No. _____

In the
Supreme Court of the United States

BRANDON RINEHART,

Petitioner,

v.

PEOPLE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of California err in holding, in conflict with decisions of the Eighth Circuit, Federal Circuit, and Colorado Supreme Court, that the Mining Law of 1872, as amended, does not preempt state bans of mining on federal lands despite being "an obstacle to the accomplishment and execution of the full purposes and objectives" of that law?

PARTIES TO THE PROCEEDING

Brandon Rinehart is the defendant in this criminal case and was the respondent in the Supreme Court of California. The People of the State of California were the petitioners in that court, where the United States of America also participated as *amicus curiae*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brandon Rinehart respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California is available at 1 Cal. 5th 652 (Aug. 22, 2016) and is reproduced in the Appendix at A-1. The order denying rehearing was not reported and is reproduced in the Appendix at B-1.

The opinion of the California Court of Appeal is reported at 230 Cal. App. 4th 419 (Sept. 23, 2014) and is reproduced in the Appendix at C-1.

The decision of the California Superior Court for the County of Plumas is unreported and is reproduced in the Appendix at D-1.

JURISDICTION

The date of the decision sought to be reviewed is August 22, 2016. The Supreme Court of California denied a petition for rehearing on November 9, 2016.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Article VI, clause 2, of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Mining Law of 1872, 30 U.S.C. § 22, provides, in pertinent part:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 5653.1(b) of the California Fish and Game Code provides, in pertinent part:

> [T]he use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:

> (1) The department has completed the environmental review of its existing suction dredge mining regulations . . . .
>
> (2) The department has transmitted for filing with the Secretary of State . . . a certified copy of new regulations . . . .
>
> (3) The new regulations described in paragraph (2) are operative.
>
> (4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.
>
> (5) A fee structure is in place that will fully cover all costs to the department related to the administration of the program.

INTRODUCTION

This case raises important issues concerning the ability of states to prohibit activity on federal lands that federal law encourages. The Mining Law of 1872 proclaims that the "valuable mineral deposits" on federal lands shall be "free and open" to mining. 30 U.S.C. § 22. As our appreciation for the environment has grown, Congress has modified this pro-prospector maxim so that, today, it is more accurate to say that

federal lands are "free and open" to mining, so long as prospectors comply with reasonable regulations to mitigate adverse environmental impacts. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

This case is not about whether states have authority to regulate the environmental impacts of mining on federal lands. The Court recognized that authority in *Granite Rock*, 480 U.S. at 593. Rather, it is about whether a state, in lieu of regulating, can simply forbid federally encouraged activities on federal lands, without regard to the particular activity's impacts or whether they can be mitigated.

Suction dredge mining is a long-standing, common, and relatively inexpensive mining method. Using what is essentially a vacuum, suction dredge miners suck up sediment from a streambed, run it through a sluice box to extract gold and other minerals, and then return that sediment to the stream from which it came.

Although federal law gives states ample room to regulate suction dredge mining—and any other form of mining—to mitigate environmental impacts, California opted not to avail itself of the opportunity. Instead, under the guise of environmental regulation, California enacted a flat prohibition on suction dredge mining anywhere within the state, including federal lands, regardless of whether the particular mining would have any adverse environmental impacts and, if so, whether they could be mitigated. Cal. Fish & Game Code § 5653.1(b). By forbidding activity on federal lands which federal law encourages, that ban "stands as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Supreme Court of California upheld the state's mining ban, ruling that the Mining Law only preempts state regulations that undermine federal policy to the extent that it does so expressly (that is to say, not at all). Pet. App. at A-25. Notably, the decision did not discuss whether California's ban is temporary or permanent and, thus, did not base its holding on that question. Although Rinehart believes that the ban would be preempted even if considered temporary, that would be an issue to address on remand. Because the Supreme Court of California broadly ruled that no state regulation or prohibition of mining, no matter how severe or how permanent, is preempted by the Mining Law, this petition should be considered on that basis.

The decision below is contrary to *Granite Rock*, which held that states have some authority to regulate mining's environmental impacts, but suggested that state regulations "so severe" as to make mining "commercially impracticable" would be preempted. 480 U.S. at 587. Similarly, several federal courts of appeals and the Colorado Supreme Court have held that, although states may regulate mining's adverse impacts, the Mining Law preempts states prohibiting mining in lieu of regulating it. *See South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998); *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984); *Brubaker v. Bd. of Cnty. Commissioners*, 652 P.2d 1050 (Colo. 1982).

The Supreme Court of California's decision threatens to undermine the ability of the federal government to set policy governing how its lands are

used. The question presented is thus of recurring, national importance. This Court should grant certiorari to resolve the conflict created by the Supreme Court of California's decision and to preserve the delicate balance between state and federal authority established under this Court's *Granite Rock* decision.

STATEMENT OF THE CASE

Statutory and Regulatory Background

Federal Mining Law

In 1872, Congress enacted "An Act to promote the Development of the mining Resources of the United States," which is commonly known today as the Mining Law of 1872. *See* Sess. 2, ch. 152, 17 Stat. 91-96 (May 10, 1872).[1] The Mining Law was enacted in the wake of the California gold rush, to encourage economic development and settlement of the West. Marc Humphries, Congressional Research Service Report, *Mining on Federal Lands: Hardrock Minerals* 1 (May 18, 2007);[2] Bancroft G. Davis, *Fifty Years of Mining Law*, 50 Harv. L. Rev. 897, 897 (1937). It was highly successful on both fronts. *See* Humphries, *supra* at 1; *see generally* Andrew P. Morriss, et al., *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, 34 Envtl. L. 745 (2004).

