

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 AMICI CURIAE SCHOLARS OF
STATE COURTS AND JUDICIAL
FEDERALISM IN SUPPORT OF
RESPONDENTS**

Adam B. Sopko
University of Colorado Law
School
2450 Kittredge Loop Drive
Boulder, CO 80309

Daniel B. Rodriguez
Northwestern Pritzker
School of Law
375 East Chicago Avenue
Chicago, IL 60611

Eric R. Olson
Counsel of Record
Olson Grimsley Kawanabe
Hinchcliff & Murray LLC
700 17th Street
Suite 1600
Denver, CO 80202
(303) 535-9151
eolson@olsongrimsley.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

Amici are prominent scholars teaching at U.S. law schools and whose work focuses on state courts—their structure, practice, and powers—and matters of judicial federalism.

INTRODUCTION AND SUMMARY OF ARGUMENT

To preserve the vital interest of comity between the state and federal systems, several limits govern this Court’s authority to review decisions from state courts, including that such decisions be “final judgments.” 28 U.S.C. § 1257(a). States have enjoyed “wide discretion in respect to establishing [their] systems of courts and distributing their jurisdiction.” *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 81 (1930). State courts have developed practices that are in some ways familiar and others entirely foreign to their Article III counterparts. To respect these features of state prerogatives, the Court has long looked to state courts’ understanding of their own procedures and jurisdiction to determine whether a state-court judgment is “final.”

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Petitioners' finality argument relies on viewing the judgment below as a stand-alone proceeding, rather than an interlocutory appeal, and thus controlled by *Atlantic Richfield*. The Court's decision there, like some earlier cases, recognized state high court decisions resolving certain independent proceedings as final. Montana's supervisory writs, like the other extraordinary writs animating these cases, are original remedies issued by supreme courts against inferior tribunals to enjoin *ultra vires* acts. Petitioners' argument, then, rests on the premise that Colorado's Rule 21 creates an original remedy that issues to rein in unlawful judicial acts.

That premise is wrong. First, Petitioners overlook the Colorado Supreme Court's revisions to Rule 21 nearly 30 years ago to implement its supervisory power, a source of authority common to state courts with no federal counterpart. Using this power, the court grants review of novel issues and cases of significant public importance that are not *ultra vires*. Thus, unlike the formal extraordinary remedies that run against judges, as in *Atlantic Richfield*, Rule 21 simply allows expedited appellate review.

Second, while the Colorado Supreme Court can and does issue extraordinary relief like prohibition and mandamus under Rule 21, it requires specific pleading to do so that Petitioners did not provide. Colo. App. R. 21(e)(1). Instead, Petitioners framed the

case as one of significant public importance and one warranting expedited review, not an extraordinary remedy against a judge.

Third, Petitioners’ other arguments attempting to frame Rule 21 as an original, standalone proceeding only undermine their theory. They emphasize Rule 21’s automatic stay provision without noting that the state’s rule governing interlocutory appeals uses the same language. And they make much of the use of the “original proceeding” label in Rule 21. But in Colorado, jurisdiction does not fall into the binary their argument requires.

The finality inquiry turns on the Colorado Supreme Court’s own understanding of its jurisdiction and procedures. Pet. Br. 18. Viewed on its own terms, the judgment below was not final and thus beyond this Court’s jurisdiction.

Deciding this case before a final judgment is not only imprudent, because it requires this Court’s premature intervention, but, more seriously, disruptive of the comity and collaboration that undergirds the final judgment rule’s key federalism values. As with other limits on this Court’s review, a coherent scheme of jurisdiction—including not just “whether” but also “when”—protects the interests of states by assuring that state courts can perform their essential functions under their state constitutions.

This Court has long ensured that state judicial procedures and the overall architecture of state procedure will be vouchsafed as an essential element of our constitutional federalism structure. Here Colorado has a well-established process for judicial decision-making and review, embodied in Rule 21. Asserting jurisdiction now interferes with this authority, with consequences not only for Colorado and its supreme court practice, but for the values of federalism long recognized by this Court.

ARGUMENT

This Court’s certiorari jurisdiction over state courts is limited to “[f]inal judgments or decrees rendered by the highest court of a State.” 28 U.S.C. § 1257(a). Whether a case meets these limits depends on the proceedings below and the state’s jurisdictional and procedural rules. *See, e.g., Brady v. Terminal R.R. Ass’n of St. Louis*, 303 U.S. 10, 13 (1938). This analysis looks at the “nature” of state court proceedings. *Atl. Richfield Co. v. Christian*, 590 U.S. 1, 12 (2020). This Court “may not second-guess” the state court’s understanding of its own rules and procedures. *McKinney v. Arizona*, 589 U.S. 139, 146 (2020). Thus, whether the judgment below is reviewable depends on the structure and processes of the Colorado courts. That inquiry tells us the judgment below is interlocutory and thus not “final.”

I. This Court’s finality jurisprudence distinguishes between a supreme court’s

law development responsibilities and remedies enjoining inferior courts for *ultra vires* acts

The heart of Petitioners' jurisdictional argument is that the judgment below is a stand-alone suit and that such proceedings are considered final for purposes of this Court's review. Pet. Br. 16-18. This misunderstands the Court's finality jurisprudence.

A. Petitioners' § 1257 theory rests on a particular branch of this Court's finality precedents that is not implicated here

This Court has recognized some independent proceedings satisfy the finality limitation on its jurisdiction over state court judgments. But that doctrine applies to particular writ proceedings that differ from this case.

