No. 19–_____

In the Supreme Court of the United States

RANGER AMERICAN OF THE V.I., INC. AND EMICA KING,

*Petitioner*s,

v.

FREDERIC J. BALBONI, JR.,

Respondent.

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

Congress has the power to "make all needful Rules and Regulations" for United States territories. U.S. Const. Art. IV, § 3. Throughout history, it has used this authority to extend portions of the Bill of Rights to the country's territories through federal legislation.

Territorial courts have at times tried to interpret a Congressionally-applied bill of rights differently than this Court interprets the source—the Bill of Rights. When Congress extended the Double Jeopardy Clause to the Philippines but its highest court departed from this Court's double jeopardy jurisprudence, this Court reversed. *Kepner v. United States*, 195 U.S. 100 (1904). Likewise, the Guam Supreme Court was reversed when it interpreted the First Amendment (applied to Guam by a federal statute) differently than this Court's First Amendment precedent. *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002). Similar decisions in other United States possessions yielded similar results. *See United States v. Husband R.*, 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (Panama Canal Zone) and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96 (1st Cir. 1946) (Puerto Rico).

This case is here because the Virgin Islands Supreme Court circumvented this Court's precedent in *Kepner*, rejected *Guerrero*, and ignored *Husband R.* and *Buscaglia*. The question presented is:

> Is the Virgin Islands Supreme Court bound by this Court's Equal Protection decisions where Congress explicitly applied the Equal Protection Clause to the Territory via a federal statute?

CORPORATE DISCLOSURE

Ranger American of the V.I., Inc. is wholly-owned by Ranger American Group Trust. No publicly-owned company owns 10% or more of Ranger American Group Trust.

DIRECTLY RELATED PROCEEDINGS

- *Balboni v. Ranger American of the Virgin Islands, Inc., et al.*, Case No. ST–14–CV–366, Superior Court of the Virgin Islands. Order entered on Jan. 24, 2018
- *Balboni v. Ranger American of the V.I., Inc., et al.*, Sup. Ct. Civ. No. 2018–0022, Supreme Court of the Virgin Islands. Judgment entered on June 2, 2019.

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JURISDICTION

The Supreme Court of the Virgin Islands entered its decision on June 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1260 to review a decision of the Supreme Court of the Virgin Islands by writ of certiorari.

STATUTORY PROVISIONS AT ISSUE

The statutory provisions at issue are set forth at App. 164a.

STATEMENT OF THE CASE

A. INTRODUCTION AND BACKGROUND.

1. The status of the Bill of Rights in the Territory of the Virgin Islands.

Territorial possessions of the United States occupy a unique niche under the U.S. Constitution. Because the territories are not "states," they are not a part of the United States in a constitutional sense. A territory cannot send electors to the electoral college in presidential elections and has no voting representation in either the House of Representatives or the Senate. And, while the U.S. Congress has generally created mechanisms by which territories can adopt a constitution and representative form of government,

until a territory does so and Congress approves it, a territory's form of government and the rights its people enjoy are dictated by federal law.[1]

In 1954, Congress created a system of government for the Virgin Islands when it enacted the Revised Organic Act of the Virgin Islands (48 U.S.C. §§ 1541–1645). Congress specified that the Virgin Islands would have a governor and the method of electing the governor. 48 U.S.C. § 1591. It determined that the territory would have a unicameral legislature, proscribed the number of legislators, the length of their terms, and how they would be elected. 48 U.S.C. §§ 1571–1573. It also created a judicial system for the Virgin Islands and authorized the Virgin Islands Legislature to create a local court system. 48 U.S.C. § 1611. Congress' control over governance of the Territory went so far as to specify the location for the capital of the Virgin Islands. 48 U.S.C. § 1541(b). And, pertinent to this petition, Congress extended portions of the Bill of Rights to the people of the Virgin Islands. 48 U.S.C. § 1561.

