No. 19-304

IN THE

Supreme Court of the United States

RANGER AMERICAN OF THE VIRGIN ISLANDS, INC., *et al.*,

Petitioners,

v.

FREDERICK J. BALBONI, JR.,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the Virgin Islands' interlocutory reversal of a pretrial declaratory order issued by the trial court, and the Supreme Court's subsequent remand for further proceedings before the trial court, is a "[f]inal judgment[]" over which this Court has jurisdiction under 28 U.S.C. § 1260.

2. Whether the Court has jurisdiction over the decision below given that the question presented is not ripe for review.

3. Whether the Supreme Court of the Virgin Islands properly interpreted its *de facto* Bill of Rights.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	1
I. Factual Background	1
II. Procedural History	1
REASONS FOR DENYING THE PETITION	5
I. THIS COURT LACKS JURISDICTION	5
A. The judgment below is interlocutory	5
1. *28 U.S.C. § 1260 confers jurisdiction only over final decisions of the Supreme Court of the Virgin Islands*	5
2. *None of the* Cox Broadcasting Corp. *exceptions apply*	10
B. The judgment below is not ripe for review	14
II. THE SUPREME COURT OF THE VIRGIN ISLANDS PROPERLY INTERPRETED ITS BILL OF RIGHTS	17
A. Section 1561 constitutes the *de facto* Virgin Islands Bill of Rights	17

TABLE OF CONTENTS—Continued

Page

B. Because § 1561 is the *de facto* Virgin Islands Bill of Rights, the Virgin Islands Supreme Court could properly interpret its terms as providing greater protections than the Equal Protection Clause of the Fourteenth Amendment... 25

1. *The constitutional protections set forth in the Fourteenth Amendment are a floor and not a ceiling* 25

2. *There is no conflict worthy of granting certiorari* 26

3. *This Court has granted great deference to judgments of the District of Columbia Court of Appeals and the Supreme Court of Guam as to federal statutes of purely local concern* 30

CONCLUSION 33

TABLE OF AUTHORITIES

CASES Page(s)

American Ins. Co. v. 356 Bales of Cotton,
26 U.S. 511 (1828).................................... 21

Am. Legion v. Am. Humanist Ass'n,
139 S. Ct. 2067 (2019)............................... 26

Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.,
389 U.S. 327 (1967).................................. 15

Browne v. People of Virgin Islands,
50 V.I. 241 (V.I. 2008)............................... 21

Clinton v. Jones,
520 U.S. 681 (1997).................................. 17

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283, 293 (1982).......................... 25

Coleman v. Thompson,
501 U.S. 722 (1991).................................. 17

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975)............................ 10, 11, 12

Defoe v. Phillip,
702 F.3d 735 (3d Cir. 2012)...................... 6

Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,
438 U.S. 59 (1978).................................... 16

Flynt v. Ohio,
451 U.S. 619 (1981).................................. 6

Goldstein v. Cox,
396 U.S. 471 (1970).................................. 14

TABLE OF AUTHORITIES—Continued

Page(s)

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 13

Guam v. Guerrero,
290 F.3d 1210 (9th Cir. 2002) 29, 30

Hall v. C&P Telephone Co.,
793 F.2d 1354 (D.C. Cir. 1986) 31, 32

Herb v. Pitcairn,
324 U.S. 117 (1945) 17

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 6, 8, 9

Kepner v. United States,
195 U.S. 100 (1904) 26, 27, 28, 29

Key v. Doyle,
434 U.S. 59 (1977) 29

Limtiaco v. Camacho,
549 U.S. 483 (2007) 32

Loughrin v. United States,
573 U.S. 351 (2014) 20

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 13

Mills v. Alabama,
384 U.S. 214 (1966) 10

Mount Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944 (2012) 14

Nat'l Ass'n of Home Builders v. Defs. Of Wildlife,
551 U.S. 644 (2007) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Ortiz v. United States,
__ U.S. __, 138 S. Ct. 2165 (2018) 21

Palmore v. United States,
411 U.S. 389 (1973).................................. 21

Pernell v. Southall Realty,
416 U.S. 363 (1974).................................. 31, 32

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945).................................. 6, 11

Reno v. Catholic Soc. Servs., Inc.,
509 U.S. 43 (1993).................................... 15, 16

Russello v. United States,
464 U.S. 16 (1983).................................... 20

Serra v. Mortiga,
204 U.S. 470 (1907)............................ 26, 27, 28

Simon v. Joseph,
59 V.I. 611 (V.I. 2013).............................. 14

South Porto Rico Sugar Co. v. Buscaglia,
154 F.2d 96 (1st Cir. 1946) 29

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010).................................. 14

Texas v. United States,
523 U.S. 296 (1998).................................. 16

Thomas v. Union Carbide Agriculture Prods. Co.,
473 U.S. 568 (1985).................................. 14, 16

UC Health v. N.L.R.B.,
803 F.3d 669 (D.C. Cir. 2015).................. 28-29

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Husband R.,
453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) 29

Virgin Islands v. John,
654 F.3d 412 (3d Cir. 2011) 5-6

Weems v. United States,
217 U.S. 349 (1910)............................ 26, 27, 28

Williams v. Taylor,
529 U.S. 362 (2000).................................. 20

CONSTITUTION

U.S. Const. art. I...................................... 3, 21, 23

U.S. Const. art. III...................................... 14

U.S. Const. art. IV, § 3, cl. 2.............. 3, 20, 21, 30

U.S. Const. amend. I 28

U.S. Const. amend. II.................................. 28

U.S. Const. amend. III 28

U.S. Const. amend. IV................................. 28

U.S. Const. amend. V 2, 28

U.S. Const. amend. VI................................. 28

U.S. Const. amend. VII 2, 28

U.S. Const. amend. VIII.............................. 28

U.S. Const. amend. IX................................. 28

U.S. Const. amend. XIV ....*passim*

U.S. Const. amend. XIV, § 1 .... 18, 19

STATUTES Page(s)

