For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FREDERIC J. BALBONI, JR., Appellant/Plaintiff, v. **RANGER AMERICAN OF THE V.I., INC. and EMICA KING,** Appellees/Defendants.	**S. Ct. Civ. No. 2018-0022** Re: Super. Ct. Civ. No. 366/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: April 10, 2018
Filed: June 3, 2019

Cite as 2019 VI 17

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

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OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 The Superior Court, in a February 21, 2018 order, certified several issues addressed in a prior January 24, 2018 opinion and order for immediate appellate review pursuant to the procedure set forth in title 4, section 33(c) of the Virgin Islands Code. For the following reasons, we reverse.

I. BACKGROUND

¶ 2 Frederic J. Balboni, Jr., was struck by an automobile driven by Emica King and owned by Ranger American of the Virgin Islands, Inc. ("Ranger American") while visiting the Virgin Islands. Balboni sued Ranger American and King in the Superior Court of the Virgin Islands. Balboni maintains that as a result of the incident "[h]e has suffered and endured hospitalizations and repeat surgeries, skin grafts, and many rounds of physical therapy," as well as "a brain injury," and that "[t]he pain and suffering he has endured is unimaginable."[1] (Appellant's Br. 5.)

¶ 3 Prior to trial, Balboni filed a "Motion to Determine 20 V.I.C. § 555 Unconstitutional," which Ranger American and King opposed. Section 555 provides, in its entirety, that

[1] 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." *Edward v. GEC, LLC*, 67 V.I. 745, 753 (V.I. 2017) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 972-73 (V.I. 2011)).

> (a) The total amount recoverable for non-economic damages for any injury to a person in an action arising out of a motor vehicle accident may not exceed $100,000; provided, however, that this limitation shall not apply upon a finding of gross negligence or willful conduct.
>
> (b) For the purposes of this section, non-economic damages include:
>
> (1) pain and suffering;
> (2) physical impairment;
> (3) disfigurement; and
> (4) other not-pecuniary damages recoverable under the tort laws of this Territory.

20 V.I.C. § 555. Specifically, Balboni argued that this statute is unconstitutional under the Fifth, Seventh, and Fourteenth Amendments of the United States Constitution, as well as the equal protection and due process clauses of section 3 of the Revised Organic Act of 1954 (hereafter the "Virgin Islands Bill of Rights").

¶ 4 The Superior Court adjudicated Balboni's motion in a January 24, 2018 opinion and order. First, the Superior Court held that the motion was ripe for adjudication even though trial had not yet occurred, since Balboni "is making a facial constitutional challenge" for which "fact-finding is not necessary," and deferring a decision until after trial "would potentially cause hardship on the parties" since "[k]nowing that one possibly cannot collect more than $100,000 in non-economic damages changes a party's trial approach." (J.A. 7-8.) With respect to the merits, the Superior Court denied the motion after determining that section 555 did not violate any of the federal constitutional provisions cited by Balboni. However, the Superior Court did not expressly consider Balboni's argument that section 555 violated the equal protection and due process clauses of the Virgin Islands Bill of Rights.

¶ 5 On February 5, 2018, Balboni filed a motion for the Superior Court to amend its January 24, 2018 opinion to certify the issues for immediate interlocutory appeal pursuant to title 4, section 33(c) of the Virgin Islands Code. The Superior Court granted the motion in a February 21, 2018

order, and certified the following four questions for review by this Court:

> Whether 20 V.I.C. § 555 impermissibly invades into the province of the jury in violation of the Seventh Amendment;
>
> Whether treating automobile accident victims differently based upon the severity of their noneconomic injuries violates the equal protection clause of the Fourteenth Amendment;
>
> Whether treating automobile accident victims and their injuries differently from victims of other types of accidents violates the equal protection clause of the Fourteenth Amendment;
>
> Whether § 555 unconstitutionally infringes on Due Process rights provided for in the Fifth and Fourteenth Amendments made applicable through the Revised Organic Act of 1954, including the substantive due process rights not to be deprived arbitrarily of life, liberty or property.

(J.A. 19.) Balboni timely filed a petition for permission to appeal with this Court on March 2, 2018, and this Court, in a March 9, 2018 order, granted the petition and set this matter for expedited review with respect to the four questions certified by the Superior Court.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 6 "Whenever [a] Superior Court judge, in making a civil action or order not otherwise appealable . . . is of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order" [2] and "[t]he Supreme Court of the Virgin Islands may thereupon, in its discretion, permit an appeal

[2] At oral argument, a question was raised as to whether the instant appeal satisfies the statutory requirement that an immediate appeal "materially advance the ultimate termination of litigation," 4 V.I.C. § 33(c), given 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 Ranger American, or awards non-economic damages in an amount less than the $100,000 cap. In its January 24, 2018 opinion, the Superior Court held that Balboni's constitutional challenge to 20

to be taken from the order, if application is made to it within ten days after entry of the order." 4 V.I.C. § 33(c). Since the Superior Court made such a certification in its February 21, 2018 order, and Balboni timely filed his petition on March 2, 2018, this Court possesses jurisdiction over this appeal by permission, based on this Court's March 9, 2018 order granting the petition. *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 607 (V.I. 2012).

¶ 7 This Court exercises plenary review of the Superior Court's application of law, including constitutional questions. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

B. The Virgin Islands Bill of Rights

¶ 8 In his appellate brief, Balboni contends that the cap on non-economic damages codified in 20 V.I.C. § 555 invades the province of the jury in violation of the Seventh Amendment, violates

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V.I.C. § 555 was ripe for adjudication before trial because Balboni brought a facial challenge for which factual findings were not required, and failing to address the constitutionality of section 555 prior to trial "would potentially cause hardship on the parties" since "[k]nowing that one possibly cannot collect more than $100,000 in non-economic damages changes a party's trial approach." (J.A. 7-8.)

We agree with the Superior Court. The Legislature modelled 4 V.I.C. § 33(c) after 28 U.S.C. § 1292(b), which contains virtually identical language, including the requirement that an immediate appeal may materially advance the ultimate termination of the litigation. As such, federal case law interpreting the federal statute on which our local statute has been based, while not binding, is highly persuasive. *See Fontaine v. People*, 56 V.I. 660, 671 n.4 (V.I. 2012). While certification for immediate appeal of issues pertaining to damages prior to trial is rare, courts have held that an interlocutory appeal by permission will satisfy the material advancement requirement if a final resolution on the certified question would result in cost savings for the parties or facilitate settlement. *See Christian v. United States*, 44 Fed. Appx. 958, 959 (Fed. Cir. 2002) (permitting appeal by permission when accepting the appeal "may materially advance the case by saving costs and preserving resources during the damages determination"); *S.E.C. v. Mercury Interactive, LLC*, 2011 WL 1335733, at *3 (N.D. Cal. Apr. 7, 2011) (unpublished) (allowing appeal when resolution of a damages issue through interlocutory appeal "would have a significant effect on the trial of this action, and perhaps upon the parties' efforts to reach settlement"). Therefore, we decline to revisit or reconsider our earlier decision to accept this interlocutory appeal, particularly when the parties have gone through the expense of full briefing and oral argument.

the equal protection clause of the Fourteenth Amendment, and violates the due process rights guaranteed by the Fifth and Fourteenth Amendments. Those provisions are made applicable to the Virgin Islands pursuant to the last paragraph of the Virgin Islands Bill of Rights.[3] However, as in his motion before the Superior Court, in his appellate brief Balboni does not limit his arguments solely to the United States Constitution. Rather, Balboni also maintains that section 555 is invalid pursuant to the first sentence of the Virgin Islands Bill of Rights, which provides as follows:

> 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.[4] Balboni cites to numerous decisions of state courts of last resort that have held that limitations on non-economic damages are invalid under various provisions of their state

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[3] "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: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; article VI, clause 3; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments." 48 U.S.C. § 1561.

[4] Balboni has not waived these claims under Rule 22(m) of the Virgin Islands Rules of Appellate Procedure. In addition to specifically raising this argument in the first substantive paragraph of his brief, the portion of Balboni's brief relating to equal protection is titled "The Non-Economic Damages Cap Violates Equal Protection Under the Fourteenth Amendment **and** the Revised Organic Act," Appellant's Br. 17 (emphasis added), and cites to numerous cases that analyze the validity of damage caps under equal protection provisions of state constitutions. In fact, the number of non-federal cases cited in Balboni's brief outnumbers the number of federal cases cited almost 2:1.

But perhaps most importantly, it is well-established that it is the content and substance of an argument, rather than its form or title, that is controlling. *See, e.g., Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-12 (V.I. 2012). That Balboni has not framed his argument in the manner preferred by the dissent does not negate the fact that Balboni has, in fact, made the argument. *See Hughley v. Gov't of the V.I.*, 61 V.I. 323, 333 (V.I. 2014) (holding that a litigant need not use "magic words" when the intent is otherwise apparent from the face of the filing).

constitutions,[5] including state equal protection and due process clauses.[6]

¶ 9 Although section 3 incorporates the federal equal protection and due process clauses by reference in addition to containing its own free-standing equal protection and due process clauses that are unique to the Virgin Islands Bill of Rights, courts have indicated that these provisions serve as separate limitations on the power of the Virgin Islands government. *See, e.g., In re Brown*, 7 V.I. 545, 551 (3d Cir. 1970) ("We hold that [the statute is] . . . not violative of the equal protection clause of the Revised Organic Act of the Virgin Islands, nor of the Fifth Amendment, by reason of the Constitution of the United States having been made applicable to the Virgin Islands by Act of Congress dated August 23, 1968.") (emphasis added); *Bryan v. Liburd*, 36 V.I. 46, 56 n.6 (V.I. Super. Ct. 1996) ("This amendment has been made applicable to the territory of the Virgin Islands by virtue of Section 3, Revised Organic Act, 1954. A similar provision also exists in the Bill of Rights listed in Section 3, of the Organic Act. Thus this claim of [the plaintiff] is an allegation of violation of local and federal constitutional (i.e. due process) rights."); *Gov't of the V.I. v. Huggins*,

[5] The dissent concludes that Balboni has waived this argument because he argues in his brief that the applicable standard of review is strict scrutiny rather than the heightened rational basis review that we ultimately adopt. However, we can find no case in which a court has ever held that a litigant has waived an argument by advocating for a higher standard of review than is ultimately applied by the court. On the contrary, this Court has reached the merits in similar circumstances where the appellant invoked the incorrect legal standard or relied on an incorrect provision of law. *See, e.g., Simmonds v. People*, 59 V.I. 480, 493 (V.I. 2013); *Phillips v. People*, 51 V.I. 258, 273 (V.I. 2009).

[6] *See, e.g., Sofie v. Fibreboard Corp.*, 771 P.2d 711, 712 (Wash. 1989); *Atl. Ocoluplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 233 (Ga. 2010); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 163-64 (Ala. 1991); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 164 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987); *State v. Sheward*, 715 N.E.2d 1062 (Ohio 1999); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 365-66 (Utah 1989); *Kan. Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 263-64 (Kan. 1988); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).

6 V.I. 3, 14 (V.I. Super. Ct. 1967) (noting that Virgin Islands tax laws must "conform[] . . . to the 'due process' and 'equal protection' clauses of the Revised Organic Act and the 'due process' clause of the Fifth Amendment of the Constitution of the United States") (emphasis added); *see also People v. Simmonds*, 58 V.I. 3, 10 n.3 (V.I. Super. Ct. 2012) ("The Revised Organic Act could be read both to prohibit the Virgin Islands, by extension of the Fourteenth Amendment, from denying equal protection of existing laws, and also to prohibit, through Section 3, the enactment of any law that would deny equal protection."); *accord In re Manglona*, Crim. App. No. 82-00011A, 1983 WL 29941, at *3 (D. Guam App. Div. Apr. 6, 1983) (unpublished) ("We emphasize that a certification petition's allegations must be sufficiently complete and specific to satisfy the fundamental requirements of due process under both the United States Constitution and the Guam Organic Act.") (emphases added). This is also consistent with how this Court has interpreted similar free-standing provisions found in the Virgin Islands Bill of Rights that govern the same subjects as portions of the federal constitution that have also been extended to the Virgin Islands.[7]

[7] We recognize that, in our prior decision in *Ward v. People*, 58 V.I. 277 (V.I. 2013), we held that the express prohibition against double jeopardy found in the Virgin Islands Bill of Rights did not confer a separate, more protective right than conferred by the Fifth Amendment. That the double jeopardy provision in the Revised Organic Act is no greater than the double jeopardy clause of the Fifth Amendment does not mean that the same must be true for every provision; in fact, this Court, in a decision issued three years before *Ward*, recognized that provisions of the Revised Organic Act could provide greater protections than the minimum required by the United States Constitution, and cited to our earlier precedents regarding bail as one such example. *See Murrell v. People*, 54 V.I. 338, 351 n.6 (V.I. 2010)

More importantly, it appears that few, if any, courts have ever interpreted the double jeopardy clause of a state constitution to confer greater rights than the double jeopardy clause of the Fifth Amendment does—in stark contrast to how the equal protection clauses of state constitutions have been interpreted. Unlike in this case, the appellant in *Ward* made the assertion that the double jeopardy provision in the Revised Organic Act's Bill of Rights was "intentionally more generous" "[w]ithout citing to any case law, legislative history, or other legal authority." *Ward*, 58 V.I. at 283. But as we shall explain in the following sections, numerous legal authorities—both case law and legislative history—demonstrate that Congress *did* intend for this Court to interpret the Virgin Islands Bill of Rights provisions in the same manner as similar

See Browne v. People, 50 V.I. 241 (V.I. 2008) (applying "bailable by sufficient sureties" clause in the Virgin Islands Bill of Rights notwithstanding the fact that section 3 of the Revised Organic Act also extends the Eighth Amendment to the Virgin Islands); *see also Murrell v. People*, 54 V.I. 338, 351 n.6 (V.I. 2010) ("[N]umerous examples exist of Congress conferring, through a territory's organic act or constitution, rights that are greater than those afforded by the United States Constitution.").

¶ 10 We recognize that, in this case, the Superior Court certified four questions that focus solely on the Fifth, Seventh, and Fourteenth Amendments of the United States Constitution. However, as we have previously explained, "this Court is not limited solely to the questions as phrased by the Superior Court in its certification order, but may consider other legal questions that are fairly related to or intertwined with the questions so certified." *Edward v. GEC, LLC*, 67 V.I. 745, 759 (V.I. 2017) (collecting cases). Here, the second and third questions certified by the Superior Court both reference equal protection, and the fourth references due process, albeit in the context of the United States Constitution. Consequently, the question of whether section 555 violates the equal protection and due process clauses of the Virgin Islands Bill of Rights is "fairly related" to the questions certified by the Superior Court.

¶ 11 But perhaps more importantly, this Court has adopted the doctrine of constitutional avoidance, which "cautions against gratuitously deciding [federal] constitutional issues when a party may receive the same relief on non-constitutional grounds." *Bryan v. Fawkes*, 61 V.I. 416, 465 n.27 (V.I. 2014) (citing *Azille v. People*, 59 V.I. 215, 227 (V.I. 2012)). Although the Revised Organic Act of 1954 serves as a *de facto* constitution for the Virgin Islands, *see Fawkes v. Sarauw*,

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provisions in state constitutions, which would necessarily confer greater protection than the federal constitution.

66 V.I. 237, 247 (V.I. 2017), courts have consistently held that the doctrine of constitutional avoidance compels courts—whenever possible—to resolve questions based on state constitutional law rather than federal constitutional law. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir. 2001) ("[W]here possible, courts will render decisions on federal constitutional questions unnecessary by resolving cases on the basis of state law (whether statutory or constitutional).") (citing *Bell v. Maryland*, 378 U.S. 226, 237 (1964)); *Toth v. Callaghan*, 995 F.Supp.2d 774, 781 (E.D. Mich. 2014) ("Even where the state law claim is a constitutional one, that claim should be decided first to avoid the federal constitutional claim."); *Hickerson v. City of New York*, 932 F.Supp. 550, 555 (S.D.N.Y. 1996) ("Plaintiffs raise substantial claims under the state constitution. These state constitutional claims should be determined before plaintiffs' claims under the federal constitution, because a ruling that the resolution violates the state constitution would obviate the need to decide the federal constitutional questions."). This preference extends to interpreting territorial organic acts in lieu of federal constitutional provisions as well. *See Hammonds v. Guam Memorial Hosp.*, Civ. Nos. 81-003A, 81-00048A, 1983 WL 30221, at *4 (D. Guam. App. Div. Apr. 4, 1983) (unpublished) ("If a case may be resolved on either constitutional or statutory grounds, a court should avoid the constitutional issue if a statutory disposition is possible . . . . Therefore, without reaching appellants' constitutional arguments, we hold that the [Guam statute] violates the due process guarantees of the Guam Organic Act."); *see also Gerace v. Bentley*, 65 V.I. 289, 302-03 (V.I. 2016), *cert. denied*, --- S. Ct. ---, 2019 WL 1756683 (2019) (reviewing the validity of a statute under the Revised Organic Act before considering a federal constitutional challenge).

¶ 12 Under these circumstances, we conclude that the issues raised in this appeal should first be analyzed under the pertinent provisions of the Virgin Islands Bill of Rights, and then analyzed

under the Fifth, Seventh, and Fourteenth Amendments of the United States Constitution only if an analysis under the pertinent Virgin Islands Bill of Rights provisions cannot provide Balboni with the full relief he has requested as part of this appeal. Proceeding in such a manner will allow this Court to apply the doctrine of constitutional avoidance to this case. Moreover, because the authorities pertinent to our analysis of the Virgin Islands Bill of Rights provisions—such as the decisions of state courts of last resort striking down caps on non-economic damages pursuant to due process and equal protection clauses found in state constitutions—were cited in Balboni's principal brief, Ranger American and the Government have had the opportunity to respond to these arguments in their response briefs, as well as at oral argument.[8] Accordingly, we re-formulate the certified questions to also include the threshold question of whether 20 V.I.C. § 555 violates the equal protection and due process clauses of the Virgin Islands Bill of Rights.[9]

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[8] Moreover, that Ranger American actually responded to Balboni's claims defeats any claim that Balboni waived these issues, since Ranger American effectively "waived waiver" by responding on the merits. *See Webster v. FirstBank P.R.*, 66 V.I. 514, 518 n.2 (V.I. 2017) ("[T]he fact that [appellee] has briefed the issue on the merits without contending that the issue has been waived is sufficient for [appellee] to have waived waiver."

[9] The dissent maintains that this Court, by re-formulating the certified questions in this manner, has deprived Ranger American of its right to be heard. But the record contains numerous instances of Ranger American responding to these claims. As noted in the previous footnote, Ranger American devoted a substantial portion of its appellate brief to addressing the authorities cited by Balboni, including a 50-state survey outlining which states have enacted caps on non-economic damages and how many of those states have found those caps to be constitutional and unconstitutional. Moreover, Balboni raised this claim in his original motion before the Superior Court. (*See, e.g.*, J.A. 37 (stating that "[t]he issue presented, whether Section 555 is unconstitutional, involves the intersection of statutory interpretation and local and federal constitutional law" and then proceeding to quote the equal protection and due process clauses of the Bill of Rights of the Revised Organic Act); J.A. 48-49 (citing and discussing cases that struck down caps on non-economic damages as violative of state constitutional provisions). And as it has on appeal, Ranger American also responded to those arguments and authorities in its opposition to that motion. (*See* J.A. 62-63, 67, 69, 72.) Further, at the oral argument in this matter, counsel for Ranger American engaged in an extended colloquy with this Court with respect to the effect of section 3 of the Revised Organic Act, including whether it codifies separate equal protection and

C. Independent Interpretation of the Virgin Islands Bill of Rights

¶ 13 Having concluded that the validity of section 555 under the equal protection and due process clauses of the Virgin Islands Bill of Rights is properly before this Court, we must now determine to what extent—if at all—these provisions may be interpreted by this Court independently of the clauses of the Bill of Rights to the United States Constitution that contain similar language. We conclude that this Court is empowered to independently and definitively interpret the Bill of Rights provisions of the Revised Organic Act as the court of last resort for the Virgin Islands. As we shall explain below, Congress did not model the Virgin Islands Bill of Rights after the Bill of Rights to the United States Constitution. Rather, the legislative history reveals that Congress modelled the Virgin Islands Bill of Rights 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. And while the Virgin Islands Bill of Rights was enacted by Congress, it was not enacted pursuant to the general and enumerated powers vested in Congress in its capacity as a national legislature through Article I of the United States Constitution. Instead, Congress enacted the Revised Organic Act as the organic governing law or constitution for the Virgin Islands through its power under the

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due process provisions from those in the United States Constitution, whether those separate provisions could be interpreted the same way as a state constitution, and whether this Court should resolve the questions under those separate provisions rather than under the United States Constitution. Oral Argument at 32:00 – 38:15, *Balboni v. Ranger Am. Inc.*, S. Ct. Civ. No. 2018-0022, *available at* http://www.visupremecourt.org. Significantly, Ranger American's counsel did not argue that this Court should not analyze the question under the Virgin Islands Bill of Rights; rather, Ranger American only responded that Balboni's claims could not withstand a facial challenge. By actually responding to Balboni's claims in its filings before both the Superior Court and this Court, and not asserting waiver at oral argument but instead responding to questions from this Court on the merits, Ranger American has exercised its right to be heard. *See Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 204 (6th Cir. 1998) (holding that it "flies in the face of logic and reason" to hold that a party's right to be heard was violated when it actually filed a response).

Territorial Clause of Article IV of the United States Constitution, which effectively authorizes Congress to enact laws for a territory as if Congress were a state government. Congress, having also directed that the relationship between the courts of the Virgin Islands and the courts of the United States to mirror the one between state and federal courts, consequently intended for this Court to exercise the power to interpret the Virgin Islands Bill of Rights in the same manner that a state court of last resort may interpret the Bill of Rights to a state constitution.

1. History of the Revised Organic Act

¶ 14 The equal protection and due process clauses of the Virgin Islands Bill of Rights provide as follows:

> 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. This language is specific to the Virgin Islands and differs from that of the equal protection and due process clauses of the Fourteenth Amendment, which instead provides that

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Nevertheless, several key phrases—such as "due process of law" and "equal protection of the laws"—appear in both provisions.

