Cases and Materials on Civil Procedure

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2021 Update

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[3] "General" and "Specific" Jurisdiction

[At the end of subsection B[3], following the Notes and Questions after Perkins v. Benguet Consolidated Mining Co., insert the following:]

BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT, 137 S. Ct. 1773 (2017). To invoke specific jurisdiction, how closely must the controversy connect with the defendant's contacts in the state? The California state supreme court had extended specific jurisdiction broadly, to encompass claims of nonresidents against defendant BSM that did not arise in California, on the stated ground that BSM had many other contacts in California and that California residents had similar claims. The U.S. Supreme Court concluded that this reasoning really amounted to a spurious kind of general jurisdiction, and it held that specific jurisdiction required more:

> In order for a state court to exercise specific jurisdiction, "the *suit*" must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." . . . "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

Ford Motor Company v. Montana Eighth Judicial District Court

141 S. Ct. 1017 (2021)

JUSTICE KAGAN delivered the opinion of the Court.

[Editor's Note: This opinion helps to define the reach of specific jurisdiction.]

In each of these two cases, [one in Montana and one in Minnesota], a State court held that it had jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State — among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.

I

[The Court here describes Ford's global reach with its advertising, parts sales, servicing of automobiles, encouragement of resales markets, and selling of new and used cars. Ford's business, it says, is "everywhere."]

Ford moved to dismiss the two suits for lack of personal jurisdiction . . . . According to Ford, the State court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to the plaintiff 's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. . . . [But the Montana and Minnesota Supreme Courts both disagreed and held that there was jurisdiction.]

II

The Fourteenth Amendment's Due Process Clause limits a State court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice."

. . . [This holding led eventually to two kinds of personal jurisdiction: general and specific.] A state court may exercise general jurisdiction only when a defendant is "essentially at

home" in the State. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. . . .

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name "purposeful availment." The defendant, we have said, must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). . . .

Where a forum seeks to assert specific jurisdiction over an out-of-State defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, (1984). . . .

. . . In Ford's view, the needed link must be causal in nature: Jurisdiction attaches "only if the defendant's forum conduct *gave rise* to the plaintiff 's claims." . . . [In other words, Ford cuts off the *"or relate to"* language in the test.]

And that rule reduces, Ford thinks, to locating specific jurisdiction in the State where Ford sold the car in question, or else the States where Ford designed and manufactured the vehicle. . . . On that view, the place of accident and injury is immaterial. So (Ford says) Montana's and Minnesota's courts have no power over these cases. . . .

. . . [But] our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. . . . In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation — *i.e.,* proof that the plaintiff 's claim came about because of the defendant's in-State conduct. . . . *See also Bristol-Myers* (asking whether there is "an affiliation between the forum and the underlying controversy," without demanding that the inquiry focus on cause) . . . .

[Ford suggests that the States of first sale, Washington and North Dakota, are proper jurisdictions. The Court disagrees; these States would have less interest in adjudicating these cases.] For each of those States, the suit involves all out-of-State parties, an out-of-State accident, and out-of-State injuries; the suit's only connection with the State is that a former owner once (many years earlier) bought the car there.

Here, resident-plaintiffs allege that they suffered in-State injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs' claims and Ford's activities in those States—or otherwise said, the "relationship among the defendant, the forum[s], and the litigation"—is close enough to support specific jurisdiction. The judgments of the Montana and Minnesota Supreme Courts are therefore affirmed.

JUSTICE ALITO, concurring. [This opinion is omitted, except to say that Justice Alito would prefer a simpler approach, one that focuses on the reasoning of the *International Shoe* test, which he believes jurisdiction in the present case would easily meet.]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment:

. . . . Typically, courts have read [the phrase, "relate to",] as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff 's injuries. . . . [A] but-for causation test isn't the most demanding. At a high level of abstraction, one might say any event in the world would not have happened "but for" events far and long removed.

Now, though, the Court pivots away from this understanding. Focusing on the phrase "arise out of or relate to" that so often appears in our cases, the majority asks us to parse those words "as though we were dealing with language of a statute." In particular, the majority zeros in on the disjunctive conjunction "or," and proceeds to build its entire opinion around that linguistic feature. The majority admits that "arise out of" may connote causation. But, it argues, "relate to" is an independent clause that does not.

Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns *mean*? Loosed from any causation standard, we are left to guess. . . .

