No. 25-170

In The
Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Colorado

BRIEF OF ALAN MORRISON AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Statutes

INTEREST OF AMICUS CURIAE[1]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask this Court to intercede in ongoing state court proceedings. The Court lacks statutory and constitutional jurisdiction to do so. Without a final judgment, 28 U.S.C. § 1257(a) bars review. And, unless and until there is a final judgment in Respondents' favor, Petitioners suffer no legally cognizable injury sufficient to create Article III standing.

There are good reasons that Congress limited this Court's review of state courts to final judgments, and there is no basis for disregarding those rules here. Petitioners can seek this Court's review at the end of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or his counsel made a monetary contribution intended to fund the brief's preparation or submission.

the state court proceedings if they end up being injured by the outcome. That is the ordinary course for preemption defenses, which neither allow for removal to federal court nor create an immunity from the ordinary inconvenience and expense of participating in litigation.

I. Under 28 U.S.C. § 1257(a), this Court's review of state courts is limited to final judgments and decrees of state courts. The Colorado Supreme Court decision is not final under the usual final-judgment rules. There are significant further proceedings yet to come in the state courts, including adjudication of additional federal defenses.

Petitioners invoke a finality exception that has been gathering dust for nearly four decades: the fourth exception listed in the Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But the limited circumstances that could justify jurisdiction under that little-used, atextual exception are lacking here. *Cox*'s fourth exception is limited to exceptional cases where all the federal questions have been conclusively determined in state court, reversal would end the case, and waiting for final judgment would seriously erode federal policy.

Not one of these requirements is satisfied here. Additional federal defenses remain to be litigated. This case thus presents the very risk of piecemeal review of federal issues that the final-judgment rule is designed to avoid. And it does so with no prospect of even ending the litigation, because resolving the one federal issue raised here would not end the case.

Nor do Petitioners point to a federal policy that would be seriously eroded by allowing the litigation to continue, much less any federal policy concerns above and beyond those present in a mine-run preemption case. The Colorado Supreme Court's decision has no consequences outside of the litigation. It does not alter—or even cast doubt on—the lawfulness of any of Petitioners' conduct. Petitioners can do what everyone else does in state court: wait until the end of the litigation and seek review if this (or any other) federal question ends up mattering to the outcome.

If read as broadly as Petitioners urge, *Cox*'s fourth exception is not only atextual; it is inconsistent with principles of federalism and modern statutory interpretation. It would pave a highway to federal court that could be traveled by all litigants who—like Petitioners—had no basis for removal but would rather not wait for final judgment. If understood so expansively, the exception cannot be justified and should be overruled.

II. Even if the ruling below were treated as final, this case would not be constitutionally justiciable in federal court.

In the usual case, plaintiffs have standing and justiciability is assured so long as defendants possess "an 'ongoing interest in the dispute' … that is sufficient to establish 'concrete adverseness.'" *Bond v. United States*, 564 U.S. 211, 217 (2011) (quoting *Camreta v. Greene*, 563 U.S. 692, 701 (2011)). But this is not the usual case. Petitioners do not now argue that this case was justiciable in federal court at the outset, and they challenged Respondents' standing under Colorado's standing rules. *See* Resp. Br. 11 n.3; Pet. App. 115a-16a.

The Court's Article III jurisdiction, therefore, depends on Petitioners' standing. They must show that the Colorado Supreme Court's decision caused "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612, 618 (1989).

Petitioners have not made that showing. Their claimed injuries are all litigation consequences stemming from the fact that the case continues to move forward. But even if their preemption defense is valid, such a defense does not protect them from the burdens of continued litigation. Instead, like all ordinary defenses, it shields them only from liability. Moreover, injuries that are merely byproducts of litigation about a dispute do not confer standing to adjudicate the merits of the dispute. This Court has repeatedly rejected such arguments in cases involving both plaintiffs' standing to sue and defendants' standing to appeal. While Petitioners would be harmed if ultimately held liable, that risk is not "certainly impending" and does not give rise to standing now. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2).