¶ 15 Previously, this Court has recognized that "like a state constitution, it is possible for the Revised Organic Act to confer on Virgin Islanders greater protections than those required by the United States Constitution." *Todmann v. People*, 57 V.I. 540, 546 (V.I. 2012) (citing *Murrell v. People*, 54 V.I. 338, 351 n.6 (V.I. 2010)). But this Court has also stated that because the Revised

Organic Act was enacted by Congress, we must consider congressional intent when determining the meaning of its language. *See Bryan v. Fawkes*, 61 V.I. 201, 230-31 (V.I. 2014) (collecting cases). Therefore, before proceeding further, we must determine to what extent this Court may interpret the equal protection and due process clauses of the Virgin Islands Bill of Rights to provide greater protections than the equal protection and due process clauses of the Fourteenth Amendment.

¶ 16 The legislative history reveals that when Congress first enacted the Revised Organic Act, it chose to borrow the Bill of Rights provisions—including the equal protection and due process clauses—from section 34 of the Virgin Islands Organic Act of 1936. *See* 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 for section 34 of the Organic Act of 1936 reveals that Congress did not model the Bill of Rights after the United States Constitution; [10] rather, it adopted "familiar provisions found in various organic acts and in State constitutions in relation to the Bill of Rights." [11] 80

[10] That the Bill of Rights adopted as part of the Organic Act of 1936 was modelled after state constitutions and other organic acts, rather than the Bill of Rights to the United States Constitution, is consistent with the fact that Congress had previously rejected a draft version prepared by the Presidentially-appointed governor, and instead enacted a version that had been drafted by the two democratically-elected Virgin Islands legislatures with only minor changes. WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 185-86 (2d ed. 2010).

[11] The dissent characterizes Senator King's explicit reference to state constitutions as conveying that section 34 of the Organic Act of 1936 contained nothing out of the ordinary as compared to comparable bills of rights in other jurisdictions. If this was Senator King's intent, it further supports our conclusion that Congress did not intend for the Virgin Islands Bill of Rights to merely be coextensive with the Bill of Rights to the United States Constitution, since it would have been out of the ordinary—even at the time of section 34's adoption—for the equal protection clause of a state constitution to be interpreted in such a limited manner. *See* W.F. Dodd, *Implied Powers*

Cong. Rec. 6609 (1936) (statement of Senator William H. King of Utah).[12] In fact, the United States District Court of the Virgin Islands held that "the Fifth Amendment has been supplemented in the Virgin Islands by section 34 of the Organic Act [of 1936] which provides a bill of rights including full guarantees of due process of law and equal protection of laws." *United States ex rel. Leguillou v. Davis*, 115 F. Supp. 392, 396 (D.V.I. 1953) (Maris, J.) (emphasis added), *overruled on other grounds*, 212 F.2d 691 (3d Cir. 1954). Notably, that decision was authored by the primary drafter of the Revised Organic Act, who elected to carry over the language of section 34 of the Organic Act of 1936 virtually verbatim into the Virgin Islands Bill of Rights.[13] *Accord Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937) ("Those decisions, though not conclusive, are entitled

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and Implied Limitations in Constitutional Law, 29 YALE L. J. 137, 159-60 (1919) ("Of express limitations in state constitutions, the general ones of most importance, those of 'due process' and 'equal protection,' have in a number of states been applied by state courts with much more strictness than has the Fourteenth Amendment by either federal or state courts.").

[12] We decline to accept the dissent's invitation to disregard Senator King's statement because at the time he made those remarks, the judicial power of the territory was vested in the District Court of the Virgin Islands. During this time period, the District Court was viewed not as a federal court, but as a purely local court of the Virgin Islands, and was treated as such until the District Court's exclusive and concurrent jurisdiction over local matters was terminated in 1994. *See Vooys v. Bentley*, 901 F.3d 172, 181-82 (3d Cir. 2018) (summarizing the history of the Virgin Islands legal system and observing that the "dual system of local and federal judicial review" did not begin until 1991 for civil cases and 1994 for criminal cases); *see also Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057 (3d Cir. 1982) (noting that because the District Court possessed "general original jurisdiction in all other causes in the Virgin Islands," "it is more like a state court of general jurisdiction than a United States district court"); *Clen v. Jorgensen*, 265 F. 120, 122 (3d Cir. 1920) (describing the District Court as a court "with jurisdiction over controversies of every kind").

[13] *See* Dolores K. Sloviter, *Memorial Tribute to the Honorable Albert Branson Maris*, 62 TEMPLE L. REV. 471, 473 (1989) (describing Judge Maris's deep involvement in drafting the Revised Organic Act of 1954); *Resolution Honoring the Honorable Albert Branson Maris*, 1973 V.I. Sess. L. p. 368-69 ("WHEREAS the Honorable Albert Branson Maris may list among his greatest contributions to the Virgin Islands . . . his participation in and considerable influence over the formulation and drafting of the [R]evised Organic Act of the Virgin Islands of 1954.").

to great weight, because they dealt with territorial powers in operation at a time so shortly before the rendition of the decisions that the judges who rendered them well may be credited with such knowledge of the purpose of these powers and their history and application, as to make these judges peculiarly competent to decide questions relating thereto.").[14]

¶ 17 To the extent any doubt remains as to whether Congress intended for the equal protection and due process clauses of the Virgin Islands Bill of Rights to be interpreted independently of the corresponding provisions of the United States Constitution, it should be erased by the congressional hearings on the 1968 amendments to the Revised Organic Act. Although the 1968 amendments amended section 3 of 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, the main purpose of the legislation was to provide for popular election of the Governor of the Virgin Islands, and to provide for the reapportionment of the Virgin Islands Legislature by the Legislature itself. *See* Public Law 89-548, § 1. However, during the congressional hearings, numerous witnesses testified that the decisions of the Supreme Court of the United States codifying the principle of "one man, one vote" were not applicable to the Virgin Islands, even though they were decided based on the equal protection clause of the

[14] Although the dissent highlights legislative history with respect to the drafting of the final paragraph of section 3 of the Revised Organic Act—conferring certain enumerated provisions of the United States Constitution to the Virgin Islands "to the extent that they [had] not been previously extended"—the relevant inquiry is not the drafting of the last paragraph of section 3 in the 1968 amendments, but the drafting of the Bill of Rights provisions that originated in section 34 of the Organic Act of 1936 and were then copied virtually verbatim into the Revised Organic Act by Judge Maris. Nevertheless, the addition of the "to the extent that they [had] not been previously extended" language renders section 3 wholly consistent with the operations of state governments, where the applicable provisions of the Bill of Rights of the United States Constitution serve as a floor that does not preclude other provisions from being interpreted so as to confer greater rights.

Fourteenth Amendment.[15] *See Virgin Islands—Elective Governor and Legislative Redistricting: Hearing on H.R. 11777 & H.R. 13277 Before the H. Comm. on Interior and Insular Affairs*, 89th Cong. 675 (1966) (statement of Harry R. Anderson, Assistant Secretary of the Interior) ("[T]he proposed amendment incorporates and makes applicable to any reapportionment the language of the equal protection clause of the 14th Amendment of the Constitution, which language is the basis of the Supreme Court's 'one man-one vote' decisions. While those decisions are not for application in the Virgin Islands, we nevertheless strongly believe in the correctness of the principle stated and by the foregoing we would provide for its enforcement in the Virgin Islands. . . ."); 89th Cong. 679 (statement of Ruth Van Cleve, Director, Office of Territories, Department of the Interior) ("As the Secretary stated a moment ago, it is our conclusion that those decisions don't themselves apply, because the equal protection language of the 14th Amendment is by its own terms applicable only to the States."); 89th Cong. 692 (statement of Dr. Aubrey A. Anduze, President of the Virgin Islands Constitutional Convention) ("Although the constitutional requirement of one man, one vote does not apply to such provisions as the Congress may see fit to make for the Virgin Islands, a regard for essential democratic principles does require that this constitutional doctrine be extended to the islands. To the extent that H.R. 13277 advances in such a direction, it is [a] step which I believe the Congress ought to take."). Had Congress intended for the equal protection clause in the Virgin Islands Bill of Rights to not have any independent meaning, but to only be interpreted identically to the equal protection clause of the Fourteenth

[15] While this testimony was made in conjunction with H.R. 13277, pertaining to section 5 of the Revised Organic Act, this is a distinction without a difference, for if the guarantee of equal protection in the Bill of Rights of the Revised Organic Act was wholly equivalent to the right of equal protection in the United States Constitution, there would be no need to amend *either* section 3 or section 5 of the Revised Organic Act to include such language.

Amendment, then the "one man, one vote" decisions of the United States Supreme Court premised on the Fourteenth Amendment's equal protection clauses would have already been automatically extended to the Virgin Islands without the need for any further congressional action.[16]

2. Authority of Territorial Courts to Definitively Interpret their Organic Acts

¶ 18 Since Congress modelled the Bill of Rights provisions after similar language found in state

[16] We recognize that the United States Court of Appeals for the Ninth Circuit in *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), found that the bill of rights provisions in the Guam Organic Act were "modeled after the Bill of Rights in the federal Constitution," *id.* at 1214, and that the subsequent extension of federal constitutional protections to Guam was not superfluous because it "adds only those provisions *not already extended*," and "[t]herefore, if a provision had been extended . . . it was not duplicated." *Id.* at 1218 n.11 (emphasis in original). To the extent that the *Guerrero* decision is not inconsistent with the United States Supreme Court's later decision in *Limtiaco v. Camacho*, 549 U.S. 483, 491 (2007), it is not apposite. First, the Ninth Circuit reached this decision without any analysis of the legislative history. *See* Christopher Serkin & Nelson Tebbe, *Is The Constitutional Special?*, 101 CORNELL L. REV. 701, 737 (2016) (observing that the reasoning of *Guerrero* was "based neither on text, nor on congressional intent, nor on precedent"). But it is clear from the legislative history of the Virgin Islands Organic Act of 1936, the original enactment of the Revised Organic Act of 1954, and the 1968 amendments to the Revised Organic Act detailed above that Congress did not model the Virgin Islands Bill of Rights after the federal constitution, and that Congress extended the equal protection clause of the Fourteenth Amendment to the Virgin Islands through the 1968 amendments precisely because it believed that the federal equal protection clause had not already been fully extended to the Virgin Islands.

In addition, the *Guerrero* decision is highly unusual in that it was the Government of Guam itself, through its Attorney General, that argued to the Ninth Circuit that the Supreme Court of Guam lacked the authority to interpret the Guam Organic Act in such a manner. Brief of Petitioner Gov't of Guam, *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002). In recent cases considering territorial autonomy, courts have afforded great weight to the position of the territorial government in such matters, even with respect to whether federal constitutional guarantees should apply to that territory. *See, e.g.*, *Tuaua v. United States*, 788 F.2d 300, 310 (D.C. Cir. 2015) ("The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level. We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives."). To the extent the position of the Executive Branch is a consideration, the Virgin Islands Government has not argued in this or any other case that this Court lacks such authority, and has actually argued in other cases that questions involving interpretation of the Revised Organic Act are not federal questions but rather are issues of local law. *See, e.g.*, Brief for Appellant Gov't of the V.I., *Dunston v. Governor of the V.I.*, 672 Fed.Appx. 213 (3d Cir. 2016).

constitutions and territorial organic acts, and did not repeal the original Virgin Islands Bill of Rights provisions when it extended the Fourteenth Amendment to the Virgin Islands as if it were a state through the 1968 amendments, "then Congress must also be presumed to be similarly familiar with the interpretations and construction given those provisions by the pertinent . . . state courts."[17] *People v. Velasquez*, 60 V.I. 22, 33 (V.I. Super. Ct. 2014) (citing *Ward v. People*, 58 V.I. 277, 283-84 (V.I. 2013)).

¶ 19 Although virtually all state constitutions contain language guaranteeing the rights to "equal protection of the laws" and "due process of law," it is an ancient and fundamental principle of United States jurisprudence "that state courts be left free and unfettered . . . in interpreting their state constitutions." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). Pursuant to this principle, state courts of last resort are not bound to follow the decisions of the Supreme Court of the United States with respect to issues of state law, even when a state constitution contains language that is wholly identical to the United States Constitution. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses."); *Cooper v. California*, 386 U.S. 58, 62 (1967) (states may "impose higher standards on searches and seizures than required by the Federal Constitution"); *Baker v. City of*

[17] That the Virgin Islands Legislature had not yet established this Court as the court of last resort for the Virgin Islands at the time Congress enacted the relevant provisions does not negate Congress's intent or require us to ignore developments in Virgin Islands law and the structure of the Virgin Islands Judiciary that have occurred over the last 50 years. *See Guam Soc. Of Obstetricians & Gynecologists v. Ada*, 776 F.Supp. 1422, 1427 (D. Guam. 1990) (rejecting the theory that constitutional law in Guam was "frozen in time" to what it was in 1968 because Congress could not have predicted post-1968 decisions of the United States Supreme Court in the area of substantive due process and equal protections at the time it extended those constitutional provisions to Guam through the Guam Organic Act).

Fairbanks, 471 P.2d 386, 402 (Alaska 1970) ("While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution . . . ."); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) ("To harness interpretation of our state constitutional guarantees of equal protection to federal standards and shift the meaning of Minnesota's constitution every time federal case law changes would undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens."); *State v. Kaluna*, 520 P.2d 51, 59 (Haw. 1974) ("[A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted."); *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976); *State v. Johnson*, 346 A.2d 66, 67 (N.J. 1975). In fact, 46 states have chosen to do just that, and interpret the equal protection clause of their state constitutions to provide greater protections than that afforded by the equal protection clause of the Fourteenth Amendment of the United States Constitution.[18]

¶ 20 Nevertheless, it is equally well-established that the provisions of the United States

[18] These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 1.7: State Constitutional Standards (2015) (collecting cases).

Constitution applicable to the states establish a floor below which states cannot go, notwithstanding the language of their state constitutions. *See Howlett v. Rose*, 496 U.S. 356, 367 (1990); *State v. Sieyes*, 225 P.2d 995, 1003 (Wash. 2010); *Arnold v. Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993). Consequently, Congress, in enacting the Virgin Islands Bill of Rights and modelling it after language found in state constitutions, and then subsequently extending the Fourteenth Amendment to the Virgin Islands as if it were a state without repealing the earlier guarantees of the Virgin Islands Bill of Rights, manifested an intent for the equal protection and due process clauses of the Fourteenth Amendment to serve as a floor with respect to what rights are conferred to the people of the Virgin Islands,[19] while preserving the possibility that the equal protection and due process clauses of the Bill of Rights—modelled after similar state constitutional provisions—could be construed by a court to confer greater rights to the people of the Virgin Islands than the minimum provided for in the United States Constitution.[20] To hold otherwise

[19] Thus, both this Court and the United States Court of Appeals for the Third Circuit have held that the 1968 amendments to section 3 had the effect of implicitly repealing other provisions of the Revised Organic Act that on their face provided for *lesser* protections than the provisions of the United States Constitution that were now extended to the Virgin Islands. *See Murrell v. People*, 54 V.I. 338, 352-55 (V.I. 2010) (holding that the express incorporation of the Sixth Amendment through the 1968 amendments implicitly repealed section 26 of the Revised Organic Act, which authorized a jury trial in a criminal case only if demanded by the defendant) (citing *Gov't of the V.I. v. Parrott*, 476 F.2d 1058, 1059-60 (3d Cir. 1973)).

[20] We recognize that in some of our prior decisions, we stated that we may presume that Congress is aware of how language has been interpreted by the United States Supreme Court, and that we should presume that Congress therefore intended to reach the same result. *See, e.g., Ward*, 58 V.I. at 283-84; *see also Rodriguez v. Bureau of Corrections*, 58 V.I. 367, 383 (V.I. 2011) (Hodge, J., concurring). However, we emphasized in other decisions "that these presumptions are precisely that—presumptions." *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 316 (V.I. 2014). As explained above, the legislative history is clear that Congress did not model the Bill of Rights provisions of the Revised Organic Act after the Bill of Rights of the United States Constitution, but instead modelled it after "familiar provisions founds in various organic acts and in State constitutions in relation to the Bill of Rights." 80 Cong. Rec. 6609 (1936). Therefore, in this particular instance, where the legislative history demonstrates that Congress used state

would render the 1968 amendment to the Revised Organic Act extending the Fourteenth Amendment to the Virgin Islands completely superfluous. *See Duggins v. People*, 56 V.I. 295, 302 (V.I. 2012) ("When interpreting statutes, we must read the statute, to the extent possible, so that no one part makes any other portion ineffective.") (citing *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009)).

¶ 21 We recognize that, with respect to interpretation of the Virgin Islands Bill of Rights, it is arguable that the power of this Court may be more limited than that of state courts of last resort interpreting their state constitutions. Although the Revised Organic Act is the *de facto* constitution of the Virgin Islands, it is simultaneously a federal enactment. *Bryan*, 61 V.I. at 427. And while this Court is the court of last resort for the Virgin Islands, we cannot ignore the reality that the Virgin Islands has not achieved statehood, but remains an unincorporated Territory of the United States. We do not conclude, however, that these facts preclude this Court from adopting an interpretation of the equal protection and due process clauses of the Virgin Islands Bill of Rights that differs from that accorded to the Fifth and Fourteenth Amendments of the United States Constitution.

¶ 22 At the time Congress first enacted the Revised Organic Act, "the Virgin Islands lacked a fully developed local judiciary, with the District Court—a federal court established by Congress rather than the Legislature and consisting of judges selected by the President of the United States rather than the Governor of the Virgin Islands—possessing jurisdiction over most civil [and criminal] actions." *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 978 (V.I. 2011). While

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constitutional provisions as a model, the appropriate inquiry is not how these terms had been previously interpreted by the Supreme Court of the United States in the United States Bill of Rights, but how they had been interpreted by state courts of last resort construing those terms in state constitutions.

"the Virgin Islands local judiciary continued to expand and receive greater jurisdiction over local matters in the decades that followed," the most "pivotal change occurred . . . when Congress subsequently amended the Revised Organic Act of 1954 to authorize creation of a local appellate court." *Id.* (citing 48 U.S.C. § 1613a). As part of those amendments, Congress divested the federal courts of their authority to review decisions of the local judiciary, and instead made such decisions reviewable only by writ of certiorari to the Supreme Court of the United States, with temporary certiorari review by the United States Court of Appeals for the Third Circuit for a period not to exceed 15 years. 48 U.S.C. § 1613.

¶ 23 Acting pursuant to the authority granted to it by Congress, the Virgin Islands Legislature created this Court and vested it with the "supreme judicial power of the Territory." 4 V.I.C. § 21. Shortly after this Court began to exercise such jurisdiction, the Third Circuit extended to the Virgin Islands several doctrines that had been adopted to govern the relationships between federal and state courts. *See Edwards v. HOVENSA, LLC*, 497 F.3d 355, 360 (3d Cir. 2007) ("Now that § 1613 mandates that the relations between courts established by laws of the United States, e.g., the Revised Organic Act, and courts established by local law should mirror the relations between state and federal courts, we conclude that § 1613 makes the Erie doctrine and the Rules of Decision Act applicable to the District Court of the Virgin Islands."). Significantly, in 2012, Congress amended the Revised Organic Act to eliminate the period of temporary certiorari review, and enacted legislation clarifying that the Supreme Court of the United States could only exercise jurisdiction to review a decision of this Court on the same basis as the courts of last resort of the 50 states. *See* 28 U.S.C. § 1260; *see also* 48 U.S.C. § 1613 ("[W]ith respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States,

including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.").

¶ 24 As a result of these developments, Congress has proactively chosen to treat the Virgin Islands judiciary as if it were a state judiciary. *See In re Alvis*, 54 V.I. 408, 413 (V.I. 2010) (quoting *Gov't ex rel. Robinson v. Schneider*, 893 F. Supp. 490, 495 (D.V.I. 1995)); *see also Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 328 (3d Cir.1986) ("[T]he history of the relationship between the United States and the Virgin Islands indicates that Congress desired the territory to have jurisdictional powers analogous to those of a state."). This Court, in its capacity as the court of last resort for the Virgin Islands authorized to exercise the "supreme judicial power of the Territory," 4 V.I.C. § 21, has exercised this power to hold that "neither this Court nor the Superior Court is required to follow the United States Supreme Court's interpretation of the Federal Rules of Evidence as binding precedent, since the interpretation of Virgin Islands evidentiary rules remains a question of Virgin Islands law even if the local rule that has been adopted is word-for-word identical to a federal rule." *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 419 (V.I. 2016) (collecting cases).

¶ 25 But while Congress has unambiguously decided to treat the Virgin Islands judiciary as a state court system, the fact remains that Congress has not actually made the Virgin Islands a state. Consequently, "unlike the constitutional federalism governing the relationship between state and federal courts, federalism in the Virgin Islands 'is administrative rather than constitutional.'" *See Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 686 (V.I. 2015) (quoting *Parrott v. Gov't of the V.I.*, 230 F.3d 615, 621 (3d Cir. 2000)). Ordinarily, Congress is only empowered to enact legislation within the scope of its general and enumerated powers under Article I of the United States Constitution, such as laws to regulate interstate commerce. However, pursuant to the

Territorial Clause of Article IV of the United States Constitution, "[i]n the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State." *Simms v. Simms*, 175 U.S. 162, 168 (1899). As we explain below, it is well-established in the precedents of the Supreme Court of the United States and the federal courts of appeal that whether Congress enacts legislation pursuant to its Article I or Article IV powers is of important constitutional significance, for while laws enacted by Congress in its capacity as a national legislature pursuant to its Article I powers are considered "laws of the United States," laws enacted by Congress through invocation of its Article IV powers are not, but rather serve as laws of the territory, with Congress standing in place of a state government. With respect to legislation enacted by Congress in its capacity as a national legislature, both federal and territorial courts are bound to fully and without qualification effectuate the intent of Congress. However, as to legislation enacted by Congress for a particular territory in its capacity as a state legislature, 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. *See, e.g.*, *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974); *People v. Rubert Hermanos, Inc.*, 309 U.S. 543, 549-50 (1940). Thus, the fact that principles of federalism between the courts of the Virgin Islands and courts of the United States are not constitutionally mandated does not deprive this Court of the power to exercise its authority, as the court of last resort for the Virgin Islands, to interpret the Virgin Islands Bill of Rights the same way as a state court of last resort may interpret the bill of rights in its state constitution.

