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 FOR PROFESSOR BENJAMIN B. JOHNSON AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court has Article III jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

2. Whether this Court has statutory jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

3. Whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

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INTERESTS OF *AMICUS CURIAE*[1]

Professor Benjamin Johnson is a Professor of Law at the University of Florida Levin College of Law. His scholarship focuses on the history and structure of the judicial power of the federal courts, with particular attention to the appellate jurisdiction and remedial powers of this Court. *See, e.g.*, Benjamin B. Johnson, *A History of Vacatur*, 135 YALE L.J. 761 (2026); Benjamin B. Johnson, *May Federal Courts Answer Questions When Not Deciding Cases?*, 100 NOTRE DAME L. REV. 583 (2025); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022). As a scholar who writes on the original understanding of this Court's role, Professor Johnson has an interest in the proper disposition of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly stressed that the scope of the Article III judicial power was set in 1789. *See, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109, 127–28 (2024); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–23 (1995). Thus, the bounds of its appellate jurisdiction must be viewed in light of history and tradition. *See Ortiz v. United States*, 585 U.S. 427, 448 (2018). Consistent with that

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[1] No counsel for a party authored this brief in whole or in part. No one other than the foregoing *amicus curiae* and his counsel made a monetary contribution to fund the preparation or submission of this brief.

history, this Court has two potentially relevant powers. First, the Court has a *revising power* over final judgments and decrees of lower courts, so long as the case satisfies constitutional standing requirements. *See T.M. v. Univ. of Md. Med. Sys. Corp.*, 146 S. Ct. 1739, 1755–56 (2026) (Thomas, J., concurring). Second, there is a distinct *answering power* that allows this Court to answer questions certified to it even though the case from which the question is drawn is before a different federal court. *See* Benjamin B. Johnson, *May Federal Courts Answer Questions When Not Deciding Cases?*, 100 NOTRE DAME L. REV. 583 (2025) (Johnson, *Answer Questions*).

This case invokes neither of these appellate powers. Since there is neither standing nor finality, the revising power does not apply. What is left is a freestanding legal question extracted from ongoing Colorado state-court litigation, but because state courts cannot certify questions to federal courts, the answering power will not avail petitioners either.

Petitioners cannot call upon the revising power for two reasons.

First, the decision below does not conclusively establish any legal rights or obligations. Petitioners claim that the Colorado Supreme Court adjudicated their legal rights. They do not identify what those rights are. Presumably, they would assert some type of immunity from state-law claims that have been preempted by federal law. This is a category error. Petitioners in effect seek to recast a merits defense as a legal right to be immune from suit. *See GEO Group v. Menocal*, 607 U.S. 438 (2026). But if that is correct, then nearly all prejudgment orders denying preemption defenses would become immediately reviewable under the collateral-order doctrine's three-part test. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This would undermine this Court's efforts to limit prejudgment appellate review.

Second, the revising power is unavailable because petitioners lack appellate standing. They suffered no cognizable injury from the judgment below. Petitioners claim two potential injuries.

For one, they say the "decision … forces[s] petitioners to continue defending" the underlying lawsuits. Pet. Br. 12. That is false. The order does not force petitioners to do anything. If they do not defend the suit, they will not somehow landed in contempt of court. They may—and most likely will—elect to defend themselves, but ordered to do so they are not. Their claim is that voluntarily defending against a claim on the merits is an Article III injury, but that cannot be correct.

For another, they argue that the Colorado Supreme Court's judgment created "binding precedent" that will be bad for them in the Boulder litigation. Pet. Br. 12. Unfavorable precedent is not an injury. If it were, every appellate judgment that forecloses a defense would injure an untold number of parties who would be affected by that precedent. This theory turns appellate courts into tortfeasors on a massive scale.

One must ask why petitioners claim harm from the *precedent* rather than from the *judgment*. After all, Article III appellate standing requires the injury to come from the judgment itself. *See* Tyler Lindley, *The Structure of a Federal Appeal*, 79 VAND. L. REV. (forthcoming 2027). Unlike precedent (that applies to other parties in other cases), the judgment would affect petitioners personally, simplifying their claims of injury.

And of course, a judgment has an immediate effect on the parties in the originating case. But petitioners cannot make this argument because it would admit that the Colorado Supreme Court's order was part of the same litigation as the underlying Boulder case. If so, it would be interlocutory and plainly not final. Petitioners are thus trying to strike an impossible balance: they need the decision below to be entirely separate from the Boulder litigation to make it final, but they need it to be interlocutory for purposes of standing. They cannot have it both ways.