For a glimpse at the complications invited by today's decision, consider its treatment of North Dakota and Washington. Those are the States where Ford first sold the allegedly defective cars at issue in the cases before us. The majority seems to suggest that, if the plaintiffs had sought to bring their suits in those States, they would have failed. The majority stresses that the "only connection" between the plaintiffs' claims and North Dakota and Washington is the fact that former owners once bought the allegedly defective cars there. But the majority never tells us why that "connection" isn't enough. Surely, North Dakota and Washington would contend they have a strong interest in ensuring they don't become marketplaces for unreasonably dangerous products. . . .

None of this is to cast doubt on the outcome of these cases. . . . The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence . . . . Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.

Notes and Questions

(1) *What, Then, Does "Relate to" Mean?* So, jurisdiction exists not only if the suit arises from, but also, if the suit "relates to" the defendant's contacts with the forum. But what does "relates to" mean?

Maybe it dissolves into meaninglessness when applied broadly. Does the President relate to the Senate Minority Leader? Does Turkey relate to Germany? Do your socks relate to your shoes? In another part of the opinion, the Court says that at a high level of abstraction, everything relates to remote causes. Arguably, everything relates to everything else in one way or another. Is Justice Gorsuch right, then?

But perhaps the "arise out of or relate to" test is not so hopeless. The issue isn't whether there is some sort of relationship, but rather, whether there is a relationship of the kind that ties facts in a lawsuit to the forum. And from there it becomes a question of considering the closeness or strength of the relationship. That determination won't be precise, but it will be as meaningful as many other kinds of determinations in the law. Does this line of reasoning save the "arising out of or relate to" test from Justice Gorsuch's criticisms?

(2) *The Forum Where the Car Was Originally Sold.* The Court's opinion suggests that the place of first sale would not be a proper place of jurisdiction. But the concurrence implies that the jurisdictional test in the Court's opinion would, actually, support jurisdiction. Who is right?

(3) David Crump, *The Essentially-at-Home Requirement for General Jurisdiction: Some Embarrassing Cases*, 70 CATH. U. L. REV. 273 (2021). This law review article critiques the Court's treatment of general jurisdiction analogously to Justice Gorsuch's critique of its handling of specific jurisdiction. The article describes several different kinds of cases in which the Supreme Court's "essentially at home" test doesn't work very well.

IV. Service of Process in International Litigation

[Replace *Kumar v. Republic of Sudan* with the following:]

Republic of Sudan v. Harrison

139 S. Ct. 1048 (2019)

JUSTICE ALITO delivered the opinion of the Court.

[Victims of the bombing of the USS *Cole* and their family members sued the Republic of Sudan under the Foreign Sovereign Immunities Act. They alleged that Sudan provided material support to al Qaeda for the bombing. The claimants directed the court clerk to address the service of process to Sudan's Minister of Foreign Affairs at the Sudanese Embassy in the United States, and the clerk later certified that a signed receipt had been returned. Sudan failed to appear. The District Court entered a default judgment for respondents, the claimants. The trial judge later issued turnover orders requiring banks to turn over Sudanese assets to pay the judgment.

[Sudan challenged those orders on the ground that the judgment was invalid for lack of personal jurisdiction. Sudan argued that the applicable statute for service upon a foreign state, § 1608(a)(3), required that the service packet be sent to its foreign minister at his principal office in Sudan, not to the Sudanese Embassy in the United States. The Second Circuit affirmed, reasoning that the statute did not say where the mailing must be sent,that the method used here was consistent with the statute's language, and that it could be reasonably expected to result in delivery to the foreign minister.] . . .

I

A

. . . Section 1608(a) sets out in hierarchical order the following four methods by which "[s]ervice ... shall be made." The first method is by delivery of a copy of the summons and complaint "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." "[I]f no special arrangement exists," service may be made by the second method, namely, delivery of a copy of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." If service is not possible under either of the first two methods, the third method, which is the one at issue in this case, may be used. This method calls for "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, *by any form of mail requiring a signed receipt, to be addressed and dispatched* by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned*."

Finally, if service cannot be made within 30 days under [the third method], service may be effected by sending the service packet "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia," for transmittal "through diplomatic channels to the foreign state." [If there is no answer after service, a default judgment is authorized.]

B

On October 12, 2000, the USS *Cole*, a United States Navy guided-missile destroyer, entered the harbor of Aden, Yemen, for what was intended to be a brief refueling stop. While refueling was underway, a small boat drew along the side of the *Cole*, and the occupants of the boat detonated explosives that tore a hole in the side of the *Cole*. Seventeen crewmembers were killed, and dozens more were injured. Al Qaeda later claimed responsibility for the attack. [Sudan argues that the method of service was wrong and did not create jurisdiction. The United States Department of Justice filed an *amicus cuirae* brief in support of Sudan, also arguing that there was no jurisdiction.] . . .