1. The "distinct suit" strand of finality jurisprudence came from statutory language that is no longer in effect

Since 1789, Congress has calibrated the Court's authority to review state-court decisions by statute. Judiciary Act of 1789, Ch. 20, §25, 1 Stat. 73, 85-87. The initial Judiciary Act imposed four requirements on such review: (i) "final judgment[s]" (ii) in "any suit"

(iii) by a state’s “highest court” (iv) that raise questions of federal law. *Id.*

The Court has developed a body of case law around each discrete requirement. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (finality); *Weston v. City Council of Charleston*, 27 U.S. 449, 454 (1829) (“any suit”); *Loc. 174, Teamsters Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 98 (1962) (“highest court”). Review is permitted only when each is met, but the requirements are analytically distinct. *See, e.g., Great W. Tel. Co. v. Burnham*, 162 U.S. 339, 341-42 (1896).

Petitioners rest their “finality” theory on this Court’s cases interpreting the “suit” requirement. Pet. Br. 16-17. But that line of cases followed from a formulation of the Judiciary Act that has not been in force for almost 80 years. *Compare* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, *with* Act of June 25, 1948, ch. 646, 62 Stat. 869.

The “self-contained suit” branch of the Court’s §1257 jurisprudence arose during the nineteenth century from requests to review state high court prerogative writ judgments. The question was whether such judgments were “suit[s],” and thus reviewable by this Court. This Court determined that extraordinary writ proceedings seeking prohibition, habeas corpus, and mandamus were all “suit[s]” and thus presumptively within its jurisdiction. *See*

Weston, 27 U.S. at 464 (“Is a writ of prohibition a suit?”); *Holmes v. Jennison*, 39 U.S. 540, 563 (1840) (“Was this proceeding before the Supreme Court of Vermont a ‘suit?’”); *Hartman v. Greenhow*, 102 U.S. 672, 676 (1880) (same).

In these foundational cases, the finality inquiry was straightforward, as no underlying lawsuit was pending elsewhere. Litigants sought extraordinary relief against non-judicial officials to enjoin unlawful acts or require them to follow the law. Resolution of these petitions was the entire case. Such writ proceedings were self-contained suits because they were the *only* suit in the case.

To be sure, extraordinary writs were not limited to non-judicial officials. Indeed, they were perhaps most potent when they lay against lower courts. *See, e.g.*, James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 Tex. L. Rev. 769, 781 (2024). State judiciaries led the way in translating British prerogative writ practice into extraordinary oversight instruments for superior courts to enjoin unlawful acts by inferior courts and other government actors. *See* Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 418 (1958).

Consistent with practice at common law, these proceedings brought questions of a lower court’s jurisdiction or authority to a higher court. *E.g.*, *Conn. River R. Co. v. Franklin Cnty. Comm’rs*, 127 Mass. 50,

58 (1879). They provided relief that was related to or derivative of the inferior court litigation. In these proceedings, the questions raised were collateral to the merits of the lower court litigation. *See, e.g., Mo. ex rel. St. Louis B. & M. Rwy. Co. v. Taylor*, 266 U.S. 200, 206 (1924); *N.Y. ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70 (1928).

State high courts ruled on these arguments in the first instance, rather than reviewing a lower court's determinations. For these reasons, such proceedings were considered within a supreme court's "original" jurisdiction, their resolution was straightforwardly "final," and the case was reviewable by this Court. *E.g., Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 31-32 (1916); *Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 380-81 (1953); *see also T. M. v. Univ. of Md. Med. Sys. Corp.*, 146 S. Ct. 1739, 1755 (2026) (Thomas, J., concurring) (discussing this history).

This Court confirmed this understanding of finality in *Fisher* and *Atlantic Richfield*. *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 385 n.7 (1976); *Atlantic Richfield v. Christian*, 590 U.S. 1, 12 (2020). Looking to the Montana Supreme Court's understanding of its own supervisory writs, the Court recognized they are "not equivalent to an appeal," but instead a standalone means of remedying a lower court's unlawful acts that will cause irreparable harm

to petitioners. *Fisher*, 424 U.S. at 385 n.7; *Atlantic Richfield*, 590 U.S. at 12.

2. The finality analysis in the Court’s “independent proceeding” precedents applies to a kind of state court proceeding not at issue here

This Court’s finality analysis in cases implicating the Judiciary Act’s “suit” requirement rested on limited and specific procedural postures. Reviewable cases were final because this Court understood them as “independent” adversarial proceedings where petitioners sought extraordinary remedies, issued directly from the state high court, often based on different legal theories or bases for relief. *See, e.g., Detroit & Mackinac Ry. Co. v. Mich. R.R. Comm’n*, 240 U.S. 564, 570-71 (1916); *Mt. Vernon-Woodberry*, 240 U.S. at 31-32. Such original proceedings were conceptually different from a superior court’s review and revision of an inferior court’s legal errors, with a remand for correction. *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807) (Court’s review was an exercise of *appellate* jurisdiction because it involved “the revision of a decision of an inferior court”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803) (appellate jurisdiction “revises and corrects the proceedings in a cause already instituted, and does not create that cause”).

Two of this Court's decisions issued the same day illustrate the distinction. Both *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549 (1947) and *Gospel Army v. City of Los Angeles*, 331 U.S. 543 (1947), arose from challenges to the same city ordinances criminalizing some kinds of solicitation.

In *Rescue Army*, a criminal defendant unsuccessfully sought prohibition from the California Supreme Court against a local trial court. In the original proceeding, the defendant raised for the first time a constitutional claim to secure relief only the high court could grant—an order enjoining the pending criminal trial. 171 P.2d 8, 10-11 (Cal. 1946). This Court concluded that the California Supreme Court's denial of relief was "final" and thus reviewable. 331 U.S. at 565-67.