Opening the door to standing based on such harms is problematic enough on its own, but doing so to move a case into federal court that is otherwise non-justiciable—while state court proceedings are still ongoing—risks the disrespect to state courts that the Court's *ASARCO* decision was designed to avoid. In *ASARCO*, the Court opened a narrow door to cases that are otherwise non-justiciable based on a final state court decision that placed the defendants "under a defined and specific legal obligation … which causes them direct injury." 490 U.S. at 618. Accepting Petitioners' theory, on the other hand, would fling open the doors to state court decisions that impose no legal obligations, but simply allow a case to move forward. Doing so in a case that no party could have brought in federal court undermines fundamental federalism principles, under which state courts have the authority to adjudicate a case in full before federal review attaches.

ARGUMENT

I. The Court lacks statutory jurisdiction to review the Colorado Supreme Court's interlocutory decision.

A. Absent narrow exceptions, this Court has jurisdiction to review only final state court judgments.

By statute, this Court has jurisdiction to review only "[f]inal judgments" of state courts. 28 U.S.C. § 1257(a). In general, finality requires "an effective determination of the litigation" as a whole, "not of merely interlocutory or intermediate steps therein." *Pierce Cnty. v. Guillen*, 537 U.S. 129, 140

(2003) (quoting *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997)).

The Court has nonetheless recognized certain exceptions where it has treated a state court's final determination of the federal issue in a case as a final judgment, even though "there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477. The exceptions fall into four categories. In two of these categories, the decided federal question will inevitably be integral to the final judgment, either because "the case is for all practical purposes concluded" or because "[n]othing that could happen" in state court "would foreclose or make unnecessary decision on the federal question." *Id.* at 479-80. In the third category, neither party will be able to seek review of the federal question after final judgment, meaning that the federal question has reached the end of the road. *Id.* at 481.

The fourth *Cox* exception—on which Petitioners solely rely—is different. That exception is for cases where 1) there are "further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," 2) "reversal of the state court on the federal issue would be preclusive of any further litigation," and 3) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-83. Exception four stands apart from the other *Cox* categories in that it involves federal questions that may be unnecessary to the resolution of the case (because the party who lost the federal question might prevail on nonfederal grounds) and which the Court can review at the end of the case if the federal question ends up being outcome determinative.

This Court has not invoked *Cox*'s fourth exception as the basis for its jurisdiction in nearly forty years. In rebuffing attempts by petitioners to resort to that exception, the Court has recognized a need for caution lest "[a]ny federal issue finally decided on an interlocutory appeal in the state courts … qualify for immediate review." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam).

In addition to the requirement that reversal by this Court end the litigation, two guardrails cabin the fourth *Cox* category's reach. First, the requirement that "delaying review" would "seriously erode federal policy" has been understood narrowly to keep this exception from "swallow[ing] the rule." *Id.* at 622. Since *Cox*, the Court has found this condition satisfied in less than a handful of situations, including where the state court permitted state regulation of the "only nuclear facility producing nuclear fuel for the Navy's nuclear fleet," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988); in a First Amendment case where there was concern about chilling speech and the uninterrupted "flow of expressive materials," *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55-57, 67 (1989); and where allowing a case to go forward would itself "defeat the core purpose" of an arbitration clause under dispute, *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987). In more recent decades, the Court has emphasized that only a federal policy interest that is "not common to all run-of-the-mine decisions" can satisfy this requirement. *Florida v. Thomas*, 532 U.S. 774, 780 (2001).

Second, in exercising jurisdiction under *Cox*'s fourth exception, the Court guards against the "probability of piecemeal review with respect to federal issues." *Flynt*, 451 U.S. at 621. In "most, if not all, of the cases falling within the [*Cox*] exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved." *Id.*

The fourth *Cox* exception is thus available only when all of a case's federal issues have been finally resolved such that waiting for final judgment would seriously erode federal policy and reversal would end the case. And even then, the erosion of federal policy must be so unusual and severe as to present an "exceptional" situation. *See Johnson v. California*, 541 U.S. 428, 429 (2004) (per curiam).