Petitioners cannot call upon the answering power either. Petitioners would have this Court answer the preemption question that the Colorado Supreme Court extracted from the Boulder litigation. This Court can answer such freestanding questions when properly exercising its answering power. Unlike the revising power, which allows a court to declare law in order to decide a case, the answering power arises when a federal court gives a binding answer to a legal question while the case from which that question arises remains before a different court. But the answering power requires three prerequisites: (1) a case pending in a federal court; (2) a request from that court for help answering a question necessary to proceed to judgment; and (3) a federal statute authorizing such a request. Since none of those three conditions obtain, petitioners also cannot resort to the answering power.

Petitioners largely attempt to avoid the constitutional limits on this Court's powers by focusing on the statutory question of finality. They point to *Atlantic Richfield Co. v. Christian*, 590 U.S. 1 (2020), as conclusive authority that the decision under review is a final judgment for purposes of the statute. This reads *Atlantic Richfield* far too broadly. Neither petitioners nor any *amici curiae* can point to a single case in which this Court has reviewed an appeal from an original state-supreme-court proceeding (including *Atlantic Richfield*) that did not—as a threshold matter—consider the state court's *authority* to proceed. This historical pattern is not itself a self-evident constitutional command, but it strongly suggests a principled, consistent, and historically grounded limit on this Court's appellate review.

This case offers the Court the chance to clarify its observation in *Atlantic Richfield* that it is "the nature of [the state-court] proceeding, not the issues the state court reviewed, that establishes" jurisdiction. 590 U.S. at 12. The inquiry into the nature of the state-court proceeding cannot be determined solely by state law. State law may describe the proceeding's form and organization; federal law must determine this Court's jurisdiction. The Court should make clear that any case it reviews, even if that case formally originates in a state supreme court, must conform to established principles of finality and constitutional limits on standing. States should remain free to organize their judiciaries as they choose, but this Court's jurisdiction is constrained by the Constitution and federal statutes.

The governing rule should be neutral and should not depend on which party prevailed below. Ordinarily, the state process should be allowed to play out until there is a judgment that finally fixes the parties' rights or obligations in the underlying litigation. Only then would there be standing for the party aggrieved by that judgment. Any exception for a separately organized state proceeding should resemble the narrow exceptions recognized in federal appellate practice: the proceeding must conclusively adjudicate a distinct entitlement—such as a right not to be subjected to an unauthorized tribunal—that would be irretrievably lost if review awaited final judgment. Rejection of an ordinary merits defense does not qualify.

This Court should not open Pandora's Box and follow petitioners to the conclusion that a decision in any proceeding—so long as it is formally separate under state law—will suffice. That would allow states to convert ordinary interlocutory rulings into reviewable final judgments simply by assigning them a separate docket number and original-proceeding label. For example, while States might empower their courts to answer freestanding questions of law—that is, questions answered outside the course of rendering a judgment in the underlying case—neither the revising power nor the answering power is available to this Court here.

The Court should dismiss the petition as improvidently granted.

ARGUMENT

I. The Revising Power Requires the Court to Apply Constitutional Finality and Standing Principles to Review of State-Court Rulings

The Court is hearing this appeal through the writ of certiorari, which Congress established in 1891 to facilitate the review of final judgments and decrees from the new circuit courts. In 1925, Congress extended certiorari to cases from state supreme courts. In both instances, Congress made clear that this Court was to proceed "with the same power and authority and with like effect as if brought up by writ of error." Judiciary Act of 1925, Pub. L. No. 68-415, § 237(b), 43 Stat. 936, 937. That writ was the traditional device used to review final judgments from common law courts in England. This Court immediately understood certiorari was part of a consistent "policy of the acts of Congress in relation to appeals and writs of error … to have the whole case and every matter in controversy in it decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665–66 (1891).

Certiorari directly invokes the Court's revising power. To invoke this power, petitioners must establish at least two things. First, they must show that there is a final judgment or decree susceptible to review that establishes legal rights or obligations. Second, they must show that they have appellate standing to contest that judgment. Petitioners can do neither.

A. Article III First Requires Finality in the Form of a State-Court Judgment That Fixes Rights or Obligations

The revising power is the "'power to revise the judgments rendered' by other courts." *T.M. v. Univ. of Md. Med. Sys. Corp.*, 146 S. Ct. 1739, 1755 (2026) (Thomas, J., concurring) (1 J. Kent, COMMENTARIES ON AMERICAN LAW 353 (11th ed. 1867) (Kent)). Or put differently, the Court's appellate role is "reviewing an already *completed* exercise of 'judicial power'" by a court that had original jurisdiction. *Ortiz v. United States*, 585 U.S. 427, 455 (2018) (Thomas, J., concurring) (emphasis added).

For purposes of the Court's revising power, it does not matter if the case comes to this Court from a federal court or a state court. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 338 (1816). That is, "exercising that revising power over the judgments of 'state tribunals' in cases involving '[federal] questions' is appellate in nature." *T.M.*, 146 S. Ct. at 1756 (Thomas, J., concurring) (quoting 1 Kent 353). But, as the First Congress recognized, the relevant requirement is the same. For this Court to wield its revising power over state supreme courts, the Founding era mandated that there must first be a "final judgment or decree" of "the highest court of law or equity of a State" to act on. Judiciary Act of 1789, Pub. L. No. 1-20, § 25, 1 Stat. 73, 85–86.