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[1] http://www.loc.gov/law//help/statutes-at-large/42nd-congress/session-2/c42s2ch152.pdf.

[2] http://digital.library.unt.edu/ark:/67531/metadc805658/m2/1/high_res_d/RL33908_2007May18.pdf.

To this day, the Mining Law is the bedrock of federal mining policy.

Congress' general purpose in enacting the Mining Law was to encourage the discovery and profitable mining of the rich mineral resources on federal lands. "The obvious intent [of the Mining Law] was to reward and encourage the discovery of minerals that are valuable in an economic sense[.]" *United States v. Coleman*, 390 U.S. 599, 602 (1968); *see* John D. Leshy, *The Mining Law: A Study in Perpetual Motion* 17 (1987) ("[T]he 1872 act expressed the policy of free access to federal lands for mineral exploration and exploitation."); Sally K. Fairfax & Carolyn E. Yale, *Federal Lands: A Guide to Planning, Management, and State Revenues* 57 (1987) ("The purpose of the 1872 Mining Act was to encourage private individuals and corporations to locate and bring to market the minerals of the western territories.").

To effectuate this purpose, the Mining Law declares that "all valuable mineral deposits" on federally owned lands are "free and open" to exploration and mining. 30 U.S.C. § 22. To establish a mining claim, a prospector must conduct exploration work to locate valuable minerals. 30 U.S.C. § 26. Once he does, the prospector files a notice with the federal government describing the claim. 30 U.S.C. § 28. If a claim is sufficiently valuable and the prospector has performed a certain amount of work, he may file a patent application to obtain title to the land containing the claim. 30 U.S.C. § 29. Most claims, however, remain unpatented and are thus federally owned lands subject to the miner's rights under the Mining Law. Humphries, *supra* at 3. In addition to federal regulations, the Mining Law embraces self-regulation

by miners through "local customs or rules of miners in the several mining districts" but only "so far as the same are . . . not inconsistent with the laws of the United States." 30 U.S.C. § 22.

As appreciation of the environment grew, Congress updated the Mining Law several times to allow for federal environmental regulation. Congress excluded several types of resources from it, including oil, gas, and coal. *See* 30 U.S.C. §§ 181-270; *see also* 30 U.S.C. §§ 601-615 (excluding sand, gravel, stone, and several other materials); Sam Kalen, *An 1872 Mining Law for the New Millennium*, 71 U. Colo. L. Rev. 343 (2000) (discussing congressional and agency actions that have incorporated environmental protection into the Mining Law's structure). Congress also adopted general laws to regulate the use of federal lands and delegated the authority to administer them to federal agencies. *See, e.g.*, Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 43 U.S.C. § 1701, *et seq*. Pursuant to these statutes, several federal agencies regulate the environmental impacts of activities on federal lands, including mining. *See, e.g.*, 30 U.S.C. § 612(b) (authorizing mining claims to be regulated to protect surface resources).

The other significant change since 1872 is that Congress authorized certain public lands to be withdrawn from the Mining Law's purview. *See Lockhart v. Johnson*, 181 U.S. 516, 520 (1901). In 1910, Congress enacted the Pickett Act, authorizing the President to withdraw lands from the Mining Law's reach. 36 Stat. 847 (1910); *see* Davis, *supra* at 906. The Federal Land Policy and Management Act later superseded that statute, transferring the withdrawal authority to the Secretary of the Interior, subject to

congressional approval for any withdrawal exceeding five thousand acres. *See* 43 U.S.C. § 1714. That statute expressly authorizes the Secretary of Interior to withdraw lands from the Mining Law at the request of a state, if several criteria are satisfied. 30 U.S.C. § 1281.[3] The Secretary can also temporarily withdraw an area at a state's request, but that withdrawal must end "as promptly as practicable and in no event shall exceed two years." 30 U.S.C. § 1281(c).

The President may also withdraw federal lands from the Mining Law under the Antiquities Act. *See* Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (Dec. 4, 1905), *codified at* 54 U.S.C. § 320301. Under that statute, the President may declare historic landmarks, artifacts, and structures as national monuments and reserve (*i.e.* withdraw) lands necessary to their protection. *Id.*; *see Cameron v. United States*, 252 U.S. 450, 454-55 (1920).

Although Congress has updated the Mining Law by allowing environmental regulation of mining and some lands to be withdrawn, "much of the law's basic architecture remains in place." John D. Leshy, *Mining Law Reform Redux, Once More*, 42 Nat. Resources J. 461, 461 (2002); Christine Knight, *A Regulatory Minefield: Can the Department of Interior Say 'No' to a Hardrock Mine?*, 73 U. Colo. L. Rev. 619, 619 (2002) ("The General Mining Law of 1872 . . . although a statutory senior citizen at 130 years old, is not only

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[3] These criteria include: that the land withdrawn is in a predominantly urban or suburban area or is in an area where mining would adversely impact nearby residential uses; that the withdrawal will not interfere with any existing, valid mining rights; and the benefits of withdrawal exceed the economic benefits of allowing mining. 30 U.S.C. § 1281.

very much alive, but in remarkably good health." (footnote omitted)).