B. The fourth *Cox* exception is not satisfied here.

1. This case does not present the rare circumstances to which the fourth *Cox* exception applies. *See Johnson*, 541 U.S. at 430. Not one of the three elements identified in *Cox* is satisfied here. And to secure the Court's jurisdiction, Petitioners would have to run the table.[2]

[2] Petitioners have also claimed that the Colorado Supreme Court's decision terminated a self-contained original proceeding and is therefore final under *Atlantic Richfield Co. v. Christian*, 590 U.S. 1 (2020). Amicus agrees with Respondents that *Atlantic*

First, this is not a case where "*the* federal issue has been finally decided" and Petitioners "might prevail on the merits on *nonfederal* grounds." *Cox*, 420 U.S. at 482 (emphasis added); *Flynt*, 451 U.S. at 621. The fourth *Cox* exception does not apply when the "remaining litigation may raise other federal questions that may later come" to the Court. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 633 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945)) (holding that a state court judgment that "monetary compensation is not an appropriate remedy for" a taking could not be treated as final because the state court had not yet determined whether a taking had occurred). The remaining litigation is almost certain to raise other federal questions here.

The Colorado Supreme Court has so far decided only one of the many federal defenses that Petitioners asserted below. *See* Pet. App. 108a-15a. Petitioners do not dispute that they may very well prevail on remand on a different federal issue. Pet. Br. 19. And their amici press other federal defenses as well. *See* Br. for Protect the First Found. as Amicus Curiae 4-15; Br. for Neutral Principles as Amicus Curiae 3-24. Review now could mean embarking on the very "piecemeal review with respect to federal issues" that the final judgment rule is designed to guard against. *Flynt*, 451 U.S. at 621.

Second, and relatedly, "reversal of the state court on the federal issue" would not "be preclusive of

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Richfield does not apply, *see* Resp. Br. 16-22, but does not address that issue because it will be addressed by other amici.

any further litigation." *Cox*, 420 U.S. at 482-83. The federal defense for which Petitioners seek interlocutory review hinges on the principle that "States lack the power to regulate conduct beyond their borders." Pet. Br. 3. But the Complaint alleges unlawful conduct by Petitioners both within Colorado and elsewhere. *See* Pet. App. 54a. So even if the federal defense at issue were valid, it would presumably not preclude litigation as to in-state conduct.

Third, there is no basis for concluding that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The key is that "identifiable federal statutory or constitutional policies" must be seriously harmed by allowing the decision to stand *while litigation continues*. *See Flynt*, 451 U.S. at 622. Any harm potentially caused by some future final judgment is irrelevant since the Court can review that judgment in the ordinary course if the federal question ends up mattering to the outcome.

Petitioners do not even attempt to identify the federal policy that would be seriously eroded by continuation of the litigation, much less point to its source in a statute or other authority. Pet. Br. 18-19. Nor could they. No real-world consequences flow from the Colorado Supreme Court's ruling at this point.[3]

[3] As described in Part II, this lack of real-world consequences—as opposed to litigation burdens alone—is an additional, independent reason why the Court's jurisdiction fails, even if the Colorado Supreme Court's decision could be labeled "final" within the meaning of 28 U.S.C. § 1257(a).

The decision does not currently impair the authority of federal regulators or interfere with federal programs in any way. At the moment, it does not even interfere with Petitioners' activities. Petitioners have not claimed that the decision is affecting how they conduct their business, let alone compelling them to make a change. Whatever the importance of the substantive questions raised by the petition, the Colorado Supreme Court's decision has no present impact whatsoever on federal policy.

When a final judgment is issued, Petitioners may prevail (on other federal grounds or state ones), in which case there will be no effect on the unidentified federal policy Petitioners hypothesize. If instead Petitioners do not prevail, "they will be free to seek [the Court's] review once the state-court litigation comes to an end," and that review suffices to protect whatever federal policy is at stake. *See Jefferson*, 522 U.S. at 82-83 (finding *Cox* exceptions were not satisfied).

2. Without identifying a specific federal policy subject to erosion here, Petitioners assert (Pet. Br. 19) that "ordinary questions of federal preemption" satisfy *Cox*'s fourth exception as a matter of "routine[]," citing two cases arising in a "similar posture." But the cited cases did not hold that federal policy will be seriously eroded whenever ordinary preemption questions are not subject to interlocutory review. Indeed, they did not address *Cox* at all. *See Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87 (2017); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013).

Because jurisdiction was not discussed in those cases, "the existence of unaddressed jurisdictional defects has no precedential effect." *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Moreover, both cases involved federal policies embedded in an express preemption clause. *See Coventry Health Care*, 581 U.S. at 90; *Dan's City Used Cars*, 569 U.S. at 254-56. The decisions cannot be read to suggest that such a clause is alone enough to convert an interlocutory decision into a final one—especially given that the Court did not address *Cox* at all—but, regardless, even that justification is absent here. *See* Pet. App. 13a.