Those terms—judgment or decree—in their historical senses mean some fixing of the parties' rights or obligations. They refer to a court's pronouncement "that, upon the matters submitted for its decision, a legal duty does or does not exist." 1 Henry Campbell Black, A TREATISE ON THE LAW OF JUDGMENTS § 1 (1st ed. 1891) (Black). The bare issuance of something that is denominated a judgment under state law is not necessarily a judgment for purposes of the revising power. Absent a court's fixing of rights or obligations, a judicial pronouncement is not fit for revision—at least not in an appellate posture—"regardless of the label placed on the paper filed in the court." *T.M.*, 146 S. Ct. at 1756 (Thomas, J., concurring) (quoting *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 573 (1833)).

The requirement of finality serves several related purposes. Rooted in the "well-settled and ancient rule of English practice" that no writ of error lay before final judgment, *McLish*, 141 U.S. at 665, it ordinarily confines appellate review to a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945). By preventing piecemeal appeals, the rule "promotes the efficient administration of justice" and "preserves the proper balance between trial and appellate courts." *Microsoft Corp. v. Baker*, 582 U.S. 23, 36–37 (2017). Those same considerations should inform review of state-court proceedings. A State may well structure an extraordinary writ proceeding as formally separate, but it cannot by labeling alone eliminate the historical finality limits that both the Constitution and Congress have always placed on this Court.

B. Article III Also Requires a Petitioner's Appellate Standing to Seek Review of a Judgment from State Court

Traditional standing doctrine requires the invoking party to identify a concrete, particularized injury that is both traceable to the defendant and redressable by the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Appellate standing is somewhat different because an appeal was historically understood to initiate new and separate litigation in which the lower court, or its judgment, was the defendant. *See* William Searle Holdsworth, HISTORY OF ENGLISH LAW 213–14 (1922); Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 115 (1941); *see also* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 809–10 (2022) (Johnson, *Question Selection*). That historical structure helps explain why appellate standing focuses on an injury caused by the judgment, rather than merely on adversity in the lower court.

In federal cases, this is not particularly taxing. The standing inquiry at the trial court carries over easily to the appellate courts, since both are bound by Article III. The final adjudication of a case that satisfies initial standing requirements will naturally generate a loser with a sufficient stake in the judgment for purposes of appellate standing. This is why appellate standing comes up primarily where intervenors or lower-court winners try to appeal. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 432–33 (2019); *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

Because state courts are not bound by Article III standing requirements, however, the constitutionality of this Court's appellate review cannot be so easily presumed. The Court must undertake its own inquiry.

"[A]ppellate standing turns on whether the appellant has suffered a legally cognizable injury, traceable to the lower court's judgment, and redressable by a reversal." Tyler Lindley, *The Structure of a Federal Appeal*, 79 VAND. L. REV. (forthcoming 2027). Article III's standing limitations, however, cannot "be satisfied *solely* by reference to the lower court's adverse judgment." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 306–07 (2000) (Scalia, J., joined by Thomas, J., concurring). That is, the mere fact of being a state-court loser is not enough for standing.

This Court faced these problems in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), which provides the test for the Court's appellate jurisdiction in such cases. Defendant-petitioners in *ASARCO* alleged "a specific injury stemming from the state-court decree." *Id.* at 617. As a result of that judgment, they were "under a defined and specific legal obligation, one which causes them direct injury." *Id.* at 618. In invoking its Article III judicial power, the Court stressed that there had been "an adjudication of legal rights" and "a final judgment altering tangible legal rights." *Id.* at 618–19. The state-court judgment invalidated Arizona's mineral-leasing statute and directed entry of declaratory relief, which placed state officials under a definite legal obligation and threatened the lessees' existing leasehold rights. Since the injury was caused by the judgment itself, it was redressable by reversal, even though the original plaintiffs may not have had Article III standing had they sued in federal court. *Id.*

What *ASARCO* teaches is that the presence of a judgment is insufficient, and mere adversity on a legal question is insufficient. The state-court judgment itself must also alter the petitioner's legal rights or obligations in a manner causing concrete injury.