By contrast, *Gospel Army* was found interlocutory and dismissed for want of jurisdiction. 331 U.S. at 547-48. There, the city sought extraordinary review of a trial court's injunction. 163 P.2d 704, 706 (Cal. 1945). Relying on a state procedural rule, the state high court granted direct review of that decision and reversed and remanded for trial. 331 U.S. at 545. Petitioners sought review from this Court, where it was dismissed as interlocutory. *Id.* at 548. The Court's analysis turned on two aspects of the proceeding. First, unlike in *Rescue Army* where the California Supreme Court considered whether to enjoin a trial judge, the *Gospel Army* court granted

extraordinary review to correct a lower court's erroneous understanding of state and federal law. Second, and related, the California Supreme Court remanded the case for trial, where the outcome on the federal question was uncertain. *Id.* at 547-48.

Jefferson v. City of Tarrant further supports this distinction. 522 U.S. 75 (1997). Petitioners sought review of a judgment from the Alabama Supreme Court that followed a similar path as the Colorado Supreme Court's decision here. The question in *Jefferson* was whether federal common law preempted a state-law claim. *City of Tarrant v. Jefferson*, 682 So.2d 29, 29-30 (Ala. 1996). The trial court denied the city's motion for judgment on the pleadings. The city sought extraordinary interlocutory review from the state high court. The supreme court reversed and remanded it for additional proceedings in the trial court.

The state-court plaintiffs petitioned this Court for certiorari, and the Respondents persuasively argued it "plainly" did not meet § 1257's finality requirement. See Br. for Resp't at 4-7, *Jefferson*, 522 U.S. 75 (No. 96-957, 1997 WL 401190 **4-7 (counsel of record John G. Roberts, Jr.)). This Court agreed, concluding the Alabama Supreme Court's decision was "avowedly interlocutory." *Jefferson*, 522 U.S. at 81. The Court focused on the nature of the state procedure. Alabama's high court used Ala. R. App. P. 5 (Rule 5) to address an issue of particular importance

to the state, rather than the entire case. *Id.* And its subsequent remand, the Court explained, meant, “[a]bsent settlement or further dispositive motions, the proceedings ... will include a trial on the merits of the state-law claims.” *Id.*

The features of Alabama’s Rule 5 that animated the *Jefferson* analysis align with Colorado’s Rule 21 practices. Rule 5 authorized the Alabama Supreme Court to review interlocutory orders that raise important, novel questions of law, where their resolution “would avoid protracted and expensive litigation.” Ala. R. App. P. 5(a). The rule thus enables the Alabama Supreme Court to intervene to quickly resolve “question[s] of first impression” to alleviate unnecessary strain on the lower courts and litigants. *E.g.*, *Mid-Century Ins. Co. v. Watts*, 323 So. 3d 39, 47 (Ala. 2020); J. Bradley Medaris, *You Can Appeal That Order ... Right?! Or Finality: The Great Conundrum*, 78 Ala. Law. 428, 432 (2017) (describing Rule 5 practices). It is not a remedy against unlawful lower court action but a tool for the Alabama Supreme Court to supervise the development of the law.

B. Rule 21 operationalizes the Colorado Supreme Court’s law development function

Petitioners’ argument assumes that the Rule 21 order below is the same kind of extraordinary writ that shaped the Court’s doctrines they rely on. But they fail to account for the Colorado Supreme Court’s

repeal and revision of Rule 21 nearly 30 years ago. These comprehensive changes render such common law proceedings unhelpful in determining whether the current order is “final.”

States “have great latitude” to structure and empower their courts as they believe best for their citizens free from “the constraints of Article III.” *Howlett v. Rose*, 496 U.S. 356, 372 (1990); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). And indeed, States operate their judiciaries in ways that are at once foreign and familiar to an Article III-informed set of sensibilities. *E.g.*, Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1886-96 (2001); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 Va. L. Rev. 1031, 1078-89 (2020). Attempting to understand the “nature” of Rule 21 proceedings through an Article III lens or shoehorn it into a Montana-shaped box risks overlooking, as Petitioners do, the relevant details at the heart of the Court’s jurisdictional inquiry. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) (“[F]ederal law takes the state courts as it finds them.”).

1. Rule 21 implements two sections—Article VI, §§ 2 & 3—of the Colorado Constitution

Rule 21 has taken different forms over the years.² But in 1998, the Colorado Supreme Court, wielding its constitutional rulemaking power, expanded the scope of Rule 21 review.

Notably, the court enlarged the constitutional powers available under Rule 21 from just “original jurisdiction” to also include the court’s supervisory power. The Rule had long implemented the court’s “original jurisdiction” provided for in the state constitution. Colo. Const. art. VI, § 3 (Section 3). Section 3 vests the court with two express sources of authority. The court can issue advisory opinions when requested by the governor or General Assembly. *Id.* The court also has authority to issue “remedial writs,” including “writs of habeas corpus, mandamus, quo warranto, certiorari, [and] injunction.” *Id.*

The court has understood Section 3’s writs clause as capturing the extraordinary remedies known at common law that shaped the independent suit branch of this Court’s finality doctrine. *Wheeler v. N. Colo. Irr. Co.*, 11 P. 103, 105 (Colo. 1886); *see also People ex rel. Barnum v. Dist. Ct.*, 218 P. 912 (Colo.

² Rule 21 was first enacted, by statute, in 1970, as Rule 116. *See, e.g.*, 1 Charles M. Rose, Colorado Revised Statutes 1963: 1970 Revision, at 831 (1970).

1923). It thus authorizes the high court to grant extraordinary relief of the listed writs only where a standard appeal would be inadequate. Richard Collins & Dale Oesterle, *The Colorado State Constitution* 174-76 (2d ed. 2020) (collecting cases). Under Section 3, Rule 21 permits the kinds of extraordinary writs at issue in *Atlantic Richfield* and its predecessors.