The Mining Law's purpose has also endured. In 1970, Congress adopted "An Act to establish a national mining and minerals policy," which confirmed "the continuing policy" to encourage mining on federal lands. Pub. L. No. 91-631, 84 Stat. 1876, § 2 (Dec. 31, 1970), *codified at* 30 U.S.C. § 21a. Congress' confirmation of the Mining Law's purpose, nearly a century after it was first adopted, maintained "the development of economically sound and stable domestic mining" as its first purpose, adding to it the promotion of more efficient mining methods and reduction of environmental impacts. *See* 30 U.S.C. § 21a.

California's mining ban

"California was shaped by the search for gold." Pet. App. at A-1. Perhaps no state owes more to this nation's rich mining history, a debt acknowledged through the inclusion of a prospector on the state's seal. *See* Sylvia L. Harrison, *Disposition of the Mineral Estate on United States Public Lands: A Historical Perspective*, 10 Pub. Land L. Rev. 131, 145-47 (1989) (discussing the history of mining in California and its role in the development of the Mining Law).

Suction dredge mining has been a part of California's history for at least 50 years. Pet. App. at A-2. A suction dredge is a motorized vacuum that sucks up streambed material through a two-to-four-inch hose. *See id.* The material is run through a sluice box to separate gold and any other heavy elements, and the remaining sediment is returned to the stream from which it came. *See id.* When occurring on federal land,

federal regulations may restrict the size of suction dredge equipment that can be used and the duration of that use. *See, e.g.*, EPA, *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, General Permit No. IDG-37-0000 (effective May 6, 2013).[4]

Historically, California also regulated suction dredge mining by requiring miners to obtain a permit from a state agency charged with avoiding adverse impacts to fish. Pet. App. at A-2. In 2009, however, California upended its regulatory regime by adopting a ban on suction dredge mining within the state. Pet. App. at C-17 to C-18.

The Legislature expressed concern that suction dredge mining could adversely affect fish, increase turbidity, and release toxins contained in sediment. The agency's subsequent environmental review showed that suction dredge mining's environmental impacts can vary based on the equipment and how and when it is used. *See* Cal. Department of Fish & Game, Suction Dredge Permitting Program FSEIR 4-33 (Mar. 2012), https://www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits (acknowledging that, depending on the circumstances, suction dredge mining can have environmental benefits or severe adverse impacts).

The ban applies to all suction dredge mining in the state, including mining on federal lands, regardless of whether the particular mining would have any adverse impact or whether any such impact can be mitigated. *See* Pet. App. at C-17 to C-18. Although suction dredges are used for a variety of purposes,

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[4] http://www3.epa.gov/region10/pdf/permits/npdes/id/IDG37_final_permit_mod_2014.pdf.

California's ban singles out mining for this adverse treatment. Non-mining uses of suction dredge equipment, including for maintenance of energy infrastructure and flood control, continue to be lawful, despite similar potential environmental impacts. *See* Cal. Fish & Game Code § 5653.1(d) (the ban "applies solely to vacuum and suction dredging activities conducted for instream mining purposes," and not suction dredging for any other purposes).

In 2012, the ban was extended by legislation forbidding the issuance of any suction dredge mining permits until the state agency adopts regulations that "fully mitigate" all potential environmental impacts. *See* Cal. Stats. 2012, ch. 39, § 7 (eff. June 27, 2012), *codified at* Cal. Fish & Game Code § 5653.1(a). However, the agency required to adopt those regulations had no statutory authority to do so. Pet. App. at E-6 to E-8. It alerted the Legislature to this problem in 2013, but the Legislature withheld the authority until October 2015—despite continuing to require these regulations before any mining permits could be issued.[5] *See* Pet. App. at A-3; S.B. 637, Cal. Stats. 2015, ch. 680 (enacted Oct. 9, 2015).

The 2015 legislation authorizes—but does not require—several agencies to adopt regulations and

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[5] The Legislature granted this authority to issue regulations only *after* the California Court of Appeal ruled that state regulations that render mining "commercially impracticable," as this one does, are preempted. *See infra* at 13-16. The Supreme Court of California's decision, upholding the ban under a theory that would allow it to remain in place forever, *see infra* at 16-19, excuses the Legislature and the agency from ever doing anything to lift it. *Cf.* S.B. 637 (noting that because of this litigation, "it is urgent that the Legislature act" to authorize suction dredge mining regulations).

standards for suction dredge mining and, once in place, resume issuing permits. S.B. 637. It also expressly authorizes a state agency to prohibit suction dredge mining. *See* Cal. Water Code § 13172.5(b)(3). No regulations have been adopted, or even proposed, under the 2015 legislation. *See* Pet. App. at A-3. Thus suction dredge mining remains completely banned in California, as it has been since 2009.