II. THE REVISING POWER DOES NOT APPLY, AS THE COLORADO RULING DID NOT ALTER ANY LEGAL RIGHTS OR CAUSE AN ARTICLE III INJURY

A. Petitioners Have Not Demonstrated Article III Appellate Standing

Petitioners claim three related injuries as grounds for standing. First, they claim that since the Colorado Rule 21 proceeding created "binding precedent," they are "at risk of adverse consequences that would not occur if petitioners had prevailed." Pet. Br. 12. Second, the "decision … forces[s] petitioners to continue defending" the underlying lawsuits. *Id.* Third, petitioners suggest that the Colorado Supreme Court (or its judgment) injured them by adversely adjudicating their legal rights. *See id.* at 20. However, unfavorable precedent is not an injury, and the Colorado Supreme

Court did not force petitioners to do anything, let alone resolve their legal rights.

1. Unfavorable precedent is not a cognizable injury

Petitioners' first asserted injury is that they have been subjected to unfavorable precedent. Petitioners confuse three distinct concepts: a judgment's legal operation, an opinion's precedential effects, and a later court's decision consistent with precedent. Here, petitioners are not injured by any command, order, or decree issued by the Colorado Supreme Court. The Rule 21 judgment discharged the order to show cause; it did not enter judgment on Boulder's claims, impose liability, or command petitioners to do anything.

Even if there were a judgment in the statutory sense, that is not enough to demonstrate standing. *See Pap's A.M.*, 529 U.S. at 306–07 (Scalia, J., joined by Thomas, J., concurring). What is salient is that the judgment in the Rule 21 case did nothing to petitioners at all.

Petitioners admit as much by asserting that the injury is not from the judgment but from the precedential effect of the judgment. But though precedent may *contribute* to a final outcome where rights or obligations are settled, it does not settle rights or obligations of any specific parties. Judgments determine rights and obligations, and they do so by following precedent, but asserting that precedent establishes rights or obligations is like confusing maps and cars: A map can tell a driver how to get from point *A* to point *B*, but the car gets her there.

That is why petitioners can point to no authority for the proposition that unfavorable precedent is an injury. If unfavorable precedent caused injury, then all present and future parties that are made worse off by the application of that precedent would be injured. If so, an untold number of potential parties would suffer Article III injuries every time an appellate court makes a decision.

Consider the case at bar. If this Court decides the preemption question on the merits, it will create unfavorable precedent for one party in this litigation and for innumerable parties across the country in any case that is affected by the opinion here. Indeed, in every case this Court decides, authoritative precedents work out poorly for many parties in courts in every state and circuit. If petitioners are correct and all such parties are injured, this Court is the Nation's single largest tortfeasor.

The fact that nonparties suffer the same asserted precedent-based harm also shows that petitioners' asserted litigation burden is attributable to the opinion's precedential force in influencing the final outcome of their case, not to a judgment's party-specific alteration of rights or resolution of claims. Nothing about this judgment injures petitioners. And since the judgment does petitioners no harm, revising it can provide no remedy.

2. Defending oneself in court on the merits is not a cognizable injury

Petitioners' second asserted injury is that "[t]he decision below will … force petitioners to incur monetary costs as a result of being forced to continue defending these lawsuits." Pet. Br. 12. Strictly speaking, the decision below does no such thing. Petitioners are not forced to defend Boulder's lawsuits. If they do not defend the lawsuits, they will not be held in contempt of the Colorado Supreme Court. Moreover, by using the future tense—will force—petitioners again admit that the judgment under review does no injury to them at present.

It is true that petitioners are likely to continue defending themselves in the Boulder litigation, but the expense of discovery, trial, and possible liability will be imposed, if at all, through orders entered in that separate case. Those burdens are not legal obligations created by the Colorado Supreme Court's judgment at issue here.

Petitioners nevertheless characterize those costs as classic pocketbook injuries in the mold of *Tyler v. Hennepin County*, 598 U.S. 631, 636 (2023). But the alleged pocketbook injury in *Tyler* was $25,000 in illegally appropriated surplus after the county seized and sold Tyler's condominium. That injury was both concrete and the subject of the dispute. Petitioners' claimed pocketbook injury, in contrast, is the future and elective cost of mounting a defense in the underlying Boulder litigation. But such future litigation costs are plainly different from those in *Tyler* as they are speculative and not at issue in the Rule 21 proceeding or in any litigation.

These future, elective costs, if they occur, would be costs, but they would not be cognizable injuries. Otherwise, any lawsuit against another person would create a new Article III injury because they might choose to defend themselves. There are times when such costs might be injurious, for instance if a party who is immune from suit is forced to defend on the merits, but mounting ordinary defenses in run-of-the-mill litigation should not be considered an injury for Article III purposes.

3. Losing on a standard, prejudgment merits defense is not a cognizable injury

ASARCO found appellate standing because the state judgment placed the appellants "under a defined and specific legal obligation" and constituted "a final judgment altering tangible legal rights." 490 U.S. at 618–19. Petitioners claim a similar "adverse adjudication of legal rights," but identify no right altered by the Rule 21 judgment. Pet. Br. 20.

