cohn Broadcasting Corp.</i> , .....	9, 11
<i>Doughty v. Cummings</i> , 28 So. 3d 580, 584 (La. App. 2 Cir. 12/30/09), writ denied, 31 So. 3d 394 (La. 4/9/2010) .....	3, 6, 7, 12
<i>Lambrix v. Singletary</i> , 520 U.S. 518, 522-23 (1997).....	12
<u>Statutes</u>	
28 U.S.C. § 1257(a) .....	4, 6, 8, 9, 11
28 U.S.C.A. § 1257 .....	8
31 U.S.C. § 5318(g)(3)(A) .....	7

## Statement of Facts

This case arises out of the June 29, 2006 indictment of Plaintiff/Respondent, Joe R. Doughty, on thirteen counts relating to his allegedly exceeding his authority as president of the Winnsboro branch of Progressive State Bank ("Progressive Bank") in Franklin, Louisiana, with regard to loans made to Abby Line, Olde Time Express ("Abby Line"). The charges against Mr. Doughty arose from two primary allegations: first, that Mr. Doughty had exceeded his authority with regard to the amount loaned to Abby Line, and second, that Mr. Doughty had allegedly approved loans to Abby Line without proper documentation. Specifically, Progressive Bank submitted a Suspicious Activity Report ("SAR") to the Financial Crime Enforcement Network ("FINCEN") dated January 10, 2003, regarding its allegations against Mr. Doughty.

In representing to the United States Attorney's office that that Mr. Doughty allegedly exceeded his authority with regard to the amount loaned and that he allegedly approved loans without proper documentation, Progressive Bank failed to disclose three important facts: first, that under the bank's own policy, Mr. Doughty was allowed to increase the line of credit and then had 45 days within which to

get ratification by the Directors Loan Committee; second, that in a memorandum dated March 28, 2003, the FDIC concluded that, after investigation, Mr. Doughty had committed no wrongdoing; and third, with regard to the allegation that Mr. Doughty approved loans without proper documentation, that the duty and responsibility to do so did not belong to him, but rather to his coworker, Tina Fortenberry. Following an investigation of the matter and an interview with Mr. Doughty, the Federal Bureau of Investigation prepared a 302 report on July 6, 2005 ("the 302").

Mr. Doughty retained an attorney, Julian R. Murray, Jr., in July of 2006 to defend him against the aforementioned charges. In November of 2006, Mr. Murray received a number of documents from the United States Attorney's office regarding the charges against Mr. Doughty. Upon review of these documents, Mr. Murray realized that they were inconsistent with the 302 and the charges upon which Mr. Doughty had been indicted. On January 14, 2008, Mr. Murray prepared a memorandum to Robert Gillespie, Assistant United States Attorney, detailing the inconsistencies between the 302 and the documents received from the United States Attorney's office. After receipt of this memorandum, the United States Attorney's office dismissed the indictment of Mr. Doughty in its entirety.

Mr. Doughty subsequently filed suit against Petitioners for defamation and malicious prosecution alleging that, as the result of a false and misleading Suspicious Activity Report filed by Petitioners for the

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<sup>1</sup> Petitioners  
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purpose of financial gain, he was indicted and became the subject of an extensive and complex investigation. Moreover, Mr. Doughty maintains that Petitioners made these misrepresentations to try to establish malfeasance on Doughty's part, so that Progressive could file a claim against its insurance policy for the loan losses.

Petitioners first filed Peremptory Exceptions of No Cause of Action and Prescription, both of which were denied by the Fifth Judicial District Court of Louisiana, Parish of Franklin. The Louisiana Court of Appeal for the Second Circuit reversed the trial court's denial of the Exception of Prescription as to the defamation claims and affirmed the trial court's denial of the Exception of No Cause of Action. *Doughty v. Cummings*, 28 So. 3d 580, 584 (La. App. 2 Cir. 12/30/09), writ denied, 31 So. 3d 394 (La. 4/9/2010).<sup>1</sup> Petitioners then sought discretionary review of the Second Circuit's decision from the Louisiana Supreme Court, which was denied without opinion. However, Petitioners did not seek review of these decisions.

Petitioners then filed a Motion for Summary Judgment with the Fifth Judicial District Court for the Parish of Franklin, Louisiana, which was dismissed by the court, orally and without explanation, on December 12, 2011, as reflected in the court's minute entry. Petitioners then sought review from the Second Circuit Court of Appeal for the State of Louisiana, which declined to exercise

<sup>1</sup> Petitioners refer to their Exception of No Cause of Action in the Petition as the "motion to dismiss." See Petition for a Writ of Certiorari, p.12.

discretionary authority to hear the case, without providing any reasons for its decision, on March 29, 2012.<sup>2</sup> Likewise, the Louisiana Supreme Court denied discretionary review of the case without explanation on June 22, 2010.

