No. 19–304

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONER

A. THIS COURT HAS JURISDICTION.

1. By statute, the decision below is final.

Respondent argues the decision below is non-final and this Court therefore lacks jurisdiction. But, a declaratory judgment is endowed—by the Virgin Islands Declaratory Judgment Act ("VIDJA")—with "the force and effect of a final judgment." V.I. Code Ann. tit. 5, § 1261. And, this Court is given the power—again by statute—to review a final judgment that challenges the validity of a statute on federal grounds. 28 U.S.C. § 1260. Thus, when the Virgin Islands Supreme Court ("VISC") declared the damage cap facially unconstitutional, it was a final judgment subject to review by this Court.

Treating declaratory judgments as final and immediately appealable is logical. Consider the declaratory judgment in this case: It was not an "as-applied" decision limited to the parties. Instead, it facially-invalidated the damage cap. It upended the Virgin Islands automobile insurance market and retroactively exposed litigants to potentially far greater liability than they expected when they purchased insurance—without an ability to buy additional insurance to protect themselves retroactively. It is essential to all automobile owners and insurers that the Question Presented be resolved quickly and not await disposition of the entire case. This beyond–the–parties–impact of declaratory judgments explains why they, like their close cousins, interlocutory

injunctions, are immediately appealable.[1]

The VISC has never determined whether the VIDJA's characterization of a declaratory judgment as a final judgment grants it appellate jurisdiction when other issues in the case remain. This Court "has not hesitated" to decide unanswered questions of state law even though how the state court might answer the question "remained uncertain." *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943).

The unanswered jurisdictional question is whether a judgment that statutorily has "the force and effect of a final judgment" is less appealable than any other final judgment. Guidance for answering the question may be gleaned from a VISC decision construing appellate jurisdiction over an interlocutory *denial* of a declaratory judgment. In *Estate of George v. George*, 50 V.I. 268, 273 (2008), the VISC recognized that under the VIDJA, declaratory judgments "shall have the force and effect of a final judgment." But, the court then held it lacked jurisdiction because the appeal was from an interlocutory order *denying* a declaratory

[1] Declaratory judgments resemble injunctions but lack an injunction's coercive power. *See Perez v. Ledesma*, 401 U.S. 82, 111–115 (1971) (Brennan, J., dissenting) (describing declaratory relief as a milder alternative to an injunction). The grant *or denial* of an injunction is immediately appealable, whereas finality of declaratory judgments is limited to cases where a declaratory judgment is *granted*. There is no immediate appeal from the *denial* of a declaratory judgment. *See, e.g., Estate of George v. George*, 50 V.I. 268, 273 (2008).

judgment.[2]

Further assistance in predicting how the VISC would interpret the VIDJA is gained from that court's rules of statutory interpretation. When statutory language "is plain and unambiguous, no further interpretation is required." *Codrington v. People*, 57 V.I. 176, 185 (2012). Here, the statute unambiguously gives a declaratory judgment the force and effect of a final judgment—and it does so while simultaneously recognizing that declaratory judgements may be combined with claims for other relief. V.I. Code Ann. tit. 5, § 1261.

Virgin Islands law specifies that phrases with "a peculiar and appropriate meaning" "shall be construed . . . according to their peculiar and appropriate meaning." V.I. Code Ann. tit. 1, § 42. This is important, because the VIDJA uses the well-understood phrase, "final judgment or decree." This phrase has determined when appellate jurisdiction attaches since the Judiciary Act of 1789. 1 Stat. 73, §§ 22, 25.

A final VISC rule of statutory construction supports appellate jurisdiction. The court gives effect to every provision in a statute to avoid an interpretation rendering any provision superfluous. *In re L.O.F.*, 62 V.I. 655, 661 (2014).

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[2] In the case *sub judice*, the trial court denied the motion for a declaratory judgment, which forced respondent to obtain permission to file an interlocutory appeal. The VISC issued a declaratory judgment when it rendered its decision. App. 86a (characterizing the relief as "a declaration that section 555 is invalid") and thus that decision is statutorily final and reviewable as a final judgment.