While petitioners do not say what these legal rights are, one suspects they assert a legal right to not have to defend against preempted state-law claims. But this is impossible. Preemption flows from the Supremacy Clause, a clause that "is not the source of any federal rights." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (quotation omitted). Relatedly, such arguments would also fail because they confuse legal rights with legal defenses. The Colorado Supreme Court adjudicated petitioners' preemption defense. It did not impose any obligation on petitioners or alter any of their rights or responsibilities.

To be sure, there are times that legal defenses intersect with (indeed are founded upon) legal rights. For instance, various immunity defenses are predicated on a party's right to be free from suit. As this Court explained last term, an immunity defense is "in its essence an entitlement not to stand trial [and] applies irrespective of the merits." *GEO Group v. Menocal*, 607 U.S. 438, 446 (2026) (quotation omitted).

One must admit that if preemption defenses were immunity defenses, this would be a different case. If preemption offered immunity—rather than nonliability—then the Colorado Supreme Court's resolution of the preemption question would have determined legal rights. Further, in that case, petitioners might also be able to claim an injury from having to defend themselves on the merits when immune.

But petitioners' preemption defense is a classic "merits defense." A merits defense "advances some reason why [a defendant's] conduct was not unlawful" or argues that "under the law he did nothing wrong." *Id*. at 445. If the court ultimately accepts the defense, the final judgment would then and only then create a legal right to "a judgment of non-liability." *Id*. at 446. Preemption, after all, is an assertion that petitioners are not "liable under state law." *Armstrong*, 575 U.S. at 326.

The difference between immunity defenses and merits defenses is that the former depends on "whether the defendant possesses a right not to stand trial." *GEO Group*, 607 U.S. at 446. If petitioners claim that the legal right adjudicated in the Colorado Supreme Court decision is the right to not defend against preempted claims, they are essentially asking this Court to convert a standard-issue merits defense into an immunity defense.

This Court should resist the petitioners' category error. If preemption defenses become immunity defenses, it would undermine much of this Court's efforts to limit immediate review of prejudgment orders. If preemption defenses are immunity defenses, then defendants have a legal right—apart from the merits of any case—to be free from suit on preempted claims.

Forcing such a defendant to defend a suit would then impose a harm that could not be remedied on appeal, making any order denying a preemption defense effectively unreviewable. Any prejudgment order denying a preemption defense would then satisfy the three-part *Cohen* test for immediate review since it would "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Van Cauwenberghe v. Biard*, 486 U. S. 517, 522 (1988).

4. Petitioners' claims of injury thus treat the decision below as final for some purposes and interlocutory for others

Petitioners must therefore strike a precarious balance. Their alleged pocketbook injury and the consequences of negative precedent are all connected to the underlying state-court litigation. As explained, unhelpful precedent is not enough to establish injury, otherwise appellate courts have been in the business of causing constitutional harms for centuries.

Petitioners recognize that they need a more direct link between themselves and the Colorado Supreme Court's decision to establish a true harm unique to them, which is why they turn to cases where this Court has considered interlocutory appeals. In particular, they draw an analogy to instances where federal district courts have certified legal questions for federal courts of appeals to answer under 28 U.S.C. § 1292(b). In those cases, this Court has accepted review of the decisions of the courts of appeals. *See Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024). Citing more examples, the Solicitor General follows (U.S. Br. 14 n.3) in petitioners' tracks. *See*

Slack Techs., LLC v. Pirani, 598 U.S. 759 (2023); *Pacific Bell Tel. Co. v. linkLine Comm'cns, Inc.*, 555 U.S. 438 (2009).

Treating the Colorado decision as an interlocutory appeal would help differentiate petitioners from other potential parties—everyone in the world is equally affected by the precedential effect of the Colorado Supreme Court's opinion—because the judgment in an interlocutory appeal personally affects only the parties to the underlying litigation. But while this connection would move petitioners closer to alleging an Article III injury, it would only do so by undermining the finality of the Colorado Supreme Court's decision. Whatever else interlocutory appeals are, they are not final. *See Atlantic Richfield Co. v. Christian*, 590 U.S. 1, 8 (2020).

Thus, petitioners' argument tries to have it both ways. They need the Colorado Supreme Court's judgment to be separate and final for statutory purposes but interlocutory for Article III purposes. If the Rule 21 proceeding was genuinely independent, petitioners must identify an injury produced by the judgment—which was just to answer a freestanding preemption question—in that independent case. Precedential consequences or needing to defend in a separate case will not suffice. If, instead, the judgment's legal operation was to determine petitioners' "right" to dismissal in the Boulder action, then the proceeding functioned as interlocutory review of that unfinished case. Petitioners cannot rely on the latter characterization for Article III while disavowing it for finality.