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[1] In 1976, Congress authorized the people of the Virgin Islands to adopt a constitution and their own form of government. Pub. L. No. 94–584, §§ 1–3, 90 Stat. 2899. The law requires any such constitution to recognize the supremacy of, *inter alia*, the Constitution and laws of the United States applicable to the Virgin Islands, "including, . . . [the] Revised Organic Act of the Virgin Islands." *Id.*, § 2(b)(1). Further, such a constitution must include a bill of rights. *Id.*, § 2(b)(3). The Territory has never successfully adopted a constitution despite five separate constitutional conventions. *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 682 n.4, 2015 WL 3634032 at *3 n.4 (2013).

This case comes before the Court because two of the three justices of the Supreme Court of the Virgin Islands departed from this Court's interpretations of the Bill of Rights and instead spun from whole cloth a "Virgin Islands Bill of Rights" that is unmoored from the U.S. Constitution and this Court's interpretations of it. This "Virgin Islands Bill of Rights" was used to invalidate a law that limited non-economic damages in motor vehicle accidents in the Virgin Islands.

2. The Virgin Islands Legislature struggles to make affordable automobile liability insurance available in the Territory. It finally succeeds by imposing a cap upon non-economic damage awards in automobile accident cases.

The elected leaders of the Virgin Islands labored—dating almost from when Congress first created the Virgin Islands Legislature—to make insurance available to people injured in motor vehicle accidents. The first effort, enacted in 1959 by the territory's Third Legislature, required all drivers to have liability insurance covering motor vehicle accidents.[2] This compulsory insurance law was repealed after only seven months, most likely due to either the cost or the scarcity of such insurance.[3]

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[2] 1959 V.I. Sess. Laws 87 (Act No. 478, June 24, 1959).

[3] 1960 V.I. Sess. Laws 11 (Act No. 519, Jan. 22, 1960). There is no available legislative history to explain why the law was repealed by the same legislature only seven months later.

In 1975, the Eleventh Legislature undertook the challenge and again enacted compulsory automobile liability insurance.[4] But within ten years—and with residents confronted with "the extreme difficulty of procuring insurance, its frightful cost and the small percentage of drivers who maintain insurance,"[5]—the Sixteenth Legislature responded to the electorate and repealed compulsory insurance.[6]

The third time proved the charm when, in 1999, the Twenty-third Legislature enacted compulsory automobile liability insurance.[7] This time, the duly-elected representatives of the people convinced insurance companies to write insurance in the Territory at affordable rates by including a limitation on the recovery of non-economic damages in motor vehicle cases that capped such damages at $75,000.[8] The cap did not apply in cases where a jury found the defendant was grossly negligent or acted recklessly. V.I. Code Ann. tit. 20, § 555. The cap applied to non-economic damages only; there was no cap on economic damages whether past, present or projected into the future. The measure was so successful in establishing

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[4] 1975 V.I. Sess. Laws 112 (Act No. 3724, July 31, 1975).

[5] *Maximin v. Rivera,* 25 V.I. 20, 24, 1990 WL 533213, *3 (Terr. Ct. 1990) (taking judicial notice of the conditions that led to the second repeal of compulsory automobile insurance).

[6] 1985 V.I. Sess. Laws 155 (Act No. 5107, § 4, Nov. 2, 1985).

[7] 1999 V.I. Sess. Laws 49 (Act No. 6287, § 24 Aug. 17, 1999) codified at V.I. Code Ann. tit. 20, §§ 701–713.

[8] 1999 V.I. Sess. Laws 58 (Act No. 6287, § 26 Aug. 17, 1999) codified at V.I. Code Ann. tit. 20, § 555 (as amended).

a stable market for automobile insurance that the Twenty-seventh Legislature felt comfortable raising the non-economic damages cap to $100,000 in 2008. *Id.*

Senators in the Virgin Islands Legislature must face the voters every two years. 48 U.S.C. § 1572(a). Despite ten legislative elections since the cap was enacted, the Legislature has amended the cap only one time—to raise the non-economic damages cap to $100,000. Evidently, the voters were satisfied that the benefit of having insured-drivers on the Territory's streets more than offset the $100,000 limitation on a potential pain and suffering award.

