No. 21-1608

In the Supreme Court of the United States

MCKINSEY & CO., INC., ET AL., PETITIONERS

v.

JAY ALIX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PROFESSORS SAMUEL P. JORDAN AND ROBERT J. PUSHAW, JR., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE**

Samuel P. Jordan is Professor of Law at Saint Louis University School of Law. He teaches and writes in the areas of civil procedure, federal courts, and conflict of laws. In particular, he has researched and written on the inherent power of the federal courts. *E.g.*, Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 Denv. U.L. Rev. 311 (2010).

* The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. The institutional affiliations of *amici* are for identification only.

Robert J. Pushaw, Jr., is the James Wilson Endowed Professor of Law at Pepperdine University Caruso School of Law. His scholarship has studied the influence of eighteenth-century Anglo-American political and legal theory on modern law governing the federal courts, particularly the justiciability doctrines and inherent judicial powers. His scholarly writings have appeared in dozens of law journals. His most recent article (co-authored with Charles Silver), *The Unconstitutional Assertion of Inherent Powers in Multi-District Litigation*, will be published next year in the BYU Law Review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III courts often invoke an "inherent" or "supervisory" power. Some forms of this power are well established, such as courts' control over proceedings before them. This case concerns a less established power: that of courts of appeals to supervise trial courts outside appellate review. That power has no clear constitutional or statutory basis. Insofar as the power exists, it is narrow and constrained, encompassing procedural and evidentiary matters and not substantive statutory matters.

I. This case squarely presents a question on which this Court recently reserved judgment: whether the courts of appeals possess supervisory power. There is no clear constitutional or statutory basis on which to conclude that they do.

1. The powers provided in Article III are different. The "judicial Power" entails certain powers for a court to govern its own proceedings, not those of other courts. The designation of this Court as "supreme" arguably affords *this* Court a supervisory power. Neither provision vests courts of appeals with supervisory power.

2. Congress likewise has granted other powers but not a general supervisory power. The Rules Enabling Act gives to all courts the power to make local rules, and to

this Court the power to prescribe rules of procedure and evidence. These powers undermine rather than support claims to supervisory power, as they are preferable to and arguably supplant traditional exercises of supervisory power. Other statutes, such as the All Writs Act, are no better grounds for courts of appeals' supervisory power.

II. Even if the courts of appeals possess supervisory power, the decision below conceived of it in a way fundamentally different from and at odds with this Court's precedent.

1. This Court has conceived of supervisory power as narrow and constrained. It has understood the power to encompass primarily procedural and evidentiary matters. Even within that domain, it has not allowed the power to interfere with Congress's legislative power.

2. This narrow, constrained conception is incompatible with the broad conception of supervisory power on which the Second Circuit rested its decision in this case. The Second Circuit invoked supervisory power to modify a substantive element (as interpreted by this Court) of a statute.

3. The Second Circuit's broad conception of supervisory power is also in deep tension with this Court's precedent on related issues. The Court has sharply limited federal courts' authority to define substantive law in the form of implied private remedies. Separately, the Court has sought to ensure that federal law is the same within a State whether applied in state or federal court. These precedents are at odds with the Second Circuit's claimed power, which would enable definition of substantive law that would apply only in federal courts.

4. This case is a good vehicle to provide guidance on the contours of the legitimate use of supervisory power. The Second Circuit relied unequivocally on a conception of the power that differs in kind, not just degree, from that articulated by this Court. Reversing the Second Circuit's

decision thus would establish necessary doctrinal boundaries without a need for subtle line-drawing.

III. The existence and scope of courts of appeals' supervisory power are important. The power may affect all types of cases, is poorly defined and thus potentially far-reaching, and raises both separation-of-powers and intra-judiciary concerns.