¶ 26 On several occasions, the Supreme Court of the United States has been asked to review 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. With respect to the District of Columbia, the United States Supreme Court declined to review a decision of the District of Columbia Court of Appeals that had interpreted a federal statute pertaining to the right to a jury trial in the District of Columbia courts. The United States Supreme Court, after recognizing that Congress intended to treat the District of Columbia judiciary as if it were a state court system, determined that "the same deference is owed to the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction" as it provided to state courts of last resort interpreting state laws. *Pernell*, 416 U.S. at 367-68; *see also Griffin v. United States*, 336 U.S. 704, 717 (1949) ("[I]t has become settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to be determined—in the absence of specific Congressional legislation—by the highest appellate court for the District."); *Fisher v. United States*, 328 U.S. 463, 476 (1946) ("We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern."). In fact, the only time that the Supreme Court of the United States refused to grant such deference to the District of Columbia Court of Appeals was in a case where it "concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction." *Whalen v. United States*, 445 U.S. 684, 688 (1980). But even in that case, the Supreme Court of the United States

emphasized that the general rule with respect to "Acts of Congress applicable only within the District of Columbia" is for federal courts to "defer to the decisions of the courts of the District of Columbia." *Id.* at 687.[21] In fact, the United States Court of Appeals for the District of Columbia Circuit has even deferred to the construction by the District of Columbia Court of Appeals of an Act of Congress directed only to the District of Columbia that was word-for-word identical to the federal Longshoremen's Act, which the District of Columbia Court of Appeals nevertheless interpreted differently. *Hall v. C & P Telephone Co.*, 793 F.2d 1354, 1357 (D.C. Cir. 1986). In doing so, it emphasized that even though Congress extended the terms of a national statute to the District of Columbia, they "were two distinct statutes passed with different purposes" notwithstanding the identical language, which would justify applying the statute directed to the District of Columbia differently from how the national statute was applied with respect to other United States jurisdictions. *Id.* at 1358.

¶ 27 More recently, the United States Supreme Court, in reviewing a decision of the Supreme Court of Guam interpreting the Guam Organic Act, extended *Pernell*, *Whalen*, and similar

[21] Scholars and others have built on these decisions of the Supreme Court of the United States by concluding that not every piece of legislation enacted by Congress should be classified as "federal law," since in addition to granting it national legislative powers, the United States Constitution expressly grants Congress the power to enact laws for the District of Columbia and for United States territories. Thus, when enacting statutes such as the District of Columbia Home Rule Act or a territory's Organic Act, Congress is not exercising national legislative powers, but instead acts as a local sovereign for that particular enclave, which justifies Article III courts deferring to the decisions of the highest local court of that jurisdiction with respect to such statutes. *See Guam and the Case for Federal Deference*, 130 HARV. L. REV. 1704, 1713 (2017) ("[T]he line between territorial and federal statutes is blurrier than one might think. On the one hand, all territorial law is, in some sense, of a federal character . . . . On the other hand, organic acts, popularly enacted constitutions, and certainly local territorial laws do not resemble traditional federal enactments."); Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 296-312 (1982); *United States v. Cohen*, 733 F.2d 128, 144 (D.C. Cir. 1984) (Mikva, J., concurring) (emphasizing that Congress is exercising a different constitutional power when it enacts a statute pertaining to the District of Columbia as opposed to when it enacts national legislation).

decisions by "accord[ing] deference to territorial courts over matters of purely local concern." *Limtiaco v. Camacho*, 549 U.S. 483, 491 (2007). Although the United States Supreme Court declined to defer to the Guam Supreme Court in that case, it did so because the provision of the Guam Organic Act at hand, which limited the amount of debt the Guamanian government could incur, "protect[ed] both Guamanians and the United States from the potential consequences of insolvency" and "[t]hus . . . [wa]s not a matter of purely local concern." *Id.* at 492. Nevertheless, the United States Supreme Court 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.* (emphasis added). *See also Guam and the Case for Federal Deference*, 130 HARV. L. REV. 1704, 1719 (2017) ("The promise of independent Guamanian institutions means little if the Guam Supreme Court's decisions regarding those institutions' authority can be cast aside by any federal court that prefers a different outcome.").

¶ 28 That Congress's purpose in enacting a statute affects its fundamental character and how it should be interpreted by the courts is further supported by several holdings of the Supreme Court of the United States. In *United States v. Pridgeon*, 153 U.S. 48 (1894), Congress had passed an act providing for establishment of a territorial government for the Territory of Oklahoma, and in the same act provided for the Criminal Code of the state of Nebraska to serve as the criminal laws of the Territory of Oklahoma until the adjournment of the first session of the territorial legislature. Although the federal government took the position that violations of the Nebraska Criminal Code in the Oklahoma Territory were "offense[s] against the United States" over which federal courts could exercise jurisdiction, the United States Supreme Court rejected the argument and held that the federal courts lacked jurisdiction because the fact that it was Congress's intent for the Nebraska

Criminal Code to serve as the temporary criminal laws of the Oklahoma Territory only until the territorial legislature enacted its own laws rendered them local offenses, rather than federal offenses.[22] *Id.* at 51-55.

¶ 29 The Supreme Court of the United States reached a similar result with respect to the Organic Act of the then-Territory of New Mexico. In *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. 694 (1914), a defendant challenged the jurisdiction of a territorial court that entered a judgment against it, based on an argument that a provision in the New Mexico Organic Act, as well as another act of Congress, had transferred exclusive jurisdiction over the case to a different court. The United States Supreme Court summarily affirmed the construction of those federal enactments by the Supreme Court of New Mexico, holding that "[w]e should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong." *Id.* at 700. This was consistent with a prior ruling of the United States Supreme Court in which it held that it lacked jurisdiction to review a decision of the Supreme Court of the then-Territory of Utah that "involved the construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature" because the matter was not one in which a "statute of the United States . . . was drawn in question," *Linford v. Ellison*, 155 U.S. 503, 508 (1894), as well as an earlier decision where the United States Supreme Court held that it lacked jurisdiction to review a decision of the former Supreme Court of the District of Columbia interpreting an act of Congress applicable to the District of Columbia because "mere judicial construction" of that enactment by

[22] Notably, the Revised Organic Act of 1954 is itself a temporary enactment, in that Congress authorized the Legislature of the Virgin Islands to call for a constitutional convention to enact a Virgin Islands Constitution, which once duly-enacted would serve as the new the charter of local government for the Territory and result in the repeal of the Revised Organic Act. *See* Public Law 94-584.

the District of Columbia court was not equivalent to questioning its validity. *Baltimore & P.R. Co. v. Hopkins*, 130 U.S. 210, 226 (1889).

¶ 30 More recently, the Supreme Court of the United States considered a virtually identical issue with respect to the Puerto Rico Organic Act of 1917. Section 39 of the Puerto Rico Organic Act had placed limitations upon the corporate ownership of land. In *People v. Rubert Hermanos, Inc.*, 309 U.S. 543 (1940), the United States Supreme Court considered an appeal from a decision of the United States Court of Appeals for the First Circuit in which it found that a Puerto Rico statute was inconsistent with section 39, and therefore void. In doing so, the First Circuit had overturned a decision of the Puerto Rico Supreme Court that had found that the statute in question was not inconsistent with the Organic Act. The First Circuit had exercised jurisdiction to review the Supreme Court of Puerto Rico on the ground that "the Organic Act is a federal law." *Rubert Hermanos, Inc. v. People*, 106 F.2d 754, 759 (1st Cir. 1939). Ultimately, the Supreme Court, after looking at the purpose for which Congress enacted section 39 of the Organic Act, held that the federal courts lacked jurisdiction to adjudicate a claim that a Puerto Rico statute is void under section 39 because "section 39 of the Organic Act is not one of 'the laws of the United States'" but rather "is peculiarly concerned with local policy" and thus should be adjudicated in the courts of Puerto Rico rather than in the courts of the United States. 309 U.S. at 550. This decision was consistent with a prior decision of the United States Supreme Court in which it held that an act of Congress that authorized the treasurer of Puerto Rico to enforce the collection of a tax by a suit at law was not a "law of the United States" and could not sustain federal-question jurisdiction in the federal courts. *People of Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483 (1933). *See also Tonje v. People of Puerto Rico*, 187 F.2d 1020, 1021 (1st Cir. 1951) (holding that whether a warrant was supported by oath as required by section 2 of the Puerto Rico Organic Act presented "no substantial

federal question"); *Campose v. Central Cambalache, Inc.*, 157 F.2d 43, 43 (1st Cir. 1946) ("The only substantial question presented by these appeals having even a savor of federal law is whether violation of the restrictions upon corporate ownership and control of land . . . embodied in § 39 of the Organic Act of March 2, 1917—the so called '500 Acre Law'—gives rise to an action by a grantor against a corporation for annulment of the latter's title to land conveyed to and held by it in excess of the limitations imposed. Upon analysis, however, this is not a question of federal law . . . ."); *Succession of Tristani v. Colon*, 71 F.2d 374, 375-76 (1st Cir. 1934) (denying federal question jurisdiction when appellant claimed that a decision of the Supreme Court of Puerto Rico was inconsistent with section 2 of the Puerto Rico Organic Act, which provided that no law shall deprive any person of life, liberty, or property without due process of law).

¶ 31 Four decades later, the Supreme Court of the United States reaffirmed the principle that the mere fact that a federal statute was enacted by Congress does not make that statute a "statute of the United States." In *Key v. Doyle*, 434 U.S. 59 (1977), the United States Supreme Court initially accepted jurisdiction to review a decision of the District of Columbia Court of Appeals interpreting an act of Congress pertaining solely to the District of Columbia, but ultimately dismissed the appeal for lack of jurisdiction after concluding that the Congressional enactment was not a "statute of the United States." *Id.* at 61. Although there was "no reference to possible distinctions between federal statutes of solely local concern and those of broader scope" in the legislative history, the United States Supreme Court concluded that "[t]he omission is understandable" because "[t]he question had not arisen before the 1970 reorganization [of the District of Columbia court system] because § 1257 then applied only to state courts, which seldom if ever confronted federal statutes of wholly local application." *Id.* at 66. In the absence of any

legislative history on that particular issue, the United States Supreme Court considered the overall Congressional purpose in creating the District of Columbia court system, and concluded that treating federal statutes directed solely to the District of Columbia as "statutes of the United States"—and thus conferring jurisdiction on the United States Supreme Court to review local courts' construction of those federal statutes—would have been inconsistent with the intent of Congress in establishing the equivalent of a state-court system for the District of Columbia:[23]

> Indeed, the purposes of the 1970 Act strongly imply the contrary. As we noted in *Palmore*, Congress intended "to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction." 411 U.S., at 409
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> This Court's mandatory appellate jurisdiction over state-court judgments under § 1257 is reserved for cases threatening the supremacy of federal law. When state courts invalidate state statutes on federal grounds, uniformity of national law is not threatened and there is no automatic right of appeal to this Court. From the analogy of the local D.C. courts to state courts drawn by Congress in the 1970 Act, it follows that no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application

Key, 434 U.S. at 67-68. *See also United States v. Edmond*, 924 F.2d 261, 263 (D.C. Cir. 1991) (deferring to local construction of "an Act of Congress applicable exclusively to the District of Columbia").

¶ 32 Even more recently, the United States Court of Appeals for the Ninth Circuit adopted a similar rule with respect to decisions of the Supreme Court of the Commonwealth of the Northern Mariana Islands ("CNMI"). The statute granting the Ninth Circuit temporary jurisdiction to review

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[23] As we shall explain in greater detail below, it is this that distinguishes the instant case from *Kepner v. United States*, 195 U.S. 100 (1904) and *Weems v. United States*, 217 U.S. 349 (1910), in that—like for the District of Columbia—Congress has manifested a clear intent for the Virgin Islands judiciary to serve as the equivalent of a state-court system, whereas it had no such intent for the local courts of the former Territory of the Philippine Islands. *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

decisions of the CNMI Supreme Court limited that jurisdiction only with respect to "cases involving the Constitution, treaties, or laws of the United States." 48 U.S.C. § 1824. Although the CNMI had enacted its own constitution, a Congressional enactment known as the Covenant continued to govern the relationship between the CNMI and the United States and set forth certain limitations on the CNMI government. 48 U.S.C. § 1801 et seq. In *Milne v. Hillblom*, 165 F.3d 733 (9th Cir. 1999), the appellant claimed that the Ninth Circuit could exercise jurisdiction to review a decision of the CNMI Supreme Court interpreting Article XII of the CNMI Constitution because it was purportedly inconsistent with a provision in the federal Covenant pertaining to land alienation, and therefore raised a federal question. Although it recognized that the Covenant was enacted by Congress and codified as a federal statute, the Ninth Circuit nevertheless emphatically rejected this argument, holding that "[i]f this court were to exercise jurisdiction every time an appellant referenced the Covenant, the distinction between the local law of CNMI and federal law would be meaningless" and advising that future litigants "should be discouraged from arguing that section 805 [of the federal Covenant] provides federal jurisdiction over a CNMI decision involving Article XII of the CNMI Constitution." *Id.* at 737. *See also Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1090 (9th Cir. 2002) ("Nor is federal question jurisdiction conferred by the plaintiffs seeking a declaration that the Governor failed to faithfully execute the laws of Guam as required under the Organic Act."); *Sonoda v. Cabrera*, 189 F.3d 1047, 1051 (9th Cir. 1999) (stating that a claim that an interpretation of CNMI local law violated the separation of powers clause of the federal Covenant would not raise a federal question). This result is consistent with how the Supreme Court of the United States rejected a similar argument that provisions of the federal treaty that ceded the Philippine Islands to the United States could be cited to create jurisdiction for federal courts to review decisions of that former territory. *See Compania General*

de Tabacos de Filipinas v. Alhambra Cigar & Cigarette Mfg. Co., 249 U.S. 72 (1919) (rejecting argument that a decision of the Supreme Court of the Philippine Islands was reviewable by the U.S. Supreme Court as involving a "treaty of the United States" because it purportedly violated provision of treaty between United States and Spain that required property rights to continue to be respected in the Philippines); *Miners' Bank of Dubuque v. State of Iowa*, 53 U.S. 1 (1851) (rejecting the argument that a bank's charter should be regarded as federal in nature when Congress passed an act amending provisions of the charter after it had been passed by the territorial legislature of Wisconsin).

¶ 33 Similarly, the United States Court of Appeals for the First Circuit has just this year held that the federal enactments providing for elected governors in all unincorporated territories—including the Virgin Islands—are not "laws of the United States" but rather "laws of the territory." In *Aurelius Investment, LLC v. Commonwealth of Puerto Rico*, 915 F.3d 838 (1st Cir. 2019), the First Circuit considered a challenge to the constitutionality of the appointments of the members of the Financial Oversight and Management Board created by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). The United States contended that if the First Circuit were to find that members of the PROMESA board must be selected by presidential nomination and Senate confirmation, "such a ruling will invalidate the present-day democratically elected local governments of Puerto Rico and the other unincorporated territories because the officers of such governments took office without the Senate's advice and consent." *Id.* at 857. The First Circuit rejected this argument by emphasizing that the elected governors and legislators of all the territories are not federal officers because they do not derive their authority from "laws of the United States," but rather "they exercise authority pursuant to the laws of the territory." *Id.* at 859. In doing so, the First Circuit recognized that the elected governor's power

"ultimately depends on the continuation of a federal grant," but found this insufficient to transform those laws into "laws of the United States," for to do so would result in every local claim posing a federal question.[24] *Id.* The provisions of the Revised Organic Act's Bill of Rights at issue in this case—the equal protection and due process clauses—do not affect any federal interests, but, like the federal law pertaining to jury trials in the District of Columbia at issue in *Pernell* or the portion

[24] We recognize that the authorities cited herein, which collectively hold that the portions of a territory's organic act that are concerned with exclusively local interests do not raise a federal question, may at first glance appear in tension with the decision of the United States Court of Appeals for the Third Circuit in *Thorstenn v. Barnard*, 883 F.2d 217, 218 (3d Cir. 1989), where it stated that the United States District Court of the Virgin Islands could exercise federal-question jurisdiction because the Revised Organic Act is a federal statute, and which has been cited uncritically in subsequent cases. As a threshold matter, the *Thorstenn* decision did not address any of the authorities cited above—in fact, it made its jurisdictional statement in passing, without citing to any legal authority other than the federal-question jurisdiction statute—and the District Court's jurisdiction was not contested by the parties. Thus, the jurisdictional holding in *Thorstenn* is akin to an unstated assumption on a non-litigated issue that is not a precedential holding that should bind future decisions. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985).

But even more importantly, the relationship between the courts of the Virgin Islands and the courts of the United States when *Thorstenn* was decided 30 years ago is not the same as it is today. Thirty years ago, the Virgin Islands lacked an appellate court of last resort, for the Legislature had not yet acted on the 1984 amendments to the Revised Organic Act to establish the Supreme Court of the Virgin Islands. Instead, the only court of the Virgin Islands was the Territorial Court of the Virgin Islands, a trial court whose decisions were appealable as of right to the United States District Court and then further appealable as of right to the Third Circuit. *See Gov't of the V.I. v. Hodge*, 359 F.3d 312, 323 (3d Cir. 2004) (discussing the "two-tier appellate review as of right" from the Territorial Court). This is in stark contrast to the judicial structure in Puerto Rico, Guam, the CNMI, the District of Columbia, and the pre-statehood territories in which the Supreme Court of the United States and the lower federal courts found the absence of federal-question jurisdiction or ordered deference to the territory's court of last resort as to local provisions of the organic act or other governing document – it should go without saying that the federal courts cannot defer to a territorial court of last resort with respect to the portions of a territorial organic act of local concern if no such court of last resort exists. Regardless of what may have been the case in the Virgin Islands prior to the assumption of jurisdiction by this Court on January 29, 2007, or the signing of Public Law 112-226 on December 28, 2012, the relationship between the courts of the Virgin Islands and the courts of the United States as to interpretation of provisions of the Revised Organic Act which are of purely local concern has necessarily changed, just as it has in numerous other areas. *See, e.g.*, *Bryan v. Fawkes*, 61 V.I. 416 (V.I. 2014); *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); *Defoe v. Phillip*, 702 F.3d 735, 743-44 (3d Cir. 2012); *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 361 (3d Cir. 2007).

of the Puerto Rico Organic Act governing corporate land ownership, is of a purely local concern by granting rights to the people of the Virgin Islands relative to the Government of the Virgin Islands. *See Whyte v. Bockino*, S. Ct. Civ. No. 2017-0024, __ V.I. __, 2018 WL 4191523, at *4 (V.I. Aug. 29, 2018) ("[E]very provision found in section 3 either confers rights upon persons in the Virgin Islands . . . or outlines the powers and responsibilities of the Virgin Islands Government . . . ."). And as noted earlier, Congress—like it has for the District of Columbia, Puerto Rico, and Guam—has expressed a clear intent to treat the Virgin Islands judiciary as if it were a state court system.[25] *See* 48 U.S.C. § 1613 ("The relations between the courts established by the Constitution

[25] The dissent places great emphasis on the decisions of the Supreme Court of the United States in *Kepner v. United States*, 195 U.S. 100 (1904) and *Weems v. United States*, 217 U.S. 349 (1910), which it cites for the proposition that when Congress uses familiar language of the U.S. Constitution in crafting a territory's bill of rights, it intends to confer only coextensive rights to the territory's inhabitants. However, the *Kepner* and *Weems* decisions do not stand for such a broad proposition. As a threshold matter, the *Kepner* and *Weems* cases both involved situations where the local courts of the Philippines had interpreted the pertinent provisions of its organic act as providing *lesser* protections than similar provisions in the United States Constitution. Moreover, the Philippines Organic Act is structured differently from the Revised Organic Act of the Virgin Islands, in that unlike section 3 of the Revised Organic Act, the Philippines Organic Act did not contain any language that also explicitly extended the first to ninth amendments of the United States Constitution in addition to including free-standing double jeopardy and cruel-and-unusual punishment provisions.

Importantly, the dissent ignores the maxim that "[t]he simple words of the opinions . . . are not as important as the contexts in which those cases were decided." *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). Unlike the Virgin Islands at the time of adoption of the Organic Act of 1936 and Revised Organic Act of 1954, Congress manifested no intent for the government of the Philippine Islands to be treated as if it were a state government. Significantly, the *Kepner* decision pointed to specific evidence indicating that the President of the United States had directed that the Bill of Rights of the Philippine Islands be modelled after the Bill of Rights of the United States Constitution. 195 U.S. at 122-24. This is in stark contrast to the Virgin Islands Bill of Rights, which the legislative history reflects were modelled not after the Bill of Rights of the United States Constitution, but after similar provisions found in state constitutions. *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.").

The reason that Congress declined to model the Bill of Rights of the Philippine Islands

of the United States and the courts established by local law . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States . . . .").

¶ 34 That the Supreme Court of the United States 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,[26] and held that federal courts lacked jurisdiction to review the Supreme

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after state constitutions is clear. In its most recent decision examining the doctrine of territorial incorporation, the Supreme Court of the United States distinguished its early-20th century precedents originating from the Philippines because "[a]t least with regard to the Philippines, a complete transformation of the prevailing legal culture would have not only been disruptive but also unnecessary, as the United States intended to grant independence to that Territory." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008); *see also* An Act To declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands (Jones Act), 39 Stat. 545 (noting that "it was never the intention of the people of the United States in the incipiency of the War with Spain to make it a war of conquest or for territorial aggrandizement" and that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein"). In fact, the Philippine Organic Act had been drafted at a time when the United States was involved in a years-long armed conflict with Filipino nationalists that had assumed actual control over much of that territory, "a war that led to thousands of U.S. causalities and over 100,000 civilian deaths, many more than in the entire Spanish-American War." *Igartua-De La Rose v. United States*, 417 F.3d 145, 166 n.36 (1st Cir. 2005) (Torruella, J., dissenting) (citing Brian McAllister Linn, THE PHILIPPINE WAR, 1899–1902 (2000)).

In contrast, the Virgin Islands was proactively purchased by the United States, with absolutely no indication that the United States ever intended to withdraw its sovereignty. On the contrary, Congress has repeatedly conferred greater local autonomy to the Virgin Islands government, to the point where it has expressly decreed that the Virgin Islands Judiciary be treated as if it were a state court system. *See* 48 U.S.C. § 1613.