4 V.I.C. § 33(c) 2

20 V.I.C. § 555 ....*passim*

28 U.S.C. § 1257 .... 5, 6

28 U.S.C. § 1257(a)..................................... 5

28 U.S.C. § 1260 5

42 U.S.C. § 1983 .... 8, 9

48 U.S.C. ch. 12, subch. II.......................... 21

48 U.S.C. § 1561 ....*passim*

48 U.S.C. § 1613 31

Act of Aug. 23, 1968, Pub. L. No. 90-496, § 11, 82 Stat. 841 18

Organic Act of the Virgin Islands, § 34, Act of June 22, 1936, ch. 699, 49 Stat. 1815 ....*passim*

Pub. L. No. 94–584, § 2(b)(1), 90 Stat. 2899 ... 32

Revised Organic Act of the Virgin Islands, Act of July 22, 1954, ch. 558, 68 Stat. 497 ....*passim*

V.I. Bill No. 23-0082 (1999), Act No. 6287 (Aug. 17, 1999) 1

OTHER AUTHORITIES

80 Cong. Rec. 6609 (1936) 18-19, 22

JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018).. 26

TABLE OF AUTHORITIES—Continued

Page(s)

S. Rep. No. 83-1271 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2585, 2593 22

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 16

U.S. House of Representatives, Committee on Insular Affairs, Hearings on H.R. 11751 to Provide a Civil Government for the Virgin Islands of the United States, 74th Cong., 2d sess. (1936) 23

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 26

WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS (2d ed. 2010) 23, 24

INTRODUCTION

The petition should be denied for a number of reasons. To begin, the Court is deprived of jurisdiction twice over: first, the judgment below is a pretrial order issued by the Supreme Court of the Virgin Islands in an interlocutory appeal by permission, and; second, the issue presented is not ripe for review. Either of these glaring jurisdictional deficiencies—both of which are omitted entirely from the petition—is sufficient to deny review.

Even if the Court had jurisdiction, review would be unwarranted. The question presented is whether the Virgin Islands Supreme Court properly interpreted its *de facto* Bill of Rights. The plain language of the statute, coupled with the legislative history surrounding its enactment and well-established rules of statutory construction, demonstrate that it did. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

I. Factual Background

This appeal arises from an automobile accident between Frederick Balboni ("Respondent") and Ranger American of the Virgin Islands, Inc. and Emica King ("Petitioners"). Respondent was hit by Petitioners' vehicle while visiting St. Thomas, U.S. Virgin Islands, resulting in traumatic injuries which required multiple surgeries, hospitalizations, and many rounds of physical therapy.

II. Procedural History

In 1999, the Legislature of the Virgin Islands passed Bill No. 23-0082, "The Short Term Revenue Enhancement Act of 1999." This revenue bill amended title 20 of the Virgin Islands Code to add a new section,

Section 555, which capped non-economic damages in automobile cases at $75,000. In 2008, the Legislature amended Section 555 to increase the limitation from $75,000 to $100,000.

Respondent sued Petitioners in the Superior Court of the Virgin Islands after being struck by Petitioners' vehicle. In light of the severity of his injuries, Respondent filed a "Motion to Determine 20 V.I.C. § 555 Unconstitutional" while discovery was still ongoing. App. 142a. Specifically, Respondent maintained that § 555 was unconstitutional and in violation of the Fifth, Seventh, and Fourteenth Amendments of the United States Constitution and the free-standing equal protection and due process clauses of the Revised Organic Act of 1954. App. 7a–8a.

The trial court denied the motion to deem the statute unconstitutional. App. 142a–143a. Respondent thereafter filed a motion for the trial court to amend its opinion to certify the issues for immediate interlocutory appeal *by permission of the Supreme Court* pursuant to 4 V.I.C. § 33(c), which permits such immediate interlocutory appeals at the discretion of the Court where they "may materially advance the ultimate termination of litigation . . . ." App. 5a.

The trial court granted the motion and certified four questions for review by the Virgin Islands Supreme Court. App. 5a. Respondent timely filed a petition for permission to appeal with the Court, which the Court granted, setting the appeal for expedited review. App. 5a.

On June 3, 2019, the Virgin Islands Supreme Court issued a decision in which a majority of the Court held that § 555 was unconstitutional, in violation of the

free-standing right to equal protection in the Virgin Islands Bill of Rights. App. 1a, 85a. Accordingly, without need to review Respondent's federal constitutional claims, it reversed the trial court's interlocutory order and remanded the matter to the trial court for further proceedings. App. 86a.

The Virgin Islands Supreme Court's majority decision contains an extensive and thorough analysis of the plain language of the Virgin Islands Revised Organic Act, its history, and the congressional intent behind its enactment. App. 7a–66a. The Court emphasized the importance of the fact that while § 1561 does incorporate the "federal equal protection and due process clauses by reference," it also "contain[s] its own free-standing equal protection and due process clauses that are unique to the Virgin Islands Bill of Rights," and which serve as "separate limitations on the power of the Virgin Islands government." App. 10a. The Court analyzed the constitutionality of § 555 as against these specific free-standing provisions. App. 8a.

In so doing, the Court examined the legislative history of § 1561, which revealed that the statute was "modelled . . . after similar provisions found in state constitutions, which state courts of last resort have virtually uniformly interpreted as conferring greater rights than those in the Bill of Rights to the United States Constitution." App. 17a. The Court noted that although the Revised Organic Act was enacted by Congress, "it was not enacted" in its "capacity as a national legislature through Article I of the United States Constitution." App. 17a. Rather, it was enacted as the "governing law or constitution for the Virgin Islands through its power under the Territorial Clause of Article IV, which effectively authorized Congress to

enact laws for a territory as if it were a state government." App. 17a. The Court ultimately held that Congress "intended for [the Supreme Court of the Virgin Islands] to exercise the power to interpret the [Revised Organic Act] in the same manner that a state court of last resort may interpret the Bill of Rights to [its] state's constitution." App. 17a.

