No. 19-

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA CALEB BOHMKER, *ET AL.*
Petitioners,

v.

STATE OF OREGON, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 21, 2019

Questions Presented for Review

In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court considered the question whether states might assert permitting authority over the development of minerals on federal mining claims on federal land. Based upon California's assurance that it did not seek to ban the mining, this Court held that "reasonable state environmental regulation" was not preempted, though state land use regulation would be. *Id.* at 588-89. Multiple states now assert the right to ban mining as a use of specified federal lands categorically, rather than provide a permit-based process for imposing reasonable environmental standards on federal mining operations.

The Ninth Circuit, in sharp conflict with *Granite Rock* and multiple federal circuit and state supreme courts, has upheld an Oregon statute prohibiting any and all motorized mining on federal land in areas Oregon deems better suited for use as fish habitat, effectively banning the development of minerals on such federal mining claims. This raises the questions:

1. Whether a state statute prohibiting any and all motorized mining in state-designated zones on federal land is categorically preempted under the Supremacy Clause because Congress has occupied the field of land use control on federal land through the Federal Land Policy and Management Act (FLPMA), 90 Stat. 2743 (1976), the National Forest Management Act (NFMA), 90 Stat. 2949 (1976), and related statutes.

2. Whether state statutes prohibiting any and all motorized mining on federal mining claims are preempted as an obstacle to the accomplishment of the full purposes and objectives of Congress set forth in multiple mining and land management statutes.

Parties to the Proceeding and Rule 29.6 Statement

The parties to the proceeding are Joshua Caleb Bohmker, Larry Coon, Walter R. Evens, Galice Mining District, Jason Gill, Joel Grothe, J.O.G. Mining LLC, Michael Hunter, Michael P. Lovett, Millennium Diggers, Willamette Valley Miners, and Don Van Orman, appellants below and petitioners here (collectively, "the Miners"); the State of Oregon, Ellen Rosenblum (in her official capacity as the Attorney General of the State of Oregon), and Mary Abrams (in her official capacity as the Director of the Oregon Department of State Lands), appellees below and respondents here (collectively, "the State"); and Rogue Riverkeeper, Pacific Coast Federation of Fisherman's Associations, Institute for Fisheries Resources, Oregon Coast Alliance, Cascadia Wildlands, Native Fish Society, and the Center For Biological Diversity, intervenor-appellees below and intervenor-respondents here.

There are no parent or publicly-held corporations involved in these proceedings, but the small-scale miners and the entities with whom they are associated here form a vital part of the Congressional design for mineral development of the federal lands, which typically begins with small-scale mining and prospecting operations making

discoveries of valuable minerals before evolving to larger operations associated with larger discoveries. (*See* ER124.[1])

[1] "ER" refers to the Excerpts of Record petitioners filed with the Ninth Circuit.

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The Miners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The September 12, 2018 opinion of the Ninth Circuit that is the subject of this petition is reported at 903 F.3d 1029 (9th Cir. 2018), and is reproduced in the Appendix hereto at pages 1a-78a. The Ninth Circuit's October 3, 2018 order granting leave to file a late petition for rehearing *en banc* is reproduced in the Appendix at pages 79a-80a, and its October 25, 2018 order denying the petition for rehearing is reproduced in the Appendix at pages 81a-82a.

The District Court's order granting the State's motion for summary judgment (and denying the Miners') is reported at 172 F. Supp.3d 1155 (D. Or. 2016) and is reproduced in the Appendix at pages 85a-110a. The District Court entered final judgment in favor of the Federal defendants on March 29, 2016, reproduced in the Appendix at page 109a.

Basis for Jurisdiction in this Court

The Ninth Circuit entered its opinion on September 12, 2018, and denied a timely petition for rehearing on October 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Regulatory Provisions at Issue

The State has, as a practical matter, foreclosed mineral development of the Miners' federal mining claims created under the 1872 Mining Act, raising a question of federal preemption under:

- The Property Clause of the U.S. Constitution (Art. IV, § 3, cl. 2; App. 110a); and

- The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2; App. 110a).

The following federal statutes principally illuminate the question of federal preemption in this context:

- The 1866, 1870, and 1872 Mining Acts, as amended, including 30 U.S.C. § 22, 26, 28 & 35 (App. 121a-126a);

- The Surface Resources and Multiple Use Act of 1955, including 30 U.S.C. § 612(b) (App. 126a-127a);

- The Mining and Minerals Policy Act of 1970, including 30 U.S.C. § 21a (App. 120a-121a);

- The National Forest Management Act of 1976 ("NMFA"), including 16 U.S.C. § 1604(a) (App. 116a-119a);

- The Federal Land Policy and Management Act of 1976 ("FLPMA"), including 43 U.S.C.