[26] The dissent characterizes our citation to these decisions as irrelevant because the standard of review that the Supreme Court of the United States may apply to this Court's interpretation of the Virgin Islands Bill of Rights is purportedly of no assistance. However, these authorities are of the highest importance because they directly address the question of whether the provisions of the Virgin Islands Bill of Rights constitute federal law or local law. It is unquestioned that this Court is bound to follow decisions of the Supreme Court of the United States on federal law, but is free to establish the law of the Virgin Islands. *Hughley*, 61 V.I. at 337-38. The United States Supreme Court has concluded that the fact that a law was enacted by Congress, in and of itself, does not make it a federal law, and has demonstrated this by either deferring to the decisions of courts of last resort for the territories and the District of Columbia with respect to those Congressional

Court of Puerto Rico with respect to a part of the Organic Act of purely local concern,[27] is fully consistent with how the United States Supreme Court has conferred similar deference with respect to the interpretation of federal statutes by agencies and instrumentalities of the federal government. The Supreme Court of the United States has held that agencies and instrumentalities of the federal government are entitled to deference from courts when interpreting federal statutes that are silent, ambiguous, or have implicit or explicit gaps that necessarily need to be filled.[28] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Specifically, it has found that it is the intent of Congress for the interpretations of such federal agencies of federal statutes to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[29] *Id.* at 844.

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enactments, or holding that it lacks jurisdiction to review those decisions at all.

[27] That the Supreme Court of the United States has granted such deference to the District of Columbia Court of Appeals with respect to its interpretation of the District of Columbia Home Rule Act—a statute enacted by Congress without the approval of the people of the District of Columbia—as well as to other territorial supreme courts interpreting their Congressionally-enacted organic acts, demonstrates that enactment of a Virgin Islands Constitution is not the only way for the people of the Virgin Islands to obtain the protections afforded to residents of the states whose constitutions contain the same language as the Virgin Islands Bill of Rights.

[28] That Congress labelled the governing document of the Virgin Islands an "organic act," the same term of art in administrative law used to describe the federal statute which is within an agency's jurisdiction to interpret, and to which deference must be owed, is itself evidence of Congressional intent to treat the Virgin Islands government similarly to an administrative agency. *See* BLACK'S LAW DICTIONARY 1544 (9th ed. 2009).

[29] In *Bryan v. Fawkes*, 61 V.I. 201 (V.I. 2014), this Court declined to extend the *Chevron* standard to decisions of Virgin Islands administrative agencies. However, in *Bryan* the question before this Court was whether the Virgin Islands Legislature intended to confer this power on every Virgin Islands administrative agency that it had created, given that on numerous occasions it had explicitly codified standards of review that in some cases were more deferential, and in other cases were less deferential, than that required by *Chevron*. *Bryan*, 61 V.I. at 227. Consequently, the issue of whether a state or territorial court must grant *Chevron* deference to a federal agency or instrumentality that had been created or authorized by Congress was not implicated in *Bryan*.

¶ 35 It is well-established that the Virgin Islands, Guam, Puerto Rico, and other territories are not separate sovereigns. Rather, they draw their authority from a single source of power: the federal government. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016); *Bryan v. Fawkes*, 61 V.I. 416, 438 (V.I. 2014); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) ("Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, the Government of Guam is in essence an instrumentality of the federal government."). In other words, each act of the Virgin Islands Government—and the three branches thereof—is effectively an act of the federal government.[30] *See Gov't of the V.I. v. Christensen*, 673 F.2d 713, 716 (3d Cir. 1982) (holding that the Government of the Virgin Islands acts as "an arm of the federal government").

¶ 36 When it enacted the Revised Organic Act, the United States Congress not only delegated certain powers to the Government of the Virgin Islands, but also established a system of separation of powers within its branches, with executive functions vested in the Executive Branch, legislative functions vested in the Legislative Branch, and judicial functions vested in the Judicial Branch. *Kendall v. Russell*, 572 F.3d 126, 135 (3d Cir. 2009). Interpretation of a statute—including provisions of the Revised Organic Act—is unquestionably within the jurisdiction of the Judicial Branch of the Virgin Islands, *see Bryan*, 61 V.I. at 213 (citing *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012))—within which this Court serves as the court of last resort. *See* 48 U.S.C §

[30] Thus, the question of sovereignty is wholly irrelevant to the question of whether this Court is authorized to interpret the Bill of Rights of the Revised Organic Act in the same manner as a state court of last resort may interpret similar provisions in a state constitution. If sovereignty were a prerequisite to such authority, the federal courts would not defer to the District of Columbia Court of Appeals with respect to its interpretation of the District of Columbia Home Rule Act, and would not defer to any executive branch agency's interpretation of its own enabling statute under *Chevron*.

1613a(d); 4 V.I.C. §§ 2, 21. *See also, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (discussing role of the judiciary under separation of powers, and concluding that "[i]t is emphatically the province and duty of the judicial department to say what the law is"). Since *Chevron* establishes a default rule for interpretation of federal statutes by federal agencies tasked with their interpretation, entities ranging from the United States Environmental Protection Agency with respect to the federal Clean Water Act, to the Legal Services Corporation as to its interpretation of the federal Legal Services Corporation Act, are required to receive deference even as to questions of law.[31]

¶ 37 The Supreme Court of the United States has extended *Chevron* deference—or a concept similar to *Chevron* deference[32]—to decisions of non-Article III courts with respect to decisions

[31] Significantly, the Legal Services Corporation—similar to the Government of the Virgin Islands—has been established in such a manner so as to minimize political interference from the federal government, and unlike the Government of the Virgin Islands "is not deemed an agency, department, or instrumentality of the federal government," but is nevertheless entitled to deference with respect to its interpretation of the Legal Services Corporation Act. *See Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 679 (D.C. Cir. 1991).

[32] We recognize that the rule announced in *Chevron* with respect to deference to administrative agencies has come under significant criticism, with several jurists and scholars calling for it to be reconsidered or overturned. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1211-12 (2015) (Scalia, J., concurring in the judgment) (stating that *Chevron* "did not comport with the APA"); *Michigan v. EPA*, 135 S.Ct. 2699, 2712 (2015) (Thomas, J., concurring) (observing that *Chevron* raises concerns under Articles I and III of the United States Constitution). In fact, this Court, when asked to apply *Chevron* deference to Virgin Islands administrative agencies, declined to do so. *Bryan v. Fawkes*, 61 V.I. 201, 225-26 (V.I. 2014). Nevertheless, we find these cases instructive, not just because they constitute additional—and perhaps the most common—instances of the federal courts declining to engage in plenary review of Congressionally-enacted legislation and instead deferring to a Congressionally-created entity, but because *Chevron* was decided contemporaneously with the enactment of the 1984 amendments to the Revised Organic Act authorizing the creation of a Virgin Islands Supreme Court. Importantly, several of the strongest criticisms against application of the *Chevron* doctrine, even if credited, would not preclude similar deference being granted to territorial governments. *See, e.g., Aurelius Investment, LLC*, 915 F.3d at 852 (explaining that the nondelegation doctrine would not preclude substantial delegation of power from Congress to territorial governments).

they render concerning the federal statutes within their subject-matter expertise. As noted above, the United States Supreme Court has granted such deference to the District of Columbia Court of Appeals and the Supreme Court of Guam with respect to their interpretations of the federal statutes that form the basis for the District of Columbia and Guam governments. *Limtiaco*, 549 U.S. at 491; *Pernell*, 416 U.S. at 367-68. It has also granted similar deference to decisions of the United States Court of Appeals for the Armed Forces with respect to the Uniform Code of Military Justice and other federal laws within that court's jurisdiction. *Middenhorf v. Henry*, 425 U.S. 25, 44 (1976) (when "[d]ealing with areas of law peculiar to the military branches," the judgments of the United States Court of Appeals for the Armed Forces "are normally entitled to great deference"); *Burns v. Wilson*, 348 U.S. 137, 140 (1953) (holding that even though military law is federal in origin, "[m]ilitary law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it . . . ."). It has even called for deference to the decisions of the United States Tax Court with respect to its interpretation of federal tax laws. *Dobson v. Comm'r*, 320 U.S. 489, 502 (1943) (holding that decisions of the United States Tax Court must stand absent "a clear-cut mistake of law" and that "[w]hile its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible."); *Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409 (9th Cir. 1986) (holding that judgments of the Tax Court "in its field of expertise are always accorded a presumption that they correctly apply the law"). The Supreme Court of the United States has even declined to exercise supervisory power over the United States District Court of the Virgin Islands in a case involving a federal issue that was nevertheless intertwined with what was primarily a local interest. *Barnard v. Thorstenn*, 489 U.S.

546, 551-52 (1989).

¶ 38 The granting of such deference to arms of the Government of the Virgin Islands' interpretation of the Revised Organic Act with respect to purely local issues is consistent with the rules of construction that the United States Court of Appeals for the Third Circuit has utilized to interpret the Revised Organic Act. In one of its very first decisions requiring an interpretation of the then-newly-enacted Revised Organic Act, the Third Circuit had to determine whether the Virgin Islands Legislature was authorized to direct one of its legislative committees to institute an investigation of the expenditures of the Executive Branch—even though at the time the Executive Branch was presided over by a governor appointed by the President of the United States and confirmed by the United States Senate—and allow that investigation to continue even after the Legislature adjourned *sine die*. Before conducting any analysis, the Third Circuit noted that "a lawyer-like opinion might be drafted pointing to the conclusion that Congress must have 'intended', in passing the Revised Organic Act, to withhold this investigatory power" because it failed to explicitly grant such power. *In re Fin. Comm. of Legislature*, 242 F.2d 902, 903 (3d Cir. 1957). However, the Third Circuit concluded that the failure of Congress to expressly grant a power in the plain text of the Revised Organic Act was not grounds for holding that it intended to withhold the power. Rather, the Third Circuit held that in the absence of language that conclusively resolves the issue, "we are inclined to adopt an interpretation which we believe to be more in harmony with the declared purpose of the Congress to 'give a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands.'"[33] *Id.* (quoting S. Rep. No. 1271,

[33] That Congress unambiguously intended for each successive organic act to provide the Virgin Islands with greater autonomy than the last is fatal to any claim that the 1968 amendments to the Revised Organic Act—enacting the last paragraph of section 3—effectively made the Bill of Rights provisions of the Revised Organic Act coextensive with similar provisions in the Bill of

83rd Cong., 2d Sess., April 29, 1954, 2 U.S. Code Cong. & Ad. News 2586). Perhaps most importantly, the Third Circuit emphasized the "contemporaneous interpretation" of the pertinent provision of the Revised Organic Act by the Legislature, and further held—similar to what would later be known as *Chevron* deference—that "in a doubtful case the interpretation given to the Act by such agencies is entitled to considerable respect." *Id.* (citing *Fleming v. Mohawk Co.*, 331 U.S. 111, 116 (1947)). *Accord, Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 365 n.20 (1959) ("[J]urisdictional statutes are not to be read literally, and are not to be construed as abstract collections of words, but derive their meaning from their setting in history and practice, with due regard to the consequences of the construction given them.")

¶ 39 Given this overwhelming authority, we cannot discern any legitimate reason for why Congress would wish to withhold equivalent authority from the Judicial Branch of the Virgin Islands with respect to the provisions of the Revised Organic Act that are of purely local concern and are within the jurisdiction of the local courts to administer. That Congress specified in the Revised Organic Act that the relations between the courts of the Virgin Islands and the courts of the United States shall be the same as that of the relationship between the courts of the fifty states and the courts of the United States, *see* 48 U.S.C. § 1613, and the Supreme Court of the United States has expressly granted equivalent deference to other non-Article III courts with respect to their interpretations of federal statutes that are within their authority to administer, is impressive

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Rights of the United States Constitution, given that the guarantees of equal protection and due process found in the Revised Organic Act were modelled after state constitutions that routinely conferred greater equal protection and due process rights than under the United States Constitution. In addition to rendering the Bill of Rights provisions mere surplusage—a highly disfavored practice—the dissent's interpretation of the 1968 amendments would effectively overrule the precedent that the United States Bill of Rights "has been supplemented in the Virgin Islands" by the Bill of Rights of the Revised Organic Act, *Leguillou*, 115 F. Supp. at 396, by effectively displacing the local Bill of Rights.

evidence that Congress did in fact intend for this Court to exercise the authority to independently interpret the provisions of its *de facto* constitution[34] that are of purely local concern, including the

[34] While both federal and local courts have repeatedly described the Revised Organic Act as the "*de facto* constitution" for the Virgin Islands, the reason for referring to the Revised Organic Act in such terms has not been fully explained. The phrase "*de facto*" means "actual; existing in fact." *See Wolf v. Gardner*, 386 F.2d 295, 299 n.2 (6th Cir. 1967); *In re Parentage of M.F.*, 228 P.3d 1260, 1276 (Wash. 2010). Thus, describing the Revised Organic Act as the "*de facto* constitution" of the Virgin Islands should not in any way imply that it is any less of a constitution than—for instance—the Constitution of Puerto Rico.

Characterizing the Revised Organic Act—as well as its predecessor, the Organic Act of 1936—as a "*de facto* constitution" is supported by the historical record. Although several other insular territories became part of the United States involuntarily as spoils of war, the population of the Virgin Islands supported becoming part of the United States. While the Virgin Islands officially became part of the United States upon their purchase from Denmark on March 31, 1917, an unofficial referendum on the sale of the islands to the United States passed with a vote of 4,727 in favor and only seven against. Isaac Dookhan, *Changing Patterns of Local Reaction to the United States Acquisition of the Virgin Islands*, 1865-1917, 15 CARIBBEAN STUDIES 50, 69 (1975). *See also* N.Y. TIMES, Aug. 18, 1916, p.1, col. 5. And on August 24 and 28, 1916, respectively, the elected Colonial Councils of St. Thomas-St. John and St. Croix unanimously passed resolutions in support of annexation of the islands by the United States. *Dookhan*, 15 CARIBBEAN STUDIES at 69. Thus, the people of the Virgin Islands—whether directly through the unofficial referendum, or indirectly through their duly-elected local government—had in fact overwhelmingly supported their change in political status.

But perhaps even more importantly, the Organic Act of 1936 and the Revised Organic Act were not unilaterally imposed on the Virgin Islands by Congress. 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

Virgin Islands Bill of Rights.[35]

¶ 40 For these reasons, we conclude that this Court has the power to interpret the equal protection and due process clauses found in the Bill of Rights to the Revised Organic Act in accordance with how those provisions have been interpreted by state courts of last resort interpreting their state bills of rights.[36] The Bill of Rights provisions in the Revised Organic Act are local law rather than federal law, in that though enacted by Congress, the protections apply only within the borders of the Virgin Islands and were never designed to have general protection throughout the United States. *Rubert Hermanos, Inc.*, 309 U.S. at 549-50. The legislative history reflects that Congress modelled the Bill of Rights after state constitutions, and not on the United States Constitution.[37] Congress—both at the time it originally adopted the Virgin Islands Bill of

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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.

[35] Notably, the Revised Organic Act itself provides that any statutes enacted by the Virgin Islands Legislature which are inconsistent with it shall not have any force or effect. 48 U.S.C. § 1574(c). As a practical consequence of the 1984 amendments authorizing the expansion of the jurisdiction of Virgin Islands local courts and the corresponding divestment of jurisdiction from the United States District Court of the Virgin Islands, the overwhelming majority of cases implicating exclusively local interests—including those in which the validity of a statute is called into question—are necessarily filed in the Superior Court of the Virgin Islands in the first instance and reviewed on appeal by this Court. *See Vooys v. Bentley*, 901 F.3d 172, 193 (3d Cir. 2018) (noting that "as of 2014, there were over 6,000 pending cases in the Virgin Islands courts").

[36] We disagree with the dissent's characterization of this holding as "revolutionary," for as we have set forth above, it is a natural extension of numerous decisions rendered by the Supreme Court of the United States, the federal courts of appeals, and other courts over the past century. And while it may be true that no court has had occasion to interpret the equal protection clause of any territory's bill of rights, "[t]he absence of an 'all fours' decision need not dismay us" because "[t]here must always be a first time for every legal rule," for "[t]hat is the way the law grows." *Kroese v. General Steel Castings Corp.*, 179 F.2d 760, 765 (3d Cir. 1950).

[37] It is for this reason that we reject the proposition that treating the Virgin Islands Bill of Rights

Rights, as well as when it amended section 3 in 1968 to incorporate the Fifth and Fourteenth Amendments—was certainly aware of how state courts of last resort had interpreted provisions in their state bill of rights differently than the United States Constitution.[38] *Gerace*, 65 V.I. at 305. And in enacting the 1968 amendments to section 3 to extend the Fifth and Fourteenth Amendments to the Virgin Islands, Congress chose not to repeal the Revised Organic Act's equal protection and due process clauses, even though that language is also found in section 3. The logical inference from this action is that Congress intended for the enumerated provisions in the Virgin Islands Bill of Rights to serve as the equivalent of a bill of rights to a state constitution, notwithstanding the extension of certain federal constitutional rights to the Virgin Islands.[39] *See Haynes v. Ottley*, 61

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as a territorial law would do nothing to advance this case. Congress, in modelling the equal protection clause in the Virgin Islands Bill of Rights after similar provisions in state constitutions, has manifested an intent for the equal protection clause of the Virgin Islands Bill of Rights to be interpreted similarly to how such clauses have been interpreted by state supreme courts interpreting similar or identical provisions in their state constitutions. As we explain in the following section, the vast majority of state supreme courts have interpreted the equal protection clauses of their state constitutions to require heightened rational basis review, a significantly higher standard than that used by the United States Supreme Court to interpret the equal protection clause of the United States Constitution.

[38] The dissent repeatedly attempts to distinguish our interpretation of the Virgin Islands Bill of Rights from a state court interpreting a state constitution because the Revised Organic Act was not popularly ratified. As explained earlier, we do not believe this is an appropriate characterization, given the legislative history demonstrating that the critical provisions of the Organic Act of 1936 and the Revised Organic Act were either drafted by locally-elected officials or approved by local referendum. However, whether the Virgin Islands Bill of Rights was popularly ratified is ultimately irrelevant to the question of whether that Bill of Rights constitutes a law of the Virgin Islands or a law of the United States. The organic acts and federal statutes at issue in *Pridgeon*, *Friday*, *Linford*, *Hopkins*, *Rubert Hermanos*, *Pernell*, and *Key* were all unilaterally imposed on the pertinent territories and the District of Columbia by Congress without a popular vote, and yet in each instance the Supreme Court of the United States deferred to the local court's construction of the federal enactment.

[39] This Court, in one of its earliest decisions, interpreted a provision in the Virgin Islands Bill of Rights as "mandat[ing] that Virgin Islands judges grant bail in sufficient sureties to all defendants other than those charged with first degree murder where the proof is evident or the presumption

V.I. 547, 564 (V.I. 2014) (recognizing that the rules of statutory construction presume that when a legislative body adopts a law, the intent is for the entire statute to be effective). To hold otherwise would effectively write those clauses out of the Revised Organic Act's Bill of Rights.[40] *See Duggins*, 56 V.I. at 3 02 ("When interpreting statutes, we must read the statute, to the extent

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great." *Tobal v. People*, 51 V.I. 147 (V.I. 2009). In reaching this conclusion, this Court relied on decisions of state courts of last resort interpreting similar or identical language in their state constitutions. However, the Excessive Bail Clause of the Eighth Amendment to the United States Constitution has been interpreted by the Supreme Court of the United States to permit preventive detention and otherwise withhold bail if the court fears that the accused is a danger to the community. *United States v. Salerno*, 481 U.S. 739 (1997). Thus, our holding in *Tobal* that the Virgin Islands Bill of Rights provides greater protection than the Excessive Bail Clause of the Eighth Amendment is wholly inconsistent with the dissent's conclusion that the extension of certain federal constitutional rights to the Virgin Islands through the 1968 amendments to the Revised Organic Act made the provisions in the Virgin Islands Bill of Rights coextensive with the rights afforded in the United States Bill of Rights.

[40] We note that the portion of the 1968 amendments to the Revised Organic Act which, among other things, extended the pertinent provisions of the Fourteenth Amendment to the Virgin Islands, also provided that:

> All laws enacted by Congress with respect to the Virgin Islands and all laws enacted by the territorial legislature of the Virgin Islands which are inconsistent with the provisions of this *subsection* are repealed to the extent of such inconsistency.