Factual Background

Rinehart has two contiguous placer mining claims, known as "Nugget Alley," in the Plumas National Forest. Pet. App. at C-3. A placer mining claim is a claim to the mineral resources in a streambed. Rinehart's claims are registered with the U.S. Bureau of Land Management. *Id.* at C-4. Like much of California, surrounding areas were thoroughly picked over by prospectors during the 19th and 20th centuries. But valuable gold deposits remain in streambeds, where they were carried by rushing upstream waters. *Id.* at C-7.

Rinehart and his father acquired Nugget Alley the same way prospectors have acquired mining claims for more than a century. They set out upon the "free and open" federal lands in search of gold and found it. Pet. App. at C-3 to C-4. After making their discovery, they complied with all the federal requirements to preserve their claim. They posted a notice at the site and filed similar notices with the county and the U.S. Bureau of Land Management. *Id.* at C-3.

For years, Rinehart mined Nugget Alley using a suction dredge under a valid California permit. Pet. App. at C-12. During that time, Nugget Alley proved to be profitable. According to Rinehart, he recovers half

an ounce of gold from his claim on an average five-hour day using his suction dredge. *Id.* at C-5. Although the price of gold is volatile, he earns roughly $750 for that effort. *Id.*

In June, 2012, Rinehart used his suction dredge equipment in Nugget Alley. Pet. App. at C-2 to C-3. Because of the ban, he did not have a valid state permit. *Id.* at C-2. Thus, his activity was in violation of the state law requiring the impossible-to-obtain permit. *Id.*

Proceedings Below

Rinehart is convicted for violating California's mining ban

Rinehart was criminally charged with two violations of California's suction dredge mining ban. Pet. App. at C-2. The parties agreed to have the court rule on the charges and stipulated to several facts concerning Rinehart's use of his equipment in violation of the mining ban. *Id.* at C-2 to C-3.

Rinehart's defense to the charges was that the ban was preempted by federal mining law. *Id.* at C-3 to C-12. To support his preemption defense, he offered evidence that a suction dredge was the only commercially practicable means of working his claim. *Id.* at C-5 to C-6. According to that evidence, the only lawful means left to him—using a shovel and pan[6]—is 96% less efficient. *Id.* That outdated method requires backbreaking labor, longer hours, and more people. *Id.* at C-6. Instead of making mining merely less profitable, shovel and pan mining is impossible at some water depths (without diverting the river) and does not

[6] *See* Cal. Fish & Game Code § 5653.1(e).

recover gold at sufficient quantities to cover the costs, especially not in the middle of a river or stream where the largest deposits tend to concentrate. *Id.* at C-5 to C-6. He also offered to produce expert witnesses who would testify that suction dredges are the only commercially practicable means of working streambed mining claims like Nugget Alley. *Id.* at C-5 to C-12.

The trial court excluded the evidence and denied Rinehart's preemption defense. Pet. App. at C-12 to C-13. Based on the stipulated facts, the court found him guilty, sentencing him to three years probation and imposing an $832 fine, which was suspended pending the probation. *Id.* at C-13.

The California Court of Appeal holds that the Mining Law preempts state laws that make mining "commercially impracticable"

Rinehart appealed his conviction to the California Court of Appeal, once again claiming that the state ban is preempted and the court erred by excluding the evidence offered to prove that defense. Pet. App. at C-13. At the Court of Appeal, Rinehart argued that the ban "stands as an obstacle to the accomplishment of the full purposes and objectives" of the Mining Law and several other federal mining and land use statutes. *Id.* at C-1.

The Court of Appeal agreed with Rinehart on the Mining Law's preemptive effect. It began by noting that, as this Court previously recognized, Congress' intent in passing the Act "was to reward and encourage the discovery of minerals that are valuable in an economic sense." Pet. App. at C-16 (quoting *United States v. Coleman*, 390 U.S. at 602). It also acknowledged states' authority to regulate mining's

adverse environmental impacts under *Granite Rock*. *Id.* at C-19 to C-20.

However, the Court of Appeal observed that *Granite Rock* says that regulations so severe as to make mining commercially impracticable are preempted. Pet. App. at C-23. And it noted that the Eighth Circuit, in *South Dakota Mining Association v. Lawrence County*, held that a county ordinance forbidding a mining method was preempted under this standard. Pet. App. at C-20 to C-23.

Following these decisions, the Court of Appeal held that if California's ban is "'so severe'" that it "frustrate[s] rights granted by the federal mining laws and, thus, ha[s] become [an] obstacle[] to the realization of Congress' intent in enacting those laws[,]" it is "unenforceable as preempted by federal mining law." Pet. App. at C-23 (quoting *Granite Rock*, 480 U.S. at 587).

Because most of the evidence relevant to this question had been excluded by the trial court, the Court of Appeal remanded the case for further fact-finding. Pet. App. at C-24. In its instructions, the Court of Appeal explained that the trial court must determine on remand whether California's "de facto ban on suction dredge mining permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?" *Id.*

The Supreme Court of California reverses

Rather than litigate that issue on remand, California appealed the case to the Supreme Court of California, which reversed. Although that court "d[id] not disagree" that the Mining Law was enacted "with

the larger purpose in mind of encouraging ongoing mineral exploration across the West[,]" it nonetheless denied that a state ban on mining could be preempted. *See* Pet. App. at A-25.