§§ 1701(a)(12), 1712(c) & 1732(b) & (c) (App. 131a-153a); and

- Federal land management regulations including 36 C.F.R. § 228.8 and 43 C.F.R. § 3809.3 (App. 156a-162a).

The State's restriction giving rise to the suit is set forth in Oregon Revised Statutes 468B.112 & 468B.114 (App. 157a-158a).

Statement of the Case

Beginning with the first mining legislation in 1866, and continuing through the entire sequence of statutes cited above, Congress established a "continuing policy of the Federal Government in the national interest" (30 U.S.C. § 21a) to foster private development of mineral deposits on federal lands through the creation of private property rights in federal mining claims (*see id.* §§ 22, 26 & 35). Through multiple statutes, Congress has also carefully limited states to an advisory role in the regulation of the use of federal land. *E.g.,* 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(c).

The Miners operate small-scale suction dredges and other motorized devices to discover and develop underwater placer deposits of precious metals. Nearly all of the Miners own, individually or through their associations, federal mining claims on federal land, some on National Forest Lands, and others under the jurisdiction of the U.S. Bureau of Land Management. One miner is a manufacturer of the motorized devices; another is a prospector using

motorized equipment to prospect for (and hopefully acquire) his own federal mining claims; and the Galice Mining District is a local governing body for and by miners in the District boundaries, including many of the areas closed by the State's ban.

While Miners can still pan for gold by hand, for all practical purposes, the development of the mineral resources on the Miners' federal mining claims cannot proceed without the use of motorized equipment. (*See* App. 73a (dissenting opinion below cites State's concession to this effect).) Nor can additional deposits and mining claims containing underwater deposits be located without the use of motorized equipment.

As this Court has explained, "the property right here [granted by Congress] is a right to a flow of income from production of the claim". *United States v. Locke*, 471 U.S. 84, 105 (1985). That right is utterly destroyed by the State's ban.

The mining and prospecting activities of the Miners, as conducted under regulation prior to the State's ban, pose no environmental risks of any remaining regulatory significance to rational regulators. Prior to the State's mining ban, the Miners operated under seasonal operating restrictions to prevent the largely-imaginary risk of disturbing fish eggs in river and stream beds. (ER122-23.) They also operated under a federal Clean Water Act permit issued by the State to assure compliance with State water quality standards. (ER43-57.) Their mining activities, properly regulated, in fact improve spawning grounds for

anadromous fish by creating loose gravels favored by the fish and by removing toxins such as lead weight and mercury. (*See* ER67-68.)

Nevertheless, other, politically-powerful river user groups objected to continued mining, and induced the Oregon Legislature, first by moratorium and then by permanent ban, to outlaw "using any form of motorized equipment, including but not limited to the use of a motorized suction dredge, for the purpose of extracting gold, silver or any other precious metals from placer deposits of the beds or banks of the waters of the state". ORS 468B.112(3); ORS 468B.114(2). The statute singles out small-scale precious metals mining for closure, while allowing other uses of motorized equipment to continue, including much larger operations with correspondingly greater environmental impacts (*see* ER119).

While the area of the ban was limited to so-called "essential indigenous salmonid habitat" protection zones (ORS 468B.114(2)), in practice those zones were drawn expansively to include many areas inaccessible to anadromous fish (*e.g.*, ER116-17). The ban restricts development of a significant portion of remaining placer deposits of gold and other heavy minerals in the State. (*See* ER41 (map).) By contrast, all motorized non-mining activities in the so-called "essential indigenous salmon habitat," including removal of streambed material and even filling in the habitat entirely, continue to be permitted by the State. ORS 196.810(1).

The District Court had federal jurisdiction over the controversy pursuant to 28 U.S.C. § 1331, insofar as this action arises under the Constitution and laws of the United States. Its grant of summary judgment in favor of the State, upholding the State's ban, was then upheld by a divided opinion issued by the Ninth Circuit, giving rise to this petition.

REASONS FOR GRANTING THE WRIT

This case involves issues of exceptional importance to the national interest in mineral development, including the balance struck by Congress between mineral development and environmental protection and the role Congress intended to afford states in regulating mineral development on federal lands. Because of the Ninth Circuit's unique and expansive jurisdiction over Western lands containing most of the Nation's federal lands and mineral resources, this Court's review is especially important. Banning mining assisted by motorized equipment is a radical step that threatens to make continued discovery and commercial development of the Nation's mineral resources impossible, and regulatory uncertainty further cripples capital investment necessary to discover and develop the minerals.

Under the rule established by the Ninth Circuit, any state restriction on the use of federal lands for any environmental reason is allowed so long as some tiny remnant of mining use is allowed—here panning for gold by hand (*see* App. 43a; *cf. id.* at 77a (dissent)). This result is contrary to decades of federal preemption precedent requiring states to

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

The Ninth Circuit's ruling allowing a categorical state-law ban on the development of federal mining claims on federal land is contrary to this Court's decision in *Granite Rock*, decisions of the United States Courts of Appeal for the Eighth and Federal Circuits, and decisions of the Supreme Courts of Colorado and Idaho. It is contrary to 150 years of interpretation of Congressional intent and direction with respect to mineral development on federal lands, and with respect to the role of states in the management of federal lands.