B. PROCEEDINGS IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS—THE CAP IS UPHELD.

On October 2, 2012, Frederic J. Balboni, Jr., a tourist from Massachusetts, was walking on Veterans Drive on St. Thomas, U.S. Virgin Islands, when he was struck by an automobile owned by Ranger American of the V.I., Inc. ("Ranger American") and driven by its employee, Emica King. Balboni filed suit in the Superior Court of the Virgin Islands on July 29, 2014. In his complaint, Balboni alleged King negligently operated the automobile and Ranger American negligently entrusted her with the vehicle. The defendants denied the allegations and alleged that Balboni was jaywalking when the accident occurred. The merits of the case have yet to be adjudicated.

On January 23, 2017, Balboni filed a motion seeking a judicial determination that the cap on non-economic damages in V.I. Code Ann. tit. 20, § 555 was unconstitutional. Balboni asserted that the cap:

1) impermissibly invaded the province of the jury in violation of the Seventh Amendment;

2) treated automobile accident victims differently based upon the severity of their injuries in violation of the Equal Protection Clause of the Fourteenth Amendment;

3) treated automobile accident victims differently than victims of non-motor vehicle accidents in violation of the Equal Protection Clause of the Fourteenth Amendment; and

4) infringed upon his Due Process rights under the Fifth and Fourteenth Amendments.

Petitioners opposed the motion. The Government of the Virgin Islands intervened and also opposed it.[9]

On January 24, 2018, the Superior Court upheld the statute. App. 142a. On February 21, 2018, it certified the constitutional issues for interlocutory review by the Supreme Court of the Virgin Islands. On March 9, 2018, that court granted leave to file the interlocutory appeal.

C. THE VIRGIN ISLANDS SUPREME COURT DEPARTS FROM THIS COURT'S EQUAL PROTECTION JURISPRUDENCE TO STRIKE DOWN THE NON-ECONOMIC DAMAGES CAP.

On June 3, 2019, a divided Supreme Court of the Virgin Islands held that the cap on damages violated

[9] The Government of the Virgin Islands intervened as of right to defend the constitutionality of the statute as authorized by V.I. Rule Civ. Proc. 5.1(c). Because the government was a party below, 28 U.S.C. § 2403(b) does not apply.

48 U.S.C. § 1561—the Equal Protection Clause made applicable to the Virgin Islands by the Revised Organic Act. App. 1a. The court reached this conclusion only after holding that Congress intended to treat the Revised Organic Act as a "local" constitution akin to a state constitution, with the Virgin Islands Supreme Court having the authority to interpret its provisions in the same manner that a state's highest court may interpret a state constitution. In other words, if the federal statute extending the Equal Protection Clause, U.S. Const. Amend. XIV, § 1, to the Territory is deemed to be a "state" constitution, then the Virgin Islands Supreme Court considers itself able to apply the clause differently than this Court does.

The critical flaw in the majority's reasoning lies in its departure from the express language of the Revised Organic Act in favor of scant legislative history. That departure is directly contrary to this Court's directive that when Congress extends "the familiar language of the Bill of Rights, slightly changed in form, but not in substance," it intends that the language be interpreted in accordance with federal law. *Kepner v. United States*, 195 U.S. 100, 123 (1904).[10]

An analysis of the language Congress crafted to extend the Equal Protection Clause to the Virgin Islands demonstrates that Congress did not merely use "familiar language." Rather, the statute *directly*

[10] It is also a departure from this Court's oft-stated general rule of statutory construction that if a statute is unambiguous and the statutory scheme is coherent and consistent, the inquiry ceases. *Kingdomware Technologies., Inc. v. United States*, __ U.S. __, 136 S. Ct. 1969, 1976 (2016).

incorporated the Equal Protection Clause of the Fourteenth Amendment *and* affirmatively stated that it was to "have the same force and effect" in the Virgin Islands "as in the United States or in any State of the United States." 48 U.S.C. § 1561.[11] With the statute itself articulating Congress' intent, it was wrong to rely upon *any* legislative history—in particular the sparse legislative history relied upon by the Virgin Islands Supreme Court—to conclude that Congress intended to allow the Supreme Court of the Virgin Islands to apply a different interpretation of the Equal Protection Clause than that applied by this Court.

