No. 18-979

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA CALEB BOHMKER, ET AL.,

Petitioners,

v.

OREGON, ET AL.,

Respondent.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), did the court of appeals correctly hold, in agreement with the other courts that have addressed a similar question, that federal law does not preempt a state prohibition on the use of motorized equipment to mine within streams that are important habitat for salmon?

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INTRODUCTION

The court of appeals applied well-settled law in upholding Senate Bill 3, an Oregon statute barring the use of motorized equipment to mine in streams that provide essential habitat for protected salmon. The court of appeals correctly determined that Senate Bill 3 is a reasonable environmental regulation that is not preempted by the federal mining laws or land use laws. In reaching that conclusion, it adhered to this Court's analysis in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), which upheld a state law prohibiting mining on federal land without a permit. The court of appeals' ruling does not conflict with *Granite Rock* or with cases from other circuits or state supreme courts. The federal agencies charged with administering the federal lands where petitioners have their mining claims agreed that Oregon's law does not conflict with federal law. This case therefore does not present any question that warrants further review.

STATEMENT

1. This case began as a challenge to Senate Bill 838, a 2013 statute that was repealed and replaced by Senate Bill 3 in 2017, after this appeal had been fully briefed. The Oregon Legislative Assembly enacted Senate Bill 838 to curtail the harmful effects of motorized mining on protected fish species and to give regulators the time to craft a new permitting system. The bill declared a five-year moratorium on motorized mining activities in or within 100 yards of watercourses that contain essential salmon habitat or con-

tain populations of bull trout. 2013 Or. Laws ch. 783, § 2(1). Essential salmon habitat is defined by statute as "the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B). Indigenous anadromous salmonid species include native species of salmon, steelhead, and cutthroat trout that are "listed as sensitive, threatened or endangered by a state or federal authority." Or. Rev. Stat. § 196.810(1)(g)(C).

In 2017, the legislature made the prohibition on using motorized mining equipment in essential salmon habitat permanent, but it narrowed the scope of the prohibition by allowing use of the equipment in adjacent uplands. Senate Bill 3, now codified at Or. Rev. Stat. § 468B.114, provides:

> (1) An operator may not allow a discharge to waters of the state from a motorized in-stream placer mining operation or activity without having an individual permit or being covered by a general permit issued under ORS 468B.050.
>
> (2) In order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey, motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential

> indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat.
>
> (3) The prohibition in subsection (2) of this section does not apply to the use of nonmotorized mining technology, including but not limited to gravity dredges and syphon dredges.

Senate Bill 3 thus requires a permit for all in-stream motorized placer mining in Oregon. A permit, however, cannot issue for motorized mining in essential salmon habitat. Non-motorized mining, including non-motorized methods of dredging, are permissible those streams.

2. Petitioners are miners, mining associations, and businesses related to the mining industry. Petitioners work their claims using a motorized suction dredges. A suction dredge uses "gasoline-powered engines to suck streambed material up through flexible intake hoses that are typically four or five inches in diameter. The streambed material is deposited into a floating sluice box, and the excess is discharged in a tailings pile in or beside the stream." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1012 (9th Cir. 2012). Petitioners, some of whom own mining claims on federal land where Oregon has designated essential salmon habitat, filed an action in district court claiming that the prohibition

on in-stream motorized placer mining was preempted by federal law.[1]

On cross-motions for summary judgment, the district court rejected petitioners' arguments that Senate Bill 838 was preempted by federal law. The court of appeals affirmed. It began by concluding that the repeal of Senate Bill 838 and the enactment of Senate Bill 3 did not moot petitioners' appeal. App. 7a-8a (citing *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993)).

Next, applying this Court's decision in *Granite Rock*, the court of appeals rejected petitioners' preemption arguments. First, the court rejected petitioners' argument that Senate Bill 3 was an impermissible attempt by Oregon to supplant federal land use planning authority. That is so because Senate Bill 3

> does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system and is carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations.