By granting the writ, and reversing the Ninth Circuit, this Court can establish a clear precedent that states wishing to regulate the development of federal mining claims on federal land must afford a permit-based system in which miners have the opportunity to comply with generally-applicable environmental standards, rather than simply issuing categorical bans singling out mining activity for unique legislative hostility. Having denied a facial challenge to a state permitting scheme in *Granite Rock*, this Court should now clarify that standardless and discriminatory prohibition of mining on federal land is not a Constitutionally-permissible policy choice for states.

This case also raises the important issue whether federal courts should give a state's legislative assertions of environmental benefits as controlling in weighing claims of federal preemption.

By affirming the grant of summary judgment to the State, and declaring the challenged state law to be a narrowly-tailored and reasonable environmental regulation notwithstanding disputed material issues of fact, and effectively refusing to consider the degree to which the statute stood as an obstacle to the mineral development of appellants' federal mining claims, the Ninth Circuit departed from procedural norms in a way that that calls for the exercise of this Court's supervisory jurisdiction.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GRANITE ROCK*.

Congress, through the Property Clause of the U.S. Constitution, "exercises the powers both of a proprietor and legislator over the public domain". *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). It has "power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them'". *Id.* (quoting *Utah Power & Light v. United States*, 243 U.S. 389, 406 (1917)). This Court has repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations". *Id.* at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

Inasmuch as the "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 585 (1996), this Court considered some (but not all) of the statutes identified above in *Granite Rock* to resolve

the question whether state law restricting operations on federal mining claims was preempted by federal law.

This Court rejected the position of petitioner Granite Rock (and Solicitor General Charles Fried) that state regulation of mining operations on federal mining claims was categorically preempted by what one (of two) dissenting opinions called "an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departments of the Executive". *Granite Rock*, 480 U.S. at 606 (Powell & Stevens, JJ., dissenting).

Recognizing that the permitting requirement might nonetheless still be preempted "as an obstacle to the accomplishment of the full purposes and objectives of Congress", *id.* at 581, this Court allowed California to require federal mining claim holders to apply for permits under state law because "the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement." *Id.* at 589; *see also id.* at 593.

This Court accepted California's representation that it was "not seeking to determine basic uses of federal land; rather it is seeking to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion". *Id.* at 587 (quoting California brief). The dissenters warned against "giv[ing] ear to that claim," *id.* at 614 (Scalia & White, JJ.,

dissenting), and the "intrusive effect of duplicative state permit systems," *id.* at 605 (Powell & Stevens, JJ., dissenting).

By 2009, California had repudiated its assurances to this Court and flatly ceased issuing permits (albeit under a different statutory scheme). When a miner was criminally prosecuted for want of a permit, the California Supreme Court upheld the refusal to issue permits against a federal preemption challenge. *People v. Rinehart*, 1 Cal.5th 652 (Cal. 2016). That case produced a petition for a writ of certiorari considered last Term (Case No. 16-970), but the Solicitor General recommended against granting the writ, in part because this case was pending and would provide a superior and broader vehicle for review of the important Constitutional questions presented.[2] This Court acted consistently with the recommendation and denied the writ *sub nom. Rinehart v. California*, 138 S. Ct. 635 (2018).

This case is that broader vehicle for review, involving Oregon's determination not to suspend a permitting program, but to affirmatively outlaw any motorized mining uses in designated areas of federal land, including on the federal mining claims of the Miners and others. In upholding the State's statute banning the mining, the Ninth Circuit repeatedly rejected the fundamental premises of this Court's *Granite Rock* decision in a way that undermines the

[2] Brief of the United States as Amicus Curiae, No. 16-970, at 22 n.7.

careful design of Congress occupying the field of use regulations governing public lands, and utterly frustrates Congress' mineral development objectives—the two classic and independent bases for federal preemption. *See Granite Rock*, 480 U.S. at 581. Because of the categorical nature of Oregon's ban, and the Ninth Circuit's insistence that the State's environmental motives were controlling as a matter of law, this case is an ideal vehicle to consider the exceptionally important questions of federal preemption presented.

A. How the Ninth Circuit Rejected this Court's *Granite Rock* Decision

In *Granite Rock*, this Court declared that "we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in the national forests." *Id.* at 585. This Court explained:

> "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used,

> damage to the environment is kept within prescribed limits."

Id. This Court held that notwithstanding substantial land use aspects of the California statute (*see generally id.* at 607-10 (Scalia & White, JJ., dissenting)), the challenged California law could operate, at least in part, as an environmental permitting statute rather than a land use regulation:

> "While the [California law] gives land use as well as environmental regulatory authority to the Coastal Commission, the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit. . . . Since the state statute does not detail exactly what state standards will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission to limit the regulations it will impose in those circumstances."