II . . .

. . . As noted, § 1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state. Although this is not, we grant, the only plausible reading of the statutory text, it is the most natural one. See, *e.g., United States v. Hohri*, 482 U.S. 64, 69–71, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987) (choosing the "more natural" reading of a statute) . . . .

A key term in § 1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. And the noun "address," in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971) . . . .

Our [natural reading] of § 1608(a)(3) [also] avoids concerns regarding the United States' obligations under the Vienna Convention on Diplomatic Relations. We have previously noted that the State Department "helped to draft the FSIA's language," and we therefore pay "special attention" to the Department's views on sovereign immunity. . . .

Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Since at least 1974, the State Department has taken the position that Article 22(1)'s principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. See Service of Legal Process by Mail on Foreign Governments in the United States, 71 Dept. State Bull. 458–459 (1974). In this case, the State Department has reiterated this view in *amicus curiae* briefs filed in this Court and in the Second Circuit. The Government also informs us that United States embassies do not accept service of process when the United States is sued in a foreign court, and the Government expresses concern that accepting respondents' interpretation of § 1608 might imperil this practice. Brief for United States as *Amicus Curiae* 25–26. . . .

* * *

We interpret § 1608(a)(3) as it is most naturally understood: A service packet must be addressed and dispatched to the foreign minister at the minister's office in the foreign state. We

therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. . . .

JUSTICE THOMAS, dissenting:

. . . [T]he FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person—"the head of the ministry of foreign affairs." 28 U.S.C. § 1608(a)(3).

Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U.S. litigant can serve the state's foreign minister. Because there is no evidence in this case suggesting that Sudan's Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA . . .. . Accordingly, I respectfully dissent.

Notes and Questions

(1) *A Nineteen-Year Delay, After Winning Judgment, Only to Hear That the Details of Mailing Were Wrong?!* Later, in Chapter 5, we include an excerpt from Charles Dickens's *Bleak House,* which criticizes delays in the old English Court of Chancery. Suffer any wrong, says the great author, rather than resort to these courts! Given the nineteen-year delay in this case, unrelated to the merits, for reasons not shown in the existing law, in the face of clear and serious damages, have procedures really improved, or are we still like *Bleak House?*

(2) *Courts' Power Depends on Proper Jurisdiction.* The issue is technical, but the court's insistence on jurisdiction, before anything can be done, is traditional.

Chapter 3

Subject Matter Jurisdiction: Power over the Generic Type of Dispute

III. Federal Subject Matter Jurisdiction

[D] Removal: Defendant's Key to the Federal Courthouse

[After the Notes and Questions on Removal Procedure, add:]

Note on the Persistence of Issues about Removal

(1) *How Much Do Defendants Want to Remove? Sometimes, Very Much.* Defendants often prefer federal court, and plaintiffs to stay in state court. See the footnote in the *Caterpillar* case.

(2) *Can Third-Party Defendants Remove? They've Tried.* A third party defendant is a party brought into the suit by a defendant (covered in a later chapter). Can a third-party defendant remove? No. See below.

(3) *An Example of Defendants Really Wanting to Remove: "Snap" Removal.* Imagine that you represent a defendant who is diverse from the plaintiff. There is another named defendant—named but not yet served—who is a local citizen. Can you remove? Well, the removal statute prohibits removal if there is a local citizen "joined and served"—and here, that defendant has been joined *but not yet served!* So, is removal authorized? The courts have gone both ways on this issue, which is informally called "snap" removal. (You'd better be quick.)

TEXAS BRINE COMPANY, L.L.C. v. AMERICAN ARBITRATION ASSOCIATION, INC., ___ F.2d ___, 2020 WL 1682777 (5th Cir.). The court of appeals here joined others in upholding "snap" removal (see the note above). The plaintiff had joined other defendants that were local citizens, so if those defendants had been served, removal on diversity grounds would have been prohibited. But this court, relying on the statutory language, decided that the prohibition applied only with respect to local citizens "joined and served," not just joined:

> "[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language." By Section 1441(b)(2)'s terms, this case would not have been

> removable had the forum defendants been "properly joined and served" at the time of removal. [The local defendants] had not been served, though. The forum-defendant rule's procedural barrier to removal was irrelevant because the only defendant "properly joined and served" . . . was not a citizen of . . . the forum state. [Thus, snap removal allowed.]