The Supreme Court of California began by observing that the Mining Law does not encourage mining at any cost, but recognizes that mining may have adverse environmental impacts and that federal agencies and, to some extent state agencies, have a role in regulating those impacts. Pet. App. at A-12 to A-13. From this uncontroversial proposition, the court set up a false choice: either Congress must have intended to preempt all state laws limiting mining or none. *Id*.

To support its holding, the court found that Congress "acquiesced" in a 19th century case in which a federal court issued an injunction against a mining company. Pet. App. at A-17 to A-21; *see Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753, 756 (C.C.D. Cal. 1884);[7] *cf. Bob Jones University v. United States*, 461 U.S. 574, 600 (1983) ("Non-action by Congress is not often a useful guide" and thus assuming congressional acquiescence is disfavored); *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). However,

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[7] *Woodruff* concerned hydraulic mining, which involves the spraying of pressurized water to erode soil and reveal mineral deposits beneath it. The process resulted in the dumping of significant amounts of debris into rivers, which harmed downstream property owners and constituted a nuisance. *See Woodruff*, 18 F. 753 at 756-57. Congress responded by adopting the Caminetti Act of 1893, which allowed the mining to resume once dams were constructed to catch debris. *See California ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 394 (9th Cir. 1985) (discussing the history of the Caminetti Act).

the Supreme Court of California ignored the fact that the case did not simply ban mining. Instead, the injunction specifically provided that "as it is possible that some mode may be devised in the future for obviating the injuries . . . so as to be both safe and effective, a clause will be inserted in the decree giving leave . . . to apply to the court for a modification or suspension of the injunction." *Woodruff*, 18 F. at 808-09. So, in addition to the fact that the decision was from a federal court—and thus preemption inapplicable to it—the injunction only applied until the mining company showed that it had mitigated its impacts. It was, therefore, more like a regulation of mining than an outright ban. California's ban, however, gives miners no opportunity to show that their activity has no adverse environmental impact or that any such impact can be mitigated.

For these reasons, the court held that, notwithstanding the Mining Law's admitted purpose, Congress had not indicated its intent to preempt state laws clearly enough. In effect, the court gave short shrift to conflict preemption because, in 1872, Congress did not foresee a conflict that would arise nearly a century and a half later and expressly preempt state laws that frustrate the Mining Law's purpose. *See* Pet. App. at A-25 ("Congress could have made express that it viewed mining as the highest and best use of federal land whenever minerals were found, or could have delegated to federal agencies exclusive authority to issue permits and make accommodations between mining and other purposes. It did neither . . ."). The decision also expressly rejected the Eighth Circuit's reasoning in *South Dakota Mining Association v. Lawrence County*. Pet. App. at A-25.

The Supreme Court of California recognized no limit on its holding. In particular, it did not consider whether California's ban is temporary or permanent and did not distinguish the Mining Law's preemptive effect based on this characterization. Pet. App. at A-25 to A-26. Rinehart believes that California's mining ban is preempted regardless of how it is characterized.[8] But, if this Court believes that characterization is relevant, that issue would need to be addressed on remand, with the benefit of the evidence that the trial court excluded.

According to the Supreme Court of California's rule, no state prohibition of mining could be preempted, no matter how burdensome or unjustified, despite standing as an obstacle to the accomplishment and execution of the Mining Law's acknowledged purpose. Pet. App. at A-25 to A-26. Rinehart asks this Court to review, and reverse, that decision.

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[8] As explained above, California's ban has been in place for eight years, with much of that time due to the Legislature's unexplained failure to authorize a state agency to adopt regulations. In contrast, if California had requested that the Secretary of Interior temporarily withdraw areas from mining, as permitted by 30 U.S.C. § 1281(c), the temporary measure could have remained in place for a maximum of two years. Alternatively, California could have followed the leads of the federal government and several states which have regulated suction dredge mining to avoid adverse environmental impacts. *See infra* at 24-25. But California declined to pursue its lawful options. This question also has no bearing on Rinehart's standing to pursue this appeal. Even if California eventually adopts suction dredge mining regulations, he would have standing to challenge the criminal sentence imposed below.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE EIGHTH CIRCUIT, FEDERAL CIRCUIT, AND THE COLORADO SUPREME COURT

The "ultimate touchstone in every preemption case" is the congressional purpose behind federal law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). State laws may be preempted because: (1) a federal statute or regulation expressly preempts the state law (express preemption); (2) federal regulation is so pervasive in an area that it has "occupied the field" (field preemption); or (3) the state law conflicts with federal law (conflict preemption), because it is impossible to comply with both or the state law erects an obstacle to the accomplishment of federal law's purpose. *See Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016).

Under this last test, "any state legislation which frustrates the full effectiveness of federal law is rendered invalid[.]" *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted). This is the "unavoidable consequence" of the Supremacy Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the

operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government.").

Although the Supreme Court of California acknowledged that Congress' "larger purpose" in enacting the Mining Law was to "encourag[e] ongoing mineral exploration across the West," it held that it has no preemptive effect on state laws that stand as an obstacle to the accomplishment of that purpose, including outright bans on mining. Pet. App. at A-25 to A-26.