Id. at 586. No such subtleties are present in the Oregon statute; as the dissent noted, "the means of accomplishing the environmental purpose undisputedly prohibit a particular use of the land, without reference to an environmental standard to be achieved." (App. 68a.)

The Ninth Circuit avoided this Court's assumption that land use regulation is categorically preempted by asserting that the statute "does not choose or mandate land uses". (App. 26a.) Of course, to outlaw motorized mining as a land use is to choose

non-motorized mining (or really, no mining at all). Indeed, the State has in substance mandated the use of Miners' federal mining claims and other federal land as fish habitat reserves. The State's policy choice overturns the federal government's determination to designate these portions of its property either open for mineral entry,[3] or, as here, where valuable discoveries have been found and claimed, to designate the land for mineral development. Simply put, the federal government has chosen a mining use for the claims involved, and the State has vetoed that choice in favor of use as fish habitat.

Because nearly any Congressionally-authorized use of federal lands may be asserted to have a significant and adverse environmental impact, the Ninth Circuit's ruling gives states full control to veto nearly any federally-authorized uses of federal land—precisely the result feared by the dissenting justices in *Granite Rock*. There is every reason to anticipate greater and greater interference with Congressional objectives if this Court does not grant the writ and clarify the scope of state regulation.

The Ninth Circuit justified conflict with *Granite Rock* by "assert[ing] that the *Granite Rock* standard is somehow non-binding dicta (App. 63a n.2

[3] Significantly, Congress has acted to restrict the authority of the Secretary of Interior to withdraw land from mineral entry (*see* 43 U.S.C. § 1714), another reason it is unreasonable to infer Congressional intent to allow *a state* to withdraw, *de facto*, large areas of federal land from mineral use.

(dissenting opinion)). However, as the dissent explains (and the dissent by Justices Scalia and White in *Granite Rock* corroborates), this Court's observations on the distinction between regulating uses and regulating environmental impacts though reasonable permit conditions transcended mere *dicta*. The Ninth Circuit's opinion also suggested that Oregon's restrictions were imposed outside the State's general land use planning system (App. 32a); as the dissent points out, "there are other land use statutes outside the code sections the majority identifies" (App. 66a).

The opinion goes further in its conflict with *Granite Rock* by attacking at length this Court's holding that even a state restriction characterized as "environmental regulation" may be preempted if it is "so severe that a particular land use would become commercially impracticable" (*Granite Rock*, 480 U.S. at 587). The Ninth Circuit feared, among other things, that "virtually every environmental regulation will render at least some mining claims commercially impracticable" (App. 28a), but Congress specified a role for state air quality and water quality standards regardless of commercial impracticability (*e.g.*, 43 U.S.C. § 1732(c); *see also Granite Rock*, 480 U.S. at 599 (Powell & Stevens, JJ., dissenting; review of statutory language, including other state standards allowed by Congress). For this reason, the Court may wish to reconsider the *Granite Rock* holding to the extent it grants independent regulatory authority to states overriding federal agency decisions in areas beyond those specified by Congress. Congress never intended for states to ban activities on federal lands that could proceed in

perfect compliance with generally-applicable environmental standards.

B. How the Ninth Circuit's Significant Reinterpretation of Federal Mining and Land Management Law Threatens the National Interest.

The Ninth Circuit's extended rejection of this Court's line-drawing exercise in *Granite Rock* between permissible and impermissible state regulation (App. 26a-28a & 37a-38a) was ultimately premised on an abrupt and unsupported reinterpretation of federal mining and land use law. Congress has always recognized that minerals can only be extracted from the particular locations where they are found, and that some degree of environmental impact is necessary and inevitable in that process. By denying this underlying axiom of federal mining law and land management regulation, the Ninth Circuit's rule permits any parochial interest that gains weight in a state legislature (or even in a state agency or locality), to totally frustrate the national interest in mineral development of federal lands.

According to the Ninth Circuit, Congress has always intended to allow states to prohibit mining on federal mining claims because mineral development is always subject to "environmental needs" (*see, e.g.,* App. 15a (citing 30 U.S.C. § 21a)), and mining is simply not the "highest and best use of federal land wherever minerals are found" (App. 28a (citing *Rinehart*, 377 P.3d at 830).) This Court's review of the Ninth Circuit's remarkable reinterpretation of

federal mining and land use law is especially important because most federal lands and mineral resources lie under the jurisdiction of the Ninth Circuit. Other Circuits are seldom presented with the questions raised herein.

A review of the relevant statutes demonstrates the striking and significant nature of the Ninth Circuit's statutory reinterpretation. The 1872 Mining Act declared:

> . . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, 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 and those who have declared their intention to become such, 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."