B. Petitioners Do Not Challenge a Judgment That Fixes Rights or Obligations, and Are Instead Asking the Court to Answer Their Freestanding Choice-of-Law Question

The Colorado Supreme Court's decision is not a final judgment or decree in the traditional sense. Here, after petitioners were sued in Colorado state court, the state trial court denied petitioners' motions to dismiss based on some (though not all) of their defenses grounded in federal law. Those motions had, in relevant part, been based on a theory that respondents' state-law claims were preempted by federal constitutional, statutory, or common law. Pet. App. 88a–115a. Through a discretionary process, the Colorado Supreme Court opined that "defendants' arguments do not convince us that federal law preempts [respondents'] state law claims in this case." *Id.* at 24a. The Colorado Supreme Court thus issued an opinion that "those claims could therefore proceed under state law" and directed "further proceedings" in the trial court, while "express[ing] no opinion on the ultimate viability of the merits of [respondents'] claims." *Id.* at 24a–25a.

Put another way, the Colorado Supreme Court's opinion that respondents' state-law claims have not been preempted resolves a freestanding legal question about the relationship between federal law and state law. It is freestanding in the sense that it is unaccompanied by a resolution of duties or liabilities. This appeal, then, is effectively an effort to get this Court to answer that freestanding question, which the revising power will not allow. This effort invokes, if anything, the Court's answering power.

III. THE ANSWERING POWER HAS HISTORICAL LIMITS THAT PREVENT IT FROM APPLYING HERE

The Court has wielded its appellate power to answer questions without a predicate judgment or decree only in very limited circumstances. The defining feature of the answering power is that it allows this Court to provide a binding answer to a legal question without also providing a judgment in the underlying case. Historical practice demonstrates that the Court can wield its answering power only upon request and only to help a lower federal court to decide a pending case. *See* Johnson, *Answer Questions* 585. The parties' mere effort to draw out an answer through litigation is not enough. *See Muskrat v. United States*, 219 U.S. 346, 361–62 (1911).

A. The Power to Answer a Freestanding Legal Question Has Historical Limits

Prior to the Founding, English judges had established a procedure for having difficult questions in ongoing cases answered by constituting a larger body of judges. For those judges to wield an answering power as an appellate tribunal, a trial judge had to determine that an answer to a legal question would assist in resolving the case.

Before the Founding, English courts used "special cases" at common law and the "cases stated" in equity to obtain answers to legal questions extracted from cases still pending in the originating court, which retained responsibility for judgment and relief. Medieval assizes adjourned difficult questions for consideration by the Court of Common Pleas, and by the seventeenth century common-law judges could decide agreed legal questions on stipulated facts. Chancery likewise referred questions of law to King's Bench, although its answers were advisory rather than controlling. *See* John Baker, INTRODUCTION TO ENGLISH LEGAL HISTORY 149–51 (5th ed. 2019); James Oldham, *Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries*, 29 LAW & HIST. REV. 181, 185–87, 214 (2011); Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1001–02 (1974); 3 William Blackstone, COMMENTARIES *452–53 (1768).

Congress adopted a similar mechanism in 1802. Because circuit courts were then composed of one district judge and one Justice, disagreement could produce a deadlock. Congress therefore authorized the circuit court to certify "the point upon which disagreement shall happen" to this Court for decision. Amendatory Act of 1802, Pub. L. No. 7-31, § 6, 2 Stat. 156, 159–61; *see* Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. 733, 737–38 (2021).

This Court understood that its answering power meant that it "could only consider the single question, upon which the judges below divided in opinion." *Ogle v. Lee*, 6 U.S. (2 Cranch) 33, 33 (1804). Even where its answers might "decide the whole cause," the Court viewed its power as answering legal questions at the behest of a lower tribunal. *United States v. City of Chicago*, 48 U.S. (7 How.) 185, 192 (1849).

Much like the English practice of limiting the referral to a freestanding legal issue, the question certified could not be factual or discretionary but needed to be a purely legal one. *See United States v. Bailey*, 34

U.S. (9 Pet.) 267, 273–74 (1835). Were the parties to desire a broader review, they would need to proceed by "a writ of error, upon the final judgment below; and the whole cause will then be before the court." *Ogle*, 6 U.S. at 33. That is, any other review would need to be premised on the Court's revising power.

This Court's answering power survives in 28 U.S.C. § 1254(2), which permits a federal court of appeals to certify "any question of law" to this Court "at any time" and authorizes the Court to give "binding instructions." Although now rarely used, the procedure retains the historical requirement that another federal court refer a question arising in a case it continues to adjudicate. *See Bowe v. United States*, 607 U.S. 13, 50 (2026) (Gorsuch, J., dissenting).

B. The Answering Power Does Not Apply Because It Cannot Be Exercised Through Certiorari and State Courts May Not Certify Federal Questions to Federal Courts

A technical point related to the answering power is that it is always exercised in aid of a lower court that is still adjudicating a case. This makes certiorari a poor vehicle for the answering power, since certiorari brings up the entire case to be reviewed as if on a writ of error or appeal. *See* Johnson, *Question Selection* 812–23. Certiorari is only used after a lower court has decided, at which point the lower court needs review—not help.