The Court then proceeded to review the free-standing equal protection clause pursuant to the authority granted to it by Congress. It held that, as the Territory's court of last resort, it could (like every state in the union)—and did—grant Virgin Islanders greater equal protection rights under the Revised Organic Act than that which is afforded under the United States Constitution. App. 72a. Specifically, the Court applied a "heightened rational basis" analysis rather than the federal "rational basis review"; App. 72a; to determine that § 555 runs afoul of the free-standing equal protection clause of the Revised Organic Act because it "treats certain classes of people differently based on their characteristics" and treats individuals who suffer injuries due to automobile accidents "less favorably than other personal injury victims." App. 67a. In so ruling, the Supreme Court of the Virgin Islands remanded the case to the trial court to continue discovery and proceed with litigation. The Petition followed.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION

The petition should be denied for the threshold reason that the Court lacks jurisdiction.

A. The judgment below is interlocutory

The judgment of the Supreme Court of the Virgin Islands is non-final. As a result, this Court lacks jurisdiction to review it.

1. *28 U.S.C. § 1260 confers jurisdiction only over final decisions of the Supreme Court of the Virgin Islands*

Section 1260 confers certiorari jurisdiction to review "[f]inal judgments" of the Supreme Court of the Virgin Islands:

> Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .

§ 1260. Review of "[f]inal judgments" by certiorari mirrors this Court's certiorari jurisdiction over the "[f]inal judgments" of the fifty state courts of last resort, governed by 28 U.S.C. § 1257.[1] *Virgin Islands*

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[1] Section 1257(a) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United

v. John, 654 F.3d 412, 415 (3d Cir. 2011); *see also Defoe v. Phillip*, 702 F.3d 735, 740 (3d Cir. 2012) ("a decision is final only if it is 'final' within the meaning of the United States Supreme Court's certiorari jurisdiction statute.") (citing 28 U.S.C. § 1257) (internal quotation marks omitted).

Section 1257 "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). In order to be reviewable, "a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Id.* This "final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

"Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." *Radio Station WOW, Inc.*, 326 U.S. at 123. The Court has recognized that "[t]his requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Id.* at 124.

States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .

The Virgin Islands Supreme Court's decision is, on its face, "merely interlocutory." In fact, the decision itself states as much: "Because this case comes to us by way of an interlocutory appeal, Balboni's claims have not yet been adjudicated, including those pertaining to the extent of his injuries. Nevertheless, we treat these facts and circumstances as true 'solely for the purposes of this appeal by permission.'" App. 3a n.1.

Put simply, Respondent's "Motion to Determine 20 V.I.C. § 555 Unconstitutional" was filed, adjudicated, appealed, and decided before trial ever began or discovery was ever concluded. App. 3a–4a. In its majority decision, the Virgin Islands Supreme Court expressly acknowledged that

> this matter has not yet been tried and it is therefore possible that the non-economic damage cap may never be an issue, such as if the jury enters judgment in favor of [Petitioners], or awards non-economic damages in an amount less than the $100,000 cap.

App. 6a n.2. The Court nevertheless declined to revisit or reconsider its earlier decision to accept this interlocutory appeal, "particularly when the parties have gone through the expense of full briefing and oral argument." App. 7a n.2. Specifically, the Court noted in dicta that an interlocutory appeal by permission will satisfy the statutory requirement that an immediate appeal "may materially advance the ultimate termination of the litigation" if a final resolution on the certified question "would result in cost savings for the parties or facilitate settlement." App. 6a–7a, n.2. After reversing the order of the trial court, the Virgin Islands Supreme Court remanded the matter to the trial court for further proceedings. App. 86a.

The Virgin Islands Supreme Court's decision has not terminated the litigation. Proceedings on remand will include additional discovery that is certain to affect the course of the litigation, as well as a trial on the merits of Respondent's territorial-law claims.

This case is strikingly similar to *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), in which the Court declined to review an interlocutory decision by the Alabama Supreme Court for lack of a final judgment. In *Jefferson*, the Alabama Supreme Court heard by permission[2] a certified pretrial interlocutory appeal from the trial court's order in an action under 42 U.S.C. § 1983 as to the availability of compensatory damages to the petitioner where the state wrongful death act permitted an award of punitive damages only. 522 U.S. at 79–80. The Alabama Supreme Court reversed the judgment of the trial court, holding that the state statute, including its allowance of punitive damages only, governed the petitioners' potential recovery on their § 1983 claims. *Id.* at 80.

This Court ultimately dismissed the petitioners' writ of certiorari for lack of a final judgment. *Id.* at 84. Notably, it held:

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[2] The Alabama courts invoked a state specific rule of appellate procedure which "allows a party to petition the Alabama Supreme Court for an appeal from an interlocutory order where the trial judge certifies that the order 'involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal form the order would materially advance the ultimate termination of the litigation and that the appeal would avoid protracted and expensive litigation.'" *Jefferson*, 522 U.S. at 80 n.2.

> The Alabama Supreme Court's decision was not a "final judgment." It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.

Id. at 81–82. The Court concluded:

> This case fits within no exceptional category. It presents the typical situation in which the state courts have resolved some but not all of petitioner's claims. Our jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation. Because the Alabama Supreme Court has not yet rendered a final judgment, we lack jurisdiction to review its decision on the Jeffersons' § 1983 claims.

Id. at 84.

The instant case presents the same "typical situation." The decision of the Virgin Islands Supreme Court affects only Respondent's claim for non-economic damages. The proceedings on remand will include a trial on the merits of Respondent's territorial-law claims. It is not final "as an effective determination of the litigation," which is ongoing. Because the decision of the Virgin Islands Supreme Court was "merely interlocutory," it cannot be considered a final judgment reviewable by this Court.