Public Law 90-496, § 11 (emphasis added). While the use of the word "subsection" could potentially imply that the earlier language in the Bill of Rights—which is found in the same *section* as the 1968 amendment—was implicitly repealed, a footnote was added to the pertinent language in the United States Code reflecting that this was a typographical error, and that Congress intended to use the word "section" rather than "subsection." *See* 48 U.S.C. § 1561 n.2. With that clarification made, it is clear that Congress did not intend for this clause to repeal any earlier portions of section 3 itself—such as the equal protection clause of the Bill of Rights—but only to repeal other statutes that were inconsistent with section 3. *See Murrell v. People*, 54 V.I. 338, 354-55 (V.I. 2010) (noting that the repealer language of the 1968 amendments had implicitly repealed 48 U.S.C. § 1616, given its inconsistency with the Sixth Amendment of the United States Constitution) (citing *Gov't of the V.I. v. Parrott*, 476 F.2d 1058, 1060 (3d Cir. 1973)); *Browne v. People*, 50 V.I. 241 (V.I. 2008) (applying "bailable by sufficient sureties" language found in the Bill of Rights portion of section 3 notwithstanding the extension of the Eighth Amendment to the Virgin Islands through the 1968 amendments to section 3).

possible, so that no one part makes any other portion ineffective.") (citing *Gilbert*, 52 V.I. at 356). Consequently, we conclude that the equal protection and due process clauses of the Virgin Islands Bill of Rights have meaning independent of the equal protection and due process clauses found in the Fifth and Fourteenth Amendments to the United States Constitution,[41] and may be interpreted by this Court in the same manner as a state court of last resort interpreting a provision in a state constitution's bill of rights.[42]

D. Equal Protection Clause of the Revised Organic Act

¶ 41 On its face, section 555 clearly implicates the equal protection clause of the Virgin Islands Bill of Rights, in that it treats certain classes of people differently based on their characteristics. Individuals who suffer injuries due to automobile accidents are treated less favorably than other personal injury victims. For example, had Balboni fallen into an open hole on the same sidewalk

[41] We emphasize that our holding in this regard is limited solely to the Virgin Islands Bill of Rights found in section 3 of the Revised Organic Act, and not to each and every provision of the Revised Organic Act. Like the Guam Organic Act, certain provisions in the Revised Organic Act affect the rights and obligations of the federal government in relation to the Virgin Islands, and thus are not provisions of purely local concern. *Limtiaco*, 549 U.S. at 492

[42] In reaching this decision, we do not question the authority of the Supreme Court of the United States to adopt a contrary interpretation of the Revised Organic Act, if it were to exercise its discretion to do so. While the United States Supreme Court has emphasized that it will grant deference to the District of Columbia Court of Appeals, the Supreme Court of Guam, the United States Court of Appeals for the Armed Forces, and other courts with respect to their interpretation of federal enactments within their jurisdiction, it has nevertheless found that such "Congressional Acts . . . like other federal laws, admittedly come within this Court's Art[icle] III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts [by the non-state court of last resort] in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute." *Pernell*, 416 U.S. at 368. Although we can discern no reason why this Court should not be granted the same deference provided by the United States Supreme Court to the District of Columbia Court of Appeals, the Supreme Court of Puerto Rico, the Supreme Court of Guam, and other non-Article III courts, we recognize that such deference is a matter of discretion rather than jurisdiction. *See Guerrero*, 290 F.3d at 1216 (rejecting argument that the Guam Supreme Court, and not the United States Supreme Court, has the "final construction" over the territorial bill of rights found in the Guam Organic Act).

and suffered identical injuries, Virgin Islands law would not preclude him from seeking unlimited non-economic damages against the contractor or any other responsible party. But because Balboni was hit by an automobile, section 555 precludes him from obtaining more than $100,000 in non-economic damages. Likewise, section 555 treats victims of automobile accidents differently depending on the severity of their injuries. While an individual who receives a minor injury after being hit by an automobile—such as a mere ankle sprain—may fully recover all of their non-economic damages, an individual such as Balboni who has undergone multiple surgeries and claims "unimaginable" harm "is only able to collect [$100,000, which is] a fraction of what he might otherwise be awarded" and will "never be made whole." (Appellant's Br. 5.)

¶ 42 That section 555 treats classes of individuals differently, so as to implicate the equal protection clause of the Virgin Islands Bill of Rights, is only the very first part of our analysis. While several courts have acknowledged that the equal protection clause of the Virgin Islands Bill of Rights, providing that "[n]o law shall be enacted in the Virgin Islands which shall . . . deny to any person therein equal protection of the laws," 48 U.S.C. § 1561, is a distinct substantive enactment from the equal protection clause of the Fourteenth Amendment, *see, e.g.*, *Brown*, 7 V.I. at 551, no court has set forth what standard a Virgin Islands court must apply to determine whether a Virgin Islands statute violates this provision. Nevertheless, this Court is not without guidance. To determine the meaning of the "bailable by sufficient sureties" clause—another provision of the Virgin Islands Bill of Rights—this Court considered how other state courts of last resort had interpreted similar or identical language in their state constitutions. *See Browne*, 50 V.I. at 259. Therefore, to guide our analysis, we consider what legal standard other state courts of last resort have applied in the context of interpreting the equal protection clause of their state constitutions.

¶ 43 State courts of last resort have almost-uniformly interpreted their state equal protection

clause to confer greater rights than the federal equal protection clause, with 46 states expressly adopting a more stringent test.[43] This was the case even before Congress adopted the predecessor to the Revised Organic Act's equal protection clause as part of the Organic Act of 1936. *See* W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 137, 159-60 (1919) ("Of express limitations in state constitutions, the general ones of most importance, those of 'due process' and 'equal protection,' have in a number of states been applied by state courts with much more strictness than has the Fourteenth Amendment by either federal or state courts.").

¶ 44 While states courts of last resort have generally endorsed the tiered-scrutiny approach utilized by the Supreme Court of the United States to adjudicate federal equal protection claims,[44] they have overwhelmingly rejected the test the United States Supreme Court applies for the lowest tier of scrutiny: rational basis review. To satisfy rational basis review under federal equal protection, the statute need only further a legitimate state interest. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981). However, federal rational basis review has been criticized as being a "virtual rubber-stamp of truly minimal review," LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–32, at 1610 (2d. ed. 1988)). Consequently, many state courts of last resort have substituted for rational basis review a higher standard, often described as "heightened rational basis," "rational basis with bite," or "rational basis with teeth." While rational basis review under the equal protection clause of the United States Constitution is highly

[43] *See* KUSHNER, *supra* note 18, at § 1.7 (collecting cases).

[44] Under this standard, a court applies strict scrutiny when a statute implicates a fundamental right or discriminates against a suspect class, applies intermediate scrutiny when a statute implicates a non-fundamental right or discriminates against certain non-suspect classes such as gender or alienage, and applies rational basis review in all other cases. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

deferential and requires a challenger to "negate every conceivable basis that might support" the classification, *see McIntosh v. People*, 57 V.I. 669, 686 n.15 (V.I. 2012), heightened rational basis review under state equal protection clauses is substantially less deferential, and 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. *See, e.g., State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) ("The key distinction between the federal and Minnesota tests is that under the Minnesota test we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires. Instead, we have required reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.") (internal quotation marks omitted); *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 460 (Wisc. 2005) ("'Rational basis with teeth' . . . focuses on the legislative means used to achieve the ends. This standard simply requires the court to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose."); *Rodriguez v. Brand West Dairy*, 378 P.3d 13, 25 (N.M. 2016) (noting that the "'modern articulation' of the rational basis test" adopted by the New Mexico Supreme Court "requires the challenger to demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record") (internal quotation marks omitted).

¶ 45 While the precise legal standard for heightened rational basis review has been given many different articulations by courts, scholars who have reviewed the case law have identified three types of heightened rational review analysis:

> (1) "ends analysis," in which classifications have been invalidated for seeking impermissible purposes;

> (2) "means analysis," in which the constitutional deficiency arises from the lack of a sufficient connection between the governmental classification and legitimate purposes; and
>
> (3) "combination analysis," wherein the classification was declared unconstitutional because some of the governmental purposes were impermissible and the classification was insufficiently related to other legitimate purposes.

Preston C. Green & Bruce D. Baker, *Circumventing* Rodriguez: *Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX. F. ON C.L. & C.R. 141, 159 (2002) (citing Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999)). If a statute fails review under ends analysis, means analysis, or combination analysis, the statute will fail heightened rational basis review.

¶ 46 We agree, for the reasons articulated by other state courts of last resort that have considered the issue noted above, that heightened rational basis review represents the appropriate standard for determining the validity of a Virgin Islands statute under the equal protection clause of the Virgin Islands Bill of Rights. Therefore, we turn to the final part of our analysis: whether the $100,000 cap on non-economic damages codified in section 555 survives heighted rational basis review.[45]

¶ 47 Several state courts have had the opportunity to apply this heightened rational basis standard to statutes imposing caps on damages in certain types of cases. Under this standard, the factor typically found to be determinative is whether the damages cap is reasonable given the

[45] Thus, we do not find persuasive the decision of the United States Court of Appeals for the Third Circuit in *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989)—in which it held that a Virgin Islands statute imposing a cap on non-economic damages in medical malpractice cases did not violate the equal protection clause of the Fourteenth Amendment—since that decision was predicated on applying the significantly more deferential rational basis standard, rather than the heightened rational basis standard we adopt to review claims under the equal protection clause of the Virgin Islands Bill of Rights.

legislative purpose identified by the government. *See, e.g.*, *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 166 (Ala. 1991); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 597 (Ind. 1980); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 692 (Wisc. 2018); *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980); *Prendergast v. Nelson*, 256 N.W.2d 657, 667-68 (Neb. 1977) (quoting *Taylor v. Karrer*, 244 N.W. 2d 201 (Neb. 1976)). However, unlike federal rational basis review, courts are not obligated to simply take the government at its word; rather, courts are authorized to disregard justifications that are speculative, or that are too attenuated or otherwise fail to demonstrate an actual connection between the damages cap and the legislative purpose. *See, e.g.*, *Ferdon*, 701 N.W.2d at 460; *Garcia*, 683 N.W.2d at 299.

¶ 48 In their briefs, Ranger American and the Government cite to both federal and state case law with respect to Balboni's equal protection challenge. Because the federal cases are inapposite to our inquiry, due to the different standard of review we apply to an equal protection claim under the Virgin Islands Bill of Rights,[46] we look to the state cases in which courts have applied the heightened rational basis review standard.

¶ 49 Applying the heightened rational basis standard, courts have consistently upheld damage caps against equal protection challenges when the government has pointed to clear legislative findings as to the purpose of the legislation—combined with at least a modicum of evidence indicating that the cap serves that purpose—but have not hesitated to hold such statutes unconstitutional in the absence of a clear legislative purpose, or when the connection between the cap and the legislative purpose is based on pure speculation. For example, the Wisconsin Supreme

[46] For example, Ranger American relies on the Third Circuit's decision in *Davis* rejecting a challenge under the equal protection clause of the Fourteenth Amendment to a damages cap in the Virgin Islands Medical Malpractice Act. But as noted earlier, this decision did not apply heightened rational basis review.

Court recently upheld, on state equal protection grounds, the constitutionality of a $750,000 cap on non-economic damages in medical malpractice cases. *Mayo*, 914 N.W.2d at 695. The Wisconsin Supreme Court arrived at this decision by pointing to numerous findings in the legislation itself—including the need to contain health care costs—that were supported with actuarial studies, documentary evidence, and testimony demonstrating a connection between a cap and that purpose. *Id.* at 693. Significantly, the Wisconsin Supreme Court emphasized that the legislature did not arrive at the $750,000 cap on non-economic damages arbitrarily, but deliberately chose that number because it "is neither too high nor too low to accomplish the goals of affordable and accessible health care." *Id.* at 694. Other courts have upheld damage caps when similar demonstrations of concrete linkage between the express purpose of legislation and particular statutory terms with targeted factual circumstances were present. *See, e.g.*, *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053 (Alaska 2002) (noting that legislative goals were "explicitly stated" in the legislation, and that a damage cap was directly related to the stated goals of decreasing the costs of litigation, fostering a positive business environment, and encouraging personal responsibility and self-reliance).

¶ 50 In contrast, just a decade earlier, the Wisconsin Supreme Court had found unconstitutional a similar $350,000 cap on non-economic damages because the legislature had failed to show any reasonable connection between a $350,000 cap and its stated intention of reducing medical malpractice insurance premiums. *Ferdon*, 701 N.W.2d at 468. Notably, the Wisconsin Supreme Court had emphasized that the $350,000 cap had been enacted in 1975, and that even if evidence supported that cap then, the passage of literally decades without amendment or re-examination could render the cap invalid under heightened rational basis review, for the need to address "[a] past crisis does not forever render a law valid." *Id.* at 630. Other courts of last resort have held

damages caps to violate state constitutional equal protection clauses in similar circumstances. *See, e.g.*, *North Broward Hosp. District v. Kalitan*, 219 So.3d 49, 58 (Fla. 2017) (holding that $750,000 and $1,500,000 caps on non-economic damages failed heightened rational basis review because the caps were arbitrary and the claim that the caps were necessary to reduce insurance premiums was speculative); *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (holding a $500,000 cap on medical malpractice damages unconstitutional in the absence of any evidence to support the claim that the cap was related to the goal of lowering insurance premiums and lowering medical care costs for all recipients of medical care).

¶ 51 We conclude that the cap on non-economic damages codified in section 555 fails to satisfy heightened rational basis review. Section 555 was enacted as part of Act No. 6287—titled the "Short Term Revenue Enhancement Act of 1999"—and introduced in the 23rd Legislature as Bill No. 23-0082. The very title of the enactment implies that the Legislature found that such changes need only be short term, or temporary, which calls into doubt the reasonableness of continuing the cap 20 years later. *See Ferdon*, 701 N.W.2d at 630 ("A past crisis does not forever render a law valid."). More importantly, except for the implied finding in the title—and unlike the damage caps found to be constitutional in other jurisdictions—neither Bill No. 23-0082 nor Act No. 6287 contains any legislative findings whatsoever with respect to any of its provisions, let alone any pertaining to the non-economic damages cap codified in section 555. Consequently, we can—at best—only speculate as to why the 23rd Legislature sought to create distinctions between classes of injured people by enacting the cap.[47]

[47] Ranger American speculates in its appellate brief that section 555 "serves a similar purpose to other statutory limitations on damages in the Virgin Islands, such as the comparative fault statute (5 V.I.C. § 1451) and the $75,000 limitation on injury actions against the Virgin Islands Port Authority (29 V.I.C. § 556)." (Appellee's Br. 10.) However, we do not see how any of these

¶ 52 In their briefs, both the Government and Ranger American maintain that the Legislature enacted section 555 to stabilize the automobile insurance market in the Virgin Islands. But as noted above, the Legislature made no legislative findings to that effect when it first enacted section 555.[48] In fact, the legislative history for Act No. 6287 contains absolutely no discussion of the cap whatsoever,[49] let alone any evidence that would tend to show a connection between establishing a

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statutes are even remotely analogous to section 555. The statute placing limitations on recovery against the Virgin Islands Port Authority was enacted in accordance with the provision of the Revised Organic Act that provides that "no tort action shall be brought against the government of the Virgin Islands . . . without the consent of the legislature," 48 U.S.C. § 1541(b), with the Legislature granting such consent with respect to the Port Authority contingent on damages being limited to $75,000. And unlike section 555, the comparative fault statute does not create distinctions between classes of injured people—in that it applies equally to all plaintiffs with respect to all causes of action—and in fact is not a "cap" at all.

[48] Ranger American further asserts, without citing to any legal authority, that section 555 "plays a similar role to worker's compensation statutes by limiting a plaintiff's available recovery" and noting that "[w]orker's compensation statutes are routinely found constitutional." (Appellee's Br. 10.) However, both federal and state courts have repeatedly refused to draw analogies between workers' compensation statutes and damage caps, because workers' compensation statutes are fundamentally different in that they "provide a *quid pro quo*" in which "[w]orkers compensation statutes eliminate the claimant's burden of proving fault in return for protection to the employer." *McBride v. General Motors Corp.*, 737 F.Supp. 1563, 1575 (M.D. Ga. 1990); *see also Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 259 (Kan. 1988) (rejecting reliance on case law upholding workers' compensation and no-fault insurance statutes because the plaintiff receives nothing in return for the limitation on the damages he may recover); *Wright v. Central Du Page Hospital*, 347 N.E.2d 736, 742 (Ill. 1976) (holding that the analogy to workers' compensation statutes fails because a cap on medical malpractice damages does not provide any benefits to malpractice victims and thus is not part of a *quid pro quo*).

[49] In its appellate brief, Ranger American states that "[t]he Legislature passed the Act with the cap on non-economic damages to encourage insurance companies to return to the Virgin Islands market," and as support cites a statement made by Senator James during debate. (Appellee's Br. 6-7.) However, the statement from Senator James that Ranger American cites was made as part of the debate on Bill No. 27-0149 nearly a decade later, and thus cannot provide evidence of actual legislative intent at the time the cap was instituted as required under heightened rational basis review.

cap on non-economic damages and making automobile insurance both available and affordable.[50]

¶ 53 While there was no discussion of the cap when Act No. 6287 was debated by the 23rd Legislature in 1999, such a discussion did take place in 2007 when the 27th Legislature considered Act No. 6998—introduced as Bill No. 27-0149—which amended section 555 to raise the cap on non-economic damages from $75,000 to $100,000. Although no senator voted against the measure, very different reasons were given for their support of the bill. Senators James, Figueroa-Serville, and Malone stated that eliminating the cap would cause the insurance industry to collapse or for premiums to rise but cited no evidence to support that claim. (J.A. 311, 322.)

¶ 54 Those three senators, however, were the only ones who cited concerns about the insurance industry as the purported reason for the cap. Others expressed support for caps on reasons that had nothing to do with the insurance industry. For instance, Senator Ottley stated that he supported the cap due to his belief that non-economic damages are subjective and difficult to calculate. (J.A. 325.) Similarly, Senator Jean-Baptiste supported a cap because he "ha[s] known cases where persons feigned all kinds of injuries and pains and hardships, came into the courthouse, barely clothed, got huge awards from a jury that were moved by the act that was put on," and then "shortly

[50] Ranger American incorrectly cites to a statement by Senator Cole during the Committee on Finance hearing on Act No. 6287, in which he states that he's "glad that there's a cap in there," and that he "hope[s] that the providers in this community, insurance providers, will provide affordable insurance so we can have the drivers and operators on the roads of the Virgin Islands being insured against casualty and all of that sort." (Appellee's Br. 7 (citing J.A. 123).) However, Ranger American neglects to note that Act No. 6287 established multiple caps, and that Senator Cole made this statement in response to a question he directed to Senator David, as to whether "we'll be able to hold compulsory automobile insurance liability to a certain level that we can afford to pay for it," to which Senator David responded, "[a]s the bill stands, Senator, it's capped at three hundred dollars, which it's less than a dollar a day for insurance coverage." (J.A. 122.) It is only in response to that statement by Senator David that Senator Cole responded that he is "glad that there's a cap in there." Consequently, it is clear that Senator Cole was not speaking to the cap on non-economic damages in automobile accident lawsuits, but was instead referencing a completely unrelated cap on the cost of compulsory automobile insurance policies.

after they were awarded huge awards, next thing you saw that person running up and down the streets, driving cars, climbing mountains and what have you, after having feigned intense injury and pain." (J.A. 347-48.) Likewise, Senator Weber maintained that "the Virgin Islands is known as the 'plaintiff's paradise'" even with the cap, and implied that the only reason to remove the cap would be to provide a windfall for certain attorneys. (J.A. 356.)

¶ 55 Senator Davis also believed a cap was necessary to limit "greedy" personal injury attorneys whose "purse[s] would [otherwise] be a little fatter" if "the door [regarding non-economic damages] is [wide] open and you can sue for whatever." (J.A. 338.) Notably, despite supporting a cap, Senator Davis stated that he did not believe the cap influenced the insurance industry, since he "do[es]n't believe that the insurance companies are going to write any insurance policy beyond $100,000 unless you take out a special policy." (J.A. 338.)

¶ 56 In contrast, Senators Russell and Dowe stated that they opposed the cap entirely, for reasons ranging from the fact that the Virgin Islands judiciary is equipped to handle excessive verdicts, to there not being any evidence that the cap would have any effect on the insurance industry. (J.A. 313, 336.) Still others, such as Senators Hill, Wesselhoft, White, and Williams, provided no reasons at all in support or opposition to the cap.

¶ 57 The "ends analysis" and "combination analysis" of the heightened rational basis standard require this Court to consider the actual legislative purpose, *Garcia*, 683 N.W.2d at 699, rather than the federal practice of "negat[ing] every conceivable basis that might support" the legislation even if the alternative basis did not actually motivate the Legislature, *McIntosh*, 57 V.I. at 686 n.15. Here, Ranger American and the Government's contention that the Legislature enacted the cap in order to stabilize the automobile insurance market is—at best—pure speculation. Neither Act No. 6287 nor Act No. 6998 contain any legislative findings. No member of the 23rd

Legislature even mentioned the cap in the debate on Act No. 6287. And while three members of the 27th Legislature identified the insurance market as a reason for continuing the cap, a larger number of senators provided reasons that had absolutely nothing to do with insurance. To the contrary, the debate on Act No. 6998 would equally support a finding that the Legislature endorsed the cap out of an animus for personal injury attorneys and plaintiffs—a clearly illegitimate purpose. That many senators expressly stated their animus towards these groups on the record in justifying the cap in itself may cause the cap to fail the "ends analysis" test of heightened rational basis review, since such naked discrimination—even against a non-protected class—is not a legitimate governmental purpose. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (holding, with respect to a measure denying food stamps to "hippies," that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); Wesley W. Horton & Brendon P. Levesque, *Kelo is Not Dred Scott*, 45 CONN. L. REV. 1405, 1418 (2016) (noting that "the rational-basis-with-a-bite test" provides that "judges should look for warning signs—suspicion of improper influence, backroom dealings, discrimination, vague or hasty planning—that should force them to take a closer look") (citing *Kelo v. New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring)). At a minimum, the fact that a substantial minority of senators were influenced by an improper purpose would require a higher showing that the cap is related to a legitimate purpose. But even if we were to accept the contention that the Legislature enacted the cap on non-economic damages for the legitimate purpose of stabilizing the automobile insurance market, the cap will only survive heightened rational basis review under the "means analysis" and the "combination analysis" if the cap is a reasonable method of implementing that purpose. In other words, there must be some actual

connection (other than mere speculation) between the cap actually selected and the goal of stabilizing the insurance market. *See Rodriguez*, 378 P.3d at 25; *Ferdon*, 701 N.W.2d at 460.

¶ 58 We conclude that there is no such connection between the cap in section 555 and this goal, whether under the more deferential "means analysis" test or the more liberal "combination analysis." As a threshold matter, the amount of the cap on non-economic damages—$75,000 as originally enacted by Act No. 6287, and $100,000 after the passage of Act No. 6998—is purely arbitrary, and is not based on any studies, actuarial analysis, or other evidence.[51] In fact, Senator Malone—one of the three senators to suggest the insurance market as the reason for the cap—implied that such evidence had not yet been considered, since he stated that "as we review the issue more closely, as we look at the statistics, we can begin to justify over time, a steady increase if it's warranted." (J.A. 363.) *Compare North Broward Hosp. Dist.*, 219 So.3d at 58 (holding that a cap violated equal protection when the amount of the cap was purely arbitrary), *with Mayo*, 914 N.W.2d at 695 (holding that a cap did not violate equal protection when legislative findings established that the amount of the cap was not an arbitrary number but was specifically chosen to serve the legislative purpose).