Petitioners filed this Petition for Writs of Certiorari following the denial of their Motion for Summary Judgment by the Fifth Judicial District Court, the Second Circuit's refusal to exercise supervisory jurisdiction, and the Louisiana Supreme Court's denial of discretionary review. None of the courts gave any reason whatsoever for their respective decisions to do so.

### Reasons for Denying the Petition

Petitioners ask this Honorable Court to review the denial of summary judgment by the Fifth Judicial District Court of Louisiana—a decision over which both the Second Circuit Court of Appeal and Louisiana Supreme Court declined to exercise their discretionary review. Pursuant to the Petition's Statement of Jurisdiction, Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), which provides this Court with the

<sup>2</sup> The Second Circuit merely concluded that its supervisory jurisdiction was not warranted. *See* Petition for a Writ of Certiorari, App. 2a-3a (internal citations omitted).

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jurisdiction to review final decrees or judgments rendered by the highest court of a State if a federal law is at issue.

Citing authority from this Court, Petitioners attempt to argue that, notwithstanding its interlocutory nature, the specific issues addressed in the Fifth Judicial District Court's denial of summary judgment in this case nonetheless make it appropriate for review under § 1257(a). Considering that the arguments asserted by Petitioners do not arise from the decision denying summary judgment, the absence of any reasons for the court's judgment on the record, the fact that Petitioners may still raise the federal issue later in the litigation, and the decision's absolute lack of precedential authority, however, this interlocutory decision is simply inappropriate for this Honorable Court's discretionary review.

A. The Decision Below Includes No Reasons for Judgment on the Record.

Even if this Court were to entertain Petitioners' proposition that the decision below may be considered a final judgment for the

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jurisdictional purposes of 28 U.S.C. § 1257(a), which is denied for the reasons discussed in further detail below, the decision that Petitioners invite this Honorable Court to review—the order of the Fifth Judicial District Court denying summary judgment—is not only unpublished, but also, as noted in the Petition, was delivered orally by the Court and is merely reflected in a minute order.

Petitioners attempt to remedy this obvious flaw in their argument by contending that the basis for the Fifth Judicial District Court's denial of immunity can be gleaned by reading the Louisiana Court of Appeal for the Second Circuit's opinion in *Doughty v. Cummings*, 28 So. 3d 580, 584 (La. App. 2 Cir. 12/30/09), *writ denied*, 31 So. 3d 394 (La. 4/9/2010). This premise, however, is blatantly flawed, as the aforementioned decision addressed Petitioners' Exception of No Cause of Action—not the Motion for Summary Judgment. In fact, the *entirety* of Petitioners' brief is premised on the procedural misapprehension that the decision for this Court's discretionary review is the Second Circuit's opinion in *Doughty v. Cummings*. *See id.* This is not the case. Despite the fact that Petitioners claimed immunity pursuant to the Annunzio-Wiley Act safe harbor provision in both their Exception of No

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Cause of Action and Motion for Summary Judgment, Petitioners cannot mischaracterize the reasoning applied by the Second Circuit in reviewing the decision based on a wholly different pleading and cite it as the reasons for judgment in the denial of the motion at hand.

In short, Petitioners now seek discretionary review of the wrong decision. If they wanted this Court to address the issues set forth in the Second Circuit's opinion in *Doughty v. Cummings*—a decision that does, in fact, include an analysis of the safe harbor provisions in the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A)—Petitioners could have sought review of the Louisiana Supreme Court's denial of discretionary review in the same manner as they do in the instant Petition for Writs of Certiorari. Petitioners in this matter did not seek this Court's review of the *Doughty v. Cummings* decision, however, and they cannot now assert those arguments in seeking review of the denial of summary judgment.

As such, Respondent respectfully contends that any and all substantive arguments asserted with regard to the safe harbor provisions of the Annunzio-Wylie Act are incorrectly raised in the Petition for Writs of

Certiorari, as they do not arise from the Fifth Judicial District Court's denial of summary judgment, which is the decision that Petitioners ask this Honorable Court to review. As such, certiorari is simply inappropriate in this matter.