That holding is not only deeply flawed, but cannot be squared with the decisions of this Court, the Eighth Circuit, the Federal Circuit, and the Colorado Supreme Court. *See Granite Rock*, 480 U.S. at 593; *South Dakota Mining Association*, 155 F.3d at 1007; *Skaw*, 740 F.2d at 934-35; *Brubaker*, 652 P.2d 1050. California's mining ban frustrates the Mining Law's purpose and is thus preempted. *See* James S. Burling, *Local Control of Mining Activities on Federal Lands*, 21 Land & Water L. Rev. 33, 48 (1986) (" '[T]he general purpose of the [Mining Law] is well understood; it was to encourage citizens to assume the hazards of searching for and extracting valuable minerals deposited in our public lands. . . .' This statutory purpose preempts any local attempts which would frustrate or prohibit mining." (quoting *United States v. Rizzinelli*, 182 F. 675, 682 (D. Idaho 1910) (footnote omitted)).

A. The Decision Below Is Inconsistent with This Court's Reasoning in *California Coastal Commission v. Granite Rock*

This Court last addressed the preemptive effect of the Mining Law thirty years ago in *California Coastal Commission v. Granite Rock*, 480 U.S. 572. *Granite Rock* was the mirror image of this case. Whereas, here, California takes the position that federal mining law has no preemptive effect whatsoever; in *Granite Rock*, miners argued that the preemptive effect was so strong that states had no authority to regulate them at all. *See* 480 U.S. at 580 ("Granite Rock argues . . . that there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law—that any state permit requirement is *per se* pre-empted."). Both extreme arguments should meet the same fate.[9]

In *Granite Rock*, this Court upheld a state permitting requirement because the Mining Law does not expressly preempt all state regulation of mining nor does it occupy the field. *Id.* at 583. Because the mining company's challenge was "broad and absolute[,]" this Court's "rejection of that challenge [was] correspondingly narrow." *Id.* at 593. The Court cautioned that its rejection of that express and field preemption challenge should not be construed to "approve any future [state regulation] that in fact

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[9] Rinehart does not ask this court to reconsider or overrule *Granite Rock*. As that decision recognizes, states may regulate mining's adverse environmental impacts, and many do. *See infra* note 14. This case is thus not about whether a state may regulate to protect the environment but whether, in lieu of regulating, it may simply ban federally encouraged activities on federal lands.

conflicts with federal law." *Id.* at 594. The Court hypothesized "a state environmental regulation so severe" that it would render mining "commercially impracticable."[10] *Id.* at 587. Such a regulation, the Court implied, would be invalid under obstacle preemption. *Id.*

This case is an opportunity to resolve the question left open by *Granite Rock*—at what point is a state regulation of mining so severe that it is an obstacle to the Mining Law's purposes? *See* John D. Leshy, *Granite Rock and the States' Influence Over Federal Land Use*, 18 Envtl. L. 99, 104 (1987) ("This is the gray area sketched out by Justice O'Connor [in *Granite Rock*], where 'a state environmental regulation is so severe that a particular land use would become commercially impracticable.'" (quoting *Granite Rock*, 480 U.S. at 587)).

B. The Decision Below Conflicts with a Decision of the Eighth Circuit

Unlike the Supreme Court of California, other courts have shown respect for Congress' purpose in enacting the Mining Law and found state laws that frustrate its purpose preempted by it. The decision below expressly conflicts with the only post-*Granite Rock* decision from a federal court of appeals on this issue. Pet. App. at A-25.

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[10] This was not a controversial position in the case, as even California acknowledged that a mining ban would preempted. *Id.* at 586 ("'The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land unless the regulation prohibits mining altogether . . . .'" (quoting *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1080 (9th Cir. 1985))).

In *South Dakota Mining Association v. Lawrence County*, the Eighth Circuit considered a preemption challenge to a county ordinance[11] that flatly forbade "the only mining method that can actually be used to extract [] minerals" on certain federal lands. 155 F.3d at 1007. The Eighth Circuit held that this outright ban was an obstacle to the Mining Law's purpose of encouraging the discovery and "economical extraction" of valuable minerals on federal lands. *Id.* at 1010-11.[12] The Eighth Circuit found it "[s]ignificant" that this Court "stressed [in *Granite Rock*] that the Coastal Commission did *not* argue that it had the authority to ban all mining." *Id.* at 1011.

Following *Granite Rock*'s rationale, the Eighth Circuit ruled that state environmental regulations are permitted but, when state laws become "prohibitory, not regulatory," they "completely frustrate[] the accomplishment of . . . federally encouraged activities." *Id.* "A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages." *Id.* To do so "offends both the Property Clause and the Supremacy Clause[.]" *Id.*

Just so here. California opted not to regulate suction dredge mining's potential environmental impacts, choosing instead to ban the federally

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[11] Although *South Dakota Mining Association* concerned a county ordinance rather than a state law, the same preemption analysis applies to both. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

[12] The Eighth Circuit recognized that Congress' purposes are more complex and include respect for the environment and state authority, *see supra* at 6-10, but nonetheless held that state regulation must be preempted if it wholly obstructs the Mining Law's primary purpose. *See* 155 F.3d at 1010.

encouraged activity entirely. It did so despite the fact that the federal government[13] and several states[14] regulate suction dredge mining to address California's concerns and its own state agency acknowledged that it could do the same.[15] California's mining ban is "prohibitory, not regulatory." *Id.* at 1011. Thus, the Supreme Court of California's decision upholding the ban cannot be reconciled with *South Dakota Mining Association*.