In this case, if the judgment below were considered interlocutory, then one could conceive of a response from this Court as offering an answer to a legal question to help the Colorado trial court decide a case before it. Aside from reintroducing finality concerns, there is a more fundamental problem with such an approach: such a state-to-federal, reverse-certification approach would be *ultra vires*.

Through the centuries, and even though review of some state-court decisions began in 1789, Congress has *never* made it possible for a legal question to be sent to this Court from a state supreme court. *See* Judiciary Act of 1789, § 25, 1 Stat. at 85–87. Rather, as it was in 1802, the certification procedure to ask for an answer on a freestanding legal question has always been limited to the federal circuit courts (Amendatory Act of 1802, § 6, 2 Stat. at 159–61) and now the federal courts of appeals (28 U.S.C. § 1254(2)).

One reason for this is that any such effort would fall short of the case-or-controversy requirement of Article III. The answering power must be premised first on the presence of some case somewhere within the federal judiciary. Extracting a pure question of law from a case in state court does not bring the case with it. The case itself remains in the state court, and so there is no case in the federal judiciary over which a federal court could act. So even if Congress attempted to set up a reverse-certification regime, it would be unconstitutional.

That is, even if the Colorado Supreme Court wanted to enlist this Court's help to decide the preemption question, it could not because neither Congress nor the Constitution allows it.

The formal danger this case presents is that original proceedings in state courts risk cutting a backdoor into the answering power. If a State's highest court can itself extract a question from a state trial-court case, generate a new proceeding where only that question of interest is presented, and then—following the case stated model from England—offer a tentative answer before sending the question to this Court, then the answering power could reach the States. This might not be a major practical concern now, since this Court has discretionary control of its docket, but if such a backdoor were constitutionally permissible, Congress could make such appeals mandatory if it so chose.

These are more than functionalist reasons why such a scheme should fail. An effort to adapt the case-stated procedure to bootstrap a freestanding question of law from the state courts to this Court must collapse because there is no real case decided with finality. A pure question of law does not itself determine any party's rights or impose any obligations. As such, the case stated would not be a case for Article III purposes.

Petitioners attempt to bring what is effectively a case stated to this Court through the device of an original proceeding in the Colorado Supreme Court. Just as in the case-stated procedure, a new original proceeding was established to single out a particular question. Indeed, the Colorado Supreme Court was explicit that it took up this case (made up of a single question) to address "issues of significant public importance that [it] ha[d] not previously considered." Pet. App. 8a. This confirms that the nature of its proceeding was to opine on the law and not to determine rights or obligations.

The Colorado Supreme Court, however, did not even provide a "definitive" declaration that "a legal duty does or does not exist" as to one of the parties. 1 Black §§ 1, 3. That court was careful to note that petitioners might indeed have *no* legal duties under Colorado law, as it did not opine on the "ultimate viability of the merits." Pet. App. 24a–25a.

The judgment in that case did not itself fix liability, impose an obligation, or conclusively determine petitioners' legal duties, and so reversing it would not either. Accordingly, there is no case here for Article III purposes, but if there were, this Court risks circumventing the historical limits of the answering power.

IV. ACCEPTING ARTICLE III JURISDICTION WOULD BE A VAST DEPARTURE FROM HISTORY AND TRADITION

A. Petitioners and *Amici Curiae* Identify No Historical Pedigree to Support Review of Petitioners' Freestanding Preemption Issue

Two separate *amici curiae* point out a line of cases dating back to 1829 in which this Court has treated original proceedings in state courts as final judgments or decrees. *See* Br. of Prof. Muller at 11–13; Br. of Former State Supreme Court Justices at 7–8. All but two of the cases are explicitly appeals from writs of prohibition, and those two are functionally equivalent to the traditional writ.

Going back to England, litigants used the writ of prohibition to dispute the authority of a court to even hear a case. The line of cases identified by *amici* is almost entirely made up of cases dealing with writs of prohibition. *See Mount Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31–33 (1916); *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co. v. Taylor*, 266 U.S. 200, 205–09 (1924); *Michigan Central Railroad Co. v. Mix*, 278

U.S. 492, 493–96 (1929); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14–16 (1931); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271–77 (1940); *Rescue Army v. Municipal Court*, 331 U.S. 549, 552–55, 565–85 (1947); *Madruga v. Superior Court*, 346 U.S. 556, 557–61 (1954).[2]

Tellingly, the two cases that are not explicitly prohibition cases are the two cases from Montana: *Atlantic Richfield*, 590 U.S. at 8–20, and its predecessor, *Fisher v. District Court*, 424 U.S. 382, 383–89 & n.7 (1976). But both cases raised the authority of the lower courts to proceed, even though Montana did not use the moniker of "prohibition" to identify its writ. The pattern suggests that review of original writ proceedings was allowed because those proceedings tested the adjudicatory authority of the state court, not because any separately docketed state proceeding was automatically fit for Supreme Court review.