But another section of the Colorado Constitution gives broad powers to the supreme court: Article VI, § 2 (Section 2). Section 2 contains the court's appellate jurisdiction, as well as its "general superintending control over all inferior courts." *Id.*; *Se. Colo. Water Conservancy Dist. v. Huston*, 593 P.2d 1347, 1350 (Colo. 1979).

This supervisory power is an important feature of state high court practice that lacks a federal counterpart. Compare Adam B. Sopko, *The Supervisory Power of State Supreme Courts*, 98 S. Cal. L. Rev. 1543, 1588-92 (2025), with *Hunter v. United States*, 146 S. Ct. 1702, 1732-34 (2026) (Thomas, J., dissenting) (quoting Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324 (2006)) and *id.* at 1724-25 (Barrett, J., concurring). The power provides state high courts with a flexible tool to oversee the judiciary, from judicial workload, e.g., *Pittsburgh Corning Corp. v. Bradley*, 453 A.2d 314 (Pa. 1982); *In re Phillips Cnty.*, 2013 Ark. 55, to managing public perceptions of

justice within the court system, *e.g.*, *State v. Elson*, 91 A.3d 862, 885 (Conn. 2014).

The Colorado Supreme Court's uses of its Section 2 power are similarly vast. Outside of Rule 21 proceedings, it has relied on its Section 2 power to consolidate complex water disputes before expert judges, *e.g.*, *Huston*, 593 P.2d at 1350, craft remedies for questionable law enforcement tactics, *e.g.*, *People v. Wolf*, 635 P.2d 213, 218 (Colo. 1981), set public access to judiciary data, *Off. of State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 426 (Colo. 1999), determine procedures to resolve fee disputes for court-appointed attorneys, *Bye v. Dist. Ct. in & for Larimer Cnty.*, 701 P.2d 56, 59 (Colo. 1985), and reduce procedural barriers for prisoners seeking court access, *Williams v. Dist. Ct. of Eighth Jud. Dist. in & for Larimer Cnty.*, 417 P.2d 496, 501 (Colo. 1966), among other applications.

For decades the court's supervisory authority served as the source of its rulemaking power, *Kolkman v. People*, 300 P. 575, 584 (Colo. 1931), until a constitutional amendment gave the court express rulemaking authority. Colo. Const. art. VI, § 21. Whatever the application, the court has explained that Section 2 has long served as a source of policymaking authority that enables it to address the interests of Coloradans in the operation of the judiciary. *E.g.*, *People v. Greer*, 502 P.3d 1012, 1017-18 (Colo. 2022).

In 1998, the court repealed the version of Rule 21 that had been on the books for nearly 30 years and substantially revised it. Colo. Sup. Ct., Rule Change #1998(14) (Nov. 19, 1998), <https://perma.cc/PW2E-EMTC>. Among its most significant changes was expanding the scope of Rule 21 beyond just Section 3’s writs clause to include the court’s Section 2 supervisory power as well. As one judge participating in the process noted, this change was designed to ensure the court could “exercise the full range of its supervisory powers” in Rule 21 proceedings so that litigants were not limited to “the traditional pigeonholes of the common law writs.” Memorandum from Hon. Morris B. Hoffman to Committee on Appellate Rules of Procedure (Sep. 22, 1998), <https://perma.cc/QZM8-SSZT>. Thus, beginning in 1998, Rule 21 allowed litigants to invoke either the Colorado Supreme Court’s authority to issue extraordinary writs *or* its supervisory power. Since those changes, Colorado practitioners have recognized Rule 21 for what it is: “an extraordinary vehicle for interlocutory review.” Jessica E. Yates, *Knowing When to Change Trains: The Ins and Outs of Interlocutory Appeals*, 41 Colo. Law. 31, 32 (2012).

Amici Former State Supreme Court Justices—none from the Colorado Supreme Court—misunderstand Rule 21’s specifics and instead frame state court procedure as a singular concept. First, their argument assumes *all* state courts not only still

rely on the ancient prerogative writ system but operate exclusively on it. Fmr. St. Sup. Ct. Just. Br. 18-23. This is simply wrong as a matter of text, history, and practice, *e.g.*, N.J. Const. art. VI, § V, ¶ 4 (providing “[p]rerogative writs are superseded” by the supreme court’s rulemaking power); N.Y. CPLR Art. 78 (§§ 7801-7806). While such extraordinary remedies are still available, contrary to their framing, not all instances of state court power come from a common law writ. *See, e.g.*, Sopko, *supra* at 1575-82. Second, while it’s hard to reconcile their account of state court practice with the practices themselves, it’s even harder to square with this Court’s precedents. If, as they argue, any instance a state high court exercises its supervisory powers is a final judgment, then any decision by a state high court must be reviewable. Fmr. St. Sup. Ct. Just. Br. 8-9. On their theory, this Court’s many cases holding state-court decisions not final and thus not reviewable are incorrect. That is not the law.

2. Rule 21 orders based on the Colorado Supreme Court’s Section 2 supervisory power are analytically different from those based on its Section 3 writ authority

Since the 1998 amendments to Rule 21, the Colorado Supreme Court’s orders have drawn from both provisions of authority in the state constitution. The different purposes of Sections 2 and 3 motivate

the distinct standards the court requires to warrant relief from either. *See, e.g., City of Westminster v. Camp*, 581 P.3d 763, 772 (Colo. 2025) (holding Rule 21 review is available “when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, *or* when a petition raises issues of significant public importance that we have not yet considered” (emphasis added) (quotation omitted)).