**B. The Decision Below Should Not be Considered a Final Judgment Pursuant to 28 USC § 1257(a).**

In addition to the fact that the arguments asserted by Petitioners do not arise from the Fifth Judicial District Court of Louisiana's decision denying summary judgment, the denial of summary judgment is not a final judgment pursuant to 28 U.S.C. § 1257(a), which provides that the Supreme Court may review "Final judgments or decrees rendered by the highest court of a State in which a decision could be had[,]" where federal laws are at issue. 28 U.S.C.A. § 1257 (West 2012). Interlocutory decisions—such as a denial of summary judgment by a trial court—do not fall within the scope of this provision.

Petitioners argue that, based on the Court's reasoning in *Cox v. Cohn Broadcasting*

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*Corp.*, the decision below should be deemed a "final judgment" within the meaning of 28 U.S.C. § 1257(a). 420 U.S. 469 (1975). In *Cohn*, the Court held that there are certain circumstances in which an interlocutory decision is treated as a "final decision" for the purposes of discretionary review pursuant to 28 U.S.C. § 1257(a). *Id.* One such scenario occurs when a federal issue is finally decided in the state court, but further proceedings remain in which the aggrieved party could prevail on other grounds, thereby rendering the Supreme Court unable to review the issue at a later time. *Id.* at 482-83.

Petitioners assert in their Jurisdictional Statement that, in this case, ". . . the jurisdictional standard is met because it is possible that Petitioners could prevail in further proceedings on non-state grounds, thereby mooting the federal issue."<sup>3</sup> This reasoning, however, is erroneous. Rather, the jurisdictional requirement is not "met" simply because a Motion for Summary Judgment that had its basis in a claim of immunity was denied by a state trial court.

In the decision below, the federal issue was not "finally decided" within the meaning of the

<sup>3</sup> See Petition for a Writ of Certiorari, p.2.

*Cohn* Court's holding because Petitioners still have the opportunity to raise the issue of immunity later in the litigation. This interpretation is buttressed by the Supreme Court's explanation of the exception cited by Petitioners, which provides, in part: "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court . . . ." *Id.* at 482. Accordingly, with this language in mind, this narrow exception clearly contemplates a scenario in which the petitioning party has absolutely no future opportunity to raise the federal issue in state court, but could potentially prevail on another nonfederal claim. Thus, in order for a case to fall within this exception, it must be impossible for the petitioning party to still prevail on the federal issue.

Conversely, the denial of a defendant's motion for summary judgment does not preclude him from raising any issue, including federal issues, raised during summary judgment proceedings at another phase of the litigation. Thus, while Respondent concedes

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the possibility that Petitioners could potentially prevail on state law issues later in the litigation, it is nonetheless inaccurate to say that the denial of summary judgment on the federal issue necessarily means that the issue of immunity has been "finally decided."

Accordingly, because the denial of summary judgment by the Fifth Judicial District Court does not fall within the exception to the § 1257(a) requirement of a "final judgment" described in *Cohn*, this interlocutory decision is not within the Court's jurisdiction for discretionary review.

**C. The Decision Below is an  
Inappropriate Vehicle for  
Discretionary Review of this Federal  
Issue.**

Notwithstanding the foregoing discussion, this case is, at best, simply a poor vehicle for the resolution of the alleged conflict in authority described by Petitioners. As discussed above *in extenso*, the order of the Fifth Judicial District Court denying summary judgment is both unpublished and was delivered orally by the Court. As such, it has absolutely no precedential weight or value whatsoever and could not possibly affect

federal policy in any other matter. Moreover, because the decision is reflected in a minute order without any reasons for judgment on the record, there is no indication whatsoever that this denial of summary judgment will erode federal policy even in the matter at hand. In other words, without an opinion from which to discern and analyze the reasons for the Fifth Judicial District Court's decision to deny summary judgment, the decision below would be a poor candidate for discretionary review.

Finally, it is well established that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Without any reasons from the Fifth Judicial District Court with regard to its grounds for denying summary judgment, this Court cannot be sure that it is reviewing a decision based solely on the federal question at issue rather than independent state law grounds. Once again, Petitioners cannot rely on the reasoning from *Doughty v. Cummings* to argue otherwise. Accordingly, any argument that this decision is the appropriate case in

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which to address any disagreement between federal and state courts on the issue at hand is without merit.

In sum, the pending Petition for a Writ of Certiorari is, essentially, a request that this Court issue an opinion reversing a State trial court's denial of summary judgment for which not a single reason for judgment, written or otherwise, was provided on the record. Such a request is unequivocally inappropriate for discretionary review and, as such, certiorari should be denied in this case.

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Conclusion

For the reasons stated herein, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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