ARGUMENT

I. There Is No Clear Constitutional or Statutory Basis for the Exercise of Supervisory Power by the Courts of Appeals

The decision below rested on the "supervisory responsibilities" of a court of appeals "to ensure the integrity" of trial-court "processes." Pet. App. 13a. This case therefore squarely presents the question whether courts of appeals possess supervisory power—a question on which this Court reserved judgment just last Term. *United States* v. *Tsarnaev*, 142 S. Ct. 1024, 1036 n.1 (2022) ("[W]e need not address" "the general existence of the Court of Appeals' supervisory power."); see *id.* at 1041 (Barrett, J., concurring) (noting "skepticism that the courts of appeals possess such supervisory power in the first place").

The courts of appeals' supervisory power lacks a clear constitutional or statutory basis. The possible constitutional bases—Article III's "judicial Power" and identifying this Court as "supreme"—are limited, respectively, to a court's own proceedings and to this Court. The possible statutory bases either point away from supervisory power (as do grants of procedural rulemaking authority) or merely facilitate appellate review (as does the All Writs Act).

1. One constitutional source of inherent authority is "judicial Power," which federal courts are directed to exercise when they have jurisdiction. U.S. Const. Art. III, § 1. The concept of "judicial Power" supports a set of implied or ancillary powers that federal courts may rely

upon, at least in the absence of legislation to the contrary.[1] These implied powers are justified (indeed, necessary) because a court would not be able to engage in the meaningful adjudication of cases without them. Accordingly, this Court has recognized that federal courts must have authority to punish contempt (*Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227-28 (1821)), to enforce judgments (*Griffin* v. *Thompson*, 43 U.S. (2 How.) 244, 257 (1844)), and to adopt other "self-preserving rules" attendant to adjudication (*McDonald* v. *Pless*, 238 U.S. 264, 266 (1915)).

Importantly, the implied powers that have been recognized as ancillary to the Article III judicial power share a common feature: they are used by a federal court to govern *its own* proceedings. See *McDonald*, 238 U.S. at 266 ("[T]he courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules."). Far from being a coincidence, this feature is a direct consequence of the justification for these implied powers: the protection of a court's power to adjudicate. That same justification does not support a general power of one court to define rules that a different court must

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[1] At the extreme, "judicial Power" may also constrain legislative action that interferes with essential aspects of the judicial function. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 217-40 (1995). For the most part, however, "Congress has undoubted power to regulate the practice and procedure of federal courts," even in circumstances where those procedures might otherwise be supplied by inherent authority. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941). The relatively recent vintage of "supervisory power" undercuts the argument that it falls within the scope of essential powers that may not be disturbed by Congress, and this Court has never suggested otherwise. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 386 (2006); Sara Sun Beale, *Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1485 (1984).

follow.[2] Put differently, the "judicial Power" language in Article III is properly understood as a source of local rather than supervisory power. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 333-41 (2006).

An alternate source of constitutional authority for the exercise of supervisory power is the designation of this Court as "supreme." U.S. Const. Art. III, § 1. The concept of supremacy in the context of Article III might be understood to entail a general power to oversee at least certain aspects of the operation of any inferior courts created by Congress. Though this appears to be the best explanation for the supervisory power exercised periodically by this Court, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 437 (2000), it is uncertain whether the power exists and how far it extends. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("I do not see the basis for any direct authority to supervise lower courts."); *W. Pac. R.R. Corp.* v. *W. Pac. R.R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting) (noting "this Court's exercise of its vague supervisory powers over federal courts"); Barrett, 106 Colum. L. Rev. at 387. What is clear is that arguments rooted in the supreme nature of this Court cannot sustain the exercise of supervisory power by the intermediate courts of appeals. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 866 (2001) ("[E]ven if one were to accept the Court's assertion that its supervisory power derives from its constitutional supremacy over the inferior federal courts, the latter tribunals can make no such claim.").

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[2] That said, the need to fulfill the essential function of adjudication might support a limited power to impose requirements that other courts must follow, for example, to preserve the record for appellate review or to provide a justification for a ruling. See Barrett, 106 Colum. L. Rev. at 337 n.57.

2. a. Even if the Constitution does not establish the power of courts of appeals to supervise the operation of district and bankruptcy courts, courts of appeals might nevertheless exercise that power by congressional invitation. Congress has legislative authority to make rules that it deems necessary and proper for federal courts to exercise judicial power effectively. That authority could include a statute that authorizes something like supervisory power.