In any event, Petitioners' argument proves too much. It would allow for interlocutory review of all "ordinary questions of federal preemption" decided in state courts, Pet. Br. 19, while making "no claim of serious erosion of federal policy that is not"—at best—"common to all run-of-the-mine decisions" on preemption. *See Thomas*, 532 U.S. at 780; *Johnson*, 541 U.S. at 430. The fourth *Cox* category requires more.

Petitioners' complaints about continued litigation (Pet. Br. 12, 20)—the only consequence of the Colorado Supreme Court decision—do not help them. Incurring litigation costs following an interlocutory ruling rejecting a preemption defense is the rule under federal law, not the exception. *See GEO Grp., Inc. v. Menocal*, 607 U.S. 438, 446 (2026). So, it is hardly corrosive to federal policy to require Petitioners to continue to litigate.

In short, this case "presents the typical situation in which the state courts have resolved some but not all" of a case. *See Jefferson*, 522 U.S. at 84 (holding that state supreme court decision answering certified question was not final for purposes of 28 U.S.C. § 1257(a)); *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam). It does not present exceptional circumstances satisfying the criteria for the fourth *Cox* category.

C. If the fourth *Cox* exception does extend to mine-run decisions like this, it should be overruled.

If Petitioners' view of *Cox* is correct, the fourth *Cox* exception reflects a wholesale, atextual carve-out from Congress's final judgment rule that vitiates the statutory limits on the Court's jurisdiction and sweeps aside principles of federalism and judicial restraint at the core of the final-judgment limitation. Such an exception cannot stand. *Cf. GEO Grp.*, 607 U.S. at 453 (Thomas, J., concurring in part and concurring in judgment) (Because the "*Cohen* collateral-order doctrine, which allows federal courts to exercise appellate jurisdiction over certain interlocutory orders, conflicts with Congress's authority over federal appellate jurisdiction," the Court "should not expand [it] beyond orders that [the Court's] precedents have already held to be immediately appealable." (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949))).

"Compliance with the provisions of § 1257 is an essential prerequisite to [the Court] deciding the merits of a case brought here under that section."

Johnson, 541 U.S. at 431. The "finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson*, 522 U.S. at 81 (quoting *Radio Station WOW,* 326 U.S. at 124). Yet *Cox*'s fourth exception rests on weak foundations in serious tension with modern precedent.

Start with the text. *Cox* itself recognized that its interpretation of finality was "pragmatic" rather than literal, and that under plain "English usage," the statutory text "would justify an interpretation of the final-judgment rule [that would] preclude review where anything further remains to be determined by a State court." 420 U.S. at 477, 486 (internal quotation marks omitted). Some of the *Cox* categories describe circumstances where the state court judgments are effectively final. *See, e.g.*, *id.* at 479 (describing situations where "the case is for all practical purposes concluded"). But the rationale for the fourth *Cox* category is transparently a policy call, reflecting the judgment that the Court should be allowed to reach questions on interlocutory review that may be ultimately unnecessary to the merits of the dispute merely because they are so "important" that it is "intolerable to leave [them] unanswered." *Id.* at 485 (quoting *Mills v. Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring)).

Yet subsequent cases have made clear that "'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive," *BP p.l.c. v. Mayor of Balt.,* 593 U.S. 230, 245 (2021) (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012)), and the Court "may not engraft [its] own exceptions onto the statutory text," *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019). If the fourth *Cox* category stretches to mine-run interlocutory decisions simply because they resolved federal defenses like preemption, then the pretense can no longer be maintained that the category interprets the word "final" rather than supplants Congress's finality mandate with a different policy choice.

Federalism principles likewise counsel in favor of abandoning the fourth *Cox* exception. A capacious version of the fourth *Cox* category upends the federalism balance inherent in foundational doctrines regarding the interplay between state and federal courts.

If read as broadly as Petitioners urge, *Cox*'s fourth exception is effectively an end-run around the well-pleaded complaint rule, allowing defendants to obtain direct federal court intervention in ongoing state court cases that could not have been removed to federal court—like this one, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1246 (10th Cir. 2022). "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, … even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983).