Neither petitioners nor *amici* provide a single instance in which this Court has reviewed an original proceeding in a state supreme court that did not, as a threshold matter, raise the authority of the lower

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[2] *Amici* also cite *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829), and *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564 (1916). Neither involved discretionary supervisory review of an interlocutory merits ruling. *Weston* reached this Court by ordinary writ of error from the final judgment in an action challenging a municipal tax; "prohibition" was simply the procedural form supplied by state law, and the action did not seek to restrain an inferior court. *Detroit & Mackinac* involved mandamus, which was the statutorily prescribed vehicle for adjudicating and enforcing a commission order. The relevant precedents here are those treating a genuinely extraordinary supervisory proceeding as separately final while litigation continued below.

courts to proceed. In this case, petitioners do not challenge the authority of the lower courts; instead, they ask this Court to answer a single legal question pertaining to an ordinary defense to the merits.

The traditional limitation of review to questions challenging the state courts' authority to proceed is of a piece with the discussion above related to merits and immunity defenses. Challenges to a court's authority—especially its jurisdiction—have long represented a special class of cases. Indeed, Congress originally reserved jurisdictional questions as a separate category of appeals that would circumvent the courts of appeals and proceed directly to the Supreme Court. *See* Judiciary Act of 1891, Pub. L. No. 51-517, § 5, 26 Stat. 826, 827–28. Congress has thus long recognized subject-matter jurisdiction as an exception to its general policy that appeals should be taken all at once at the conclusion of litigation.

This is not to say that this Court exercises a general supervisory authority over state courts. This Court "has been emphatic in its insistence that its supervisory power does not extend to state courts." Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 342 (2006). Rather, just as district courts may intervene to remove cases from state courts when Congress has directed a federal venue, this Court may intervene to ensure that state courts do not decide federal issues when they lack the authority.

Moreover, a challenge to adjudicatory authority protects an interest categorically distinct from an ordinary merits defense. Jurisdictional limits may protect "the defendant against the burdens of litigating" in an unauthorized forum and secure an "individual liberty interest" against the exercise of judicial power. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982). Challenges to the court's authority resemble immunity defenses in two ways. First, they assert that a defendant cannot be judged in the court "whether or not he acted wrongly." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997). Second, they protect an individual liberty interest, suggesting that freedom from litigation in an unauthorized forum approaches a legal right.

Seen in this light, it is clear why the line of cases noted by *amici* has some basis in Article III standing and why this case does not. The historical cases involved a distinct kind of claim: that the lower court lacked lawful authority to adjudicate at all. By answering at all, the state court necessarily addressed the disputed legal right to avoid litigation in the courts below. Petitioners assert no such entitlement here. They seek review only of the rejection of an ordinary merits defense.

B. This Court Should Vindicate Traditional Finality and Standing Limitations

Ordinarily, review of state-court decisions should await a judgment that finally fixes the parties' rights or obligations and leaves nothing material to be decided in the underlying litigation. That traditional rule preserves the division between trial and appellate adjudication, prevents piecemeal review, promotes efficient judicial administration, and ensures that this Court reviews a completed exercise of judicial power rather than an isolated legal ruling. *See McLish*, 141 U.S. at 665–66; *Catlin*, 324 U.S. at 233; *Microsoft*, 582 U.S. at 36–37.

Any exception for an original state-court proceeding should track the narrow exceptions recognized in federal appellate practice. Review may be appropriate where the state-court judgment conclusively adjudicates a distinct entitlement that would be irretrievably lost if review awaited final judgment—such as the historical prohibition cases testing whether an inferior tribunal possessed authority to subject a party to further adjudication. *Cf. Cohen*, 337 U.S. at 546. But the exception should remain narrow. It should not extend to a separately docketed proceeding that merely resolves an ordinary merits defense while leaving the underlying action unfinished.

That rule is neutral as to the prevailing party. Finality and standing should not turn "*solely*" on who won in the Colorado Supreme Court. *Pap's A.M.*, 529 U.S. at 306–07 (Scalia, J., joined by Thomas, J., concurring). Neutrality cuts in both directions: whether the court rejected petitioners' preemption defense or accepted it, neither side should obtain immediate review merely because Colorado chose to resolve the issue through an original proceeding. Unless the state-court judgment itself finally disposes of the underlying litigation or adjudicates a recognized entitlement to avoid further proceedings, the proper course is to allow the case to reach a genuine final judgment and then seek this Court's review.

CONCLUSION

This Court should dismiss the petition for a writ of certiorari as improvidently granted.

Respectfully submitted,

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