Yet Congress has not conferred general supervisory power on the courts of appeals, or indeed on any federal court. To be sure, this Court has a statutorily created role in the promulgation of procedural and evidentiary rules. See 28 U.S.C. § 2072. But this Court has no statutory authority to unilaterally impose procedural rules on other federal courts. Relatedly, each federal court has power to create rules to govern its own proceedings. See 28 U.S.C. § 2071; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57; Fed. R. App. P. 47. But, again, the scope of that power is local rather than supervisory. Pushaw, 86 Iowa L. Rev. at 866 n.680.

b. Indeed, the statutes on procedural and evidentiary rules, in view of their history, point to a general flaw in the contemporary use of supervisory power by any federal court. The earliest uses of supervisory power by this Court arose almost exclusively in the criminal context, at a time when the Rules of Criminal Procedure had not been adopted and no statute authorized evidentiary rulemaking. Sara Sun Beale, *Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1439-41, 1487 & n.315 (1984). In the absence of such rules, perhaps the use of something like supervisory power to achieve procedural reform was necessary or at least permissible. But Congress has long since established statutory rulemaking processes for procedural and evidentiary rules at all levels of the federal judiciary.

That these statutory processes now exist undercuts the continued use of supervisory power. At a minimum, the rulemaking processes suggest that courts should approach supervisory power with caution. Caution is warranted because statutorily prescribed rulemaking has significant advantages over rulemaking within adjudication. Chief among these is that, under statutory processes, rules are promulgated "only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960). These benefits attend reform of procedure through the rulemaking process. Barrett, 106 Colum. L. Rev. at 385-86 (discussing process-oriented benefits of rulemaking relative to supervisory power); see also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1136-41 (2002) (similar, though not explicitly about supervisory power).

Indeed, the statutory rulemaking processes might be understood to be not merely preferable but mandatory. In other contexts, this Court has understood the introduction of a statutory mechanism to have implications for the use of judicially created doctrines that might otherwise be available. *E.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 113 (2009) (limiting collateral order doctrine due to "legislation designating rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable" (quotation marks omitted)); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (Administrative Procedure Act "may not be avoided by the process of making rules in the course of adjudicatory proceedings"). That same understanding is implicit in the admonition that a change to existing rules "must be obtained by the process of amending the Federal

Rules, and not by judicial interpretation." *Jones* v. *Bock*, 549 U.S. 199, 213 (2007) (quotation marks omitted). If rulemaking processes are collectively understood as a legislative specification for how rules applicable in lower federal courts are to be created, then deviations—including supervisory power—are problematic even when employed to fill gaps in the existing procedural framework. Barrett, 106 Colum. L. Rev. at 385; Beale, 84 Colum. L. Rev. at 1483-84.

c. Other potential statutory sources for supervisory authority have some superficial appeal, but are ultimately unavailing. For example, the All Writs Act, 28 U.S.C. § 1651, surely contemplates a form of supervision of lower courts by the courts of appeals and this Court. Even so, the All Writs Act accomplishes this by facilitating interlocutory appellate review of lower-court activities. It does not serve as a source of authority to create rules that will apply to that review. Beale, 84 Colum. L. Rev. at 1480 (discussing *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957)). Much the same could be said for the myriad statutes that provide the basis for appellate review of lower-court judgments. *Id.* at 1481.

II. Any Legitimate Use of Supervisory Power Must Be Narrow and Constrained

Even if the courts of appeals possess supervisory power, the Second Circuit's decision demonstrates the need for this Court's guidance on the contours of the power's legitimate use. The Second Circuit invoked its supervisory power to depart from this Court's interpretation of the substantive elements of a statute. Such a broad conception of supervisory power is not only at odds with this Court's narrow, constrained conception thereof but also in deep tension with this Court's precedent on implied private remedies and uniformity of law in state and federal courts. The clarity and categorical nature of the Second

Circuit's decision make this case an attractive vehicle to address these important issues.