Petitioners’ observation that the court issues orders using its Section 3 power that provide relief resembling writs at common law is correct but incomplete. Pet. Br. 16-18. In such cases, the court might say it’s issuing “[r]elief in the nature of prohibition,” *People v. DeGreat*, 461 P.3d 11, 14 (Colo. 2020), “quo warranto,” *Romanoff v. State Comm’n on Jud. Performance*, 126 P.3d 182, 184 (Colo. 2006), or other such writs. Since lower courts are the object of these remedies, Rule 21(e)(1) requires parties name a “court or tribunal” as “proposed respondents.” *E.g.*, Rule 21 Petition at 2, *State v. Seymour*, 526 P.3d 954 (Colo. 2023) (No. 2023SA12). Such relief depends on a showing that movants “lack any other adequate remedy.” *People v. Ostuni*, 58 P.3d 531, 533 (Colo. 2002) (collecting cases). Along these lines, Petitioners are correct that the Colorado Supreme Court has the authority to issue orders that are like the extraordinary writ proceedings at common law that produced the “self-contained” case jurisprudence they rely on. Pet. Br. 17.

But Rule 21 orders implementing the court’s Section 2 supervisory power differ meaningfully from those invoking Section 3’s writ authority. In particular, the court does not focus on the harm or potential injury to the petitioner from the lower court’s unlawful action. Instead, review via Rule 21 under the Section 2 supervisory power turns on the legal question of the underlying litigation.

In these cases, the court is not reining in unlawful acts by an inferior tribunal, as with extraordinary writs. Rather, the court uses its supervisory power to address issues of significant public interest to Colorado. For example, novel issues affecting the state’s economy, *e.g.*, *Miller v. Crested Butte, LLC*, 549 P.3d 228, 233 (Colo. 2024) (examining tort law issue affecting Colorado’s ski industry); *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 660 (Colo. 2005) (granting review of “a matter of ... widespread importance to citizens of Colorado and the construction industry”), criminal justice system, *e.g.*, *People v. Brooks*, 426 P.3d 353, 359 (Colo. 2018) (reviewing sentencing statute because it impacted “a significant number of cases pending throughout Colorado”), civil justice system, *e.g.*, *Brown v. Long Romero*, 495 P.3d 955, 958 (Colo. 2021) (addressing novel tort issue implicating a “considerable number of cases”); *Ronquillo v. EcoClean Home Servs., Inc.*, 500 P.3d 1130, 1133-34 (Colo. 2021) (deciding “an issue of significant public importance”), public schools, *e.g.*, *Reeves-Toney v. Sch.*

Dist. No. 1 in City & Cnty. of Denv., 442 P.3d 81, 85 (Colo. 2019) (evaluating constitutionality of “landmark legislation” about public school teacher contracts); *Dwyer v. State*, 357 P.3d 185, 188 (Colo. 2015) (similar), and more.

In these Section 2 cases, the court is not granting the order to show cause as a remedial measure to prevent harm to the moving party. In fact, adequate remedies often exist for petitioners in such cases just as they exist here. *E.g.*, *In re Marriage of Wollert & Joseph*, 464 P.3d 703, 714 (Colo. 2020) (Boatright, J., dissenting). Instead, the court grants the order to provide guidance for lower courts and litigants. *See, e.g.*, *In re Marriage of Green*, 547 P.3d 1095, 1098 (Colo. 2024).³

Such uses of Rule 21 implement the supervisory power’s function to develop the law and oversee the judiciary’s workload. These managerial

³ The United States’s brief is confused on this point. It cites an example of the court granting review of a dispute because of its importance to the judiciary “*and* because no other adequate remedy is available.” *People in Int. of T.T.*, 442 P.3d 851, 856 (Colo. 2019); U.S. Br. 13; *accord* Pet. Br. 18. But as discussed, Section 2 is not concerned with the adequacy of relief. The brief cites *Sanders* for a similar proposition. U.S. Br. 13. But in *Sanders*, the court recognized an ordinary appeal would provide adequate relief but nevertheless granted review due to the importance of the issue. *Sanders v. Dist. Ct. in & for Montrose Cnty.*, 444 P.2d 645, 650 (Colo. 1968). In these ways, the United States, like Petitioners, rests its argument on labels and magic words rather than the “nature” of such proceedings.

features are defining characteristics of this unique state-court power. *See* Sopko, *supra*, at 1569-72, 1574-75. Indeed, Section 2 has served this purpose for the Colorado Supreme Court before Rule 21 was first promulgated. *See, e.g., Sanders*, 444 P.2d at 650.

Rule 21 orders allow the court to expedite review of consequential issues. *See, e.g., Brooks*, 426 P.3d at 359. These orders develop state law while maintaining the proper operational efficiency of the judiciary. *See, e.g., Brown*, 495 P.3d at 958. Thus, unlike the party-focused remedies before this Court in *Atlantic Richfield* and its predecessors, Rule 21 as used here is an issue-focused tool of interlocutory review.

3. The Rule 21 order below differs from Montana’s supervisory writs before the Court in *Atlantic Richfield*

Petitioners and their amici’s core finality argument rests on the premise that Rule 21 is like Montana’s supervisory writs, which this Court held were final in *Atlantic Richfield*. But that premise misses how both features of state court practice operate.

First, the Montana Supreme Court’s supervisory writs, at issue in *Atlantic Richfield*, differ from its supervisory power. As in its sibling states, the Montana Supreme Court has used its supervisory

power to fulfill its managerial role, overseeing the operations of the judiciary. *See, e.g., State ex rel. Browman v. Wood*, 543 P.2d 184, 189 (Mont. 1975), *Matter of K.H.*, 701 P.2d 720, 720 (Mont. 1985). Such uses of this authority are typical of state high courts, including the Colorado Supreme Court's Section 2 power.