The language deeming declaratory judgments final judgments is unnecessary when those judgments terminate litigation (because, an order ending the litigation on the merits is a classic final judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Thus, limiting appellate jurisdiction to case-terminating declaratory judgments would make the unique statutory language superfluous. The language is not superfluous; because, it renders a declaratory judgment immediately appealable in those *other* cases, such as this one, where it would otherwise be considered non-final.[3] Ordinary statutory construction

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[3] The VIDJA derives from the Uniform Declaratory Judgment Act. *Pan Am. World Airways, Inc. v. Virgin Islands*, 459 F.2d 387, 389 n.1 (3d Cir. 1972). In states adopting the Uniform Act, courts disagree as to immediate appealability. *See Emson Inv. Properties, LLC v. JHJ Jodeco 65, LLC*, 824 S.E.2d 113, 116–17 (Ga. 2019) (allowing appeal) and *Webb-Boone Paving Co. v. State Highway Com'n*, 173 S.W.2d 580, 582 (Mo. 1943) (same); *Canal Ins. Co. v. Reed*, 666 So. 2d 888, 891 (Fla. 1996) (observing that "the legislature has clearly stated that declaratory judgments are final judgments" and recognizing them as immediately appealable). *But see Essex Foundry v. Biondella*, 17 A.2d 568, 570 (N.J. 1941) (disallowing appeal); *Moncrief v. Tate*, 561 S.W.2d 941, 942 (Tex. App. 1978) (same); *Boyett v. Boyett*, 598 S.W.2d 86, 88 (Ark. 1980) (same).

The federal declaratory judgment act, 28 U.S.C. § 2201, includes the familiar "shall have the force and effect of a final judgment" language. The circuits are split as to whether this authorizes an immediate appeal when the case is otherwise not final. *Compare Thermice Corp. v. Vistron Corp.*, 832 F.2d 248, 251 (3d Cir. 1987) *and Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619, 620–21 (7th Cir. 2006) (both recognizing immediate appealability) *with Petrol Corp. v. Petroleum Heat & Power Co.*, 162 F.2d 327, 329 (2d Cir. 1947) *and S. Parkway Corp. v. Lakewood Park Corp.*, 273 F.2d 107, 108 (D.C. Cir. 1959) (both

principles dictate that a declaratory judgment is final—and therefore immediately appealable.

2. An order declaring a statute unconstitutional on its face and leaving no federal issues to decide is final for purposes of appeal to this Court.

Respondent argues the judgment below is non-final and the Court has jurisdiction only if the judgment falls within the types of cases this Court has found "pragmatically final" as described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But, even if "linguistic gymnastics"[4] can take a judgment that is final by legislative command and transform it into a

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denying immediate appeal). The Seventh Circuit has an intra-circuit split. *Compare Wachovia Bank, N.A., supra, with Peterson v. Lindner*, 765 F.2d 698, 702–04 (7th Cir. 1985).

This Court has discussed declaratory judgment appellate jurisdiction in only one case—and then only in dicta. In *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976) the plaintiffs obtained summary judgment as to liability only. The district court's order certified the decision for interlocutory appeal but this Court concluded that the requirements for such an appeal were not met and dismissed for lack of jurisdiction. At oral argument, the petitioner "suggested" that the order granting summary judgment on liability qualified as a declaratory judgment. *Id.* The Court evidently did not accept this argument, explaining that "even if we accept[ed]" the argument, there were other unresolved requests for relief. The Court did not discuss the statutory language and it appears the issue was not briefed.

[4] *See St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 791 n.4 (1981) (Stevens, J. concurring) (stating it is not the "function of this court to perform linguistic gymnastics in order to upset the plain language of Congress") (internal quotation marks omitted).

non-final judgment,[5] the declaratory judgment invalidating the damage cap is pragmatically final.

Respondent's BIO accurately summarizes the four pragmatic categories of exceptions to the finality doctrine as elucidated in *Cox Broadcasting Corp.;* but, respondent is too quick to conclude that the first and second categories are inapplicable to this case.