30 U.S.C. § 22. As discussed below, for 150 years, the "free and open" language and related features of federal mining law have been held to create a powerful federal objective in mineral development that will supersede contrary state laws standing as an obstacle to mineral development.

Defying yet another aspect of *Granite Rock*, however, the Ninth Circuit made a cornerstone of its decision the holding that § 22 "*expressly incorporates state regulation of mining activity*, [by] stating that exploration authorized by the statute must occur 'under regulations prescribed by law.'" (App. 44a (emphasis added); *see also id.* at 20a (Congress imposed a general requirement to follow state laws through § 22).) It is obvious, as this Court observed in *Granite Rock*, that the early mining laws "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation". *Granite Rock*, 480 U.S. at 582.

Rather, the phrase "regulations prescribed by law" language in § 22 refers to provisions concerning how title to mining claims is acquired and held, which, whether enacted by states or "local customs or rules of miners," must be consistent with federal law. The Ninth Circuit's novel reinterpretation of § 22 conflicts with an entire line of earlier decisions of this Court explaining the role and development of § 22 and the other early statutes with which it

should be interpreted *in pari materia*.[4] *See, e.g., Jackson v. Roby*, 109 U.S. 440, 440-41 (1883); *Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905).

Until 1955, Congress granted miners such as petitioners "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26; *see also* 30 U.S.C. § 35 (same rules for placer claims). Congress then passed the Multiple Use Act, which provides, in pertinent part, that

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United

[4] To assist in interpreting these cases, § 22 began in 1866 as 14 Stat. 251, ch. 262, § 1, and was later recodified as Revised Statutes § 2319. These statutes were enacted against a backdrop in which Congress made it clear, as Western states like Oregon were admitted to the Union, that they "shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof . . .". 11 Stat. 383 (1859) (Oregon); *see also* 9 Stat. 452 (1850) (California). Barring the use of motorized equipment necessary to make valuable discoveries of minerals necessary to obtain federal mining claims plainly interferes with the Congressional objective of these statutes as well.

> States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . . *Provided further,* That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

30 U.S.C. § 612(b) (emphasis added).

The two provisos are important in assessing Congressional intent and federal preemption. Regrettably, in *Granite Rock*, this Court did not address the preemptive significance of either.

The first proviso constitutes "Congress' prohibition on regulations that 'endanger or materially interfere with' mining operations". *United States v. Backlund*, 689 F.3d 986, 996 n.9 (9th Cir. 2012); *see also In re Shoemaker*, 110 I.B.L.A. 39 (July 13, 1989) (U.S. Bureau of Land Management may not engineer fish habitat improvement interfering with mining).[5]

The Ninth Circuit thus infers an intent by Congress to allow state regulation which *does* materially interfere with mining operations, even as Congress has denied such regulatory authority to federal agencies, because Congress struck the balance in favor of developing minerals at the expense of necessary injury to surface resources (including fish and wildlife).[6] Later, Congress would clarify that certain state environmental standards could be applied, but never authorized any and all state regulation.

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[5] Many earlier statutes concerning the Forest Service also show the Congressional intent to protect and foster mineral development. *See generally* 16 U.S.C. §§ 551 (limited authority to prevent "depredations upon the public forests") & 478 (explaining that § 551 shall not prohibit development of mineral resources); *see also id.* §§ 472 (limiting Service authority over laws affecting mining), 475 (purpose to exclude mineral lands from forest purview) & 482 (same).

[6] Federal fish and wildlife protections, such as the Endangered Species Act, continue to apply to operations on federal mining claims, but federal agencies confirm that small-scale motorized mining of this sort may proceed consistently with the Act. (*See* ER25.)

In the second proviso, Congress expressly addressed the scope of state law in relation to federal mining claims, ensuring that state law schemes for water rights would not be affected. This language is also inconsistent with any intent by Congress to give broader effect to state law. *Expressio unius est exclusio alterius.*

Language in the 1970 Mineral Policy Act cited by the Ninth Circuit merely established national goals for "orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs . . .". 30 U.S.C. § 21a(2). Congress wanted to foster "the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land" (*id.* § 21a(4)), not authorize general state environmental regulation generally, much less authorize mining bans.

When enacting the FLPMA and NFMA in 1976, Congress again made unmistakable its intent to assure the primacy of mineral uses for mineral lands and continued to make clear the limited and advisory role of state law. FLMPA called upon federal land managers to avoid "*unnecessary* or *undue* degradation of federal lands" (43 U.S.C. § 1732(b); emphasis added), while managing federal land "in a manner that recognizes the Nation's need for domestic sources of minerals" (*id.* § 1701(a)(12)).