But Montana's supervisory *writs* are different. Unlike Rule 21, Montana's supervisory writs were created as explicit remedies against lower courts acting *ultra vires*, like extraordinary writs of mandamus and prohibition. *See* Larry Howell, "Purely the Creature of the Inventive Genius of the Court": *State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control*, 69 Mont. L. Rev. 1, 22-32 (2008). As with those writs, relief is conditioned upon a showing that there is no "adequate remedy" beyond the court's extraordinary relief. *E.g., State ex rel. Wellcome v. Dist. Ct. of Eighteenth Jud. Dist. in & for Gallatin Cnty.*, 406 P.2d 164, 164 (Mont. 1965). The Montana Supreme Court found *Atlantic Richfield* satisfied this exacting standard. Order, *Atlantic Richfield v. Christian*, No. OP 16-0555 (Mont. Oct. 5, 2016) (granting writ of supervisory control), <https://perma.cc/S5C8-FXGK>.

Second, Montana's supervisory writs lie against lower courts as a remedy to prevent such harm. Consistent with its historical roots, supervisory

writs issue where lower courts ignore or disregard settled points of law and where such decisions will cause irreparable harm. *E.g.*, *State v. Dist. Ct. of First Jud. Dist.*, 63 P. 395, 400 (Mont. 1900).⁴

Thus, unlike Rule 21 and other vehicles for an expedited appeal, supervisory writs are of a piece with the original writ proceedings this Court has understood as independent suits since they were designed to remedy contemptuous behavior causing injury that cannot be addressed on appeal, like mandamus and prohibition.

4. The decision below was not final

The decision below differs fundamentally from *Atlantic Richfield*.

Petitioners did not frame their Rule 21 petition as an extraordinary writ like mandamus or prohibition. Had they done so, this case would have been like *Atlantic Richfield* and likely “final.” *Cf. United States v. Dist. Ct. in & for Eagle Cnty.*, 401 U.S. 520 (1971).

⁴ This Court’s review in *Atlantic Richfield* reflected its deference to state courts’ own determinations whether such harm exists as a matter of state law. Thus, when the Court asserted jurisdiction over the supervisory writ in *Atlantic Richfield*, it did not adopt Montana’s conception of injury but rather accepted the high court’s understanding of its own law.

Rule 21(e)(1) requires parties seeking mandamus or prohibition to name the lower court as a proposed respondent. Petitioners did not do so, instead just naming “the Board of County Commissioners of Boulder County and the City of Boulder” as Respondents. Pet. for Order to Show Cause Pursuant to C.A.R. 21 at 1, 4, 5, *Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, (No. 24SA206), <https://perma.cc/W6BY-WY88> (Rule 21 Pet.). And Petitioners claimed the case “raises issues of significant public importance that the Court has not yet considered.” *Id.* at 7. They did not argue they faced irreparable harm, that a later appeal would be inadequate, or that the trial court had no jurisdiction. *Id.*

Thus, Petitioners did not seek a remedy against a lower court to address irreparable injury. The proceeding below was not an “original” writ as this Court’s precedents understand them. Instead, Petitioners chose Rule 21’s alternative path via Section 2 as a litigation fast track. They used the rule to expedite an appeal of a motion to dismiss. And the court accepted discretionary review of that motion based on the importance of the merits in the underlying litigation. While it refers to such proceedings as “original,” it was not considering collateral issues of jurisdiction, harm to Petitioners, or other issues that drove the finality analysis in *Atlantic Richfield* and its precursors.

This Court has already confronted this distinction under Colorado law.

In *United States v. Dist. Ct. in & for Eagle Cnty.*, 401 U.S. 520 (1971), the Court reviewed a judgment from the state supreme court. There, the United States unsuccessfully sought an original writ of prohibition from the Colorado Supreme Court to enjoin a water dispute in state trial court. 458 P.2d 760, 761-62 (Colo. 1969). This Court granted certiorari and affirmed on the merits. As with Montana's supervisory writs, the standalone proceedings in Colorado's high court contested the legality of an inferior court's authority over the litigation, required a showing that an ordinary appeal could not remedy the alleged harm, and offered distinct relief against the lower court.

By contrast, in *O'Dell v. Espinoza*, this Court dismissed a judgment from Colorado's high court that remanded the case for trial "for want of jurisdiction" because it was not final. 456 U.S. 430, 430 (1982). Recognizing the novelty and importance of the underlying legal issue, the state's high court bypassed the intermediate appellate court to resolve the issue and "guide the trial court in its conduct of proceedings on remand." *Espinoza v. O'Dell*, 633 P.2d 455, 459, 461 (Colo. 1981). This Court dismissed the case as non-final since the fact that the Colorado Supreme Court remanded the case for trial meant "its decision is not final as an effective determination of the

litigation.” *O’Dell*, 456 U.S. at 430 (quotation omitted).

Though *O’Dell* came to the Colorado Supreme Court under Rule 50 (allowing for certiorari before judgment) rather than Rule 21, the court has treated them interchangeably when reviewing Rule 21 orders under its Section 2 power. *E.g.*, *Reale v. Bd. of Real Est. Appraisers*, 880 P.2d 1205, 1211 (Colo. 1994) (Erickson, J., dissenting); *Goebel v. Colo. Dep’t of Insts.*, 764 P.2d 785, 792 (Colo. 1988). Both Rule 50 and Rule 21 enable the high court to address questions of public importance to Colorado.

Importantly, Rule 21 authorizes the court to intervene in litigation even earlier than Rule 50 allows. Colo. App. R. 50(a) (limiting expedited review to cases “newly filed or pending in the court of appeals”). To the extent that Rule 50 orders are non-final, *O’Dell*, 456 U.S. at 430, Rule 21 orders are less final still.