C. The Decision Below Also Conflicts with Pre-*Granite Rock* Decisions from the Federal Circuit and the Colorado Supreme Court

The conflict between the decision below and *South Dakota Mining Association* provides a compelling basis for review. But the conflict created by the Supreme Court of California's decision goes deeper. The decision below also conflicts with cases from the Federal Circuit and Colorado Supreme Court that were decided before *Granite Rock*. Although those cases are entirely consistent with this Court's decision, the Supreme

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[13] *See* EPA, *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, *supra*.

[14] *See* Alaska Department of Natural Resources, Division of Mining, Land & Water, Fact Sheet: *Suction Dredging* (Feb. 2012),http://dnr.alaska.gov/mlw/factsht/mine_fs/suctiond.pdf; Idaho Department of Water Resources, Recreational Mining Permits, https://www.idwr.idaho.gov/files/stream_channel/2016-Recreational-Mining-Letter-Permit.pdf; Montana Department of Environmental Quality, *General Permit for Portable Suction Dredging*, Permit No. MTG370000 (May 28, 2015), http://deq.mt.gov/Portals/112/Water/WPB/MPDES/General%20Permits/MTG370000PER.pdf.

[15] Pet. App. at E-6 to E-8.

Court of California dismissed them simply because they preceded *Granite Rock*. Pet. App. at A-24.

In *Skaw v. United States*, the Federal Circuit considered several miners' takings claims against the federal government for requiring a permit that a federal agency refused to timely process. 740 F.2d at 934-35. To avoid liability, the government argued that the miners did not have a property right in their claims because state law forbade suction dredge mining, the only practical means by which they could mine their placer claims.[16] *Id.* The Federal Circuit rejected that defense because the state suction-dredge mining ban conflicted with the miners' rights under the Mining Law. *Id.* It "would have made it impossible for plaintiffs to exercise rights theretofore granted by the mining laws" and was thus preempted. *Id.* at 940.

In *Brubaker v. Board of County Commissioners*, the Colorado Supreme Court considered a preemption challenge to a county's refusal to issue a permit for activity that was a necessary predicate to mining. 652 P.2d at 1052-54. Foreshadowing the *Granite Rock* decision, the court acknowledged that the Mining Law does not preempt all state regulation of mining on federal lands. *See id.* at 1056. But where a state "seeks not merely to supplement the federal scheme, but to prohibit the very activities contemplated and authorized by federal law[,]" it goes too far. *Id.* "Such

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[16] Beginning in 1955, Idaho required dredge and placer miners to obtain a permit from a state agency. *Id.* In 1977, however, the state amended the law to prohibit dredge mining in any form on the St. Joe River and its tributaries. *Id.*; *see State ex rel. Andrus v. Click*, 554 P.2d 969, 974-75 (Idaho 1976) (upholding the 1955 permit requirement but suggesting that a ban on mining would be preempted).

a veto power is not consistent with the Supremacy Clause." *Id.*; *see* Wendy I. Silver, *Local and Federal Regulation of Mining in a Wilderness Area*, 18 Colo. Law. 1967, 1967 (1989) (surveying federal and state preemption decisions regarding mining and concluding "a state or county permit requirement may be used to impose reasonable regulations on the exercise of the federal right to mine, but may not be used to prohibit mining").

The Supreme Court of California's decision depriving the Mining Law of any preemptive effect and upholding the state suction-dredge mining ban is squarely at odds with these decisions. As *Skaw* and *Brubaker* explain, states may regulate mining's potential environmental impacts but they may not simply ban or veto mining in lieu of regulating it. *Skaw*, 740 F.2d at 934-35; *Brubaker*, 652 P.2d at 1056. That is precisely what California has done. *See* Cal. Fish & Game Code § 5653.1. The conflict between the decision below and *Skaw* and *Brubaker* further underscores the need for this Court's review.

II

WHETHER STATES MAY FORBID FEDERALLY ENCOURAGED ACTIVITY ON FEDERAL LANDS IS AN ISSUE OF NATIONAL IMPORTANCE

Although the conflict created by the Supreme Court of California's decision alone warrants this Court's review, that need is heightened by the important and recurring nature of the question presented. The federal government owns vast areas of the country, the uses of which can be extremely controversial. Thus, the threat of states attempting to

frustrate Congress' chosen uses for these lands is significant. The decision below invites states to frustrate federal land management policies by limiting their preemptive effect to cases where Congress adequately foresees the conflict to expressly preempt contrary state law.

The federal government owns roughly 640 million acres in the United States, nearly 30% of the nation's land. *See* Carol Hardy Vincent, et al., *Federal Land Ownership: Overview and Data*, Congressional Research Service Report No. R42346 at 1, 3 (Dec. 29, 2014).[17] Federal land ownership is particularly prevalent in the West. Although the federal government owns a small fraction of the land in eastern states, less than 0.3% of Connecticut, Iowa, and New York, it owns as much as 84.9% in western states (Nevada). *Id.* at 3. For instance, it owns a majority of the land in Alaska, Idaho, Nevada, Oregon, and Utah. *Id.* at 4-5.