1. This Court has primarily conceived of supervisory power as narrow and subject to meaningful constraints. The initial exercises of supervisory power came in response to a perceived need to address procedural and evidentiary issues that could benefit from a uniform federal approach or that implicate the integrity of federal judicial proceedings. Beale, 84 Colum. L. Rev. at 1444-55 (discussing early use of supervisory power). More recent decisions have retained the focus on these issues. *E.g.*, *Hollingsworth* v. *Perry*, 558 U.S. 183, 196 (2010) (per curiam) ("The Court may use its supervisory authority to invalidate local rules . . . in violation of an Act of Congress . . . particularly . . . when those rules relate to the integrity of judicial processes."); *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985) (affirming court of appeals' use of "supervisory powers [to] . . . promulgat[e] procedural rules governing the management of litigation").

In particular, two features of this Court's supervisory-power cases bear emphasis. First, the domain of supervisory power traditionally has been understood to encompass procedural and evidentiary matters. See *Dickerson*, 530 U.S. at 437 (suggesting that this Court may exercise supervisory power "to prescribe rules of evidence and procedure"); *McNabb* v. *United States*, 318 U.S. 332, 340 (1943) (discussing implied "duty of establishing and maintaining civilized standards of procedure and evidence"). Second, even within that limited domain, the exercise of supervisory power has been deemed legitimate only to the extent that it does not interfere with Congress's power to legislate. This means that rules created through supervisory power are subject to override by a subsequent act of Congress, see *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959), and also that supervisory power may not be used to avoid extant statutory commands, *Thomas*, 474

U.S. at 148. As applied to the use of supervisory power by the lower federal courts, this Court has added a corollary constraint: supervisory power may not be used in a manner inconsistent with this Court's precedent. *Tsarnaev*, 142 S. Ct. at 1036.

2. The Second Circuit's decision in this case is inconsistent with this Court's narrow view of supervisory authority. First, the court invoked supervisory power not to articulate a procedural or evidentiary rule but to supply a substantive definition of causation. Pet. App. 13a ("The fact that this case invokes our supervisory responsibilities . . . means that its proximate cause analysis differs somewhat."); see *id.* at 16a-17a, 19a. Second, the definition of causation thus supplied explicitly deviated from this Court's interpretation of the governing statute. Pet. 10-13.

These aspects of the Second Circuit's decision mean not merely that it exceeded arbitrary boundaries but that it embraced a broad conception of supervisory power that differs in a fundamental way from the narrow, constrained conception explained above. Under the Second Circuit's broad conception, courts of appeals may refashion substantive law and available remedies to the extent that they deem necessary in light of perceived federal interests. To be fair, the Second Circuit is not the first court to conceive of supervisory power in this manner. Some of this Court's own precedents might seem to suggest such a broader conception, Beale, 84 Colum. L. Rev. at 1455-56 n.157, and some appellate courts have thus framed the supervisory power as a "legitimate function of a court's law-making role." *In re Grand Jury Proc.*, 507 F.2d 963, 970 (3d Cir. 1975) (Aldisert, J., dissenting).

3. a. This broader conception of supervisory power echoes other judicially created powers that this Court has abandoned. "In the mid-20th century, the Court . . . assumed it to be a proper judicial function to provide such

remedies as are necessary" for statutory and constitutional violations. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quotation marks omitted) (discussing *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). Implication of private remedies in cases like *Borak* and *Bivens* was, like the Second Circuit's broad conception of supervisory power, substantive rather than procedural. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) (likening implication of remedies to "substantive federal law"). Also like the Second Circuit, *Borak* and *Bivens*-era cases created substantive law "in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. See generally Beale, 84 Colum. L. Rev. at 1494-1506 (comparing remedies based on supervisory power with remedies implied in *Borak* and *Bivens* lines of cases).