Subsequent decisions have explained those two categories. For example, in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), a declaratory judgment invalidating a state statute on federal grounds was issued; but, the state supreme court remanded for further proceedings. This Court nevertheless found that the case fell within both categories. 490 U.S. at 612. With respect to the first category, it observed that "on remand, the trial court does not have before it any federal question" and "the trial court's further actions cannot affect" the state supreme court's ruling that the statute was invalid. Further "the federal issue was conclusive and the outcome of further proceedings preordained." *Id.*

This case is similar to *ASARCO*. The sole federal issue in the case was conclusively decided. And, because the statute was declared *facially* unconstitutional, the declaratory judgment *cannot* be mooted or otherwise affected by the subsequent proceedings. No matter the eventual result, the declaratory judgment will still affect the entire

[5] "[O]xymoron is not a typical feature of congressional drafting." *Stern v. Marshall*, 564 U.S. 462, 477 (2011). Nor is it a typical feature of Uniform Act drafting.

Territory. The declaration of facial unconstitutionality guarantees that the judgment will not be mooted by whatever happens on remand. As for the second category, the federal issue is finally decided and will survive (due to the declaratory judgment) and thus require decision by this Court regardless of the outcome of future proceedings below.

That the issues will not be mooted on remand distinguishes this case from the primary case relied upon by respondents: *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1977). That case did not involve a declaratory judgment that invalidated a statute and the Court held that the issue would neither survive nor require decision regardless of the outcome on remand. *Id.*, 522 U.S. at 82.

Cox Broadcasting stated that there were "*at least* four categories of such cases," 420 U.S. at 477; thus, the list of categories is not exclusive. A narrow way to construe jurisdiction in this case would be to recognize a fifth category: Cases where (1) a declaratory judgment (defined as final by statute) has held a statute facially invalid on federal grounds; (2) the ruling's facial nature gives it broader application than just to the parties and thus will have continuing effect even if, for example, the parties settle; (3) the ruling has a significant impact on justified expectations of non-parties; and (4) an immediate rather than delayed review is the best way to conclusively resolve the doubt cast by the appealed ruling upon the justified expectations of non-parties.[6]

[6] An additional factor may warrant consideration: whether all federal issues are fully resolved (as they are in this case) such

B. THE ISSUE IS RIPE.

In a secondary effort to avoid review, respondent contradicts the position he took in the proceedings below—that the validity of the damage cap was ripe for determination. There are two types of ripeness: constitutional ripeness ("Article III limitations on judicial power") and prudential ripeness ("prudential reasons for refusing to exercise jurisdiction"). *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n.18 (1993). Respondent's challenge does not distinguish between the two.

Constitutional ripeness considers whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972) (internal quotation marks omitted). The claim must not be impermissibly speculative such that it fails to meet Article III's case or controversy requirement.

Ripeness is "a question of timing." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974). "[I]t is the situation now" rather than the situation at the time of the lower court's decision that determines ripeness on appeal. *Id.* In this case, the petitioners are "now" being sued but are deprived of statutory protection in the litigation. The single contingency that

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that the Court can avoid the prospect of piecemeal appeals. There may be instances, however, when the judgment's impact upon non-parties is so substantial that it outweighs concerns about piecemeal appeals.

they *might* not need that protection does not render the issue *impermissibly* speculative and thus constitutionally unripe.

To the extent respondent relies upon prudential ripeness, his strategic flip-flop is barred by judicial estoppel.[7] Judicial estoppel arises when a party's later position is clearly inconsistent with an earlier position and the party persuaded a court to accept the earlier position. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). (A court may also consider if the party asserting the inconsistent position gains an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.) *Id.*

In the proceedings below, respondent asserted his facial constitutional challenge to the damage cap was ripe because it required no fact-finding; and waiting for a ruling until trial imposed undue hardship because the outcome of the ruling "impacts crucial [litigation, including settlement] decisions." App. 145a. The trial court accepted both of these arguments, App. 146a–147a, and specifically accepted the argument that in a facial challenge, the possibility the damages might not exceed the cap was irrelevant to the ripeness analysis. App. 150a n.29. Now, respondent urges the opposite. BIO, pp.16–17. Respondent is judicially estopped from doing so.