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[1] In addition to naming the State of Oregon as defendant, petitioners also named the Attorney General, Ellen Rosenblum, and the Director of the Department of State Lands, Mary Abrams. Ms. Abrams has left state service. The current Director of the Department of State Lands is Vickie Walker.

App. 26a. Second, and for similar reasons, the court of appeals rejected petitioners' arguments that Senate Bill 3 conflicted with Mining Act or other federal mining laws. Again relying on *Granite Rock*, the court concluded that Senate Bill 3 is a reasonable state environmental law and that Congress "intended reasonable state environmental regulation to govern mining on federal lands." App. 53a.

Judge Smith dissented, concluding that Senate Bill 3 was an impermissible land use law under this court's analysis in *Granite Rock* or that there was a dispute of fact about the effect of Senate Bill 3 that precluded summary judgment for the state. App. 78a.

REASONS FOR DENYING THE PETITION

The court of appeals' decision does not conflict with *Granite Rock* or with any circuit court or state supreme court decision. Moreover, the United States and federal agencies that control the public land where petitioners have their claims agree that Oregon's law is not preempted. Finally, petitioners' arguments turn on contested factual assertions about the intent behind and effect of Oregon's law that were correctly resolved against petitioners by the court of appeals and do not warrant this Court's review.

A. The court of appeals' opinion does not conflict with *Granite Rock*.

Petitioners broadly assert that the court of appeals "rejected" this Court's decision in *Granite Rock*

and that review is needed to correct that error. Pet. 8–26. But the court of appeals' decision is consistent with *Granite Rock* and is a faithful application of the rule announced in that case.

In *Granite Rock*, which concerned California's requirement that a mining operation on federal land receive a state permit, this Court made clear that "reasonable state environmental regulation is not pre-empted" by the federal mining laws or the federal land use laws. 480 U.S. at 589, 593. As to the Mining Law of 1872, 30 U.S.C. § 22, which is at the heart of petitioners' preemption challenge in this case, *Granite Rock* noted that the 1872 law "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Id*. at 582. Nor did the pertinent federal regulations suggest any intent to preempt state law. *Id*. at 583-84.

As to the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600 *et seq*., and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq*.,the federal land use laws, *Granite Rock* assumed without deciding that those laws preempt "the extension of state land use plans onto unpatented mining claims in national forest lands." *Id*. at 585–86. *Granite Rock* distinguished state land use laws from state environmental regulations: "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. at 587. Although this Court recognized that the line "will not always be bright," the "core activity described by each phrase is undoubtedly different." *Id.*

In this case, the court of appeals simply applied *Granite Rock* in upholding Senate Bill 3. Assuming that the combination of NFMA and FLPMA preempts the extension of state land use plans onto unpatented mining claims on federal land, as this Court did in *Granite Rock*, the court of appeals concluded that Senate Bill 3 was not a land use law, and, instead, was a reasonable environmental regulation. App. 25a–26a. As noted, the court of appeals emphasized that the statute did not choose uses for federal land and has an express environmental purpose, which the statute accomplishes by prohibiting motorized methods of mining in critical habitat only. App. 26a. Nothing in *Granite Rock* suggests that a prohibition on a method of mining in sensitive fish habitat is tantamount to a prohibition on mining as a permissible use of federal land. *See* App. 30a–33a. Relatedly, the court of appeals rejected petitioners' arguments that Senate Bill 3 conflicted with the Mining Act or other federal mining laws, again applying the analysis from *Granite Rock*, which explained that the Mining Act and federal mining regulations did not express any intent to preempt state environmental laws. App. 53a.

Petitioners broadly assert that the court of appeals "misinterpreted a whole host of federal statutes to allow any environmental concern asserted by a state to veto federal mineral development." Pet. 26.