¶ 59 More importantly, there is no evidence that a cap on non-economic damages—in any amount—will have any effect on the automobile insurance market in the Virgin Islands. Virgin Islands law does not compel insurance companies to issue unlimited insurance policies. On the contrary, the statutes providing for compulsory automobile liability insurance for private passenger vehicles and motorcycles only require minimum insurance coverage in the amount of $10,000 for bodily injury for one person, $20,000 for bodily injury for two or more people, and $10,000 for

[51] It appears that the $100,000 cap on non-economic damages is the lowest such cap in the United States.

property damage.[52] *See* 20 V.I.C. § 703. While insurance companies may elect to issue policies in excess of these amounts, such a decision is purely discretionary. *See* 20 V.I.C. § 704(d). As Senator Davis stated in the debate on Act No. 6998, there is absolutely nothing preventing an insurance company from simply refusing to write an automobile insurance policy to cover non-economic damages greater than $100,000. Such a practice would have the same effect for the insurance company as the statutory cap on non-economic damages but would allow automobile accident victims to seek redress from other responsible parties (such as the vehicle's driver) without negatively impacting the insurance company. And such a result would be due to the actions of private market actors, rather than unsupportable discriminatory legislation enacted by the government.

¶ 60 Given the lack of a sufficient connection between the cap and the goal of making automobile insurance available in the Virgin Islands, section 555 is invalid under both the "means analysis" and "combination analysis" tests. But our holding would remain the same even if we were to accept—which we do not—that a cap on non-economic damages could have a positive effect on the automobile insurance market in the Virgin Islands. Like other state courts to consider the issue, "we fail to see how singling out the most seriously injured [automobile accident] victims for less than full recovery bears any rational relationship to the Legislature's allegedly stated goal of alleviating the financial crisis in the [automobile] insurance industry."[53] *North Broward Hosp.*

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[52] The minimum compulsory insurance coverage is largely the same for taxicabs, trucks, and buses, except that minimum compulsory insurance for bodily injury for two or more persons rises to $25,000 for taxicabs and trucks and $50,000 for buses. *See* 20 V.I.C. § 703.

[53] Additionally, as this case illustrates, the cap on non-economic damages disproportionately places the burden of stabilizing the automobile insurance market in the Virgin Islands on individuals who do not participate in that market. Balboni is not a resident of the Virgin Islands, but simply a visitor to the Territory. Moreover, he was not injured as a result of driving a vehicle

Dist., 219 So.3d at 58 (internal quotation marks omitted). Importantly, the only arguable justification for allocating this burden to the most severely injured—that these individuals contribute to a disproportionate amount of the costs—does not withstand scrutiny, since "society, through the courts, has developed a remedy to secure itself from the ills of a 'run-away' jury that has imposed a disproportionately high award," in the form of judicial review of the verdict.[54] *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991). For these reasons, we conclude that the cap on non-economic damages codified in section 555 violates the equal protection clause of the Revised Organic Act, and therefore a $100,000 cap on non-economic damages does not apply to this case. Consequently, we reverse the portion of the January 24, 2018 opinion in which the Superior Court held that Balboni's non-economic damages could not exceed $100,000.[55]

III. CONCLUSION

¶ 61 Although the Superior Court certified four questions to this Court relating to whether section 555 violates the Fifth, Seventh, and Fourteenth Amendments of the United States Constitution, the doctrine of constitutional avoidance compels us to examine whether Balboni may obtain the same relief—a declaration that section 555 is invalid—without resolving the federal

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on a Virgin Islands road; rather, he was a pedestrian who was struck by a vehicle while walking on the sidewalk. We can discern no rational reason why the burden of stabilizing the market for automobile insurance in the Virgin Islands should be disproportionately shouldered by pedestrians who have been severely injured.

[54] *See Antilles School*, 64 V.I. at 437-38 (noting that a damages verdict may be set aside by a judge "if it is not supported by sufficient evidence in the record, or if a reduction is compelled under the United States Constitution").

[55] Because we conclude that section 555 is invalid pursuant to the equal protection clause of the Virgin Islands Bill of Rights, we need not decide whether it also violates the due process clause of the Virgin Islands Bill of Rights, or if it is unconstitutional under the Fifth, Seventh, or Fourteenth Amendments to the United States Constitution.

constitutional questions. Because the Virgin Islands Bill of Rights guarantees a right to equal protection under the laws that is separate and independent from the equal protection clause of the Fourteenth Amendment, this Court may analyze the validity of section 555 pursuant to that provision. Since section 555 treats certain classes of people differently but is not reasonably related to a legitimate legislative purpose, we conclude that the $100,000 cap on non-economic damages in automobile accident cases violates the equal protection clause of the Virgin Islands Bill of Rights. Accordingly, we reverse the January 24, 2018 opinion and order, and remand this matter to the Superior Court for further proceedings.

Dated this 3rd day of June, 2019.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

CABRET, Associate Justice, dissenting.

¶ 62 Because I disagree with the majority's determination that we have the authority to independently interpret the provisions of section 3 of the Revised Organic Act to provide greater protection than the nearly identical provisions of the U.S. Constitution—an issue that was neither raised by the parties nor considered by the Superior Court—I respectfully dissent. Specifically, I conclude that the majority's position is expressly foreclosed by longstanding precedent of the Supreme Court of the United Sates, highly persuasive precedent of the federal circuit courts of appeal, and the previous decisions of this Court. Furthermore, it is my opinion that this line of cases, considered in light of the relevant legislative history, compels the conclusion that Congress intended for the due process and equal protection clauses of section 3 to confer upon the people of the Virgin Islands rights coextensive with the analogous 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. Finally, I conclude, like the trial court, that 29 V.I.C. § 555 withstands traditional rational basis scrutiny and does not violate either the Fifth, Seventh, or Fourteenth Amendment to the U.S. Constitution.

I. THE MAJORITY'S REFORMULATION OF BALBONI'S ARGUMENT

¶ 63 Appellant Frederic Balboni argues that 20 V.I.C. § 555, which limits the recovery of non-economic damages in motor vehicle collision cases to $100,000, violates the Fifth, Seventh and Fourteenth Amendments of the U.S. Constitution, as applicable to the Virgin Islands through the "bill of rights" found in section 3 of the Revised Organic Act. After unsuccessfully arguing at the trial court level that section 555 is unconstitutional, Balboni moved the Superior Court to certify several constitutional issues for immediate interlocutory appeal to this court

under title 4, section 33(c) of the Virgin Islands Code.[1] While the Superior Court certified four questions to this court, the majority chose to dispose of them by reformulating the questions certified and only considering whether section 555 violated the equal protection and due process clauses of the Revised Organic Act.

¶ 64 The majority argues that the inclusion of separate due process and equal protection provisions in section 3 of the Revised Organic Act reflects Congress's intent to empower this Court to interpret the Act—the Territory's *de facto* constitution—like a state would its own constitution, including the authority to construe the rights in the Act under a heightened standard of review. After determining that this Court possesses the power to depart from the federal interpretations of the equal protection and due process clauses, the majority relies on this theory of independent interpretation to subject section 555 to a heightened rational basis standard of review adapted from the jurisprudence of various state courts of last resort. Under this heightened standard of review, the majority concludes that section 555 violates the equal protection clause of section 3 of the Revised Organic Act.

¶ 65 As a threshold matter, I must strenuously object to the majority's decision to resolve this case on the basis of an issue never raised by the parties and never considered by the Superior Court: Whether this Court may interpret the "bill of rights" provisions of the Revised Organic Act as extending greater protection to the people of the Virgin Islands than

[1] The Superior Court certified the following four questions to this court regarding the constitutionality of Section 555:

> (1) Whether 20 V.I.C. § 555 impermissibly invades into the province of the jury in violation of the Seventh Amendment;
>
> (2) Whether treating automobile accident victims differently based upon the severity of their noneconomic injuries violates the equal protection clause of the Fourteenth Amendment;
>
> (3) Whether treating automobile accident victims and their injuries differently from victims of other types of accidents violates the equal protection clause of the Fourteenth Amendment;
>
> (4) Whether § 555 unconstitutionally infringes on Due Process rights provided for in the Fifth and Fourteenth Amendments made applicable through the Revised Organic Act of 1954, including the substantive due process rights not to be deprived [] arbitrarily of life, liberty or property.

(J.A. 19.)

substantially similar provisions of the United States Constitution. The majority claims that "because the authorities pertinent to our analysis of the "Bill of Rights" provisions—such as the decisions of state courts of last resort striking down caps on non-economic damages pursuant to due process and equal protection clauses found in state constitutions—were cited in Balboni's principal brief, "Ranger American and the Government have had the opportunity to respond to these arguments in their response briefs, as well as at oral argument." This statement strains credulity. Reading closely, one notices that the majority does not, and indeed cannot, contend that Balboni *argued* that this Court should apply the heightened standard of review applied in the cited cases. Instead, the majority claims only that Balboni cited certain cases pertinent to "*our analysis;*" that is, the analysis of an issue raised by the majority *sua sponte*, without the benefit of any argument or briefing from any party. Yet incredibly, the majority asserts that Balboni's references to these cases cited in support of an entirely different argument somehow provided Appellees an opportunity to respond to "these arguments," that are in fact raised for the first time, *sua sponte*, in the majority opinion.

¶ 66 Indeed, while some of the cases Balboni cited in his brief featured state courts applying heightened scrutiny to the provisions of their own state constitutions to find similar caps unconstitutional, Balboni never argued, either in his brief or at oral argument, that we should adopt this type of heightened standard. Rather, Balboni argues that we should apply strict scrutiny because the right to a civil jury trial is a fundamental right. (Appt's Br. At 11). Alternatively, Balboni argues that even if the right to a jury trial is not a fundamental right, section 555 does not withstand traditional rational basis test scrutiny either, because it bears no rational relationship to a permissible governmental purpose. (Appt's Br. At 19). Even in discussing state court cases striking down caps as violative of their own equal protection clauses, Balboni does not attempt to distinguish between traditional, federal rational basis

review and the heightened review applied by those state courts, let alone affirmatively argue that this Court should adopt such a heightened standard. At best it was "only adverted to in a perfunctory manner [and] unsupported by argument," and should therefore be considered waived under V.I. R. APP. P. 22(m).

¶ 67 Similarly, in its attempt to conjure from the Revised Organic Act civil rights above and beyond those guaranteed by the U.S. Constitution, the majority claims that "Balboni does not limit his arguments solely to the United States Constitution," but that he also argues "that section 555 is invalid pursuant to the first sentence of the 'Bill of Rights.'"[2] Nowhere in his appellate brief, however, does Balboni even mention the separate guarantees of due process and equal protection found in the opening lines of section 3, let alone attempt to draw a distinction between the protections afforded by these purportedly separate rights to due process and equal protection and those guaranteed by the Fourteenth Amendment as applicable through the final paragraph of section 3. While Balboni does assert in the first sentence of the relevant section of his brief that "[s]ection 555 violates the Equal Protection Clause of the Fourteenth Amendment and The Revised Organic Act of 1954," this threadbare statement is a far cry from the majority's reformulation of the argument that the Revised Organic Act contains a separate and distinct due process clause imposing heightened requirements beyond those of the Fourteenth Amendment. (Appellant's Br. at 17.) In my opinion, Balboni's simple assertion that the damage cap violates both the Fourteenth Amendment and the Revised Organic Act, stands for nothing more than the unremarkable proposition that a violation of the Fourteenth Amendment would, necessarily, constitute a violation of the Revised Organic Act—the statute establishing the applicability of the Fourteenth Amendment in the Virgin Islands. This straight-forward interpretation of Balboni's position is supported by the concluding sentence of his

[2] "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. § 1521

equal protection argument which prays only that "this Court … determine that section 555 impermissibly invades individual liberties in violation of the Equal Protection Clause of the Fourteenth Amendment," with no mention of the either the Revised Organic Act or any additional right found therein. (Appellant's Br. at 23.) In short, the idea that the first sentence of section 3 imposes a separate guarantee of due process and equal protection does not originate from the parties and is simply another argument raised *sua sponte* by the majority.[3]

¶ 68 I have scoured the parties' briefs in vain for any mention of heightened rational basis review or other language indicating the parties' intent to argue that this Court should—or should not—adopt a standard of constitutional review from state courts that is yet unknown in the law of the Virgin Islands. However, this argument appears nowhere in the parties' briefs and is instead raised, for the first time, in the majority opinion.[4]

¶ 69 Critically, the majority's determination to focus the decision upon such a novel, paradigm-shifting issue *sua sponte* raises myriad due process and fairness concerns. *Brunn v. Dowdye*, 59 V.I. 899, 905 (V.I. 2013) ("Since the Superior Court sua sponte raised and adjudicated this issue in its October 20, 2009 Opinion, it committed error by depriving Brunn of her right to be heard."). We have consistently held that it is error for a court to decide an issue raised *sua sponte* without first providing all parties to the case with notice and opportunity to be heard on the issue. *See, e.g.*, *Malloy v. Reyes*, 61 V.I. 163, 175 (V.I. 2014) ("[R]ais[ing] and decid[ing] [an] issue *sua sponte*, without providing notice to the parties or an opportunity to brief this issue… in itself constitutes error because in raising and deciding an issue without

[3] The majority asserts that "Ranger American actually responded to Balboni's claims" and that this response "defeats any claim that Balboni waived these issues, since Ranger American effectively 'waived waiver' by responding on the merits." However, Ranger American's brief, much like Balboni's brief, cites these state law cases considering challenges to damage cap statutes only to establish the number of jurisdictions that have upheld or struck down such statutes, with absolutely no discussion of the heightened rational basis standard of review applied by those courts, let alone any argument that this Court should adopt that standard for the Virgin Islands.

[4] The parties' briefs are available to the public through the Court's electronic docket at: https://efile.visupremecourt.org/public/caseSearch.do

providing notice or a chance to respond, the [court] denie[s] [the parties their] right to be heard."); Instead of engaging in such judicial activism, we should address the issues as presented to ensure that the parties have had the opportunity to brief and respond to the issues and arguments upon which this Court bases its decision. We should not strike down a statute duly enacted by the Legislature on constitutional grounds without the benefit of full adversarial briefing and argument. *See Whorton v. Dixon*, 214 S.W.3d 225, 228 (Ark. 2005) ("This court will not strike down a legislative act on constitutional grounds without first having the benefit of a fully developed adversary case."). By depriving Appellees of any opportunity to be heard on these novel and deeply important issues, the majority deprives them of the guarantees of due process from whatever source derived.[5]

¶ 70 However, even considering the majority's arguments on the merits, I still conclude this Court lacks the authority to interpret the Revised Organic Act as if it were a popularly ratified constitution rather than a federal statute because the contrary position—that adopted by the majority—is expressly foreclosed by the cannons of statutory interpretation, by the decisions of every federal appellate court—including the Supreme Court of the United States—that has considered the issue, and by the past decisions of this Court.

II. SECTION 3 OF THE REVISED ORGANIC ACT

¶ 71 The U.S. Virgin Islands is an unincorporated territory of the United States established under Article IV of the U.S. Constitution. U.S. CONST. Art. IV, § 3, Cl 2. As an unincorporated territory, the Virgin Islands enjoys the rights and privileges explicitly extended to it by the U.S. Congress under its Article IV powers. *Id.* ("The Congress shall have Power to dispose of and

[5] The majority invokes the doctrine of constitutional avoidance to explain its *sua sponte* decision to engage in independent interpretation of section 3 of the Revised Organic Act. However, constitutional avoidance of this kind is only possible if we assume from the outset that this Court has the authority to engage in such independent interpretation. However, as discussed below, the relevant decisions of the Supreme Court of the United States, the federal circuit courts of appeal, and this Court foreclose us from exercising such authority, and therefore the doctrine of constitutional avoidance is not applicable to this matter.

make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). Virgin Islanders enjoy the protections of some of the U.S. Constitution, but not all of the protections afforded to U.S. citizens living in the several states. *Murrell v. People of the V.I.,* 54 V.I. 338, 350 (V.I. 2010); *see also Balzac v. Porto Rico,* 258 U.S. 298 (1922). And, even where Congress does not explicitly confer rights by statute, certain fundamental constitutional rights nonetheless extend to the Virgin Islands. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero,* 426 U.S. 572, 599 n.30 (1976); *Balzac v. Porto Rico,* 258 U.S. 298, 312-13 (1922); *Terr. Court of the V.I. v. Richards,* 673 F. Supp. 152, 158 (D.V.I. 1987) ("[O]nly the most fundamental constitutional rights extend to this territory where Congress is silent on the subject."). While specific protections of the U.S. Constitution extend to Virgin Islanders, the territory lacks its own constitution on similar footing with those of the several states or the Puerto Rico Constitution.[6] Instead, the Virgin Islands' government is organized under the Revised Organic Act of 1954. 48 U.S.C. § 1561. This federal statute sets forth the Territory's governmental structure and functions as its *de facto* constitution. *Bryan v. Fawkes,* 61 V.I. 201, 232 (V.I. 2014) ("[T]he Revised Organic Act serves as the de facto constitution for the Virgin Islands.") (citing *Todmann v. People,* 57 V.I. 540, 546 (V.I. 2012)). Section 3 of this Act is titled the "Bill of Rights" and outlines specific rights and prohibitions applicable to the Territory. *Id.* at § 3. In 1968, Congress amended his section also to explicitly extend certain provisions and amendments of the United States Constitution to the Virgin Islands. *Id.* (extending "the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments" to the Virgin Islands).

[6] However, Congress has prescribed a path for the Territory to enact its own constitution. *See* Act to Provide for the Establishment of Constitutions for the Virgin Islands and Guam, Pub. L. 94-584, 90 Stat. 2899 (1976). The Territory has yet to adopt a constitution despite holding five constitutional conventions to date. *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 682 n.4 (V.I. 2015).

¶ 72 While the Revised Organic Act of 1954 may serve as the functional equivalent of a territorial constitution, it remains a federal statute and is not a popularly ratified constitution. *Gov't of the V.I. v. Rivera*, 333 F.3d 143, 145 (3d Cir. 2003). This is a critical distinction, because while sovereign states are free to interpret the provisions of their own constitutions to impose heightened protections beyond those found in the U.S. Constitution, we are bound to interpret federal statutes according to the canons of statutory construction, with the main purpose of giving effect to Congress's intent in enacting the statute. *See Guam v. Guerrero*, 290 F.3d 1210, 1217 (9th Cir. 2002) ("Not 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.").

A. Controlling Authority

¶ 73 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.[7] 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.

[7] Of course, I recognize that Congress, in various organic acts, has expressly conferred certain rights that have no analog in the U.S. Constitution. For example, the Revised Organic Act provides for a right to bail under most criminal charges despite the absence of any similar protection in the U.S. Constitution. *Tobal v. People*, 51 V.I. 147, 160 (2009) ("[S]ection 3 of the [Revised Organic Act] mandates that Virgin Islands judges grant bail in sufficient sureties to all defendants other than those charged with first degree murder where the proof is evident or the presumption great."). But these cases are inapposite to the issue presented here: whether Congress, in using phrases with well-defined meanings in U.S. Constitutional law such as "due process" and "equal protection" in the Revised Organic Act intended for those phrases to carry that same meaning, or some other unknown meaning to be later defined by the territorial courts.

¶ 74 In *Guam v. Guerrero,* 290 F.3d 1210 (9th Cir. 2002), the Ninth Circuit considered an issue nearly identical to that raised by the majority in this case: "whether the Supreme Court of Guam was within its authority to interpret [its organic act] as providing more protection for religious freedom than its federal counterpart." *Id.* at 1216. The structure of the bill of rights of Guam's organic act is nearly identical to that of our own. *Compare* 48 U.S.C. §1421b *with* 48 U.S.C. §1561. In their original versions, each consisted simply of a list of enumerated rights with no explicit reference to the U.S. Constitution. However, in 1968 both provisions were amended to insert identical language expressly extending the protections of certain clauses of, and amendments to, the U.S. Constitution to each territory. *See* Pub. L. No. 90-496, 82 Stat. 839 (1968). It is therefore unsurprising that Guerrero made precisely the same argument propounded by the majority in this case: that "subsection (u)… extends to the people of Guam rights found in the federal constitution—it is a floor below which the Guam legislature cannot dip—whereas subsection (a) is analogous to a free exercise clause found in a state constitution that the Supreme Court of Guam may interpret more broadly." *Guerrero,* 290 F.3d at 1216.

¶ 75 The Ninth Circuit's reasoning in rejecting this argument is worth repeating here:

> Of course, Guam is not a state, has no locally adopted constitution, and its "Bill of Rights" was passed not by its citizens, but rather by Congress. While § 1421b might function as a constitution, *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir.1996) ("The Organic Act serves the function of a constitution for Guam."), it remains quite unlike a constitution of a sovereign State. Guam is a federal instrumentality, enjoying only those rights conferred to it by Congress, and its "Bill of Rights" is a federal statute. Not 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. We are powerless to delegate authority to the Supreme Court of Guam to interpret matters of federal law in a manner other than that provided by the federal judiciary.
>
> This principle is not newly minted. As far back as 1904, the U.S. Supreme Court recognized that local courts in the Philippines, which was then under the control of a U.S. military government, could not interpret the double jeopardy clause in the statutory bill of rights enacted by Congress for the Philippines differently than the construction given by the U.S. Supreme Court to its analogous provision in the Fifth Amendment of the federal Constitution. *Kepner v. United States*, 195 U.S. 100, 123–24, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

> The Court said:
>
> > "These words [in the Philippines's statutory bill of rights] are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution.... How can it be successfully maintained that these expressions of fundamental rights, which 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?" *Id.* (emphasis added).
>
> The U.S. Supreme Court reaffirmed this principle only six years later in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), holding that the provision of the Philippines's statutory bill of rights that prohibited the infliction of cruel and unusual punishment must have the same meaning as the Eighth Amendment of the federal Constitution. *Id*. at 367, 30 S.Ct. 544; *see also United States v. Husband R.*, 453 F.2d 1054, 1058 (5th Cir.1971) (holding that the "statutory bill of rights enacted by Congress for an unincorporated territory such as the Canal Zone is to be given the same construction as that accorded the equivalent provisions of the Constitution"); *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96, 100 (1st Cir. 1946) ("When 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.").

Id. at 1216-17.