Petitioners thus could not remove this case to federal court. *See id.* Nor could they have brought their preemption defense to federal court as a declaratory judgment action. *See id.* at 16. Yet an expansive view of *Cox* would allow federal court intervention in ongoing, non-removable state cases through the mechanism of this Court's review, rather than hewing to federal court review only following final judgment.

On top of opening the door to intervention in state cases too soon, the fourth *Cox* exception permits intervention in a state court proceeding when it may not matter and when intervention is not clearly needed to prevent a judgment from violating federal law. This effectively invites the Court to issue advisory opinions. The Court has repeatedly recognized that it will not "review judgments of state courts that rest on adequate and independent state grounds" because "'if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'" *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). This doctrine involves "sensitive issues of federal-state relations." *Id.* at 1039. Yet the fourth *Cox* category—if unleashed from its guardrails—invites the Court to rush ahead and beat the state court to the punch by making sure the state court is unable to reach state-law grounds that could obviate any need for federal review.

If the fourth *Cox* category is understood as permitting this sort of interlocutory interference in state court proceedings where the federal courthouse doors would otherwise be closed, it should be overruled in favor of hewing to the statutory text, under which Congress provided for review only of final judgments of state courts. 28 U.S.C. § 1257(a).

II. Petitioners lack standing to invoke the Court's Article III jurisdiction.

Even if the Colorado Supreme Court's decision somehow qualifies for an exception to the final-judgment rule, the decision has only one consequence: Petitioners must continue litigating this case. That consequence, which is the basis for all the injuries that Petitioners claim, does not qualify as an injury-causing invasion of Petitioners' legally protected interests that confers Article III standing in this Court to adjudicate the merits of their preemption defense.

For starters, Petitioners do not have a legally protected interest in avoiding litigation costs. If valid, Petitioners' federal preemption defense shields Petitioners from paying damages or facing other state-law penalties. Because the defense confers no federal right to be free from continued litigation, the Colorado Supreme Court has not invaded Petitioners' legally protected rights. Much less has it "finally determine[d]" those rights (Pet. Br. 20) because it has not determined that Petitioners are liable for anything.

In addition, Petitioners' complained-of litigation costs are merely a "byproduct" of the litigation. Injuries that are merely a byproduct of litigation about a dispute do not confer standing to adjudicate the merits of the dispute. That rule disqualifies Petitioners' litigation-costs injury here.

As for the theory that the decision subjects Petitioners to the "risk of adverse consequences" (Pet. Br. 12)—presumably a damages award, though that is left unsaid—Petitioners do not attempt to show that any such consequences are imminent or likely. Speculative threatened future injuries do not confer standing. Tellingly, Petitioners do not assert that they have altered their conduct in any way because of perceived future risks. Petitioners have no claim to the type of injury that would give rise to Article III standing.

A. Harms that are nothing more than a byproduct of litigation do not confer Article III standing to adjudicate the substance of the litigants' dispute.

1. Standing requires harm to a "legally protected interest," *Lujan*, 504 U.S. at 560, and "is not dispensed in gross," *Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (internal quotation marks omitted). Thus, the interest a litigant seeks to vindicate must be more than just a "concrete private interest." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (internal quotation marks omitted). It must also be an interest that is "judicially cognizable," *Bennett v. Spear*, 520 U.S. 154, 167 (1997)—*i.e.*, that the law protects. Not only that, the existence or scope of the legal protection for the complained-of harm must be what is at issue in the lawsuit or appeal. *Diamond v. Charles*, 476 U.S. 54, 70 (1986); *see also ASARCO*, 490 U.S. at 624 ("federal standing 'often turns on the nature and source of the claim asserted'" (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))). In other words, there must be a match between the interest asserted and the subject of the litigation such that "the interest … consist[s] of obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Nat. Res.*, 529 U.S. at 772-73.

Implementing these principles, the Court has held that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773. A judicially cognizable injury must stem from the underlying dispute, and not from the litigation about that dispute. This is why plaintiffs cannot obtain standing based on their interest in "reimbursement of the costs of litigation," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998), nor keep a suit alive on the merits based on their interest in recovering attorney's fees, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

The same goes for defendants, who cannot obtain standing to appeal the substance of a judgment based on their interest in avoiding paying plaintiffs' attorney's fees. In *Diamond*, the Court held that an intervenor-defendant lacked standing to appeal an adverse judgment on the merits simply because the judgment required him to pay the plaintiffs' attorney's fees. 476 U.S. at 69-71. This is so even though the obligation to pay attorney's fees is a concrete and personal harm, caused by the judgment below, that would be redressed by reversal of the judgment on the merits. The "mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III." *Id.* at 70-71.