The NMFA referred back to the Multiple-Use Sustained Yield Act of 1960 (16 U.S.C. § 1604(e)(1)),

which in turn carefully limited the Forest Service's authority over outdoor recreation, range, timber, watershed, wildlife and fish purposes to ensure no interference with mineral development (*see* 16 U.S.C. § 528; *see also* statutes cited *supra* n. 5). Congress has always recognized that minerals must be extracted where found, and that some degree of environmental degradation is *necessary* (and thus not undue) in that process.

In addition, as the dissent below explains, both NMFA and FLPMA "expressly designate the level of state participation contemplated by federal law" (App. 58a), generally consigning the state to a consultative role.[7] All of these and other consultative requirements "would be superfluous . . . if the States were meant to have independent land use authority over federal lands". *Granite Rock*, 480 U.S. 613 (Scalia & White, JJ., dissenting).

FLMPA provides that the Secretary of Interior may require "compliance with [an] applicable State or Federal air or water quality standard or implementation plan" (43 U.S.C. § 1732(c)), but the final decision for compliance is left with the

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[7] Another statute showing the Congressional intent to limit states to advisory role is 30 U.S.C. § 1281, providing a process for states to petition the Secretary of Interior to exclude particular areas from mining operations where there is an "adverse impact on lands used primarily for residential or related purposes". While the Ninth Circuit correctly noted that Oregon could not utilize this statute to set aside federal land for fish habitat (App. 16a n.4), it is further confirmation of Congressional intent to limit states to advisory roles.

Secretary, and Oregon's mining ban is not an "air or water quality standard or implementation plan". It was because the Miners' use of motorized equipment on their federal mining claims could proceed in perfect compliance with environmental standards that the State resorted to zoning them out of existence by special statute.

The use of the term "standards" is vital to interpreting Congressional intent. As the dissent explained,

> "standards identify an environmental end to be achieved and offer a means of measuring the degree to which a particular use conflicts with an environmental objective. They are also facially neutral towards varying uses of the land."

(App. 65a.) Granting the writ and reversing the Ninth Circuit would leave mining operations subject to generally-applicable environmental standards developed by state and federal agencies—standards the Miners can meet. This Court's clarification of *Granite Rock* to afford a role for state environmental *standards* will accommodate any and all legitimate environmental objectives, while restraining Constitutionally-prohibited restrictions on uses of federal lands.

By contrast, the radical alternative put forth by the Ninth Circuit allows a state to veto any and all federally-approved uses of federal land for any environmentally-related reason it asserts. While a

bare majority of this Court concluded in *Granite Rock* that "reasonable" environmental restrictions would not upset the balance set forth by Congress in the foregoing statutes, allowing categorical mining bans (without any effective opportunity to challenge their reasonableness once an environmental purpose is claimed) "necessarily conflicts with the federal system". *Granite Rock*, 480 U.S. at 605 (Powell & Stevens, JJ., dissenting).

Consistent with the foregoing statutes, Forest Service regulations provide that mining operations should be conducted "so as, *where feasible,* to minimize adverse environmental impacts . . .". 36 C.F.R. § 228.8 (emphasis added). This includes compliance with state air and water quality standards. *Id.* § 228.8(a) & (b). With respect to the protection of fish habitat, miners are to take "all practicable measures to protect" it, *id.* § 228.8(e), not to cease mining when some level of impact is unavoidable.

The Ninth Circuit pointed to language in *Granite Rock* in which this Court reviewed the Forest Service regulations and loosely characterized them as requiring "coincident compliance with state law as well as federal law" (App. 98a (quoting *Granite Rock*, 480 U.S. at 584)), but the regulations are lawful as requiring compliance with air and water quality standards expressly intended to apply by Congress. The regulations would not be lawful if misconstrued to require compliance with any and all state restrictions asserted to benefit the environment

notwithstanding material interference with mineral development.

U.S. Bureau of Land Management regulations cited by the Ninth Circuit do purport to require miners to comply with any state regulation which "requires a higher standard of protection for public lands". 43 C.F.R. § 3809.3. This regulation is patently unlawful in light of the Congressional restriction on agency authority in 30 U.S.C. § 612(b) and the Congressional protection of mineral development. *Cf. Granite Rock*, 480 U.S. at 583 (no challenge made to Forest Service regulations). Inasmuch as the Secretary of Interior has the "ultimate decision" concerning uses of federal lands (H.R. Conf. Rep. No. 94-1724, p. 58 (1976)), and is commanded to foster mineral development while avoiding only environment impact that is unnecessary in that process, telling states they may impose any level of restrictions without regard to mining impacts is not a supportable exercise of his regulatory discretion.

Moreover, since *Granite Rock*, this Court has refined its use of federal agency regulations in assessing questions of preemption. *See generally Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness"). The Ninth Circuit rejected this line of Supreme Court authority as well through its repeated citations of § 3809.3 (App. 20a, 51a). Neither the Forest Service nor the U.S. Bureau of Land

Management has ever attempted to explain how telling states they can prohibit mining would be consistent with the statutes confided to their administration.