¶ 76 Taken together, the *Guerrero* court observed, these cases establish that "a territorial court lacks the authority to interpret a federal statute or federal constitutional provision contrary to the interpretation the U.S. Supreme Court has given it." Thus, the Ninth Circuit held that "it was error for the Supreme Court of Guam to conclude that '[d]espite the similarity of the two provisions, [the Supreme Court of Guam] can reach its own conclusions on the scope of the protections of section 1421b(a) and may provide broader rights than those which have been interpreted by federal courts under the United States Constitution.'" *Id.* at 1217.[8]

[8] In *People v. Moses*, 2016 Guam 17, the Supreme Court of Guam construed the Ninth Circuit's *Guerrero* decision as "leaving open the possibility that we could interpret the Organic Act to be more protective, if the provision were substantively different than the federal version." *Id.* at 21. However, the court concluded that the double jeopardy language of Guam's Organic Act was "nearly identical" to the language of the Fifth Amendment, and therefore "fails to offer sufficient cause to recognize a source of greater protection in our case law." *Id.* Likewise,

¶ 77 Moreover, our own precedent addressing this line of federal caselaw compels the same conclusion. In *Ward v. People*, 58 V.I. 277 (V.I. 2013), the defendant argued that Congress' inclusion of the express prohibition against double jeopardy in section 3 of the Revised Organic Act was intended to confer a separate, more protective right than that conferred by the Fifth Amendment as applied to the Virgin Islands by the final paragraph of section 3. We noted, however, that such an interpretation was explicitly foreclosed by the United States Supreme Court decision in *Kepner* cited above. We further explained that "[s]ince the *Gavieres* and *Kepner* decisions were issued before Congress adopted the Revised Organic Act—and, in fact, pre-date the transfer of the Virgin Islands to the United States in 1917—we may infer that Congress, by including this language in the Revised Organic Act and being aware of how that same language had been interpreted by the United States Supreme Court, intended to reach the same result with respect to the Virgin Islands." *Ward*, 58 V.I. at 283-84; *see also Rodriguez v. Bureau of Corrections*, 58 V.I. 367, 383 (V.I. 2011) (Hodge, J., concurring) ("It is appropriate to presume that Congress intended that the meaning of the habeas provision it included in our Revised Organic Act would be consistent with the Supreme Court's interpretation of the habeas provision of the U.S. Constitution.") (citing *United States v. Wells*, 519 U.S. 482, 495 (1997) (presuming "that Congress expects its statutes to be read in conformity with [Supreme Court] precedents")).

¶ 78 It is true that the U.S. Supreme Court has not had occasion to interpret the equal protection clause of any territory's statutory bill of rights, and therefore we cannot infer that Congress had direct knowledge of any specific interpretation of such language prior to the enactment of section 3. However, we must infer that, at the time of the enactment of section 3, Congress was familiar, not merely with the final result of the Supreme Court's decision in

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as discussed below, the first sentence of the section 3 of the Revised Organic Act is nearly identical to the analogous language of the Fourteenth Amendment.

Kepner, but also with the principle of statutory interpretation upon which that decision was based: that when Congress uses the familiar language of the U.S. Bill of Rights in fashioning a territory's statutory bill of rights, it intends to confer upon the people of that territory rights coextensive with those enshrined in the corresponding provisions of the U.S. Constitution. And while *Kepner*, *Guerrero*, and *Ward* dealt with other provisions of territorial bills of rights and did not directly address the equal protection clause at issue in this case, the principles of statutory construction articulated in those cases are equally applicable here.

¶ 79 Just like Guam, or the Philippines at the turn of the last century, the Virgin Islands "is not a state, has no locally adopted constitution, and its "Bill of Rights" was passed not by its citizens, but rather by Congress." *See Guerrero*, 290 F.3d at 1216. The Virgin Islands remains a "federal instrumentality, enjoying only those rights conferred to it by Congress, and its 'Bill of Rights' is a federal statute." *See id.* And just as in *Kepner*, the Revised Organic Act's guarantee that "'[n]o 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,' is hardly strange to lawyers or students of constitutional law," consisting of nothing more than "the familiar language of the Bill of Rights, slightly changed in form, but not in substance." *See Kepner*, 195 U.S. at 123. Thus, binding precedent from the Supreme Court of the United States, persuasive precedent from the federal Circuit Courts, and our own decision in *Ward* all compel the same two conclusions: (1) that Congress intended for the guarantees of due process and equal protection in the first sentence of section 3 of the Revised Organic Act to confer upon the people of the Virgin Islands rights coextensive with those enshrined in the due process and equal protection clauses of the Fourteenth Amendment; and (2) that this Court lacks the authority to interpret these provisions of the Revised Organic Act in any manner other than that provided by the Supreme Court of the United States.

B. Legislative History

¶ 80 The majority employs a variety of arguments in its attempt to circumvent application of this line of cases and the principles of statutory interpretation for which they stand. Ultimately though, none of these arguments is sufficiently persuasive to justify departure from the result compelled by the controlling precedent discussed above.

¶ 81 First, the majority argues that we are free to interpret the provisions of section 3 as a state court would interpret its own constitution because the legislative history concerning its enactment purportedly reveals that section 3 was patterned on bills of rights found in other organic acts and state constitutions rather than the Bill of Rights of the U.S. Constitution. Specifically, the majority relies on the statement of Senator William H. King of Utah that section 34 of the Virgin Islands Organic Act of 1936—the predecessor to section 3 of the Revised Organic Act—"contains familiar provisions founds in various organic acts and in State constitutions in relation to the Bill of Rights." 80 Cong. Rec. 6609 (1936). According to the majority, this demonstrates that Congress modeled section 3 after other organic acts and state constitutions rather than on the Bill of Rights of the U.S. Constitution. Therefore, the majority argues, Congress must have intended for section 3 to function like the bill of rights of a state constitution, with this Court concomitantly being free to independently interpret the provisions of section 3 to provide for protection greater than that afforded by analogous provisions of the U.S. Constitution.

¶ 82 However, the Senator's simple statement that section 34 *contains* familiar provisions also found in other organic acts and in state constitutions is not, as the majority contends, the equivalent of a statement that congress *adopted* the provisions of section 34 from organic acts and state constitutions and not from the U.S. Bill of Rights.[9] The former statement merely

[9] It is notable that the majority selectively omits the word "contains" from its quotation of the Senator's statement, replacing it with the word "adopted," thereby changing the apparent implication of the language that follows.

conveys the impression that section 34 contains nothing out of the ordinary as compared to comparable bills of rights in other jurisdictions, whereas the later implies that the provisions of section 34 have specific origins in other organic acts and state constitutions.

¶ 83 Yet, even if we accept, for the sake of argument, that section 34 was modeled after similar provisions of other organic acts and state constitutions, there is no logical connection between this simple observation and the revolutionary proposition urged by the majority that this Court has the power to independently interpret the provisions of our statutory bill of rights in the same manner as the high court of a sovereign state may interpret its popularly ratified state constitution. Indeed, when the Senator made these remarks in 1936, the territorial judiciary as we now know it did not yet exist and the judicial power of the territory was instead vested in the District Court of the Virgin Islands. *See Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1055 (3d Cir. 1982) ("The judicial power of the Virgin Islands shall be vested in a court to be designated 'the District Court of the Virgin Islands'. . . .") (quoting Act of June 22, 1936, ch. 699, s 25, 49 Stat. 1807). It was not until the enactment of the Revised Organic Act in 1954 that Congress first authorized the creation of a local appellate court. *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 978 (V.I. 2011) (citing 48 U.S.C.§ 1613a). Thus, the assertion that Congress, in 1936, intended to confer such awesome power upon a non-existent court—a court that Congress would not first conceive of until 1954 and that would not, in fact, be established until 2004—is, to say the least, unconvincing.

¶ 84 Next, the majority places great emphasis on certain statements offered during the congressional hearings on the 1968 amendments to the Revised Organic Act. The majority goes so far as to say that "any doubt" that Congress intended for this Court to exercise the authority to independently interpret the provisions of section 3 "should be erased" by these remarks. The three statements referenced in the majority opinion—from Harry R. Anderson, Assistant

Secretary of the Interior; Ruth Van Cleve, Director of the Office of Territories of the Department of the Interior; and Dr. Aubrey A. Anduze, President of the Virgin Islands Constitutional Convention of 1965—all expressed concern that the recent "one man-one vote" decisions of the Supreme Court of the United States were not, by their own terms, applicable to the Virgin Islands and encouraged the House Committee on Interior and Insular Affairs to adopt statutory language ensuring that any reapportionment of the Virgin Islands Legislature would conform to this principle.

¶ 85 However, these statements are irrelevant in determining the Congressional intent behind the language of section 3 for two critical reasons. First, these are the not the statements of members of Congress at all, but rather of two executive branch officials and one prominent Virgin Islands citizen testifying in support of legislation. And without any statement from an actual member of Congress adopting or at least indicating some agreement with these statements, the legal opinion reflected in these statements—that the Fourteenth Amendment guarantee of equal protection does not apply in the Virgin Islands—cannot be directly ascribed to Congress.

¶ 86 But more importantly, the statements quoted by the majority were not made during the committee hearing on H.R. 11777—the bill providing for an elected governor and amending *section 3* of the Revised Organic Act—but were, in fact, made the following day during the committee hearing on H.R. 13277, in support of including specific equal protection language in *section 5* of the Revised Organic Act. That section reads in relevant part: "The apportionment of the legislature shall be as provided by the laws of the Virgin Islands: Provided, That such apportionment shall not deny to any person in the Virgin Islands the equal protection of the law. . . ." 48 U.S.C. § 1571. Thus, the statements of Anderson, Van Cleve, and Anduze, while undoubtedly illustrative of the general socio-political climate at the time of the 1968

amendments, have no direct relevance to our interpretation of section 3 of the Revised Organic Act.

¶ 87 Ultimately, the majority invokes the remarks of Senator King together with the testimony of the three witnesses just discussed to support its argument that we must interpret the due process and equal protection clauses of the first sentence of section 3 as establishing separate rights open to independent interpretation by this Court because, according to the majority, to hold otherwise would render the final paragraph of section 3 superfluous. However, a close examination of relevant legislative history reveals that the drafters of the 1968 amendment to section 3 recognized this same issue, and ultimately resolved it by carefully crafting the amendment to extend to the Virgin Islands various specific provisions of the U.S. Constitution only "to the extent that they [had] not previously been extended. . . ."

¶ 88 Interestingly, the congressional record reflects that the final version of the 1968 amendment to section 3 was not drafted by any member of Congress, but rather by the United States Attorney General's Office. As initially proposed before the House Committee on Interior and Insular Affairs, the amendment to section 3 provided: "The provisions of paragraph 1 of section 2 of Article IV and section 1 of Amendment XIV of the Constitution of the United States shall have the same force and effect within the territory of the Virgin Islands as in the United States or in any State of the United States." *See* Virgin Islands—Elective Governor and Legislative Redistricting: Hearings before the Subcommittee on Territorial and Insular Affairs on H.R. 11777 and H.R. 13277, 89th Cong. 2, 3 (1966). Subsequently, the House substantially amended the proposed language to read as follows: "To the extent not inconsistent with the status of the Virgin Islands as an unincorporated territory of the United States, the provisions of the Constitution of the United States of America and all its amendments shall have the same force and effect within the Virgin Islands as in the United States." 90 Cong. Rec. 23, 049.

¶ 89 Prior to taking up the bill for consideration in the Senate, Senator Quentin N. Burdick, Chairman of the Subcommittee on Territories, wrote to the Attorney General "requesting his views on the possible effects" of the proposed amendment to section 3 as well an identical proposed amendment to the corresponding section of the Organic Act of Guam being considered simultaneously.[10] 90 Cong. Rec. 23,046. In response, the Deputy Attorney General, on behalf of the Attorney General, identified several problems with the proposed amendment, noting that "the effects of the amendment are doubtful," as it was "not certain whether and to what extent the amendments [would] actually benefit the inhabitants of Guam and the Virgin Islands." *Id.* at 23,047.

¶ 90 The Deputy's letter explained that the Attorney General's Office was primarily concerned with the language extending provisions of the Constitution only "to the extent not inconsistent with the status of the Virgin Islands as an unincorporated territory."

> At its narrowest, the general effect of the House amendment may well fail to confer any benefit upon the inhabitants of [the Virgin Islands]. Many, if not most, of the provisions of the Constitution relate to the States and inhabitants of States. Hence, it could be said that the extension to [the Virgin Islands] of any Constitutional provision relating to States would be inconsistent with the status of [the Virgin Islands] as an unincorporated territory, since [the Virgin Islands] is not a State. Therefore the language of the amendment would render such provisions inapplicable to [the Virgin Islands].

Id. However, the Deputy's letter also "pointed out that the Virgin Islands already enjoy the benefits of due process and equal protection clauses analogous to those contained in the Fourteenth Amendment," and "[h]ence, the reference to the Fourteenth Amendment in [the proposed amendment to section 3] would appear to have been unnecessary." *Id.*

[10] The responsive letter, authored by the Deputy Attorney General, began by explaining: "For the sake of simplicity our comments are limited generally to [the relevant section of] the Guam bill. However, they would apply equally to [the relevant section of the Virgin Islands bill]. That section is identical to [the corresponding section of the Guam bill] except for its reference to the Virgin Islands." 90 Cong. Rec. 23,046. I follow the same approach in my analysis, referring only to the Virgin Islands rather than Guam where appropriate.

¶ 91 In order to resolve the "technical question raised by the House amendment," 90 Cong. Rec. 23,692, the Office of the Attorney General drafted the language that would ultimately become the last paragraph of section 3, making two critical revisions from the previous version. First, the revised amendment eliminated the troublesome language conditioning the applicability of constitutional rights upon their consistency with the Virgin Islands' status as an unincorporated territory and replaced it with a list of specific articles and amendments to be applied "with the same force and effect" as they would in any sovereign state. But more importantly for our purposes, to address the problem of the apparently redundant guarantees of due process and equal protection in section 3, the Attorney General's Office also inserted new prefatory language to clarify that the amendment would extend the enumerated rights to the Virgin Islands only "to the extent that they [had] not been previously extended." Thus, in order to address the concerns raised in the Deputy's letter, Congress adopted this final version of section 3, as "drafted by and approved by the Department of Justice," with the additional "endorsement of the Department of the Interior." 90 Cong. Rec. 23,047.

¶ 92 Even without the benefit of any analysis of the legislative history, the Ninth Circuit in *Guerrero* rejected the same argument against superfluidities now propounded by the majority based solely on the plain meaning of the relevant language in the nearly identical provisions of the bill of rights in the Guam Organic Act. The court reasoned:

> Guerrero argues that our reading will render provisions of the Organic Act's "Bill of Rights" redundant and superfluous. If subsection (u) was merely extending rights that had not previously been extended, and subsection (a) already provided the federal level of free exercise protection, why did Congress mention the First Amendment again in subsection (u)? Thus, he argues, the free exercise portions of subsections (a) and (u) must be subject to different interpretations. Or, put differently, Congress provided Guam two layers of religious protection, one federal and one subject to local interpretation that cannot fall beneath the floor of federally protected rights. While Guerrero's reading is not unreasonable, we find that the interplay of subsections (a) and (u) is less convoluted. Had Congress wanted to add a separate layer of constitutional protections, simpler language would have sufficed, for example, "in addition"

> or "also." In any case, subsection (u) adds only those provisions not already extended. Therefore, if a provision had been extended, like free exercise of religion, it was not duplicated by subsection (u).

Guerrero, 290 F.3d at 1218 n.11. This same reasoning applies with equal force to the due process and equal protection language of the first sentence of section 3 of the Revised Organic Act.

¶ 93 Thus, the legislative history clearly confirms the interpretation, suggested by the plain language of section 3 itself, that the 1968 amendment to section 3 is not superfluous because it only operates to extend the Fourteenth Amendment guarantees of due process and equal protection "to the extent that they [had] not been previously extended."

C. Federal Court Jurisdiction and Standards of Review

¶ 94 Perhaps in recognition of the limited persuasive value of its argument on the primary issue of statutory interpretation, and aware of the possibility of future certiorari review by the Supreme Court of the United States, the majority devotes nearly fifteen pages of its opinion to a discussion of federal caselaw addressing the limits of federal court jurisdiction to review decisions of territorial high courts,[11] as well as the deferential standard of review sometimes applied in such cases.[12] And while this exploration of the nuances of federal review of territorial

[11] *See, e.g., United States v. Pridgeon*, 153 U.S. 48, 54 (1894) (holding that a violation of the Criminal Code of Nebraska, which temporarily served as the criminal code of the territory of Oklahoma by act of Congress, was not an "offense against the United States" over which the federal could exercise jurisdiction); *Linford v. Ellison*, 155 U.S. 503, 508 (1894) (finding that a territorial court decision involving "construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature" did not present a challenge to the validity of a statute of the United States sufficient to invoke federal court jurisdiction under the relevant jurisdictional statute); *People v. Rubert Hermanos, Inc.*, 309 U.S. 543, 550 (1940) (holding that "section 39 of the Organic Act [of Puerto Rico] is not one of 'the laws of the United States' within the meaning of [the relevant jurisdictional provision of the Judicial Code]"); *In re Tristani v. Colon*, 71 F.2d 374, 375 (1st Cir. 1934) (holding that no federal question jurisdiction existed upon a finding that the questions presented did not "in any way" involve "the construction or application of the provisions of sections 25 and 37 and section 2 of the Organic Act").

[12] *See, e.g., Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (acknowledging the Court's "longstanding practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed'") (citing *Fisher v. United States*, 328 U.S. 463, 476 (1946); *Griffin v. United States*, 336 U.S.704, 718 (1949)); *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. 694, 700 (1914) (holding that "[w]e should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong").

court decisions is certainly interesting as an academic exercise, s*ee Guam and the Case for Federal Deference*, 130 HARV. L. REV. 1704 (2017), it is also wholly irrelevant to the resolution of this case. Knowing what standard of review the Supreme Court of the United States may apply to a potential challenge to our interpretation of the Revised Organic Act does not, in any way, assist us in interpreting the Revised Organic Act in the first instance. The deferential approach of the federal courts tells us nothing of Congress' intent in enacting section 3 or the 1968 amendments. Instead, these cases are only relevant insofar as they discuss the standard of review that would be applied to our interpretation of section 3 if one or more of the parties involved in this case successfully petitioned for review of our decision by writ of certiorari to the Supreme Court of the United States.

¶ 95 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."[13] However, none of the language of this suggested standard, or anything resembling it, can be found in any of the decisions referenced by the majority. In fact, these federal cases are more notable for what they omit than for what they contain. None of these cases concern the interpretation of a

[13] Even if we accept for the sake of argument the doctrine advanced by the majority, it brings us no closer to resolving this case. Let us assume that section 3 of the Revised Organic Act is a "territorial law" enacted by Congress sitting in place of the territorial legislature, and further assume that we may "interpret it pursuant to the same principles and authority governing interpretation of state laws by a state court of last resort." Of course, when interpreting state laws enacted by state legislatures, state courts of last resort apply the principles of statutory construction with the primary goal of giving effect to the legislature's intent in enacting the law. So, applying the approach propounded by the majority, we wind up with nothing more than the unremarkable conclusion that our task in interpreting section 3 of the Revised Organic Act is to apply the principles of statutory construction to ascertain and give effect to the legislature's intent—in this case Congress' intent—in enacting section 3.

territory's statutory bill of rights. And none of these cases mention, let alone address, the primary issue raised by the majority— whether Congress intended for this Court, or any territorial high court, to exercise the authority to independently interpret its statutory bill rights as state high courts interpret their own constitutions.

¶ 96 The majority points to the concluding paragraph of the Supreme Court's relatively recent decision in *Limtiaco v. Camacho*, 549 U.S. 483, 491 (2007), noting 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."[14] Critically though, the majority omits the very next sentence of the opinion in which the Court explained that, "[o]n the other hand, the Organic Act is a federal statute, which we are bound to construe according to its terms." *Id.* The *Limtiaco* opinion does not even mention, let alone limit or overturn, the Court's longstanding decisions in *Kemper* and *Weems.* Nor does the opinion discuss *Guerrero* or the other decisions of the federal circuit courts upholding the principle of statutory construction first announced in *Kemper*: that when Congress uses the familiar language of the U.S. Constitution in crafting a territory's statutory bill of rights, Congress intends to confer upon the people of that territory rights coextensive with those enshrined in the analogous provisions of the U.S. Constitution. *See Kemper*, 195 U.S. at 123.

[14] In a footnote, the majority baldly asserts, without explanation, that the Ninth Circuit's decision in *Guerrero* is "inconsistent" with the Supreme Court's observations in *Limtiaco*. However, as with every other case cited by the majority, *Limtiaco* did not involve the interpretation of a territory's statutory bill of rights, and is only relevant to the extent it informs us of the standard of review that might be applied to a future challenge to the decision we reach here today.

D. The Path to Independent Interpretation of Individual Rights in the Virgin Islands

¶ 97 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*, 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.

¶ 98 Yet, as convinced as I am of the error of the majority's approach, I am equally convinced that Congress has, in fact, expressed a clear intent for this Court to one day exercise the authority to independently interpret the provisions of our own "Virgin Islands Bill of Rights" just as state courts of last resort interpret the provisions of their respective state constitutions. Unfortunately, this bill of rights is not found in section 3 of the Revised Organic Act or, at present, anywhere because the "Virgin Islands Bill of Rights" has yet to be written. The majority correctly observes that, at least since the enactment of the Revised Organic Act in 1954, Congress has granted the people of the Virgin Islands an ever-increasing degree of autonomy and self-determination in their government. Examples include legislation providing for the popular election of the Governor of the Virgin Islands and specifying that the relations between the courts of the Virgin Islands and the courts of the United States shall be the same

as that of the relationship between the courts of the fifty states and the courts of the United States. *See* 48 U.S.C. §§ 1591, 1613.