2. *None of the* Cox Broadcasting Corp. *exceptions apply*

Four categories of exceptions to this otherwise strict final-judgment rule exist. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477–83 (1975). None apply. The first category includes those cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. This Court has explained that in such cases, "because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." *Id.* The quintessential example is *Mills v. Alabama*, 384 U.S. 214 (1966), where the state appellate court had ordered the trial court to convict the petitioner if the petitioner had written an editorial that he admittedly had written. *Id.* at 217. Because the case would have inevitably ended in a conviction and have been "a completely unnecessary waste of time," this Court took jurisdiction and heard the case. *Id.* at 217–18.

This case does not fall under the first *Cox* category. The Virgin Islands Supreme Court remanded the case for further proceedings, including a full trial on the merits of Respondent's territorial-law claims. Unlike in *Mills*, Petitioners here have not conceded liability, which not only puts liability at the forefront of the issues to be decided on remand but which also means a jury could potentially find in favor of Petitioners, rendering the question they raised in the petition moot. A far cry from "a completely unnecessary waste of time," a trial on remand in this matter is necessary in order to know whether the question raised by

Petitioners for review is even relevant or timely to begin with.

The second category in *Cox* includes cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp.*, 420 U.S. at 480. The Court has held that immediate review under this category is appropriate where "[n]othing that could happen . . . short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Id.* (citing *Radio Station WOW*, 326 U.S. at 126–27). Again, this case does not fall into this category. In fact, further proceedings may well obviate the need for resolution of the question presented in the petition, as the case might be resolved on fact-bound, territorial-law grounds that render the question presented irrelevant, or even moot, to the outcome of the case, such as if the jury renders a defendant's verdict or fails to award more than $100,000 in non-economic damages to Respondent. The second exception thus does not apply.

The third *Cox* category includes cases where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.*, 420 U.S. at 481. In such cases, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* While it is true in the present case that if Petitioners prevail on the merits at trial, the issue raised in the petition will be moot, it

is *not* true that governing territorial law would preclude Petitioners from again presenting these claims for review should they lose on the merits. In that case, if Petitioners lose on the merits *and* the jury awards more than $100,000 in non-economic damages to Respondent,[3] Petitioners would be free to challenge that award on appeal on any supported basis, including the grounds raised in the instant petition. Accordingly, the third category does not apply.

Finally, this Court has held that it has jurisdiction in

> 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, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Cox Broadcasting Corp., 420 U.S. at 482–83. The Court explained: "In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of state litigation." *Id.* at 483.

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[3] The issue may also be mooted if the Petitioner loses at trial but the jury fails to award more than $100,000 in non-economic damages.

Here, neither point is true. To the former, while Petitioners may prevail on the merits on nonfederal grounds, reversal of the state court on the presented issue would do *precisely* what the exception permits: "merely control[] the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come." Specifically, the issue presented concerns the constitutionality of a territorial statute that caps the amount of non-economic damages that may be awarded in cases involving motor vehicle accidents. The question thus affects *only* the nature and character of evidence concerning non-economic damages, not the availability of non-economic damages to Respondent in the first place.[4]

To the latter point on policy, refusal to review the Virgin Islands Supreme Court's decision now, on immediate interlocutory review, as opposed to at the termination of all proceedings will not "seriously erode federal policy." Pursuant to this exception, the Court has taken review of cases presenting pressing questions of national security (*Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179–80 (1988)) and free speech protections in the context of an impending election (*Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 246–47 & n.6 (1974)). No such extraordinary circumstances exist here.

Review of the interlocutory decision of the Virgin Islands Supreme Court is not warranted.

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[4] The question does not even go this far. Respondent could always present evidence of *all* non-economic damages, not only those limited to a cap of $100,000. The constitutionality of the cap really only affects how much the jury may award Respondent on the basis of that evidence.

B. The judgment below is not ripe for review

The case is also unripe.[5] As explained above, it arises solely from an interlocutory appeal in the Supreme Court of the Virgin Islands and remains far from trial. "[R]ipeness is peculiarly a question of timing . . . [i]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agriculture Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation marks and citation omitted). This Court must "limit its review of interlocutory orders," *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), and when asked to do so the Court must consider "[1] the fitness of the issues for judicial decision and [2] the hardship of withholding court consideration." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010).

Generally, when "no final judgment has been rendered and it remains unclear precisely what action [Petitioners] will be required to take," it is proper "to deny the petitio[n] for certiorari" as "not yet ripe for review by this Court . . . ." *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.) (concurring in denial of petition for certification). Likewise, when

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[5] Because Virgin Islands courts are not Article III courts, "[i]n the territorial courts, ripeness, like standing, is . . . not jurisdictional." *Simon v. Joseph*, 59 V.I. 611, 629 (V.I. 2013). "As a nonjurisdictional, judicially-created doctrine, the ripeness doctrine, like other claims-processing rules, is subject to waiver if not timely asserted by the party that benefits from its application." *Id.* The respective decisions of the Virgin Islands Supreme Court and the trial court, where the issue was then ripe for review are thus irrelevant to the separate question of ripeness presented to this Court here.

underlying factual disputes remain so an intermediate court of appeal has "remanded the case, it is not yet ripe for review by this Court" and "[t]he petition for a writ of certiorari [should be] denied." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

The reasoning of *Reno v. Catholic Soc. Servs., Inc*., 509 U.S. 43 (1993), is instructive. There, Congress passed a statute offering legal status to certain undocumented immigrants. *Id.* at 46. Its criteria for eligibility were narrowly interpreted by the Immigration and Naturalization Service. *Id.* at 47. In response, potentially-affected undocumented immigrants filed two class action lawsuits challenging the INS regulations. *Id.* at 47–48. The district courts granted relief, holding the regulations invalid, and the Ninth Circuit affirmed. *Id.* at 45, 48–49, 53.