2. *Diamond* involved an order to pay the other party's litigation costs, rather than the defendant's interest in avoiding its own litigation costs. But in either case the litigation costs are "only a byproduct of the suit itself." *Id*. And an interest in avoiding one's own litigation costs has even less purchase for standing, because the complained-of harm—paying for litigation—is usually not one that the law protects against at all.

Defendants do not generally have a legal right to avoid their own litigation costs. Ordinary defenses protect litigants from liability, not lawsuits. This is one reason why ordinary defenses—unlike immunities from suit—are not immediately appealable. *See supra* p. 12. As explained in *GEO Group*, although an immunity is an "'entitlement not to stand trial,'" a "'mere defense' … offers something different, and of lesser value." 607 U.S. at 446 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985)). An immunity permits a litigant to "avoid[], in addition to liability, all the usual 'burdens of litigation.'" *Id.* (quoting *Mitchell*, 472 U.S. at 525-26). A "valid defense," on the other hand, allows the defendant to escape liability, but not "the varied rigors and costs of legal proceedings." *Id.*

An ordinary defense thus confers no federal right to be shielded from litigation costs. But even if it did, a legal right to be shielded from litigation costs is distinct from a legal right to be shielded from liability. So, an injury tied to the former cannot confer justiciability over an appeal about the latter.

3. The situations where the Court adjudicates claims of litigation-related harms confirm the requirement that the complained-of harm must match the legal issue at stake. Litigation harms confer standing only when the disputed issue is whether federal law protects a party from that litigation harm. Such an injury does not confer standing to litigate the substance of the parties' dispute. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980) (holding that named plaintiffs' "desire to shift part of the costs of litigation" to a class conferred jurisdiction "only to review the asserted procedural error" of denying class certification, "not for the purpose of passing on the merits of the substantive controversy" when claims were otherwise moot).

The arbitration case cited by Petitioners (Pet. Br. 20) provides an example. In *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019), the question was whether the district court had correctly ordered class arbitration, rather than individual arbitration. *Id.* at 179-80. The Court held that the employer's "interest in avoiding [the] consequences" of the "fundamental" shift from individual to classwide arbitration provided the employer standing to appeal. *Id.* at 182 (citation omitted). That individual-to-class-arbitration injury matched the substance of the appeal, which was entirely about whether the arbitration agreement protected the employer from classwide arbitration—not the merits of the employment dispute. *Id.* at 180.

B. Petitioners' litigation-cost harms are a mismatch for their preemption arguments.

These principles demonstrate that Article III standing is absent here.

Petitioners' primary claimed injury is the "monetary costs … to continue litigating in Colorado." Pet. Br. 20. As explained above, Petitioners will likely face the burden of litigating this suit regardless of the outcome of their preemption defense, since their in-state conduct will still be at issue. In any event, Petitioners have no legal right to be free of litigation costs, even if their preemption defense is valid. *See GEO Grp.*, 607 U.S. at 446.

Moreover, the litigation harm Petitioners assert does not match the legal interest they seek to defend. The issue Petitioners seek to invoke this Court's jurisdiction to adjudicate is not whether federal law shields them from litigation costs (it doesn't) but whether it shields them from state-law damages (which the Colorado Supreme Court decision has not caused them to pay). That mismatch defeats standing.

Petitioners insist (Pet. Br. 21) that "litigation consequences" are enough, and that their standing is confirmed by cases in which the Court has reviewed federal court decisions rejecting motions to dismiss although defendants could have prevailed on other grounds. But these cases are wholly inapposite. In two of them, there is no mention of standing or Article III jurisdiction. *See Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024); *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166 (2023). The third case mentions the plaintiff's standing only in describing the Fifth Circuit's holding; it was not questioned in this Court. *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 473 (2022). The Court did not have jurisdiction to hear such cases because of defendants' harms from continued litigation—that topic was not broached—but because the plaintiffs' standing assured Article III justiciability. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 211 (2020) ("When the plaintiff has standing, 'Article III does not restrict the opposing party's ability to object to relief being sought at its expense.'" (quoting *Bond*, 564 U.S. at 217)).[4]