When the two justices in the majority created the artifice of a "Virgin Islands Bill of Rights" and deemed it to be the equivalent of a state constitution, they enabled themselves to reject this Court's Equal Protection Clause precedent. Had they followed this Court's precedent, they would have reviewed the

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[11] The Revised Organic Act contains two clauses relating to equal protection. The opening sentence of 48 U.S.C. § 1561 states:

> No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

The final paragraph of Section 1561 provides, in pertinent part:

> The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory *and shall have the same force and effect there as in the United States or in any State of the United States*: . . . the second sentence of section 1 of the fourteenth amendment; . . .

(Emphasis added.)

damages cap under the lowest level of Equal Protection Clause scrutiny: rational basis scrutiny. Instead, the majority substituted "heightened rational basis" review, just as the highest courts of some states do when applying the Equal Protection Clause of their own state's constitution. As the Virgin Islands Supreme Court explained, this "heightened rational basis" review "requires a court to analyze the actual justification for the statute, rather than engage in speculation by considering any and all possible reasons for its enactment." App. 70a. The two-justice majority applied this heightened scrutiny to strike down the cap.

Dissenting Justice Maria Cabret was unsparing in her criticism of the majority's reasoning:

> First, it is most telling that the majority, in its lengthy, circuitous opinion, does not reference a single decision in which a territorial high court—or federal court sitting as high court of a territory—interpreted a right conferred by Congress in an organic act to be more protective than its analog in the U.S. Constitution. Indeed, every federal appellate court to consider the issue, including the Supreme Court of the United States, has reached the opposite conclusion: that when Congress uses well-known constitutional language in the bill of rights of a territorial organic act, it intends that the protection afforded by that right be coextensive with the protection afforded by its analog in the U.S. Constitution.

App. 97a–98a [footnote omitted].

> In the end, the majority opinion is built upon a misguided interpretation of an incomplete picture of the legislative history surrounding section 3 of the Revised Organic Act. Moreover, the majority wholly ignores the binding precedent of the Supreme Court of the United States in *Kemper* [sic], the highly persuasive decisions of the federal circuit courts of appeal in cases like *Guerrero,* and this Court's own decision in *Ward*. These cases, considered in the context of the full body of relevant legislative history, lead inexorably to the conclusion that Congress intended for the due process and equal protection clauses of section 3 of the Revised Organic Act to confer rights coextensive with those enshrined in the corresponding provisions of the Fourteenth Amendment; and that this Court may not interpret these provisions in any manner other than that provided by the Supreme Court of the United States.

App. 117a–118a.

The dissent was correct. The decision is contrary to this Court's precedent and that of three circuits.

REASONS FOR GRANTING THE PETITION

A. The decision below conflicts with three relevant decisions of this Court on an important question of federal law.

The federal Bill of Rights protects citizens from governmental overreach. If territorial governments were free to modify the portion of the federal Bill of Rights that Congress extends to the citizens of the territories, those rights could easily become illusory. Thus, Congress does not bestow upon the governments of the territories the power to modify those rights, whether through legislation or executive action or, as in this case, through judicial interpretation.[12]

In *Kepner*, 195 U.S. 100 (1904), this Court observed the basic principle that when Congress extends to a territory "the familiar language of the Bill of Rights, slightly changed in form, but not in substance," it intends that the language be interpreted in accordance with the understanding of that familiar language. *Id.* at 123. At issue in *Kepner* was the proper interpretation of the Double Jeopardy Clause, which Congress had extended to the Philippine Islands.