The Property Clause gives Congress an authority to regulate federally owned lands analogous to the states' police power. U.S. Const. art. IV, § 3, cl. 2; *see Camfield v. United States*, 167 U.S. 518, 525 (1897). The Court has "repeatedly observed" that decisions about the use of federally owned lands are "'entrusted primarily to the judgment of Congress'" and cannot be second-guessed by states or federal courts. *See Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

Although Congress' authority to decide the uses of federal lands is clear, its decisions are often controversial, especially in the western states where

[17] https://fas.org/sgp/crs/misc/R42346.pdf.

federal ownership is disproportionately concentrated. People understandably care a great deal about how "our" lands are used. Unpopular decisions about the use of these lands have sparked sharp protests. *See, e.g.*, Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers' Prison Terms*, N.Y. Times, Jan. 2, 2016, at A13;[18] Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. Times, Apr. 23, 2014, at A1;[19] Gladwin Hill, *Stakes Are High in the "Sagebrush Rebellion,"* N.Y. Times, Sept. 2, 1979, at E5.[20] They have also lead to innumerable lawsuits. *See, e.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (challenge to the application of a Park Service regulation to hovercraft use); *Salazar v. Buono*, 559 U.S. 700 (2010) (challenge to federal statute authorizing the transfer of federally owned lands to avoid the removal of a cross); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) (challenge to timber harvesting on Forest Service lands); *John R. Sand & Gravel Company v. United States*, 552 U.S. 130 (2008) (challenge to cancellation of lease to mine federally owned lands). If federal lands are put to conservation uses, someone will object. *See, e.g.*, *Wyoming v. U.S. Dep't of Interior*, 839 F.3d 938 (10th Cir. 2016); *Idaho Wool Growers Association v. Vilsack*, 816 F.3d 1095 (9th Cir. 2016); *United States v. Estate of Hage*, 810 F.3d 712 (9th Cir. 2016). If they are put to

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[18] http://www.nytimes.com/2016/01/03/us/oregon-ranchers-will-return-to-prison-angering-far-right-activists.html.

[19] http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html.

[20] http://www.nytimes.com/1979/09/02/archives/stakes-are-high-in-the-sagebrush-rebellion.html.

economic uses, someone else will. *See, e.g.*, *Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234 (9th Cir. 2015); *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015).

Congress' decision to encourage mining has been no exception. Some object to the mining of federally owned lands under any circumstances and have called for the Mining Law's repeal. *See* Robert M. Hughes & Carol Ann Woody, *A Mining Law Whose Time Has Passed*, N.Y. Times, Jan. 11, 2012, at A27.[21] Controversy over suction dredge mining on federally owned lands has not been limited to California. Since California adopted its ban, Oregon followed its lead by imposing a ban that is set to remain in place until at least 2021. Oregon S.B. 838, § 2(1). Like California's ban, Oregon's forbids suction dredge mining throughout the state, including federal lands, regardless of whether the particular mining would have any adverse environmental impact or, if so, that impact could be mitigated. *See id.*

The decision below threatens to further increase conflict over the uses of federal lands. Competing demands on these lands should be resolved in Congress or federal agencies, where Congress lawfully delegates this authority. *Cf.* Marla E. Mansfield, *A Primer of Public Land Law*, 68 Wash. L. Rev. 801, 821-57 (1993) (surveying the statutes and regulations that apply to the uses of federal lands).

States have a role to play, by supplementing the federal regime through the exercise of their police powers. *Granite Rock*, 480 U.S. at 580. But "those

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[21] http://www.nytimes.com/2012/01/12/opinion/a-mining-law-whose-time-has-passed.html.

powers exist only 'in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.'" *Kleppe*, 426 U.S. at 545 (quoting *Geer v. Connecticut*, 161 U.S. 519, 528 (1896)); *see Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905) ("'The right to supplement Federal legislation, conceded to the state, may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws.'" (quoting 1 Lindley on Mines, 2d ed. § 249)).

Limiting the preemptive effect of Congress' decisions about the use of federal lands to express preemption would be unreasonable. As this case demonstrates, the conflict over the use of federal lands may not arise until decades or centuries after legislation is enacted. To expect Congress to predict all future conflicts that may develop over the use of federal land, or else sacrifice the preemptive effect of its policy, would substantially erode Congress' power. It could also erode the states' power, by encouraging Congress to overly limit their ability to supplement regulation of federal lands out of fear for what future conflicts may arise.

Although directly addressed only to the Mining Law, the reasoning of the decision below could equally apply to state laws barring any other federally encouraged activity on federal lands. In addition to mining, this could include controversial activities on federal lands, like fracking and oil drilling, as well as relatively more benign activities, like livestock grazing. The decision below, therefore, threatens to inflame already heated conflicts over the uses of federal lands

and undermine Congress' primary authority to resolve these questions.

CONCLUSION

This case is an opportunity for the Court to resolve the question left open by *Granite Rock*—whether states may prohibit mining on federal lands or regulate it to the point that it is commercially impracticable, thereby frustrating the Mining Law's purposes. This question is of national importance and answering it would resolve a conflict between the California Supreme Court, on one side, and the Eighth Circuit, Federal Circuit, and Colorado Supreme Court, on the other. The petition for a writ of certiorari should be granted and the judgment reversed.

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Respectfully submitted,

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