This Court vacated and remanded, holding that, unless the "action challenged ha[s] been felt in a concrete way by the challenging parties," it is not ripe for a federal court to review. *Id.* at 53, 57 (internal quotation marks omitted). Because the regulations were not "felt immediately by those subject to [them] in conducting their day-to-day affairs," and because "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge," the claim was not ripe. *Id.* at 58. The regulations "impose[d] no penalties for violating any newly imposed restriction," and instead "limit[ed] access to a benefit created by the [statute] but not automatically bestowed on eligible aliens." *Id.* at 58. The benefit remained contingent on "further affirmative steps . . . beyond those addressed by the disputed regulations" and "a case-by-case [determination of] whether each applicant has met all of the Act's conditions, not merely those interpreted by the regula-

tions in question," remained. *Id.* at 58–59. Crucially, this Court held that "a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." *Id.* at 59.

So too here. The Supreme Court of the Virgin Islands' invalidation of the damages cap has not been felt in a concrete way by Petitioners. There is no immediate change in day-to-day affairs. In fact, this case's interlocutory posture leaves open unsettled factual and legal questions that bear directly on whether Petitioners will be harmed by the decision at all.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–581 (1985)). In this case, there have been no findings of fact, no determinations of liability, and no cap applied. This is not a case where Petitioners have already suffered a tangible injury. *Cf. Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 73–74 (1978) (challenge to damages cap on nuclear accidents ripe where, aside from threat of future meltdown, residents already suffered from radiation exposure and thermal pollution).

Should this Court grant the petition and the parties settle or a judgment be entered in an amount below the cap, hundreds of hours in preparing for a Supreme Court appeal and tens of thousands of dollars would be wasted, all to the detriment of parties who could have amicably resolved the dispute without unnecessary judicial waste. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-83 (10th ed. 2013) (discussing that granting petitions such as this "lessen[]

the likelihood that a Supreme Court ruling will save the parties and the courts from wasted effort," which should weigh heavily against certiorari). Without such certainty, this Court's ruling would "amount to nothing more than an advisory opinion" that could ultimately have no effect on the judgment at all. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (explaining that "[w]hen this Court reviews a state court decision, . . . reviewing the *judgment* [and] if the resolution of a federal question cannot affect the judgment, there is nothing for the Court to do.") (emphasis in original); *see also Clinton v. Jones,* 520 U.S. 681, 700 n.33 (1997) (observing that this Court "early and wisely determined that it would not give advisory opinions . . . ."). As this Court does not issue such opinions, and because the issue raised is not ripe for review, the petition must be denied.

II. THE SUPREME COURT OF THE VIRGIN ISLANDS PROPERLY INTERPRETED ITS BILL OF RIGHTS

The petition should be denied where the Supreme Court of the Virgin Islands, as the court of last resort for the Virgin Islands, is empowered to and did properly interpret its *de facto* Bill of Rights independent of the clauses of the Bill of Rights to the United States Constitution.

A. Section 1561 constitutes the *de facto* Virgin Islands Bill of Rights

The Virgin Islands Bill of Rights is found at 48 U.S.C. § 1561 and contains the "Rights and Prohibitions" of the United States Virgin Islands. Specifically, the first sentence of § 1561, which is relevant here and was enacted in 1936, provides that: "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." 48 U.S.C. § 1561. Separate and distinct from this free-standing equal protection and due process clause, § 1561 in 1968 added language at the end to incorporate by reference the federal equal protection and due process clauses:

> 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 . . . .

§ 1561.

Before that express extension of the U.S. Constitution's Equal Protection Clause to the Virgin Islands in 1968, no statute had done so. In 1968, Congress amended the Revised Organic Act to extend various provisions of the United States Constitution—including the equal protection and due process clauses of the Fourteenth Amendment—to the Virgin Islands. Act of Aug. 23, 1968, Pub. L. No. 90-496, § 11. In doing so, it did not repeal the original Virgin Islands Bill of Rights provisions from the 1936 and 1954 enactments, but rather it left them alone, meaning that then, as now, § 1561 contained two equal protection clauses—the first stemming from the local Virgin Islands Bill of Rights and the second stemming from the Fourteenth Amendment of the United States Constitution.

Critically, the earlier 1936 version of § 1561 was modeled after "familiar provisions found in various

organic acts and in State constitutions," not the federal constitution. 80 Cong. Rec. 6609 (1936). Section 1561 thus contains two separate equal protection and due process clauses. The Virgin Islands Supreme Court's decision here interpreted the free-standing equal protection clause, and not the United States Constitution's Equal Protection Clause in the Fourteenth Amendment, incorporated by reference. App. 7a–8a.

In a footnote, Petitioners note that § 1561 contains two equal protection clauses, but they fail to acknowledge that: (1) this case hinges on the Virgin Islands Supreme Court's interpretation of the first clause, not the second; and (2) the existence of two equal protection clauses in the same statutory section undercuts the argument that they are redundant. Pet. 8 n.11. In fact, Petitioners seem to suggest, incorrectly, that it is the *second* clause at issue here. They emphasize the language providing that the incorporation of "the second sentence of section 1 of the fourteenth amendment" "shall have the same force and effect there as in the United States or in any State of the United States." Pet. 8 n.11. That is neither here nor there. The Virgin Islands Supreme Court expressly rested its decision *only* on the first clause, not the second clause. App. 7a–8a.

To that end, Petitioners make no attempt to connect the language in the second equal protection clause—namely, that it "shall have the same force and effect there as in the United States or in any State of the United States"—to the first clause, nor do the Petitioners even suggest it is applicable. Instead, they boldly state that review of or reliance upon *any* legislative history was "wrong," ignoring that it was reviewed in an attempt to decipher the meaning of the first clause and not the second. Contrary to

Petitioners' suggestion, both legislative history *and* the principles of statutory construction are helpful to determine what a statute containing two differently-worded equal protection clauses means for the people of the Virgin Islands.