In sum, the Ninth Circuit has misinterpreted a whole host of federal statutes to allow any environmental concern asserted by a state to veto federal mineral development, casting aside the very precise roles for states crafted by Congress with respect to regulation of uses of federal lands. Congress manifestly never intended to allow states to single out and ban particular mining activities on federal land, much less all motorized mining. Unless this Court grants the writ and re-establishes the balance between state and federal authority over federal lands, mineral development and other uses of federal land throughout the West will be crippled by state vetoes, including uses approved by the federal land managers charged by Congress to manage federal lands.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH EIGHTH CIRCUIT AND FEDERAL CIRCUIT DECISIONS ON THE SAME MATTER.

The Eighth Circuit has straightforwardly applied *Granite Rock* to strike down a state law prohibition "of any new or amended permits for surface metal mining within the Spearfish Canyon Area" in the famous Black Hills region. *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998),

As the Eight Circuit explained:

> "The ordinance's *de facto* ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted."

Id. at 1011 (emphasis added). Again, the State here conceded at oral argument before the Ninth Circuit that it has put forth a *de facto* ban on mineral development in the restricted areas. (*See* App. 73a.)

The Ninth Circuit rejected the Eighth Circuit's simple and practical distinction between "prohibitory" and "regulatory" actions by states. The Ninth Circuit professed to find the Eighth Circuit's

distinction "unworkable". (App. 43a.) Far from being unworkable, the rule easily identifies any state law restriction that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in the mining laws, *Granite Rock*, 480 U.S. at 581, even without regard to the considerations of "commercial impracticability" discussed by this Court.[8]

While the Ninth Circuit's remarkable reinterpretation of federal mining law allowed it to find that Oregon's ban "does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress" (App. 2a), that holding is premised on its erroneous divination of an express Congressional intent to allow any and all state regulation under the 1872 Mining Act, as amended, and its rejection of what it formerly called "the all pervading purpose of the mining laws . . . to further the speedy and orderly development of the mineral resources of our country". *United States v. Nogueira*, 403 F.2d 823 (9th Cir. 1968) (quoting *Bagg v. New Jersey Loan Co.*, 88 Ariz. 182, 354 P.2d 40, 45 (1960)).

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[8] The Ninth Circuit had previously and easily struck down state veto power over oil drilling as an obstacle to the Mineral Lands Leasing Act of 1920, explaining that "[t]he federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress". *Ventura County v. Gulf Oil Co.*, 601 F.2d 1080, 1084 (9th Cir. 1979).

The United States Court of Appeals for the Federal Circuit, in a decision preceding *Granite Rock*, also found a state law banning one of the same kinds of small-scale mining at issue in this case—suction dredge mining to be preempted by federal law. *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). In order to find that federal takings compensation was available from federal regulatory action, the Federal Circuit had to find an earlier state statute restricting mining preempted, and it did so:

> "Under the Act of May 1, 1872, plaintiffs had the property right to possess and mine to exhaustion the minerals located on their unpatented claims without payment of royalty. [Citations omitted.] Since it prohibited dredge mining on federal land, compliance with the 1977 [Idaho] Act would have made it impossible for plaintiffs to exercise rights theretofore granted by the mining laws. The Idaho Supreme Court has recognized that federal legislation necessarily overrides such a conflicting state law. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 974 (1976) (dictum)."

Skaw, 740 F.2d at 940. This case is illustrative of many that needed to read no further than 30 U.S.C. § 22 to find Constitutionally-forbidden interference with the important federal purpose of fostering mineral development on federal lands.

The Ninth Circuit distinguished *Skaw* and many other contrary cases (some discussed below) as preceding the *Granite Rock* holding that reasonable state environmental restrictions might be imposed in a permitting process. (App. 51a-52a.) That is a distinction without a difference, because the state statute involved in *Skaw* was an outright ban by the Idaho Legislature akin to the one at issue here (forbidding suction dredging in the St. Joe River), and was not a permitting statute.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH STATE SUPREME COURT RULINGS

The Ninth Circuit's holding is flatly contrary to the holding of the Supreme Court of Colorado in *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982). The Colorado Supreme Court struck down a county's attempt to prohibit core drilling to determine the validity of a federal mining claim, explaining that this

> ". . . reflects an attempt by the County to substitute its judgment for that of Congress concerning the appropriate use of these lands. Such a veto power does not relate to a matter of peripheral concern to federal law, but strikes at the central purpose and objectives of the applicable federal law. The core drilling program is directed to obtaining information vital to a determination of the validity of the appellants' mining claims. Recognition of a power in the Board to prohibit that activity

> would contravene the Congressional determination that the lands are 'free and open to exploration and purchase,' 30 U.S.C. § 22, and so would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' under the mining laws."

Brubaker, 652 P.2d at 1056-57.