There is thus no general rule that the burden of continued litigation justifies admittedly "interlocutory" review (Pet. Br. 20) of decisions denying motions to dismiss—indeed the rule is exactly the opposite. *See supra* p. 12.[5]

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[4] The government cites a few additional cases in this posture (SG Br. 14 n.3). As with Petitioners' cases, standing was not addressed in any of the cases and the plaintiffs' standing was unquestioned in all three. *See Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023); *Atl. Richfield*, 590 U.S. 1; *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

[5] The cases that Petitioners cite do not advance their position as to either Article III standing or the statutory jurisdiction argument discussed above, *see supra* Part I. In each federal case, not only did the district court have federal question jurisdiction and the plaintiffs have Article III standing, the courts of appeals had unquestioned statutory jurisdiction. Thus the decisions were properly reviewable in this Court under 28 U.S.C. § 1254, even though decisions denying motions to dismiss would ordinarily be unappealable interlocutory orders. In *Warner*

C. Petitioners' potential future injuries are too speculative to give rise to standing now.

1. Petitioners are not injured in any other way by the litigation at this stage. For starters, the Colorado Supreme Court decision has not "finally determine[d] petitioners' federal rights" as Petitioners claim (Pet. Br. 20). The Supremacy Clause, which gives rise to Petitioners' preemption defense, "is not the source of any federal rights." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (internal quotation marks omitted). Although a valid preemption defense shields a litigant from liability, it does not confer a federal right to avoid the burdens of litigation. So, a decision that does nothing more than reject a preemption defense and allow continued litigation is not a final "adjudication of legal rights" like the declaratory judgment at issue in *ASARCO*, 490 U.S. at 618.

In *ASARCO*, the Court addressed a declaratory judgment that "pose[d] a serious and immediate threat to the continuing validity" of defendants'

Chappell Music, 601 U.S. at 370, *Slack Technologies*, 598 U.S. at 765, and *Pacific Bell*, 555 U.S. at 444, an interlocutory appeal had been certified under 28 U.S.C. § 1292(b). In the other two cases, the district courts had issued final judgments dismissing the cases, so appeal was taken under 28 U.S.C. § 1291. *See Health & Hosp. Corp.*, 599 U.S. at 174; *Houston Cmty. Coll. Sys.*, 595 U.S. at 473. For the one state case cited by the government, the Court based final-judgment jurisdiction on the finding that the Montana decision was issued in a self-contained proceeding rather than an appeal, *Atl. Richfield*, 590 U.S. at 12, a status that does not apply here, *see* Resp. Br. 16-22.

mineral leases. *Id*. That case involved, not a potential future decision, but a judgment fully and finally determining that the statute authorizing the leases violated federal law. *Id.* Even then, two justices would have held that the plaintiffs' "absence of standing disposes of this case and requires dismissal of the appeal." *Id.* at 634 (Rehnquist, C.J., dissenting, joined by Justice Scalia); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 306 (2000) (Scalia, J., concurring, joined by Justice Thomas) ("remain[ing] of the view that [*ASARCO*] was incorrectly decided").

Here, there has been no adjudication, preliminary or otherwise, of whether any of Petitioners' conduct violates any law, state or federal. Nothing in the Colorado Supreme Court decision casts doubt upon Petitioners' rights to engage in that conduct. *See* Pet. App. 24a-25a. The only thing the decision resolves is that Petitioners must continue to litigate the lawfulness of their conduct until a final judgment is reached. An ordinary defense, even if valid, does not protect against this continued litigation.

2. Petitioners also gesture at possible future injury, complaining vaguely of the "risk of adverse consequences" (Pet. Br. 12). The government puts it more plainly as the risk of paying damages (SG Br. 14). As to this potential future injury, the problem is not a mismatch with Petitioners' claimed right to be free of liability, but rather wholesale speculation.

The Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotation marks omitted; alteration in original). But it "is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990). Petitioners offer at best speculation about the outcome of future court proceedings, which falls short of the standing mark. *See Clapper*, 568 U.S. at 401 (Article III injury cannot be "speculative").

Tellingly, Petitioners do not claim they are suffering any present harm from the potential future liability. They and the government offer cases where standing has been founded on a litigant being "coerced" to alter its primary conduct—which it claims is legally protected—by the threat of prosecution or liability. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129-30 (2007); *see* Pet. Br. 20; SG Br. 14. In such cases, the risk of liability is part of what causes the Article III injury, but the injury is the deterrence or impairment of legally protected conduct. No such injury is claimed here.