It is well established that when "Congress includes particular language in one section of a statute but omits it in another—let alone the very next provision—this Court presume[s] that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted). Similarly, the "cardinal principle" of statutory interpretation is that courts "must give effect, if possible, to every clause and word of a statute." *Loughrin*, 573 U.S. at 358 (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). Because this Court has "cautioned against reading a text in a way that makes part of it redundant"; *Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 669 (2007); the legislative history behind the meaning of the first equal protection clause is necessary to properly effectuate the meaning of § 1561. It is worth noting that after decrying its use, Petitioner makes hardly any mention of the critical legislative history surrounding the enactment of the Virgin Islands Bill of Rights.

The history surrounding enactment of § 1561 significantly demonstrates Congress's intent to leave two equal protection clauses—one local and one federal—in the Virgin Islands Bill of Rights. Section 1561, as a part of the Revised Organic Act, was enacted by Congress pursuant to its power under the Territorial Clause of Article IV of the United States Constitution, which authorizes Congress to enact laws for a territory

as if Congress were a state government.[6] App. 17a; *see also Browne v. People of Virgin Islands*, 50 V.I. 241, 247 (V.I. 2008). It was *not* enacted with Congress sitting in its capacity as a national legislature under Article I. App. 17a. Section 1561 is the only section contained in Subchapter II of Chapter 12 of Title 48 of the United States Code, which pertains only to the United States Virgin Islands. 48 U.S.C. ch. 12, subch. II. Notably, Subchapter II is specifically entitled, "Bill of Rights." 48 U.S.C. ch. 12, subch. II & § 1561. This unambiguous identification of § 1561 as the Virgin Islands Bill of Rights should be the beginning and the end of any question regarding the propriety of the Virgin Islands Supreme Court to independently interpret its terms as providing greater protections than the equal protection and due process clauses of the Fourteenth Amendment.[7]

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[6] The Territorial Clause of Article IV of the United States Constitution provides in relevant part: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2; *see also Ortiz v. United States*, __ U.S. __, __, 138 S. Ct. 2165, 2197 (2018) (Alito, J., dissenting) (noting that the Court has "often repeated that [i]n legislating for [the Territories], Congress exercises the combined powers of the general, and of a state government" [internal quotation marks omitted]) (citing *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828), and *Palmore v. United States*, 411 U.S. 389, 403 (1973)). Under the Territorial Clause, "unlike any of its other powers, Congress's power over the Territories allows it to create governments in miniature, and to vest those governments with the legislative, executive, and judicial powers, not of the United States, but of the Territory itself." *Ortiz*, __ U.S. at __; 138 S. Ct. at 2197.

[7] It is thus difficult to understand Petitioners' claim that "the two justices in the majority created the artifice of a 'Virgin Islands Bill of Rights'" when the express language of the Revised

Even if such unambiguous language did not exist, however, the legislative history surrounding the enactment of the Revised Organic Act of the Virgin Islands reveals that Congress intended § 1561 to serve as the Virgin Islands' own independent Bill of Rights, subject to interpretation by its court of last resort in the same way that state constitutions are subject to independent interpretation by their own states' courts of last resort.

Congress, sitting as if it were a state government, did not model the Virgin Islands Bill of Rights after the Bill of Rights to the United States Constitution. Rather, it modeled the Virgin Islands Bill of Rights after similar provisions found in state constitutions. App. 17a. "[W]hen Congress first enacted the Revised Organic Act in 1954, it chose to borrow the Bill of Rights provisions—including the [separate] equal protection and due process clauses—from section 34 of the Virgin Islands Organic Act of 1936." App. 19a (citing to S. Rep. No. 83-1271 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2585, 2593 ("Section 3 provides a bill of rights which is in part similar to the Bill of Rights in the United States Constitution and which parallels the bill of rights, in somewhat different order, contained in the existing Virgin Islands Organic Act.")). The legislative history of section 34 of the Virgin Islands Organic Act of 1936 reveals that Congress adopted "familiar provisions found in various organic acts and in State constitutions in relation to the Bill of Rights." A19a–20a (citing to 80 Cong. Rec. 6609 (statement of Senator William H. King of Utah)).

Organic Act itself identifies § 1561 as the Virgin Islands' "Bill of Rights." Pet. 8.

Significantly, the Organic Act of 1936 and the subsequent Revised Organic Act of 1954 were not unilaterally imposed on the Virgin Islands by Congress as federal statutes enacted under Article I typically are; rather they were drafted with the best interests and approval of the people of the Virgin Islands in mind. As a majority of the Virgin Islands Supreme Court in this matter explained:

> When Congress first considered establishing a permanent government for the Virgin Islands, the Chair of the Senate Committee on Territories and Insular Possessions—Senator Millard E. Tydings—rejected a draft organic act that had been prepared by the Presidentially-appointed governor, and instead demanded that another bill be drafted "which would meet with approval of the local people." U.S. House of Representatives, Committee on Insular Affairs, Hearings on H.R. 11751 to Provide a Civil Government for the Virgin Islands of the United States, 74th Cong., 2d sess. (1936), p.1. In response, the two democratically-elected Virgin Islands legislatures existing at that time drafted the bill that would, with only minor changes, eventually become the Virgin Islands Organic Act of 1936. WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 185-86 (2d ed. 2010). In other words, the first charter and *de facto* constitution of the Virgin Islands, which includes the Bill of Rights provisions at issue in this case, was not solely drafted by Congress, but was—like the Constitution of Puerto Rico and the CNMI Constitution—drafted by representatives elected directly by the people of the Virgin

> Islands, and then subsequently approved by Congress.
>
> Likewise, the adoption of the Revised Organic Act and the subsequent amendments thereto had also not been initiated unilaterally by Congress. Rather, those enactments were spurred by local referendums on several subjects, including a desire to combine the two legislatures into a single legislature. *Id.* at 234. In other words, like the Constitution of Puerto Rico, both the Virgin Islands Organic Act of 1936 and the Revised Organic Act of 1954 were adopted with the consent of the people of the Virgin Islands either directly or through their democratically-elected representatives and then made official through the acquiesce of Congress.