Petitioners’ discussion of Rule 21’s features fails to persuade that it constitutes a standalone proceeding. Pet. Br. 17-18.

First, they point to Rule 21’s requirement that litigants name the trial court as a respondent. Pet. Br. 17 (citing Colo. App. R. 21(e)(1)). But as the rule explains, this is only when petitioners seek a prerogative writ, and Petitioners did not do so in their

Rule 21 petition in any event. Rule 21 Pet. at 1, 4-5. Further, as a matter of local custom in Colorado, direct judicial participation as parties in such responses was largely abandoned long ago. *See, e.g.*,^{1B} Stephen A. Hess, Colo. Prac., Methods of Practice § 35:9 (7th ed.); Hoffman Mem., *supra* (noting Colorado’s trial court judges typically “just ignore [Rule] 21 orders to show cause”). And when trial courts do respond to Rule 21 orders, they are litigated by the Attorney General’s office or actual parties to the suit. *See, e.g.*, Hess, *supra*, § 35:9.

Second, Petitioners’ emphasis on Rule 21’s automatic stay provision cuts against their position. Pet. Br. 17-18. Per Rule 21, underlying proceedings are stayed only upon issuance of a Rule 21 order. Colo. App. R. 21(h)(2). But this is identical to the stay provision in Colorado’s rule governing interlocutory appeals to the state’s intermediate appellate court. *See* Colo. App. R. 4.2(f).⁵ And in any event, this Court’s own precedents reject the relevance of such features. *Compare, e.g., Atlantic Richfield*, 590 U.S. at 12 (reviewing Montana supervisory writs which provide supreme court with discretionary stay authority), *with, e.g., Jefferson*, 522 U.S. at 81 (holding Rule 5 review, which avails Alabama’s Supreme Court with the same authority, non-final).

⁵ Both rules share additional features. *See* Stephen G. Masciocchi & Tina R. Van Bockern, *Civil Interlocutory Appeals in Colorado State Courts*, 49 Colo. Law. 38, 42-43 (Oct. 2020).

Third, Petitioners’ reliance on the supreme court’s reference to Rule 21 proceedings as “original” reveals their misunderstanding of Colorado law. That terminology is ubiquitous in the court’s orders, including when it exercises its Section 2 and Section 3 powers. It therefore does not answer the question of what source of authority the court used to review this case. But more substantively, original jurisdiction in Colorado does not have the same binary meaning Petitioners need it to. Pet. Br. 17-18; see also Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. Chi. L. Rev. 83, 92-100, app. (2024) (documenting variation of original jurisdiction in state courts). For example, disciplinary hearings before the supreme court are characterized as “original proceedings,” and yet are considered appeals from inferior disciplinary bodies. *E.g.*, *In re Foster*, 253 P.3d 1244, 1247 (Colo. 2011) (“In this *original proceeding* in discipline, respondent ... *appeals* the orders” below (emphasis added)); *cf.* Colo. R. Civ. P. 242.33(a) (referring to such original proceedings as “appellate review”). So, too, with review of certain ballot initiatives. *See, e.g.*, *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 564 (Colo. 2012) (“In this *original proceeding* ... *we review* the Ballot Title Setting Board’s ... findings” (emphasis added)); *cf.* C.R.S. § 1-40-107(2) (noting that in such original proceedings the supreme court either “affirm[s] ... or revers[es]” the “action of the title board”).

To be sure, when the Colorado Supreme Court issues the kinds of extraordinary writs authorized by Section 3 via Rule 21 order, the judgment is usually final for purposes of § 1257, as *Atlantic Richfield* counsels. But that is not the order the supreme court issued below. And Petitioners’ failure to attend to the deliberate design of Colorado procedure does not make it so.

II. Federalism values are threatened if this Court claims jurisdiction over Colorado’s Judgment

The limits on federal jurisdiction embedded in § 1257 reflect the values of “cooperation and comity” at the heart of our system of constitutional federalism. *T.M. v. Univ. of Maryland Medical System Corp.*, 146 S. Ct. 1739, 1751, 1752 n.9 (2026) (quotation omitted) (Section “1257’s finality requirement rests in part on principles of federalism.”); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 48-49 n.7 (1987); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Respecting these values ensures that the federal courts will not intervene prematurely in matters pending in state courts, and therefore the state courts will be able effectively to implement their objectives in their judicial processes.

This careful architecture emerged from Congress’s clear decision in 1789 to impose a condition on the exercise of federal jurisdiction. See generally Henry M. Hart, Jr., *The Power of Congress to Limit*

the Jurisdiction of Federal Courts, 66 Harv. L. Rev. 1362 (1953). It implemented a principle of judicial federalism which goes back to the origins of the Judiciary Act of 1789. “This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.” *Radio Station*, 326 U.S. at 124. Requiring finality protects state courts from untimely interference by federal courts with their state decision-making processes, and safeguards values of comity that are central elements in our scheme of federalism. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 505 (1975) (Rehnquist, J., dissenting) (noting “comity and federalism are significant elements of § 1257 finality”).

The Court’s finding of jurisdiction here does not just threaten comity. It disrupts our larger system of constitutional federalism because it prevents states from construing and implementing their state constitutions, including state courts that interpret their own constitution and laws. *Id.* at 503 (“uncontrolled federal judicial interference with state administrative and judicial functions would have untoward consequences for our federal system”). This principle strikes just the right balance between federal and state judicial power, a balance that gives meaning to our system of federalism. *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison). *See also* Jeffrey H. Sutton, *Who Decides?*

States as Laboratories of Constitutional Experimentation (2021).