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[12] Typically, Congress *does* authorize each territory to engage in a process that could lead to a territorial constitution. *See, e.g.*, Pub. L. No. 94–584, §§ 1–3, 90 Stat. 2899 (authorizing the Virgin Islands to convene a constitutional convention). But, the results of such an effort are not self-enacting and Congress must approve any proposed territorial constitution. *Id.*, § 5. Ironically, the Territory's last effort to adopt a constitution failed because the proposed constitution was "inconsistent with the Constitution and Federal law." *See* Pub. L. No. 111–194, 124 Stat. 1309. Congress encouraged the convention to reconvene and correct the issues, *id.*; but, the convention never reconvened.

The prosecution in *Kepner* argued that when Congress applied the Bill of Rights to the Philippine Islands, it intended to "make effectual the jurisprudence of the islands as known and established before American occupation." 195 U.S. at 120. Before the United States assumed dominion over the Philippine Islands, Spanish law applied. Under the Spanish version of double jeopardy, unlike the United States' version, jeopardy did not attach until there was a final judgment "in the court of last resort." *Kepner*, 195 U.S. at 121.[13]

This Court granted certiorari to decide whether Congress intended to apply the Spanish or American understanding of when jeopardy attached when it extended the Bill of Rights to the Territory. The Court explained that "we must look to the origin and source of the expression, and the judicial construction put upon it before the enactment in question was passed." 195 U.S. at 121. As the Court noted, the language ultimately used by Congress to apply the Double Jeopardy Clause to the Philippine Islands was "not strange to the American lawyer or student of constitutional history" even though the "familiar language" from the Bill of Rights was "slightly changed in form, but not in substance." 195 U.S. at 123. The Court then rhetorically asked,

> How can it be successfully maintained that these expressions of fundamental rights, which

[13] Kepner was acquitted in the Philippine Islands trial court. The United States appealed to the Supreme Court of the Philippine Islands, which reversed, found Kepner guilty, and imposed sentence. 195 U.S. at 110.

> have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

Kepner, 195 U.S. at 124. Answering this question, the Court stated, "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Id.* This Court concluded that the federal statute applying the Constitution's Double Jeopardy Clause must be interpreted by reference to the federal Bill of Rights.

This Court reaffirmed the same principle twice after *Kepner*. In *Serra v. Mortiga*, 204 U.S. 470, 474 (1907), the Court considered it "settled" that the Congressional extension of the Bill of Rights to the Philippine Islands was to be interpreted in accordance with the Constitution's Bill of Rights. Likewise, in *Weems v. United States*, 217 U.S. 349 (1910), the Court held that when Congress prohibited the infliction of cruel and unusual punishment in the Philippine Islands, the language it used to do so "was taken from the Constitution of the United States, and must have the same meaning." *Id.* at 367.

Had the majority in the decision below adhered to the holdings in *Kepner*, *Weems*, and *Serra*, it would have applied this Court's rational basis review to the

non-economic damages cap and upheld the statute.[14] Instead, it relegated *Kepner* and *Weems*[15] to a footnote (App. 49a, n.25) and distinguished them by citing *Boumediene v. Bush*, 553 U.S. 723, 757 (2008), which

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[14] In *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989), the Third Circuit rejected an Equal Protection challenge to a Virgin Islands cap on medical malpractice damages because the cap was a rational way "to curb, through legislation, the high costs of malpractice insurance and thereby promote quality medical care" in the Territory. 883 F.2d at 1158. As Lloyd's America, Inc. noted in an amicus brief filed in the Virgin Islands Supreme Court proceeding, every federal court that has considered whether a cap on damages passes muster under rational basis scrutiny under the Equal Protection Clause has upheld the cap. *See, e.g.*, *Estate of McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011) (Florida law limiting non-economic damages in medical malpractice cases did not violate Equal Protection Clause because the cap was rationally related to the legitimate goal of reducing medical malpractice premiums and the cost of medical care); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519–20 (6th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006) (holding Michigan's statutory cap on medical malpractice damages did not violate the Equal Protection Clause); *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir.), *cert. denied*, 518 U.S. 1005 (1996) (Kansas cap of $250,000 for non-economic damages did not violate Equal Protection Clause because it furthered a legitimate interest in stabilizing insurance rates); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (Texas statute limiting non-medical damages did not violate Equal Protection Clause of the United States Constitution); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (upholding California cap on non-economic recovery under Equal Protection Clause challenge because it was rational for lawmakers to believe that a damages cap would help reduce malpractice insurance premiums).