HOME DEPOT U.S.A. v. JACKSON, 139 S. Ct. 1743 (2019). Can someone other than a defendant remove? Here, the Supreme Court, per Justice Thomas, held: No. A credit card lender filed a state court action against a consumer to collect a credit card debt arising from the consumer's purchase of a water treatment system, and the consumer filed a counterclaim and third party class action claim against the system's manufacturer and retailer. The third party defendant removed the entire action to the federal district court. After removal, the federal district judge granted the defendant consumer's motion to remand.

The Supreme Court ultimately granted certiorari to determine whether the removal was proper. After reviewing the language and history of the two statutes, the Court held that neither the general removal statute, 1441, nor the Class Action Fairness Act authorized removal by the third party defendant. Apparently, only defendants can remove.

Chapter 7

Discovery and Disclosure

II. The Scope of Discovery

[A] The Discovery Standard: Information That Is Relevant and Proportional

[After the Notes and Questions following *Cain v. Wal-Mart Stores, Inc.,* add:]

REICHARD v. UNITED OF OMAHA LIFE INSURANCE COMPANY, ___ Fed. Appx. ___ (3d Cir. 2020). The federal courts have continued to apply Rule 26(b)(1) to restrict discovery. In this case, for example, the court of appeals deferred to the discretion of the district judge:

> [Plaintiff] Reichard sought discovery on Dr. Reeder's alleged conflict of interest. Dr. Reeder was the sole medical reviewer of her [administrative] appeal [and he had upheld the denial of her insurance claim]. But he also worked as United of Omaha's senior vice president. So, she argued, he had an incentive to deny benefits. She sought information about his "batting average": the fraction of benefits denials he affirmed on appeal. In other words, she wanted access to other appeals for which he had served as the medical reviewer. Presumably, she wanted to use evidence of a high denial rate to show that his business-side duties were biasing his medical judgment.
>
> The District Court's denial of discovery was reasonable. Discovery must always be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Here, there was evidence that combing its databases for this information would have imposed a substantial burden on United of Omaha. Plus, the information's value to Reichard would have been minimal at best. A low reversal rate would not prove bias or a conflict of interest. Rather, Reichard would have to show that each of those decisions was unreasonable based on the evidence in each file. Doing so would require a mini-trial on each of these other appeals. Even if Reichard showed that, it would still not change her burden to show that *on the administrative record here*, the denial of *her* benefits claim was unsupported by substantial evidence. Given the high cost of producing the evidence and its minimal probative value, the District Court reasonably denied the motion. . . .

Notes and Questions

(1) *Skillful Advocacy about Discovery Requires Evidence about Burdens.* Notice that here, the defendant was able to produce "evidence" showing the "burden" of the discovery. How can that be done? Through witnesses familiar with the administrative process, or through electronics experts? And what could plaintiff have done in opposition (at reasonable cost, which would have been difficult)?

(2) *The Issues to Which the Discovery Is Aimed Are Important Too.* The court pointed out that the district judge recognized the doctor's conflict of interest and weighed it in deciding. Does this consideration help explain the denial of the requested discovery? Of course, the opinion does not reveal the total cost of discovery to both sides.

Chapter 10

Trial

III. Jury Selection

[B] *Voir Dire* Examination and Challenges

[2] Prohibited Grounds for Peremptory Challenges

[After the "Notes on How to Present," add the following:]

FLOWERS v. MISSISSIPPI, 139 S. Ct. 222 (2019). In this criminal case, the Supreme Court discussed the kinds of evidence that indicated discriminatory exercise of peremptory challenges. (The same prohibitions on discriminatory challenges apply in civil cases.)

The defendant had been convicted and sentenced to death six times. In the previous trials, the prosecution had struck all black potential jurors, and here the prosecution struck all but one. The Court, per Justice Kavanaugh, held, first, that this record of past strikes could be taken into account in the present case in determining discriminatory intent. A second factor was the pattern here, which was similar to the past cases. A third factor was differential questioning of black and white jurors. Here, prosecutors had questioned black jurors more extensively than white. A fourth factor was inconsistent reasons given for striking white than black jurors. The prosecution here explained strikes against black jurors by their acquaintance with witnesses but did not strike white jurors who were similarly situated. The combination, said the Court, required reversal even though the lower courts had found no discrimination.

Part Two
Rules Supplement

Federal Rules of Civil Procedure

Amended April 2020, effective December 1, 2020.

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

Federal Rules of Appellate Procedure

Amended April 2020, effective December 1, 2020.

Rule 35. En Banc Determination.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Rule 40. Petition for Panel Rehearing.

(a) Time to File; Contents; Answer; Action by the Court if Granted.

* * * * *

(3) Response. Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

United States Code

CHAPTER 151. DECLARATORY JUDGMENTS

§ 2201. Creation of Remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * * * *