No. 18-979

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL., IN SUPPORT OF PETITIONERS

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Questions Presented

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.

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Interest of Amici Curiae[1]

Founded in 1973, **Pacific Legal Foundation (PLF)** is the nation's oldest and largest nonprofit legal foundation that seeks to protect the right of private property and related liberties in courts throughout the country. In executing this mission, PLF and its attorneys have been frequent participants in environmental litigation.

The **Waldo Mining District (WMD)** was established in 1852 in the Oregon Territory, and has been recognized as the first government of southwestern Oregon. Currently located in Cave Junction, Oregon, WMD is an unincorporated association of miners, roughly half of which hold one or more mining claims within the Siskiyou or other National Forests. One of the principal purposes of WMD is to promote the interests of its members, many of whom find their livelihood, recreation, and identity in suction dredge mining. Most members of WMD are considered small-scale miners who work individually or in small groups to mine claims on lands managed by the United States Forest Service or Bureau of Land Management. Many of these miners operate suction dredges. Since the 1990s, WMD has been actively involved in both state and federal rulemaking

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received the requisite notice of the intent to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

(including Oregon's suction dredge ban) and has also served as petitioner, intervenor, and amicus in numerous mining regulation cases.

In 1851, a group of prospectors made the first discovery of gold in southern Oregon in what would be **Josephine County, Oregon**. Since then, the County has attracted professional and recreational miners from all over the world. Just as hunting and fishing are part of Native American cultural heritage, mining is an essential part of Josephine County's unique cultural identity. Mining activity in Josephine County has supported the economy for decades. Currently, over 900 placer mining claims are located in Josephine County. Each miner spends roughly $5,000 to $9,000 per year on equipment, fuel, and supplies, amounting to over $4.5 million for Josephine County's economy. Additionally, mining attracts more than 500 tourists every year, introducing millions of dollars annually into the local economy. The County also brings in revenues based on placer mining applications, charging $93 annually to process placer mining applications. Oregon's suction dredge ban has resulted in uncertainty and has discouraged investment. Hundreds of Josephine County citizens are now faced with the possibility of losing their livelihoods and their homes.

The **New 49'ers** is one of America's most active small-scale mining associations, currently with 1,500 active members. The organization owns or leases over 60 miles of gold-bearing stream and river properties in Siskiyou County, California. Formed in 1984 specifically for the purpose of pooling the limited financial resources of its members to acquire a surplus

of viable mining properties for all, the organization soon developed a very valuable educational program so that beginning members can learn how to locate and develop the endless shallow gold deposits which exist within and alongside America's gold-bearing waterways. During this period, the New 49'ers program attracted more tourism dollars than any other business in Siskiyou County. In fact, during the 1990s and early 2000s, the New 49'ers program was the most active and productive small-scale mining program in the United States. Since 1993, the New 49'ers has been actively defending small-scale mining in California and elsewhere. Currently, members have been reduced to using gold pans and, therefore, only a few of the New 49'ers members are still actively mining.

American Mining Rights Association (AMRA) is a California, member-based nonprofit association comprised of small miners and public land users across America. AMRA is the nation's largest small-scale mining advocacy association and its primary purpose is to educate small-scale miners and public land users on the intricacies of restrictions and permitting for small-scale mining. AMRA was created in 2012 due to over-regulation, broad and vague interpretations of poorly written laws, and the California suction dredge moratorium. Many of the small-scale miners AMRA serves use suction dredging as their primary source of income and many use suction dredging as an offset to their income or as a retirement fund. A small vial of gold—roughly the size of a lipstick tube—is currently valued at over $1,300. AMRA believes that the regulatory scheme created in Oregon has rendered real property interests

essentially worthless because of the inability of miners to legitimately extract the valuable minerals on their claims.

Western Mining Alliance (WMA) was formed in 2011 in response to California's suction dredge moratorium. It represents the interests of independent miners throughout the West on environmental issues that affect their ability to work their claims. WMA promotes an evenhanded approach to regulation, one that pursues the goals of environmental protection while being attentive to the burdens placed on individuals. Toward that end, it has engaged in public information campaigns, political advocacy, and litigation.

Public Lands for the People (PLP) is an all-volunteer nonprofit organization whose mission is to represent groups and individuals that are interested in keeping public and private lands in the United States open to prospecting, mining, and outdoor recreation. It serves to unite, inform, and raise funding on all causes and issues related to land user rights. PLP keeps tabs on proposed restrictions to land use and represents members at public hearings on these matters.

Bedrock Prospectors Club was incorporated in Washington State in 1981. The club owns ten mining claims and has access to an additional five mining claims in Washington State. Bedrock Prospector Club members are small-scale miners and many of them use suction dredges to process gravels and collect precious gems and metals—like gold, silver, and platinum. Members use suction dredges because they are efficient tools to prospect gold bearing gravels.

When small miners are forced to use less efficient tools, such as gold pans or sluices, profits drop off to the point that miners lose their livelihoods, investments, money, and time. The legal inconsistency among government enforcement agencies, the lower courts, and this Court has only led to an increased sense of insecurity among the members of the Bedrock Prospectors Club.

Baker County, Oregon was founded in 1862. Early settlers passed through the area on the Oregon Trail on their way to the Willamette Valley, unknowingly traversing what would become the largest gold producer in the Northwest. Gold was discovered in the County in 1861 and large-scale dredging was used extensively. Though not suction dredges, three gold dredges worked the Powder River in Sumpter Valley between 1913 and 1954. The dredges traveled more than eight miles, extracting $10 million to $12 million in gold. The last dredge, known simply as Sumpter No. 3, closed in 1954 after producing over $4 million in gold over its lifetime. At the time, gold was $35 per ounce. At today's price of around $1,350 per ounce, Sumpter No. 3 produced over $150 million dollars in gold. Many local miners are small-scale and use suction dredging to process gravels to collect gold and other metals and gems. They use suction dredges because they are the most efficient method to process gold bearing gravels. Today, Baker County supports mining in all of its forms and actively pursues the right to mine on public and private lands. Mining restrictions will injure the County's economy, culture, and customs. The County's population has fluctuated due in part to the boom-and-bust nature of mining. The population in 2008

was 16,455, a 1.7% decrease from 2000 and down from a high of 17,295 in 1960. It is a priority to Baker County that federal and state governments do not interfere with citizens' rights of access, property, and occupation while prospecting and developing mineral resources.

The **Oregon Mining Association (OMA)** represents the interests of Oregon miners in regulatory and legislative affairs to create and maintain laws that are conducive to the exploration, development, and extraction of minerals in Oregon. OMA has testified on the Oregon suction dredge mining ban, which eliminates the only practical means to recover minerals from instream claims. OMA works to build support for federal, state, and local policies that create, rather than eliminate, opportunities for mining in Oregon. Mining is an important part of Oregon's history, and is a key industry to revitalize rural Oregon economies.

The **American Exploration & Mining Association (AEMA)** is an advocate for the North American mining community and develops and coordinates the industry's response to national legislative and regulatory issues. AEMA currently has 1,700 members in 42 states. AEMA advocates for responsible mining policies and uses its advanced capabilities and extensive expertise to educate the public and policymakers. AEMA supports the Mining Law of 1872 and responsible, modern, and sustainable mining on federal land. AEMA believes that it is not in the country's interest for states to undermine carefully regulated mineral production on federal lands, or for states to impose their views of the

permissible land uses on federal lands that make mining practically unworkable.

Resources Coalition is a Washington State non-profit organization that was formed for the education and defense of human and civil rights related to the use of public lands for small-scale mineral prospecting and mining. Its mission is to bring about a consensus on the usage of public lands through education and respect for private property as well as other basic freedoms.

Slate Creek Mining District (SCMD) was established in 1894 in Washington State. It represents and supports the interests of miners, mineral rights holders, and mineral land patents within its territory. SCMD institutes local mining district laws that pertain to the management of the miner and land in the district per the 1872 Mining Law in conjunction with any other federal or state laws that apply. SCMD promotes public interest, awareness, knowledge, and education in a symbiotic relationship among agencies, organizations, people, animals, plants, land, and water. A large percentage of SCMD's mineral claims are placer claims, the suction dredge being the key to extracting minerals from these claims in a safe and environmentally responsible manner. Oregon's suction dredge ban, as well as other anti-mining regulations, have impeded many members from extracting the valuable minerals on their federal mining claims.

Although not all of the Amici are directly interested in Oregon's suction dredge ban, all are directly interested in the preservation of small-scale mining in this country. The mining knowledge and

experience of Amici will provide the Court a useful perspective on the central issue in this case: whether Oregon's suction dredge ban is preempted by federal law. Federal law accommodates state interests by allowing for regulation of mining's environmental impacts. But it does not allow states to engage in land use regulation or to regulate so far so as to frustrate federal land use policy, precisely the purpose and effect of Oregon's suction dredge ban.

Introduction and Summary of Argument

In 1872, Congress passed the Mining Law, which proclaims all "valuable mineral deposits" on federal lands to be "free and open" to mining. 30 U.S.C. § 22. As the nation's appreciation of natural resources grew, Congress modified this basic policy with a proviso—federal lands are "free and open" to mining, so long as prospectors comply with reasonable regulations to mitigate adverse environmental impacts. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987).

This case does not raise the question of whether a state *may* impose environmental regulations on mining that takes place on federal land. That question was resolved in the affirmative by *Granite Rock*. Rather, this case asks whether a state, in lieu of regulating, may simply forbid an activity on federal land that Congress encourages. Under longstanding principles of preemption and the reasoning of *Granite Rock*, a state may not.

Oregon bans suction dredge mining[2] on federal land, frustrating entirely Congress' purpose of encouraging this activity. Petition for Writ of Certiorari, Appendix (Pet. App.) 77a-78a (N.R. Smith, J., dissenting). Yet the Ninth Circuit upheld the state ban against this preemption challenge. *Id.* at 55a-56a (majority op.). That decision merits this Court's review for three reasons.

First, the majority below repudiated this Court's analysis in *Granite Rock*, which held that states may impose reasonable environmental regulation on mining but may not engage in land use regulation, *i.e.*, dictating or prohibiting "particular uses" of federal land, as Oregon purports to do here. *Id.* at 29a. According to the majority below, the line this Court drew in *Granite Rock* "make[s] no sense" and should be abandoned. *Id.* at 31a. *See id.* at 63a-65a (N.R. Smith, J., dissenting) ("The premise of the majority's insistence that the *Granite Rock* line is nonsense also lacks merit."). Such considerations are for this Court alone; lower courts may not repudiate this Court's decisions.

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[2] Oregon banned the use of "motorized in-stream placer mining," including but not limited to the use of suction dredge mining. Pet. App. 157a. Suction dredge mining is a longstanding, 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 the sediment to the stream from which it came.

Second, this case affords the Court an opportunity to resolve a conflict among the federal courts of appeals and state courts of last resort, while also clarifying an important precedent of this Court. *Granite Rock* upheld state environmental regulation against a field preemption claim, but left open the possibility that such regulation could be conflict-preempted if "so severe" as to make a federally authorized activity "commercially impracticable." *Granite Rock*, 480 U.S. at 587. Following this Court's analysis, the Eighth Circuit has applied *Granite Rock* to hold a local mining regulation preempted. *See S.D. Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998). The Ninth Circuit and Supreme Court of California have gone the other way, with the former going so far as to declare the practical impracticability test unworkable. Pet. App. 28a; *People v. Rinehart*, 377 P.3d 818 (Cal. 2016). As the dissent below observed, the Ninth Circuit's analysis "would allow an end-run around federal preemption." Pet. App. 73a (N.R. Smith, J., dissenting).

Finally, the case presents an issue of national importance: the preemptive effect that Congress' policy-making for federal lands has on state laws that attempt to obstruct congressional policies. Federal-state conflict over the use of the vast federal estate is a recurring problem. The Ninth Circuit's holding, if applied to other uses of federal lands, would exacerbate the problem considerably. Thus, the Court should grant review to clarify how conflict preemption principles apply to federal land use laws, like the Mining Law.

Argument

When a state law conflicts with federal law, the state law must yield. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). A state law 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); (3) or the state law conflicts with federal law (conflict preemption). *See Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016). Under conflict preemption, whenever state legislation "frustrates the full effectiveness of federal law," it is preempted. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). 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 execution the powers vested in the general government.").

This Court last addressed the preemptive effect of the Mining Law 30 years ago in *Granite Rock*, which raised the question of whether a state environmental permitting system was pre-empted by federal law. Answering in the negative, the Court concluded that federal land use plans and reasonable state environmental regulation can operate in harmony. Thus, per *Granite Rock*, reasonable environmental regulation can, at least in some instances, avoid federal preemption.

The Court in *Granite Rock* emphasized, however, that its decision was a narrow one. 480 U.S. at 593. To win the day, the Coastal Commission "needed merely to identify a possible set of permit conditions not in conflict with federal law." *Id.* Presuming that the Coastal Commission would only impose "reasonable environmental regulation," the Court ruled in its favor. But the decision warned that the Court would not uphold any state laws that "choose[] particular uses for the land" or "in fact conflict[] with federal law." *Id.* at 587, 594.

The Ninth Circuit's decision disregards these warnings and instead invites states to frustrate federal policy at will. In doing so, the decision purports to repudiate a ruling of this Court. *See* Pet. App. 65a-66a (N.R. Smith, J., dissenting). It also deepened an existing conflict among the lower courts. Such a consequential decision should not escape this Court's review.

I.

Certiorari should be granted because the Ninth Circuit failed to apply *Granite Rock*'s field preemption test.

In *Granite Rock*, this Court held that federal law preempted the field of "land use planning" for, but not "environmental regulation" of, federal land. *Granite Rock*, 480 U.S. at 586-88. Explaining the distinction between the two, the Court described land use planning as that which chooses particular uses for the land, whereas environmental regulation "requires only that, however the land is used, damage to the

environment [be] kept within prescribed limits." *Id.* at 587-88.

The Ninth Circuit failed to apply this test when it determined that Oregon's suction dredge ban is environmental regulation, rather than land use regulation. Pet. App. 56a-66a (N.R. Smith, J., dissenting). The suction dredge ban "does not identify a 'prescribed limit[]' on 'damage to the environment' that must be avoided 'however the land is used.'" *Id.* at 61a-62a (quoting *Granite Rock*, 480 U.S. at 587). Even if miners fully mitigated their impacts, Oregon's ban would still apply. Thus, Oregon's ban effectively declares certain federal lands to be unavailable for certain uses. This is state land use planning, which *Granite Rock* held to be field preempted.

The Ninth Circuit did not merely misapply the standard in *Granite Rock*, an error which standing alone might not require this Court's review. Instead, the Ninth Circuit went on to reject this Court's "formalistic approach" which purportedly "make[s] no sense[.]" *Id.* at 31a. As the dissent below explained, the majority misrepresented this Court's careful explanation of the difference between land use regulations and environmental regulations. *Id.* at 64a-66a (N.R. Smith, J., dissenting). If *Granite Rock* is to be reconsidered—and Amici see no reason that it need be—it should be done by this Court, not by lower courts in piecemeal fashion.

II.

Certiorari should be granted to resolve the split between the Eighth and Ninth Circuits as to which conflict preemption test applies.

Even if the Court finds that Oregon's ban is an environmental regulation not a land use plan, the ban would still be preempted because it conflicts with federal law. Both the Eighth and Ninth Circuits have applied *Granite Rock* to state or local regulation of mining, but they have employed different conflict preemption rules. *Compare S.D. Mining Ass'n*, 155 F.3d at 1007 (applying a practicability analysis) *with* Pet. App. 26a (applying an environmental purpose test). This case presents the opportunity for the Court to resolve the conflict between these decisions.

In settling that conflict, this Court will also have an opportunity to resolve the question left open by *Granite Rock*—at what point is a state regulation of mining so severe that, regardless of whether it is characterized as land use or environmental regulation, it is preempted as an obstacle to the Mining Law's purpose? *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)).

In *South Dakota Mining Association*, the Eighth Circuit considered a preemption challenge to a county ordinance 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 ordinance was "prohibitory, not regulatory" and would "frustrate[] the accomplishment of . . . federally encouraged activities" because it banned the "only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area . . . ." *Id.* at 1011. The outright ban of a particular mining method on federal land would be 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. Thus, the Eighth Circuit held the ordinance preempted by federal law. *Id.* at 1011. Pre-*Granite Rock* cases also support the Eighth Circuit's analysis. *See Skaw v. United States*, 740 F.2d 932, 940 (Fed. Cir. 1984); *Brubaker v. Bd. of County Comm'rs, El Paso County*, 652 P.2d 1050, 1059 (Colo. 1982).

In contrast, the Ninth Circuit rejected the "commercial impracticability" test from *Granite Rock*, stating that it "handcuff[s] regulators." Pet. App. 28a. Instead, the court looked to whether the Oregon ban had an environmental purpose and to whether the fit between that purpose and the ban was adequate. *Id.* at 26a. Thus, even assuming that the Oregon ban rendered mining commercially impracticable, the Ninth Circuit upheld the ban because of its supposed environmental purpose and purportedly close fit between that purpose and the ban's impacts. But as the dissent below noted, the majority could cite "no legal authority . . . for the proposition that federal

preemption analysis includes an assessment of the fit between the substance of a state law and its stated purpose." *Id.* at 70a (N.R. Smith, J., dissenting).

There are now two competing theories in the lower appellate courts, with the Eighth Circuit applying a form of practicability analysis and the Ninth Circuit applying an environmental purpose test. *S.D. Mining Ass'n*, 155 F.3d at 1007; Pet. App. 26a. The Eighth Circuit's analysis remains true to *Granite Rock*'s "commercial impracticability" test because it examines whether a regulation still allows miners to extract minerals in a "practical way." *S.D. Mining Ass'n*, 155 F.3d at 1007. In contrast, the Ninth Circuit's approach discards the preemption analysis required by *Granite Rock* in favor of a loose and easily satisfied means-end inquiry. Pet. App. 70a-71a (N.R. Smith, J., dissenting).