[15] The majority did not mention the *Serra* decision.

dealt with an unrelated issue.[16] The majority seized upon *Boumediene*'s description of the history of the Philippine Islands as a territory that was acquired by the United States in war with no intention of retaining sovereignty over it once a stable government was in place. By way of contrast, the Court observed that "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." 553 U.S. at 757.

Engaging in a *non sequitur* fallacy, the Virgin Islands Supreme Court majority distinguished *Kepner* on the grounds that Congress had intended to grant independence to the Philippine Islands whereas it intended to retain sovereignty over the Virgin Islands. App. 49a, n.25. But, Congress' intent to retain a territory was not germane to *Kepner*'s holding that when Congress uses the familiar language of the Bill of Rights, it is presumed that it intends to apply the settled and well-known meaning of the Bill of Rights. *Kepner*, 195 U.S. at 124. The majority deployed this distinction-without-a-difference to provide window dressing for its refusal to follow *Kepner*.

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[16] *Boumediene* was initiated as a habeas corpus petition brought by detainees at the naval base at Guantanamo Bay, Cuba. The issue was whether the Suspension Clause of the Constitution prohibited the suspension of the writ of habeas corpus for detainees held on soil where the United States was not the sovereign. This Court held that the Suspension Clause was a fundamental Constitutional right that applied to the Guantanomo Bay detainees *ex proprio vigore*. *Boumediene* has no application to the present controversy because there was no federal law making the Suspension Clause applicable and no question as to how to interpret a provision of the constitution that applies beyond the fifty United States as a result of an Act of Congress.

Kepner, *Weems*, and *Serra* each teach that the Virgin Islands Supreme Court must interpret the Equal Protection Clause that Congress applied to the Territory in the Revised Organic Act in accordance with federal law and may not create a new body of jurisprudence based upon its own view of how the Equal Protection Clause should apply. The Virgin Islands Supreme Court's failure to follow this Court's precedent requires correction. The petition for certiorari should be granted because only this Court can make that correction.

B. The decision below conflicts with three U.S. courts of appeal on an important question of federal law.

Almost twenty years ago, the Guam Supreme Court tried a similar end run around its Organic Act—in the context of First Amendment rights extended to Guam by Congress. Like the Virgin Islands Supreme Court, the Guam court sought to expand a constitutional right beyond the limits required by the U.S. Constitution. Like the Virgin Islands Supreme Court, the Guam court expressed the view that "this court sits as the highest tribunal in this jurisdiction and that Congress intends to allow Guam to develop its own institutions." And, like the Virgin Islands Supreme Court, the Guam court opined that "[d]espite the similarity" between a clause in the Bill of Rights and the corresponding extension of that clause to Guam via its Organic Act, "this court can reach its own conclusions on the scope of protections" provided by the Organic Act "and may provide broader rights than those which have been interpreted by federal courts under the United States

Constitution." *People v. Guerrero*, 2000 Guam 26, ¶22, 2000 WL 1299635 at *6 (2000), *rev'd*, *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002).

The Ninth Circuit granted certiorari[17] and rejected the exact same arguments subsequently endorsed by the Virgin Islands Supreme Court in this case. *Id*. It observed that while Guam's Organic Act "might function as a constitution," it nevertheless was a federal statute and "remains quite unlike a constitution of a sovereign state." *Guerrero*, 290 F.3d at 1216–17. It further noted that "[n]ot even a sovereign state may interpret a federal statute or constitutional provision in a way contrary to the interpretation given it by the U.S. Supreme Court." *Id.* at 1217.