In one of this Court’s first opinions that recognized federalism as a meaningful value to be safeguarded by the judiciary in determining the scope and limits of federal jurisdiction, Justice Frankfurter described statutory jurisdictional limits as “an historical mechanism for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter.” *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939); *see also Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941). This harmony helps both the federal courts, by protecting their great power from interference by state courts and enabling their role as the ultimate arbiters of national law, and the state courts by giving them space to apply local law and procedure. Such balance is reflected throughout this Court’s jurisprudence, including the abstention doctrine, Eleventh Amendment immunity, the anti-commandeering doctrine and, as here, the interpretation of finality under § 1257.

Viewing the finality requirement as a nagging impediment to the assertion of federal jurisdiction now when this Court may have its own judgment on the ultimate dispute misunderstands the purpose of the finality requirement and the larger objectives of federalism. “Jurisdictional prerequisites,” Justice

Marshall wrote, “cannot be disregarded simply because it seems more economical for the Court to decide the case.” *See Am. Export Lines v. Alvez*, 446 U.S. 274, 289 (1980) (Marshall, J., dissenting). Rather, “considerations that determine finality ... have reference to very real interests – not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.” *Id.* at 289. *Michigan v. Long*, 463 U.S. 1032 (1983), reinforces this logic, by making clear that this Court will limit its interventions when a state decision is supported by adequate and independent state grounds. This doctrine aligns with other federalism-forward doctrines, such as abstention and the *Rooker-Feldman* doctrine, because they reinforce the values of “harmony” and “comity” so central to the architecture and overall purpose of our constitutional system. *T.M.*, 146 S. Ct. at 1751.

Federal jurisdiction should not flatten the diversity of state judicial processes and, in doing so, treat with insufficient respect the discretion that our federalism approach gives to the states to organize their system of judicial power and practice in the way they elect.

Allowing federal jurisdiction when the requirement of finality has not been met creates asymmetric impacts and degrades federalism, systematically shifting authority away from state courts to the federal courts. Boulder’s suit rests on

longstanding state causes of action—nuisance, trespass, unjust enrichment—whose development is the historic province of state common-law courts. Early federal intervention would freeze that development not just in Colorado but also in other states with cases that involve potential federal defenses to state-law claims.

Further problematic are the incentive effects that a ruling for premature jurisdiction would create within state courts. Consider a result that would expand the holding of *Atlantic Richfield* to cover this very different context. Petitioners’ jurisdiction argument is, in essence, that because the Colorado Supreme Court acted through an original proceeding under Rule 21, its decision “terminated” that discrete proceeding and is therefore final. This argument is especially corrosive because it turns a state’s own procedural generosity against it. Colorado, like many states, permits interlocutory supervisory review so that its highest court can guide lower courts efficiently. If invoking that mechanism converts an interlocutory ruling into a federally reviewable final judgment, state high courts face a perverse choice: curtail their internal appellate procedures or accept that every supervisory ruling on an issue a party claims is federal opens a door to immediate Supreme Court review. How a state frames review—a core attribute of state sovereignty—would be shaped by fear of federal intervention on interim issues. A state constitutional provision that empowers state courts to

review trial court rulings because of their importance would be underutilized because courts would worry about this Court's intervention. Moreover, it would limit state courts from developing their own law. The Colorado Supreme Court granted interlocutory review below because of the novelty of the underlying questions of state law. 586 P.3d at 167.

The Colorado courts have not finished their work here. The Colorado Supreme Court resolved a preemption defense at the motion-to-dismiss stage and remanded for trial. Not only does Petitioners' preemption argument—and this Court's review—remain available later, but Boulder must still prove causation, injury, and damages under demanding state tort standards. Petitioners retain every merits defense and they may obtain a judgment that would make federal intervention unnecessary. This case is the paradigm of a non-final, interlocutory decision. *Accord S. Pac. Co. v. Gileo*, 351 U.S. 493, 495-96 (1956) (“Since the issues of negligence and damages remain to be tried, there is no final judgment in the highest court of the State, and this Court, therefore, lacks jurisdiction....”). Eroding the finality requirement threatens federalism values and the balance of powers in our constitutional system of government. Whatever practical advantages Petitioners seek here by having this Court resolve the preemption question more quickly are not worth this threat.

Finally, if the Court asserts jurisdiction, it will undermine the traditional discretion accorded to state courts to define the scope of their own jurisdiction under their state constitutions. This discretion goes beyond the practical considerations of comity and respect but goes to the heart of what it means to entrust to the state judiciary meaningful authority to define and implement state constitutions.

CONCLUSION

The petition should be dismissed for lack of jurisdiction.

Respectfully submitted,

Eric R. Olson
Counsel of Record
Olson Grimsley
Kawanabe Hinchcliff &
Murray LLC
700 17th Street, Suite
1600
Denver, CO 80202
(303) 535-9151
eolson@olsongrimsley.com
Counsel for Amici Curiae

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APPENDIX

Amici are scholars of state and local courts and judicial federalism. All signatories are participating in their individual capacity, not on behalf of their institutions. Titles and institutional affiliations are provided for identification purposes only.

Professor Daniel B. Rodriguez
Harold Washington Professor of Law
Northwestern Pritzker School of Law

Professor Adam B. Sopko
Associate Professor of Law
University of Colorado Law School

Professor Jonathan Marshfield
Professor of Law
University of Florida
Levin College of Law

Professor Constance Van Kley
Assistant Professor
University of Montana
Alexander Blewett III School of Law

Professor Jonathan David Shaub
Norman & Carole Harned Associate Professor
of Law & Public Policy
University of Kentucky
J. David Rosenberg College of Law

Professor Robert F. Williams
Distinguished Professor of Law Emeritus
Rutgers Law School

Professor Quinn Yeargain
1855 Professor of the Law of Democracy and
Associate Professor of Law
Michigan State University College of Law