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[7] Because prudential ripeness can be waived, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010), it stands to reason that it can also be barred by judicial estoppel.

C. THE PETITION SHOULD BE GRANTED.

While ostensibly addressing reasons to deny certiorari, respondent instead devoted all of sections II.A.–II.B.1. of the BIO to an argument on the merits.[8] When respondent finally challenges the reasons put forward for granting certiorari, he fails to address the third reason advanced by petitioners; and, his arguments directed to the other reasons fail. Further, respondent does not dispute that the Question Presented raises an important question of federal law.

1. Respondent ignores the third reason advanced by petitioners for granting certiorari.

Petitioners asserted that the VISC-majority had taken for itself the power to declare statutes unconstitutional under the ephemeral "Virgin Islands Bill of Rights" yet neither the people of the Territory nor their elected representatives had any power to amend "their" bill of rights to overrule the majority. This evisceration of the separation of powers, accomplished through a misinterpretation of a federal statute, raises an important question of federal law that has great importance to the people of the Territory.

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[8] Respondent devotes section II.A. to a restatement of the two-justice majority's analysis of the legislative history of the Territory's organic acts. This analysis sheds no light upon the factors this Court considers when deciding whether to grant certiorari. If the Court wishes to examine the legislative history at this stage, Justice Cabret's dissent refutes the (inaccurate) legislative history described by the majority. *See* App. 104a–113a.

Respondent's failure to answer this argument effectively concedes that there are good grounds to grant certiorari.

2. The decision below departs from this Court's precedent.

VISC *did* depart from this Court's precedents in *Kepner v. United States*, 195 U.S. 100 (1904); *Serra v. Mortiga*, 204 U.S. 470, 474 (1907); and *Weems v. United States*, 217 U.S. 349 (1910). Consequently, respondent distinguishes them to justify the departure.

Respondent does not address the lower court's use of a *non sequitur* fallacy to distinguish *Kepner*. As explained in the Petition, that distinction had no bearing upon *Kepner's* holding that Congress' use of familiar language from the Bill of Rights means it intends to apply the well-known meaning of that language. *Kepner*, 195 U.S. at 124.

Respondent instead raises two other incorrect distinctions:

(1) The local courts in *Kepner* and *Weems* interpreted constitutional provisions to reduce rights; whereas here, the VISC interpretation provided greater rights (BIO, p.27); and

(2) Congress did not intend to treat the Philippine Islands as if it were a state government (BIO, p.28).

Both distinctions fail for the same reason stated above: When this Court instructs that familiar language from the Bill of Rights be interpreted in

accordance with its well-known meaning, there is no latitude to vary that interpretation depending upon whether (1) the interpretation gives lesser or greater rights or (2) Congress treats the territorial government more or less like a state government.[9]

3. The decision below conflicts with three Circuits.

Respondent dismisses the directly conflicting decisions in *United States v. Husband R.*, 453 F.2d 1054 (5th Cir. 1971) and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96 (1st Cir. 1946) with a rhetorical face slap: "[T]hey are, like *Kepner*, distinguishable and irrelevant." BIO, p.29.

Respondent distinguishes *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) because the Guam Organic Act of 1950 was "modeled after the Bill of Rights in the Constitution." BIO, p.29. But, the plain language of 48 U.S.C. § 1561 (the Virgin Islands Revised Organic Act) applies sections of the Constitution and its amendments to the Territory. Contrary to respondent's contention, Congress did not model the Virgin Islands Organic Act on a state constitution. The decision below and *Guerrero* are in irreconcilable conflict.

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[9] The second distinction also depends upon misreading 48 U.S.C. § 1561 as encompassing two Equal Protection Clauses. Justice Cabret's dissent repudiates this assertion. App. 108a–113a. This second distinction also invokes what Justice Cabret described—accurately—as "the majority selectively omit[ting]" a word from the legislative history, "thereby changing the apparent implication of the language" in that history. App.105a n.9.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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