The conflict between the Eighth and Ninth Circuits, as well as the conflict between the Ninth Circuit and *Granite Rock*, underscore the need for this Court's review. This case affords the Court an opportunity to resolve these conflicts and clarify the "commercial impracticability" test.

III.

Certiorari should be granted because this case raises an important question of federal law regarding the states' ability to frustrate Congress' policies for use of federal land.

While the issues addressed above already warrant this Court's review, the need for such review is highlighted by the important and recurring nature of

the question presented. The federal government owns vast areas of land, the uses of which are controversial. Thus, the threat of states attempting to frustrate Congress' chosen uses for federal land is significant. The decision below invites states to frustrate federal land management by expanding the authority of the states to enforce regulations that conflict with federal policies.

The federal government owns roughly 640 million acres in the United States, nearly 30% of the nation's lands. *See* Carol Hardy Vincent, et al., *Federal Land Ownership: Overview and Data*, Congressional Research Service Report No. R42346 at 1, 3 (Mar. 3, 2017).[3] Federal land ownership is particularly prevalent in the West, where the Ninth Circuit has predominant jurisdiction. The federal government owns more than 50% of the land in many Ninth Circuit states like Alaska (61.3%), Idaho (61.6%), Nevada (79.6%), and Oregon (53%). And significant portions of land in Arizona (38.7%), California (45.9%), Hawaii (20%), Montana (29%), and Washington (28.6%) are federally owned. Meanwhile, the federal government owns less than .03% in more eastern states like Connecticut and Iowa. *Id.* at 7-8.

While the Court has "repeatedly observed" that decisions about the use of federally owned lands are "entrusted primarily to the judgment of Congress," states and the lower federal courts may be tempted to second-guess that judgment. *See Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (citing *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 29 (1940)). Although states may sometimes supplement

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

federal land policy through the use of their police powers, "those 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)). *Accord 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 § 249 (2d ed. 1903))).

Decisions about federal land are often controversial. *See, e.g.*, Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers' Prison Terms*, N.Y. Times, Jan. 2, 2016, at A13; Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. Times, Apr. 23, 2014, at A1; Gladwin Hill, *Stakes Are High in the "Sagebrush Rebellion*," N.Y. Times, Sept. 2 1979, at E5. They have led to numerous lawsuits. *See, e.g., Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (challenge to application of Park Service regulation of hovercraft use); *Salazar v. Buono*, 559 U.S. 700 (2010) (challenge to federal statute authorizing transfer of federally owned lands to avoid removal of a cross); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (challenge to timber harvesting on Forest Service lands); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (challenge to cancellation of lease to mine federally owned lands).

These decisions have also generated substantial state-federal conflicts, as states have sought to obstruct Congress' decisions about the use or non-use of federal lands. *See Crystal Bay Marina v. Sweeden*, 939 F. Supp. 839, 841-42 (N.D. Okla. 1996) (banning recreational development on federal land was preempted by federal law); *Boundary Backpackers v. Boundary County*, 913 P.2d 1141, 1146-47 (Idaho 1996) (restricting sale of federal land was preempted by federal law); *Nevada v. Watkins*, 914 F.2d 1545, 1561-62 (9th Cir. 1990) (state's attempt to add veto clause to nuclear waste site approval was preempted by federal law).

The Ninth Circuit's decision makes such conflicts more likely, by altering the test for preemption so as to facilitate state efforts to obstruct federal land use policy. The reasoning of the decision below could equally apply to other state laws barring federally encouraged activities on federal lands, especially given that other land use cases cite *Granite Rock* as precedent. *See Crystal Bay Marina*, 939 F. Supp. at 841-42; *Boundary Backpackers*, 913 P.2d at 1146-47; *Nevada v. Watkins*, 914 F.2d at 1561-62. Under the majority opinion below, virtually any state regulation that purports to advance a "reasonable" environmental purpose will survive a preemption analysis—even if that regulation conflicts with federal law.

Competing demands on federal lands should be resolved in Congress or by federal agencies that wield lawfully delegated congressional 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). Contrary to this well-established principle, the Ninth Circuit's decision gives the states a veto power on federal land use. Such an unfounded and momentous ruling merits this Court's review.

Conclusion

The petition for certiorari should be granted.

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Respectfully submitted,

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