¶ 99 Consistent with this historical trend, in 1976 Congress enacted Pub. L. No. 94-584, authorizing the Legislature to call a constitutional convention to draft "a constitution for the local self-government of the people of the Virgin Islands." *See* Act to Provide for the Establishment of Constitutions for the Virgin Islands and Guam, Pub. L. No. 94-584, 90 Stat. 2899 (1976). In the act, Congress expressly required, among other things, that any constitution produced by such a convention "contain a bill of rights." *Id.* This draft constitution would only take effect upon final approval by "not less than a majority of the voters" participating in an islandwide referendum "to be conducted as provided under the laws of the Virgin Islands." *Id.*

¶ 100 With respect to *this* constitution, I have no doubt that Congress intended for this Court to exercise the full authority to interpret it in the same manner as state courts of last resort interpret their own respective constitutions; including the authority to interpret the provisions of its bill of rights to provide for greater protection than analogous provisions of the federal Bill of Rights. It would then be our solemn duty to interpret our "Virgin Islands Bill of Rights" to give effect to the intent of its framers rather than the intent of Congress as we must when interpreting the statutory bill of rights of the Revised Organic Act. However, our authority to engage in such independent interpretation is conditioned upon the people of the Virgin Islands first exercising their authority to draft and adopt a true "Virgin Islands Constitution" containing a "Virgin Islands Bill of Rights" emanating from the will of the people and adopted by the consent of the governed. But unless and until this happens, our task is one of statutory rather than constitutional construction and we remain bound to give effect to the intent of Congress as interpreted by the Supreme Court of the United States.

III. BALBONI'S CLAIMS UNDER THE U.S. CONSTITUTION

¶ 101 Having determined that this court lacks the power to impose the heightened scrutiny the majority urges, I next turn to the Superior Court's certified questions. Because Balboni brings a facial challenge in this matter, he has the burden of establishing that no set of circumstances exist where 29 V.I.C. § 555 would be valid. *United States v. Salerno,* 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Balboni must show that the statute is unconstitutional in all of its applications. *Id.* "[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *Washington v. Glucksberg,* 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)). "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50.

A. The Seventh Amendment Right to Civil Jury Trial

¶ 102 The first question the Superior Court certified for review is whether section 555 impermissibly invades the province of a jury in violation of the Seventh Amendment of the U.S. Constitution. Appellant Balboni argues that by capping non-economic damages at $100,000, section 555 unconstitutionally intrudes upon his right to have these damages decided by a jury, as required by the Seventh Amendment.[15] To determine whether section 555 is unconstitutional, we first examine the scope of the Seventh Amendment's guarantee of a right

[15] In his brief on appeal, Balboni references a number of state court decisions concluding that legislative caps on damages violate their respective state constitutional rights to trial by jury and access to courts. *See, e.g., Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012). However, as discussed extensively above, this Court lacks the authority to independently interpret section 3 of the Revised Organic Act in the manner that state courts may interpret their own popularly ratified constitutions, and these decisions are therefore irrelevant to our Seventh Amendment analysis.

to a jury trial and whether this right implicates caps on non-economic damages in motor vehicle collisions, like the one in section 555.

¶ 103 The Seventh Amendment of the U.S. Constitution guarantees that

> [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. Congress expressly extended the Seventh Amendment to the Virgin Islands in the 1968 amendments to the Revised Organic Act. 48 U.S.C. § 1561; *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 432 (V.I. 2016) ("Although the Seventh Amendment has not been extended to the several States by incorporation through the Fourteenth Amendment, Congress, through the Revised Organic Act, expressly extended the Seventh Amendment to the Virgin Islands."); *Samuel v. United Corp.*, 64 V.I. 512, 521 (V.I. 2016) ("The right to a jury trial in a civil suit in the Virgin Islands is guaranteed by section 3 of the Revised Organic Act of 1954."); *see also* 5 V.I.C. § 321 ("The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States shall apply in civil actions in the District Court of the Virgin Islands, except as otherwise provided by law."). This right extends to matters in the Superior Court as well. *Samuel*, 64 V.I. at 521-22 (citing 5 V.I.C. § 321).

¶ 104 While the Seventh Amendment right to civil jury trial applies in the Virgin Islands, section 555 does not violate this right. The Seventh Amendment does at least two things. First, it guarantees the right to have a jury sit as factfinder in civil cases where the amount in controversy is at least twenty dollars. U.S. CONST. amend. VII. Second, it proscribes reexamination of any fact tried by a jury. *Id.* Balboni claims that section 555 violates the Seventh Amendment by capping noneconomic damages at $100,000 thus impermissibly invading the province of the jury. (Appt.'s Br. 8.) But the Seventh Amendment does not restrain the legislature from enacting recovery caps like the one in section 555. Instead, it restricts a

court from interfering with a jury's verdict. *Davis v. Omitowoju,* 883 F.2d 1155, 1165 (3d Cir. 1989) ("Where it is the legislature which has made a rational policy decision in the public interest, as contrasted with a judicial decision which affects only the parties before it, it cannot be said that such a legislative enactment offends either the terms, the policy or the purpose of the Seventh Amendment."); *see also Boyd v. Bulala,* 877 F.2d 1191, 1196 (4th Cir. 1989); *Smith v. Botsford Gen. Hosp.,* 419 F.3d 513, 519 (6th Cir. 2005); *Schmidt v. Ramsey,* 860 F.3d 1038, 1046 (8th Cir. 2017).

¶ 105 Further, Balboni argues that the Seventh Amendment's guarantee to a jury trial is a fundamental right and therefore subject to strict scrutiny review. The Supreme Court has incorporated several of the rights found in the U.S. Constitution's Bill of Rights through the Fourteenth Amendment's Due Process Clause because it found that these rights are fundamental. *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937) ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution."); *McDonald v. City of Chicago,* 561 U.S. 742, 749 (2010) (the Second Amendment is fully applicable to the States); *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968) ("[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee."). But, the Seventh Amendment's guarantee to a right to jury trial in civil matters is not one of these fundamental rights. Instead, the Seventh Amendment is one of the few Amendments that the Supreme Court has declined to extend to the states by way of incorporation through the Fourteenth Amendment. *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211, 217 (1916) ("[T]he 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same."). *McDonald*

v. City of Chicago, 561 U.S. 742, 867 (2010) (Stevens, J. dissenting) (pointing out that "we have declined to apply several provisions to the States in any measure.").

¶ 106 Additionally, the First Circuit recently reversed a Puerto Rico District Court decision that attempted to extend the Seventh Amendment right to civil jury trial to the territory as a fundamental right incorporated through the Fourteenth Amendment. *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 27 F. Supp. 3d 265 (D.P.R. 2014). As the First Circuit explained on appeal, "[t]he Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases." *González-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015) (collecting cases). Similarly, while this court has recognized that the right to a jury trial is a fundamental right in a criminal trial, we have never found the civil right to jury trial to be fundamental. *Murrell v. People*, 54 V.I. 338, 355 (V.I. 2010). Accordingly, because the right to a civil jury trial under the Seventh Amendment is not a fundamental right under U.S. Supreme Court precedent, it is not a fundamental right in the Virgin Islands subject to strict scrutiny analysis.

¶ 107 While we are only bound by decisions of the U.S. Supreme Court interpreting the Seventh Amendment, decisions of the Circuit Courts of Appeal addressing this issue are also highly persuasive. *Hughley v. Gov't of the V.I.*, 61 V.I. 323, 337-38 (V.I. 2014) ("[I]t is well established that the court of last resort for a state or territory is not bound by decisions of its regional federal court of appeals or any other lower federal court — even those interpreting the United States Constitution — but need only follow the United States Supreme Court."). It is worth noting that Balboni does not point to a single case in which a federal court has found that a cap on damages violates the U.S. Constitution. Indeed, federal courts have consistently upheld similar caps, particularly caps on noneconomic damages in medical malpractice cases. *See, e.g., Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989). In *Davis*, the Third Circuit applied

the rational basis test to the Virgin Islands law capping noneconomic damages in a malpractice verdict at $250,000 and determined that the cap was constitutional. *Id.* at 1158 ("[T]he Virgin Island's decision to curb, through legislation, the high costs of malpractice insurance and thereby promote quality medical care to the residents of the islands, provides a rational basis for capping the amount of damages that can be awarded a plaintiff.").

¶ 108 Several other Circuit Courts have reached similar conclusions. For instance, in *Boyd v. Bulala*, the Fourth Circuit determined that Virginia's cap on damages of $750,000 for medical malpractice jury verdicts did not violate the Seventh Amendment. 877 F.2d at 1196. The *Boyd* court pointed to two reasons for rejecting the trial court's holding that found the cap unconstitutional. First, the court distinguished between the role of juries as factfinders and the role of the legislature to "mandate compensation as a matter of law." *Id.* Accordingly, while the jury makes findings of facts regarding damages, the legislature possesses the power to determine that damages over a certain limit are not compensable. *Id.* Thus, the court held that the Virginia legislature acted within its authority when it capped damages in medical malpractice cases at $750,000, reasoning that "[i]f a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well." *Id.*

¶ 109 The Sixth Circuit similarly upheld a damages cap in *Smith v. Botsford General Hospital*, 419 F.3d 513, 515 (6th Cir. 2005). In that case, the court cited *Boyd v. Bulala* and determined that Michigan's malpractice damages cap did not implicate any protected jury rights and therefore did not violate the Seventh Amendment. *Id.* at 519. The Eighth Circuit similarly found that Nebraska's damages cap did not violate the Seventh Amendment. *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017). That court relied on the *Boyd* and *Smith* decisions in determining that Nebraska's recovery cap did not run afoul of the U.S. Constitution's right

to a jury trial. *Id.* at 1046. Other federal courts have similarly upheld caps on noneconomic damages challenged on other grounds. *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir. 1996) (determining that a cap did not violate the Due Process Clause of the U.S. Constitution because it "rationally furthers the state's interests"); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (upholding a cap on noneconomic damages challenged under the Equal Protection Clause); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (upholding a cap on nonmedical damages because the cap did not violate the Due Process or Equal Protection Clauses of the U.S. Constitution).

¶ 110 Thus, because we lack the power to impose our own heightened standard of review and remain bound to follow Supreme Court precedent, I would not evaluate Balboni's claim under heightened scrutiny as the majority urges. Instead, I would follow the decisions of the federal Circuit Courts of Appeal holding that similar caps do not violate the Seventh Amendment.[16] Section 555 neither abrogates the right to a jury trial nor imposes a reexamination of a jury award in violation of the Seventh Amendment. The cap therefore represents a permissible exercise of legislative authority and does not invade the province of the jury. Section 555's cap simply limits the damages available to a claimant who has had its day in court. Accordingly, I would answer the first certified question in the negative and hold that section 555 is a permissible legislative cap on noneconomic damages that does not violate the Seventh Amendment.

B. Equal Protection

¶ 111 Next, I will consider the second and third certified questions together because they implicate the same constitutional right and they are largely related. The second question asks

[16] Appellees point out in their brief that thirty-nine states have enacted caps on noneconomic damages. (Appellee's Br. At 16). Further, nineteen states have upheld statutory caps against constitutional challenges. *Id.* Eight states have struck down caps, while ten states have apparently never had their statutes challenged. *Id.*

whether treating automobile accident victims differently based upon the severity of their noneconomic injuries violates the equal protection clause, while the third asks whether treating automobile accident victims differently than victims of other types of accidents violates that same clause. The Equal Protection Clause of the Fourteenth Amendment bars any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Revised Organic Act of 1954 specifically extends the Fourteenth Amendment's Equal Protection Clause to the Virgin Islands. 48 U.S.C. § 1561 (extending "the second sentence of section 1 of the fourteenth amendment" to the Territory).

¶ 112 "The Equal Protection Clause guarantees United States citizens a 'right to be free from invidious discrimination in statutory classifications and other governmental activity.'" *Fleming v. Cruz*, 62 V.I. 702, 716 (V.I. 2015) (citing *Harris v. McRae*, 448 U.S. 297, 322 (1980)). "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Webster v. People*, 60 V.I. 666, 673 (2014) (citing *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).

¶ 113 To answer certified questions two and three we must first determine what level of scrutiny to apply to section 555. When a law is challenged under the equal protection clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted). Exceptions to this general rule include statutes that draw classifications based in race, alienage, and national origin, as well as laws that bear upon fundamental rights. *Id.* Laws that fall under any of these exceptions will instead be analyzed under strict scrutiny. "To successfully withstand strict scrutiny review, the government must show that the law advances a compelling state interest that is narrowly tailored to restrict the fundamental right to the least extent necessary to meet

the compelling state interest." *Beaupierre v. People*, 55 V.I. 623, 631-32 (V.I. 2011) (citation omitted). Laws not subject to strict scrutiny are presumed valid and need only be rationally related to some legitimate government interest. *Heller v. Doe*, 509 U.S. 312, 319 (1993) ("For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.").

¶ 114 Accordingly, I next consider whether section 555 implicates a protected class, requiring strict scrutiny review. If it does not, the rational basis test applies. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981). Generally, "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Balboni has failed to show that victims of car collisions are a suspect class—i.e. a classification based on race, national origin, religion, or alienage. *See, e.g., Cont'l Ins. Co. v. Ill. Dep't of Transp.*, 709 F.2d 471, 475 (7th Cir. 1983) ("[P]ersons who have the misfortune to be the victims of a tort committed by the State of Illinois or its employees other than by means of a motor vehicle—are not the kind of vulnerable minority for which the equal protection clause as interpreted by the Supreme Court expresses a special solicitude, [and therefore] the test of constitutionality is simply whether there is some rational basis for the different treatment."); *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985) ("Since malpractice victims with noneconomic losses that exceed $250,000 do not constitute a suspect class and the right to recovery of tort damages is not a fundamental right, strict scrutiny is not appropriate in this case.").

¶ 115 Because this dispute does not implicate a suspect class and because this court does not have the power to impose heightened rational basis review, I would instead apply traditional rational basis review. Under the rational basis test, "a law will be sustained if it can be said to

advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Furthermore, "to satisfy equal protection concerns under rational basis review, the Constitution does not require the government 'to draw the perfect line nor even to draw a line superior to some other line it might have drawn,' but 'only that the line actually drawn be a rational line.'" *Moses v. Fawkes*, 66 V.I. 454, 469 (V.I. 2017) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012)).

¶ 116 To answer the questions certified to us by the Superior Court we must determine whether section 555's cap on noneconomic damages—a cap that treats automobile accident victims differently based upon the severity of their noneconomic injuries and treats automobile accident victims differently than victims of other types of accidents—fails the rational basis test. To support its holding that section 555 fails heightened rational basis review, the majority cites arguments made for and against the cap when it was debated by the Legislature. According to the majority, the reasons given by the legislators who supported the bill do not withstand the heightened review the majority argues is appropriate in this case. Specifically, the majority concluded that there is no connection between the cap and the goal of stabilizing the automobile insurance market in the territory. I disagree.

¶ 117 The bill that introduced the cap in section 555 was debated in committee and during regular session, and arguments were made for and against the cap during these debates. (J.A. 111-34; 307-75.) For example, Senator David argued that compulsory coverage would better protect Virgin Islanders and visitors. (J.A. 116-17.) David also argued that compulsory coverage would reduce the number of unsafe cars from the roadways. (J.A. 118.) Senator Berry offered several arguments for the bill's passage as well. She argued that compulsory coverage would help ensure that victims of motor vehicle collisions can receive treatment for their

injuries. (J.A. 197.) Another Senator argued that this legislation would make car insurance affordable in the territory and cause more insurers to write affordable policies as well. (J.A. 204-05.) The original cap of $75,000, which has since been changed to $100,000, represents an apparent political bargain struck by Senators who championed the bill to ensure insurance was available and affordable in the territory. (J.A. 311.) (Senator James explaining that "I could say this: While you don't want no cap, no cap could also mean no insurance at all. So let us do the balancing act and do the right thing here."); (J.A. 322.) (Senator Figueroa-Serville arguing "we have to create a balance where you could protect the people of the Virgin Islands by ensuring the stability of the insurance industry."). Another Senator supported the cap because of the subjectivity of noneconomic losses compared with other more objective losses that are easier to calculate and that are not capped. (J.A. 325.) Others supported the cap to keep jury awards in check. (J.A. 347.) Still another Senator supported the cap as a foil to the notion that the Virgin Islands are well known for being a "plaintiff's paradise" and other losses are not capped by the measure. (J.A. 356.) When the cap was raised to $100,000 certain Senators argued against such an increase for various reasons, while others supported it based on cost of living increases and for other reasons. (J.A. 346.)

¶ 118 Again, under rational basis review, a statute like section 555 is entitled to a strong presumption of validity. *F.C.C. v. Beach Commc'ns,* 508 U.S. 307, 314 (1993). And as we have explained, "it is not the function of this Court to substitute its judgment for that of the Legislature." *Brady v. Gov't of the V.I.,* 57 V.I. 433, 443-44 (V.I. 2012). And more importantly, Balboni has not carried his substantial burden of proving that section 555 has no rational basis related to a legitimate government interest. *F.C.C.,* 508 U.S. at 314 (explaining that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it"). Here, Balboni has failed to establish that no set of

circumstances exists under which the Act would be valid as he has failed to demonstrate that the Act would serve no rational basis in any of its applications.

¶ 119 Thus, applying the proper rational basis test, the reasons proffered by the Senators in support of the cap withstand scrutiny. I would hold that the justifications for the cap offered by the Senators in committee and during regular session are reasonably related to the government's interest in ensuring the availability of affordable automobile insurance in the territory. Accordingly, I would answer both questions two and three in the negative and hold that section 555 does not violate the Equal Protection Clause.

C. Substantive Due Process

¶ 120 The final question the Superior Court certified is whether section 555 unconstitutionally infringes on the substantive due process rights in the Fifth and Fourteenth Amendments as applicable to the Virgin Islands through the section 3 of the Revised Organic Act of 1954, including substantive due process rights to not be arbitrarily deprived of life, liberty or property. The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment's due process clause similarly holds that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. While found in different amendments, the U.S. Supreme Court has interpreted these clauses identically. *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

¶ 121 Balboni argues that section 555 infringes upon his fundamental right to a jury trial, and consequently his right to substantive due process. To evaluate this claim, we must again first determine which test to apply. "If the right burdened by the complained-of legislation . . . is a

'fundamental' right protected under the due process clause, then we apply the strict scrutiny test." *Beaupierre v. People*, 55 V.I. 623, 631 (V.I. 2011) (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)). The Supreme Court has held that certain provisions of the Bill of Rights of the U.S. Constitution embody fundamental rights. It has also found other fundamental rights inherent in the "liberty" protected by the substantive due process clause, including "the rights to marry, *Loving v. Virginia*, 388 U.S. 1[, 12] (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535[, 541] (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390[, 399-400] (1923); *Pierce v. Society of Sisters*, 268 U.S. 510[, 534-35] (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479[, 485-86] (1965); to use contraception, *id*.; *Eisenstadt v. Baird*, 405 U.S. 438[, 453-54] (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165[, 172-73] (1952), and to abortion, [*Planned Parenthood v. Casey*, 505 U.S. 833, 848-49 (1992)]." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (collecting cases). However, as explained above, the Supreme Court has never held that the right to a jury trial in civil cases is either a fundamental right or a fundamental aspect of liberty protected by the substantive due process clause, and thus Balboni's argument must fail.

¶ 122 Additionally, Balboni argues that section 555 "forecloses full recovery through a full and fair trial on the merits, which is a fundamental guarantee of due process." (Appt.'s Br. at 24.) Specifically, Balboni argues that section 555's cap represents an "arbitrary legislative revision absent a countervailing remedy." (*Id.* at 24-25.) In an analogous case, the Fifth Circuit considered a due process challenge to a statute limiting the recovery of nonmedical damages in medical malpractice actions. The court noted that "[a]ny due process challenge must rely on a perceived abrogation of a common law right to recover for tort damages worked by the statute." *Lucas v. United States*, 807 F.2d 414, 421 (5th Cir. 1986). However, quoting the

Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), the court explained:

> [O]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Lucas, 807 F.2d at 422 (quoting *Duke Power*, 438 U.S. at 88 n.32 (dicta)). Thus, the Fifth Circuit determined that the statutory cap on nonmedical damages did not violate the plaintiff's substantive due process rights as applied in that case. *Id*. Indeed, as clarified in both *Duke Power* and *Lucas*, the right to recover a certain amount in controversy is not a right protected by the due process clause of the Fourteenth Amendment. *Duke Power*, 438 U.S. at 88 n.32 ("[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts.") (collecting cases); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

¶ 123 Likewise, Balboni's claim that the statutory cap on noneconomic damages violates his substantive due process rights must fail because section 555 does not implicate any identifiable property or liberty interests protected by the due process clause. Rather, section 555's limitation of noneconomic damages represents a policy determination of the Virgin Islands Legislature which we should not upset or second guess absent a clear showing that it deprives him of some interest in liberty or property guaranteed by the due process clause of the Fourteenth Amendment. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) ("[T]he Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation' . . . ." (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). Furthermore, section 555 does not fully abrogate Balboni's common law right to recover damages. Instead, the cap

in section 555 only limits the recovery of noneconomic damages and only in certain instances, and it also includes specific exceptions for cases of gross negligence or willful conduct. Accordingly, I would answer the fourth certified question in the negative and hold that section 555 does not violate Balboni's Fourteenth Amendment right to due process.

IV. CONCLUSION

¶ 124 In summary, I would not reach the issue of whether this Court has the authority to independently interpret the provisions of section 3 of the Revised Organic Act to provide greater protections than those afforded by analogous provisions of the U.S. Constitution because this issue was neither raised by the parties nor considered by the Superior Court and therefore implicates substantial concerns of fairness and due process. Being compelled to address this issue however, it is clear that the majority's position is foreclosed by the binding precedent of the Supreme Court of the United States in *Kepner*, the highly persuasive decisions of the federal circuit courts of appeal, and this Court's own decision in *Ward*. These cases, together with the relevant legislative history, compel me to conclude that Congress intended for section 3 of the Revised Organic Act to confer upon the people of the Virgin Islands rights coextensive with those enshrined in the analogous provisions of the U.S. Constitution. Moreover, because the Virgin Islands has not yet adopted a popularly ratified constitution and is instead organized under the Revised Organic Act —a federal statute—this Court remains constrained to interpret the provisions of the Revised Organic Act according to the principles of statutory construction as provided by the Supreme Court of the United States. Finally, I would answer all four questions certified by the Superior Court in the negative and would hold that 29 V.I.C. § 555 withstands traditional rational basis scrutiny and does not violate Balboni's Seventh or Fourteenth Amendment rights as applied to the Virgin Islands through section 3 of the Revised Organic Act. Accordingly, I would affirm the Superior Court's January 24, 2018

opinion and remand this matter for further proceedings. For these reasons, I respectfully dissent.

/s/ Maria M. Cabret

MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court