This case, though preceding *Granite Rock*, is perfectly congruent with it: the County had a permitting system, but as applied to the mining operation, the drilling restriction constituted a Constitutionally-forbidden obstacle to mineral development. The case confirms that state law restrictions preventing citizens from obtaining federal mining claims—like Oregon's ban on motorized equipment needed to demonstrate a valuable discovery—are obviously forbidden obstacles to Congressional objectives in the mining law.

The Ninth Circuit's decision is also contrary to the Idaho Supreme Court *dictum* cited in *Skaw*. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 974 (1976). In the *Andrus* case, the Idaho Supreme Court again anticipated *Granite Rock* by upholding an Idaho permitting scheme for dredge mining. Just as in *Granite Rock*, the Idaho Supreme Court held that reclamation and other provisions of the Idaho Act would be "unenforceable to the extent they rendered it impossible to mine the lode deposit" (554 P.2d at 975), but found no such evidence of

impossibility given the record before it and the facial nature of the challenge (*see also id.* at 975 n.3). Here, impossibility is conceded.[9]

In short, an entire body of law offering a simple, common sense interpretation of when state restrictions are a Constitutionally-forbidden obstacle has been overturned by the Ninth Circuit. Indeed, the Ninth Circuit's remarkable re-interpretation of 30 U.S.C. § 22 to authorize any and all state environmental regulation stands contrary to almost all authority construing § 22 up until the California Supreme Court's 2016 decision in *Rinehart*. Were it not so obvious that the states cannot constitutionally ban mining on federal land (so that few states until very recently attempted to do so), the decision below would be inconsistent with far more cases.

If the Ninth Circuit's revolutionary reinterpretation of federal mining and land management law is not reversed by this Court, more and more state law prohibitions of federally-authorized mineral and energy development activities will be encouraged, substituting expert agency consideration of scientific issues in environmental statutes like the federal Clean Water Act with categorical bans based on political considerations. The Property Clause and Supremacy

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[9] Notwithstanding its position in this case, Oregon itself has easily interpreted 30 U.S.C. § 22 as forbidding state-law based restrictions on mining uses in *Elliott v. Oregon Int'l Mining Co.,* 60 Or. App.474, 654 P.2d 663 (Or. Ct. App. 1982).

Clause protect Congressional goals for federal land from such obvious interference.

IV. THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Ninth Circuit declared that Oregon's prohibition was "carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations." (App. 26a; *see also id.* at 36a.) But as the dissent observed, such a holding "necessarily turns on facts that are disputed or not in evidence, including the extent to which motorized mining negatively impacts fish habitat and whether there are some means of motorized mining that would not adversely impact fish habitat". (App. 70a.)

In upholding a grant of summary judgment for the State, the Ninth Circuit establishes the rule that the mere assertion of environmental benefits for restricting the use of federal land is controlling against any contrary factual showing. This is a departure from the accepted and usual course of judicial proceedings sufficient to warrant supervisory jurisdiction. Questioning of asserted environmental benefits may be taboo in some environmentalist circles, but the federal courts are supposed to afford a trial when presented with genuinely-contested issues of material fact.

The Ninth Circuit's holding allows states throughout the Ninth Circuit to advance any "environmental" ground to regulate uses of federal land, while foreclosing any effective inquiry into the degree of conflict with federal objectives. The Property Clause and the Supremacy Clause demand more careful consideration. Under the Ninth Circuit's rule, states may now require federal timber to be harvested by hand with axes and horses, ban motor vehicles from federal land, or impose any number of parochial restrictions contrary to national interests.

Finally, a peculiar feature of the Ninth Circuit's opinion is that it bolstered its lengthy attack on this Court's "commercial impracticability" holding in *Granite Rock* with the assertion that the Miners waived the argument. (App. 26a-27a & n.6.) This was a sufficiently shocking distortion of the record for the dissent to write: "Come on. That cannot be the basis for our decision." (App. 74a; *see also id.* at 74a-75a & n.8 (citing very extensive record evidence refuting any possible claim of waiver).)

As the dissent's citations demonstrate, at all relevant times, including in oral argument before the Ninth Circuit, the Miners contended that Oregon's prohibition is a categorically-preempted land use restriction, *and* stands as a forbidden obstacle to the accomplishment of federal mineral development objectives as applied to them and their federal mining claims. The Ninth Circuit's repeated mistreatment of the Miners and other natural

resource interests, uncorrected by this Court, tends to "undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law". *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1041 (9th Cir. 2012) (Smith, Kozinski, Ikuta & Murguia, JJ., dissenting), *cert. denied*, 568 U.S. 1228 (2013).

In short, the exercise of this Court's supervisory jurisdiction is needed not merely to overturn the Ninth Circuit's attempt to subordinate development of most of the nation's mineral resources to state veto, but also to correct its departure from longstanding procedural norms.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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