Unlike the Virgin Islands Supreme Court, the Ninth Circuit recognized that this Court's decisions in *Kepner* and *Weems* governed the resolution of the issue. The decision below is in irreconcilable conflict with the Ninth Circuit in *Guerrero*.

The Virgin Islands decision also directly conflicts with two other circuits. *See United States v. Husband R.*, 453 F.2d 1054, 1058 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (citing *Kepner* and holding that the "statutory 'bill of rights' enacted by Congress for the Canal Zone" was to be "given the same construction" as given to "equivalent provisions of the Constitution") and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d

[17] Until a 2004 amendment, 48 U.S.C. § 1424-2 provided that the Ninth Circuit would have certiorari jurisdiction for the first fifteen years following the Guam legislature's establishment of a local appellate court. Pub. L. No. 98–45, § 22B, 98 Stat. 1732) (codified as amended 48 U.S.C. § 1424-2).

96, 100 (1st Cir. 1946) (holding that "[w]hen Congress by the Organic Act enacted for Puerto Rico provisions similar to those contained in our 'Bill of Rights' it intended them to have the same purport as the like provisions of our Constitution"). The Virgin Islands Supreme Court did not cite, let alone distinguish, either case.

C. The Question Presented raises an important question of federal law and has great importance to the Territory.

Although the Virgin Islands Supreme Court, like the Guam Supreme Court in *Guerrero*, 2000 Guam 26, wished to freely interpret the Organic Act in the same manner that a state's highest court might interpret a state constitution, there is one critical difference between a territorial court interpreting an organic act and a state court interpreting its state constitution: All state constitutions are subject to a process by which the people of the state can amend their constitution directly or indirectly at the ballot box (whether that be by initiative, constitutional convention, or action of a state legislature[18]). If the highest court of a state strikes down a state statute as contrary to a state constitution, the people of that state have the right and capability to overrule their highest court if they disagree with it.

The same is not true in the Virgin Islands. The Territory's citizens have no right—direct or indirect—

[18] *See generally* Amending State Constitutions, Ballotpedia, https://ballotpedia.org/Amending_state_constitutions (summarizing each state's constitutional amendment process) (last visited Aug. 30, 2019) .

to amend the Revised Organic Act. Thus, when the two unelected justices of the Virgin Islands Supreme Court held that V.I. Code Ann. tit. 20, § 555 violated the "Virgin Islands Bill of Rights," the people of the Territory were left powerless to correct the court.

The lack of an electoral "remedy" to correct the unelected two-justice majority takes on particular importance given that the majority struck down a law enacted by the duly-elected Virgin Islands Legislature twenty years previously. There was enough satisfaction with this law that ten successive legislatures were voted into office without repealing the damages cap. The people of the Virgin Islands are left with no recourse or capability to amend this ephemeral "Virgin Islands Bill of Rights" that exists solely by the dictate of the two-justice majority of the Virgin Islands Supreme Court. There is no process by which the people or Legislature of the Virgin Islands may enact a change to reflect the will of the people.[19]

The decision of the Supreme Court of the Virgin Islands also has unsettled what had been a settled area of federal law. There is a risk that other territorial courts will follow the Virgin Islands down this wayward path. For example, recent jurisprudence from the Supreme Court of Guam raises the specter that it will interpret portions of the Guam Organic Act

[19] The sole recourse available is to persuade Congress to amend the Revised Organic Act. But the people of the Virgin Islands have no vote in the Senate, and their Delegate to the House of Representatives cannot vote on legislation. Pub. L. No. 92-271, 86 Stat. 118. Thus, their power to cause an amendment to the Revised Organic Act is limited to moral suasion to convince a majority of the House and the Senate to act.

independently from the Constitution. *See People v. Moses*, 2016 Guam 17, ¶21, 2016 WL 1735783 at *5 (2016) (suggesting the "possibility that we could interpret the Organic Act to be more protective" than the U.S. Constitution). It is important that this Court act to resolve the split and restore certainty relating to the power of territorial courts to interpret federal law differently than this Court.