App. 61a n.34. This legislative history reveals that the Virgin Islands Bill of Rights was born of Congress's intent to make sure the people of the Virgin Islands were protected in the same way and with the same rights and privileges (including the same right of interpretation) that the people of the States were at that time.

By contrast, Petitioners point to no text or legislative history whatsoever suggesting that Congress intended to deprive the people of the Virgin Islands of the same right enjoyed by other U.S. citizens to constitutional protections above the floor provided by the U.S. Constitution. Petitioners correctly note that the Virgin Islands has not adopted an entirely new constitution of their own. The question is thus whether, in the interim, Congress intended to afford them the same right to local constitutional protections enjoyed elsewhere in the United States, or to deprive

them of that right. The latter is a tough pill to swallow, and Congress never said any such thing.

Both the plain language of § 1561 as well as the legislative history of its enactment and subsequent revisions thus demonstrate that it is the *de facto* Virgin Islands Bill of Rights. The underlying premise of Petitioners' position, however, presumes otherwise, and is incorrect. The petition should be denied.

B. Because § 1561 is the *de facto* Virgin Islands Bill of Rights, the Virgin Islands Supreme Court could properly interpret its terms as providing greater protections than the Equal Protection Clause of the Fourteenth Amendment

1. *The constitutional protections set forth in the Fourteenth Amendment are a floor and not a ceiling*

As noted above, the underlying premise of the question presented by Petitioners to this Court is that § 1561 is a "federal statute," which required the Virgin Islands Supreme Court to be bound by the Court's Equal Protection decisions in interpreting its terms. If it is not, however, as discussed in the Part II.A, the Supreme Court was entirely proper in interpreting its *de facto* Bill of Rights more broadly than the Equal Protection Clause of the Fourteenth Amendment.

It is well established that the constitutional protections set forth in the Fourteenth Amendment, as applicable to the states and territories, are a floor and not a ceiling to the protections each state and territory may provide for its own citizens pursuant to local constitutional law. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("a state court is entirely free to read its own State's

constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee") (citing generally William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977)); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.") (citing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018) and Brennan, *supra*).

Accordingly, Petitioners' claim that the Virgin Islands Supreme Court improperly surpassed the restraints of this Court's precedent interpreting the equal protection clause must fail. *See* Pet. 11 ("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."). The Virgin Islands Supreme Court was not modifying the federal Equal Protection Clause. It was interpreting the constitutional guarantees of its own *separate* equal protection clause, as a state court of last resort is entitled to do.

2. *There is no conflict worthy of granting certiorari*

Petitioners complain that the Virgin Islands Supreme Court's decision improperly conflicts with *Kepner v. United States*, 195 U.S. 100 (1904), *Serra v. Mortiga*, 204 U.S. 470 (1907), and *Weems v. United States*, 217 U.S. 349 (1910). Pet. 11–16. This

complaint misunderstands these cases, as they are not only distinguishable but also inapposite to a state court's interpretation of a state constitution.

First, as the Virgin Islands Supreme Court pointed out, the *Kepner* and *Weems* decisions both involved situations where the local courts of the Philippines had interpreted the pertinent provisions of its organic act as providing *lesser*—not *greater*—protections than the similar provisions of the United States Constitution. App. 49a n.25. It is undisputed that the rights in the United States Constitution are a *floor* for the rights to which people in the United States are entitled, which is why—in rejecting the insufficient interpretations by the local courts—the Court recited the 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." *Kepner*, 195 U.S. at 124; *see also Weems*, 217 U.S. at 367 ("the provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States, and must have the same meaning"). Following *Kepner*'s lead, the Court in *Serra* similarly recognized this principle as relevant to application of certain rights a criminal defendant has in the former territory of the Philippines. *Serra*, 204 U.S. at 474.

Most important, however, to *why* the Court recognized this principle in these cases, is the fact that the Philippines Organic Act was structured differently and enacted with a different purpose than the Revised Organic Act of the Virgin Islands. Specifically, unlike § 1561 of the Revised Organic Act, which contains a free-standing equal protection clause in addition to an express incorporation by reference of the Equal Protection Clause of the Fourteenth Amendment, the

Philippines Organic Act did not include free-standing double jeopardy and cruel-and-unusual punishment provisions in addition to language that expressly incorporated by reference the First to Ninth Amendments of the United States Constitution. Thus, the structure of the Act did not suggest a separate and independent Bill of Rights from the rights extended in the federal Constitution. App. 49a n.25.

Additionally, unlike the Virgin Islands at the time of the adoption of the Organic Act in 1936 and the Revised Organic Act in 1954, Congress "manifested no intent for the government of the Philippine Islands to be treated as if it were a state government." App. 49a n.25. *Kepner*, in fact, states the opposite: that the President of the United States expressly instructed Congress to adopt and incorporate the federal Bill of Rights to the people of the Philippine Islands. 195 U.S. at 122. Congress thus enacted, in the former territory of the Philippines, "with little alteration, the provisions of the Bill of Rights," and, accordingly, "there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom . . . ." *Id.* at 124. *Kepner* served as the basis for the Court's decisions in both *Serra* and *Weems*, which both concerned interpretation of the Philippines Organic Act.

The Virgin Islands Bill of Rights, of course, was not modeled after the federal Bill of Rights but rather after similar provisions found in state constitutions. *See infra*. *Kepner*, *Serra* and *Weems* are thus not only distinguishable but also irrelevant to the Virgin Islands Supreme Court's interpretation of its own Bill of Rights. *See UC Health v. N.L.R.B.*, 803 F.3d 669,

683 (D.C. Cir. 2015) (Edwards, J., concurring) ("[T]he precedential value of a decision is defined by the context of the case from which it arose. If, in light of that context, the decided case is materially or meaningfully different from a superficially similar later case, the holding of the earlier case cannot control the latter."); App. 49a–50a n.25.