While the cases implying private remedies have not been overruled, applying them has become a "disfavored judicial activity." *Ziglar*, 137 S. Ct. at 1857 (quotation marks omitted). The main reason is that the Court has "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert* v. *Boule*, 142 S. Ct. 1793, 1802 (2022) (quotation marks omitted); accord, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008). "The question is who should decide whether to provide for a damages remedy, Congress or the courts?" *Ziglar*, 137 S. Ct. at 1857 (quotation marks omitted). And "[i]n most instances, the Court's precedents now instruct, the Legislature is in the better position." *Ibid.*

The separation-of-powers considerations that ended implication of new private remedies counsel against expanding the supervisory power beyond its narrow constraints. Any decision invoking that power to modify the substantive elements of a statute arguably usurps power

that the Constitution vests in Congress. At the least, it "raises the same concerns about institutional competence . . . addressed in the cases involving the implication of civil remedies." Beale, 84 Colum. L. Rev. at 1506.

b. Moreover, any supervisory power that enables courts to define substantive federal law would create an anomaly: the content of federal law could differ between state and federal courts within a State. Because federal courts do not supervise state courts, *e.g.*, *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 345 (2006), supervisory power cannot include direction to state courts. Hence, substantive federal law created under the supervisory power would apply only in federal courts, not in state courts. State and federal courts within a State could therefore apply different substantive federal law. This Court has strongly discouraged that anomaly. *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965) ("[I]t would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."); *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (noting "the principle of uniformity within a state" requiring "equal administration of justice in coordinate state and federal courts sitting side by side").

4. Deciding this case would require only choosing between the broad and the narrow conception of supervisory power, not drawing a precise line between them. No matter its exact bounds, the power should not be understood to include authority to depart from this Court's interpretation of the substantive elements of a statute whenever certain allegations (such as fraud on a court) are made. Yet that is just the way in which the Second Circuit understood its power. Pet. App. 16a-17a (distinguishing this Court's decisions on the ground that "none of [them]

involved allegations of fraud on a court whose operations we superintend").[3]

III. The Existence and Scope of Courts of Appeals' Supervisory Power Are Important

The issues in this case are important for at least three reasons.

First, the supervisory power may arise in all kinds of cases. To illustrate, *Tsarnaev* was a criminal bombing case, and this case is a civil dispute between competitors about bankruptcy disclosures. Despite the glaring differences, both cases (and many in between) implicate the existence and scope of lower courts' supervisory power.

Second, the supervisory power is poorly defined and thus potentially quite broad. The power "has been described as nebulous, and its bounds as shadowy." *Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc) (quotation marks and footnote omitted). It is "an almost pure expression of a court's exercise of discretion." Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 Ga. L. Rev. 411, 417 (2020). Such vagueness may invite abuse or at least confusion.

Third, the supervisory power poses both an "interbranch problem" and an "intrabranch problem." Barrett, 106 Colum. L. Rev. at 336. An interbranch problem with Congress arises if supervisory power can supplant or sup-

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[3] Courts of appeals have the inherent power to investigate and punish fraud on the court. *Universal Oil Prods. Co.* v. *Root Refin. Co.*, 328 U.S. 575, 580 (1946). The Second Circuit's decision cannot be sustained on this ground. The power is limited to "the court which allegedly was a victim of th[e] fraud," which the Second Circuit here was not. *Weisman* v. *Charles E. Smith Mgmt., Inc.*, 829 F.2d 511, 513 (4th Cir. 1987) (citing *Universal Oil*, 328 U.S. at 580-81, and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 247-50 (1944)). And remedies are confined to vacatur and fees. See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). The plaintiff in this case seeks treble damages.

plement statutes and statutorily enacted rules. See pp. 7-9, 11-13, *supra*. An interbranch problem with the Executive arises if supervisory power can limit prosecutors' means. See Beale, 84 Colum. L. Rev. at 1508-10. And intrabranch questions arise when one court supervises another outside appellate review. In this case, for example, the Second Circuit held that it was better suited to investigate the fraud allegations than the courts that were allegedly defrauded. Pet. App. 21a-22a. Yet the courts that were allegedly defrauded had come to their own conclusion that no further investigation was necessary. Pet. 21 n.3.

CONCLUSION

For the foregoing reasons, the petition should be granted. This Court should clarify either that supervisory power may not properly be relied upon by the courts of appeals or that the appropriate use of supervisory power is narrow and constrained.

Respectfully submitted.

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