The decision below is also of great importance to the Virgin Islands. As the Government of the Virgin Islands explained in its brief to the Supreme Court of the Virgin Islands in support of the constitutionality of the damages cap, Guardian Insurance Company and Lloyd's America, Inc., two of the largest writers of automobile insurance in the Territory, stated that if the cap were struck down, they would reconsider their decisions to write such insurance and if they continued to write it, would be forced to increase their premiums significantly. The decision below leaves the Legislature without the one tool that finally succeeded in bringing affordable automobile liability insurance to the Territory and, as indicated above, without a remedy for either the Legislature or the voters to correct the Virgin Islands Supreme Court.

The decision also has a profound impact upon insurers and drivers alike. With a two-year statute of limitations for personal injury negligence cases,[20] and lawsuits in the Virgin Islands courts taking an *average*

[20] V.I. Code Ann. tit. 5, § 31(5)(A). Balboni filed suit with only 65 days left before the two-year statute of limitations ran.

of ten years for adjudication,[21] the elimination of the damages cap retroactively affects civil cases involving traffic accidents that happened in the past twelve (or more) years. The impact upon insurance companies and drivers sued for negligence is substantial. Decisions by insurers as to the premium to charge, and by automobile owners regarding how much insurance to purchase, were made in the past two decades based upon reasonable expectations—rooted in this Court's century-old precedent in *Kepner*. Those decisions are now retroactively undermined. Although insurers and drivers cannot turn back the clock to revisit those decisions, this Court can correct the Virgin Islands Supreme Court's error.

D. This case provides an ideal vehicle for the Court to clarify the standard of review that applies to decisions of territorial courts that interpret federal law.

Congress has directed that the relationship between this Court and the Supreme Court of the Virgin Islands shall be the same as the relationship between this Court and "the courts of the several states." 48 U.S.C. § 1613. This Court defers to the interpretation that a state's highest court gives a state statute. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 256 (1974). On the other hand, "when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed." *Minnesota v. Clover Leaf*

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[21] *Vooys v. Bentley*, 901 F.3d 172, 193 (3d Cir. 2018), *cert. denied*, __ U.S. __, 139 S. Ct. 1600.

Creamery Co., 449 U.S. 456, 461 (1981) citing *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

The majority in the case below sought to blend these two rules and carve out a different rule when a federal statute applies the Constitution to a territory. The dissent below accurately described the majority's position:

> The majority attempts to distill from these cases a general rule: that when Congress enacts legislation "in its capacity as a national legislature, both federal and territorial courts are bound to fully and without qualification effectuate the intent of Congress," but when Congress steps into the role of the territorial legislature and enacts legislation specifically directed at a particular territory, "the Congressional enactment is to be treated as a territorial law, with a territorial court of last resort authorized to interpret it pursuant to the same principles and authority governing interpretation of state laws by a state court of last resort."

App. 115a (quoting from the majority opinion) (footnote omitted).

As the dissent also noted (App. 113a), the majority devoted fifteen pages of its opinion to an effort to build the narrative that the Revised Organic Act—federal law—is to be treated as local law that is to be interpreted by the Virgin Islands Supreme Court with *this* Court deferring to such an interpretation. This case presents an opportunity for this Court to fully

implement the mandate of 48 U.S.C. § 1613 and clarify that when the Supreme Court of the Virgin Islands interprets a statute adopted by the *Virgin Islands* Legislature, such interpretation is entitled to deference; but, correspondingly, just like state courts, territorial courts receive no deference when interpreting a federal statute and must conform to this Court's decisions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the Supreme Court of the Virgin Islands.

Respectfully submitted,

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