Petitioners also complain that the Virgin Islands Supreme Court's decision is in conflict with decisions stemming from three United States Courts of Appeal: *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), *United States v. Husband R.*, 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972), and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96 (1st Cir. 1946). Pet. 16–18. Where *Husband R.* and *South Porto Rico Sugar Co.* merely adopt and apply the aforementioned principle from *Kepner*, they are, like *Kepner*, distinguishable and irrelevant. There is no conflict.

There is similarly no meaningful conflict with *Guerrero*. Although the Ninth Circuit in *Guerrero* was addressing a similar question, the Court itself expressly noted that the Guam Organic Act of 1950, which established a "Bill of Rights" for Guam's inhabitants, was "modeled after the Bill of Rights in the federal Constitution." 290 F.3d at 1214. Beyond this statement, the Court conducted no review of the statute's legislative history. It simply concluded that because the statute was passed by Congress[8] and not by Guam's citizens, and because it was modeled after

[8] The *Guerrero* Court similarly failed to address this Court's conclusion in *Key v. Doyle*, 434 U.S. 59, 61 (1977), that the mere fact that a federal statute was enacted by Congress does not make that statute a "statute of the United States."

the federal Constitution, it "remains quite unlike a constitution of a sovereign State," and thus is a federal statute that may not be interpreted as providing more constitutional protections than the federal Constitution. *Id.* at 1217.

The legislative history surrounding the Virgin Islands Bill of Rights, of course, reveals how easily distinguishable the decision of the Virgin Islands Supreme Court is with that of the *Guerrero* court. The Virgin Islands Supreme Court conducted an extensive and complete review of the legislative history of § 1561 of the Virgin Islands Revised Organic Act, and based its decision not on the fact that the Revised Organic Act was passed by Congress, but rather that the Revised Organic Act was *modeled after state constitutions* and passed by Congress *pursuant to its authority in the Territorial Clause of the Constitution*. The Ninth Circuit failed in *Guerrero* to even identify under what authority Congress acted in passing the Guam Organic Act in the first place. The distinctions between *Guerrero* and the present matter render any "conflict" identified by the Petitioners meaningless.

3. *This Court has granted great deference to judgments of the District of Columbia Court of Appeals and the Supreme Court of Guam as to federal statutes of purely local concern*

Petitioners fail to acknowledge that this Court has long deferred to the interpretations by non-state courts of last resort of laws that were technically federal, in that they were enacted by Congress, but which dealt with pure issues of local law, such as in the District of Columbia and Guam.

In *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974), this Court expressly recognized its well-established "reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *See also id.* ("we believe the same deference is owed the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction.").

In *Pernell*, looking to the legislative history of the Court Reform Act, by which Congress restructured the District's court system, the Court recognized that the restructure was accomplished with a primary purpose of making the District's court system "comparable to those of the states and other large municipalities." *Id.* at 367. The District of Columbia Court of Appeals was made the highest court of the District, "similar to a state Supreme Court," and "its judgments made reviewable by this Court in the same manner that we review judgments of the highest courts of the several States." *Id.* This is identical to the structure and purpose of 48 U.S.C. § 1613, which established that the judgments of the Supreme Court of the Virgin Islands are reviewable by this Court in the same manner in which the decisions of state courts of last resort are reviewed. With the intent of Congress as its guide, the Court ultimately recognized the great deference that is owed to the District of Columbia's court of last resort in interpreting even technically federal principles of law—in that they were enacted by Congress—that were purely local in substance and effect. 416 U.S. at 366–69; *see also Hall v. C&P Telephone Co.*, 793 F.2d 1354, 1357–58 (D.C. Cir. 1986) (deferring to construction by D.C. Court of Appeals of an Act of Congress directed only to the District of Columbia).

In *Limtiaco v. Camacho*, 549 U.S. 483, 491 (2007), the Court extended these principles from *Pernell* and *Hall* to a decision of the Supreme Court of Guam interpreting the Guam Organic Act. It emphasized that "decisions of the Supreme Court of Guam, as with other territorial courts, are instructive and are entitled to respect when they indicate how statutory issues, including the Organic Act, apply to matters of local concern." *Id.* at 492.

The free-standing equal protection clause of the Virgin Islands Bill of Rights is of purely local concern. As in these cases, its initial passage by Congress did not preclude the Virgin Islands Supreme Court from treating it as such and interpreting it accordingly. And it similarly does not warrant review by this Court. The petition should be denied.[9]

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[9] Finally, Petitioners complain about a purported lack of electoral remedy if the people of the Virgin Islands interpret their *de facto* Bill of Rights differently than the Virgin Islands Supreme Court does. Pet. 18–20. But, elsewhere, Petitioners concede such a remedy exists. To wit, in 1976, "Congress authorized the people of the Virgin Islands *to adopt a constitution* . . . ." Pet. 2 n.1 (emphasis added). If the people prefer a different interpretation, they may hold a constitutional convention and enact it. While Petitioners' claim that this "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),"; Pet. 2 n.1 (emphasis added); it says no such thing. Rather, it requires any such constitution to "recognize, and be consistent with, the . . . supremacy of the provisions of the Constitution, treaties, and laws of the United States applicable to the Virgin Islands . . . including, but not limited to, *those provisions* of the Organic Act and Revised Organic Act of the Virgin Islands . . . *which do not relate to local self-government*." Pub. L. No. 94–584, § 2(b)(1), 90 Stat. 2899 (emphasis added). The free-standing equal protection clause of § 1561 affects only how the Virgin

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Islands govern themselves, not their relationship with the federal government. It may be amended via constitutional convention.