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), the Court's harm analysis focused on "burdens … on electoral speech" and the need to divert resources from other priorities "in the crucial days leading up to an election." *Id.* at 165. In *Camreta*, the Court held that an officer who "regularly engages in [the challenged] conduct as part of his job" has standing to appeal a decision holding that conduct unconstitutional because the potential future liability "force[s] the official to change his conduct." 563 U.S. at 703-04 & n.4. In cases of this kind, the injury and the claimed legal protection match: litigants claim legal protection for their intended or desired conduct, and the injury that confers standing is the deterrence or alteration of that conduct.[6] But that sort of injury is wholly inapplicable here. Petitioners do not claim that the Colorado Supreme Court decision has affected the way they do business at all, nor that they even have been nudged—never mind coerced—to change their conduct one whit.

3. Petitioners' argument about the preclusive effect of the Colorado Supreme Court decision (Pet. Br. 20) adds nothing to their other theories. The preclusive effect that Petitioners claim—Colorado trial courts must follow Colorado Supreme Court opinions—does not actually preclude Petitioners from litigating their preemption defense in this Court. All it does is postpone that review. In other words, the preclusive-effect argument is simply another way of stating that Petitioners must bear litigation costs until the state court case reaches final judgment. That is not a cognizable harm that creates Article III standing to litigate the merits of Petitioners' preemption defense.

That does not mean, of course, that Petitioners would never have standing to seek this Court's review of their federal defenses. If Petitioners' conduct is

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[6] The dissenting justices in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), would have held that Nike had standing based on this sort of injury, on the theory that "Nike's speech on public matters might be 'chilled' immediately" by the interlocutory state decision. *Id.* at 667-70 (Breyer, J., dissenting). No justices suggested that the mere continuation of litigation was sufficient to confer standing.

ultimately found unlawful and they are ordered to pay damages, or to comply with some other remedy, they would then suffer an invasion of the legally protected interest that they seek to adjudicate here. But Petitioners claim no current harms like those that would flow from a final judgment, with good reason—no such harms were inflicted by the Colorado Supreme Court's decision. The only effect of that decision is continued litigation.

D. Maintaining justiciability guardrails is especially crucial for cases that could not have been brought in federal court in the first instance.

Adopting Petitioners' theory would undermine federalism principles crucial in cases like this one where, otherwise, state courts alone would have jurisdiction.

State courts are "presumptively competent" to resolve questions of federal law under our constitutional "system of dual sovereignty." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In *ASARCO*, the Court emphasized that finding justiciability based on "concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts," even though "the original plaintiffs lacked standing to sue," would avoid "disrespect to state-court proceedings and judgments." 490 U.S. at 612, 623. The decision avoided disrespecting the state courts because the alternatives to exercising jurisdiction in *ASARCO* would "render nugatory the entire proceedings in the state courts." *Id.* at 620.

Here, however, the alternative to (improperly) exercising jurisdiction now is exercising jurisdiction later—if the Colorado courts end up inflicting an Article III injury that federal law protects Petitioners against. Finding standing now, where a state court has merely "allow[ed] the case to go forward," would "effect a drastic expansion of *ASARCO*'s reasoning, extending it to cover an interlocutory ruling that merely allows a trial to proceed." *Nike*, 539 U.S. at 662 (Stevens, J., concurring). In such a case, the only injury asserted by the party seeking review in this Court is the burden of continuing to litigate in state court. The state court's decision has caused no consequences outside of the litigation—and Petitioners do not claim it has. Under those circumstances, it disrespects state courts to intervene.

This is a case that our federal system remits completely to state court before final judgment. Petitioners do not claim that Respondents could have brought this action in federal court. Petitioners could neither have removed it to federal court nor brought their own federal declaratory judgment suit to adjudicate their preemption defense. *See supra* p. 15. Dismissal of their petition would not render the state proceedings nugatory; it would respect the authority of state courts to adjudicate the case in full before federal review attaches. Federal justiciability doctrines should not be expanded beyond their longstanding bounds to justify premature intervention in ongoing state court proceedings.

CONCLUSION

The petition should be dismissed for lack of jurisdiction.

Respectfully submitted,

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