To the contrary, the opinion contains a detailed analysis of the relevant statutes, including the Mining Act of 1872, App 39a–45a; the Surface Resources and Multiple Use Act of 1955, App 46a–47a; the Mining and Minerals Policy Act of 1970, App 47a–48a; and the Surface Mining Control and Reclamation Act of 1977, App 48a–49a. From those statutes, and consistent with *Granite Rock*, the court of appeals correctly concluded that Congress did not intend to preempt state environmental regulations, even when a regulation might prohibit a particular method of mining. App 49a, 54a. The opinion does not suggest that states have authority to "veto" mineral development. Rather, the opinion simply reflects the intent of Congress to require that mining operations comply with both state and federal law where the two are compatible.

B. There is no circuit split for this Court to resolve.

The state and federal courts that have considered similar state prohibitions on motorized mining in waterways have concluded that those laws are not preempted under *Granite Rock*. *See People v. Rinehart*, 377 P.3d 818 (Cal. 2016), *cert. denied*, 138 S. Ct. 635 (2018) (upholding California's moratorium on permits for suction dredge mining under *Granite Rock*); *Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014) (upholding prohibition on suction dredge mining in waterways designated by the Oregon Scenic Waterways Act under *Gran-*

ite Rock). The court of appeals decision is consistent with those cases.

In arguing for review, petitioners assert that court of appeals' decision is at odds with *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). They are wrong, as the court of appeals explained in its extended discussion of that case. App. 39a–45a, 50a–51a. *South Dakota Mining* considered whether a county zoning ordinance that prohibited all new or amended permits for surface metal mining in an area that was ninety percent federal land, with the remaining land consisting of privately owned mining claims, was preempted by the Mining Act. 155 F.3d at 1007. In that case, the record showed that surface mining was "the only mining method that can actually be used to extract" minerals in the area covered by the zoning ordinance. *Id*. In the Eighth Circuit, the county abandoned the ordinance and argued that it was preempted; the United States was not involved in the litigation. *Id*. at 1008 n. 3. The Eighth Circuit concluded that the zoning ordinance was not a reasonable environmental regulation under *Granite Rock*. *Id*. at 1011. Instead, "[t]he 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." *Id*.

Senate Bill 3 is not at all like the ordinance at issue in *South Dakota Mining*, because it is not a *de facto* mining ban targeted specifically at federal lands nor does it lack an environmental justification. Ore-

gon's law applies statewide and is not focused on federal lands; the ordinance in *South Dakota Mining* specifically targeted an area of the county that was ninety-percent federal land. The record in this case shows that mining remains possible under Senate Bill 3; the law is not a "de facto ban" on mining.[2] *See* App. 30a n. 7 (citing evidence from petitioners concerning their mining activities and scope of their claims). And Senate Bill 3 has the express environmental purpose of protecting threatened and endangered fish. Or. Rev. Stat. § 468B.114(2). The ordinance in *South Dakota Mining* had no such purpose. There is no conflict between that case and this one.

The other cases petitioners cite as showing a conflict with court of appeal's decision were decided before *Granite Rock* and are readily distinguished. *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), involved a takings claim against the United States by the owners of unpatented mining claims on the St.

[2] Petitioners assert that Oregon conceded at oral argument that Senate Bill 3 was a "*de facto* ban on mineral development." Pet. 27; *see also* Pet. 4. That is not the case. At argument, the court asked counsel for Oregon to assume, based on the summary judgment record, that the statute effectively prohibits mining in essential salmon habitat. Counsel for Oregon simply acknowledged that assumption. United States Court of Appeals for the Ninth Circuit, *16-35262 Joshua Bohmker v. State of Oregon,* YouTube (Mar. 8, 2018), https://youtu.be/IrC_pz9CNh4, 20:38 to 21:16. As counsel for Oregon later explained, the summary judgment record showed that miners could work the upland portions of their claims and use non-motorized methods in essential salmon habitat. *Id.* at 25:51-26:28.

Joe River in Idaho. When Congress added the St. Joe River to the national system of Wild and Scenic Rivers, Congress prohibited dredge or placer mining, and the plaintiffs sought compensation for loss of property, based on their inability to mine. *Id.* at 934–35. The Claims Court had rejected the plaintiffs' inverse condemnation claim, in part because they lacked a permit to mine under Idaho law, which also prohibited dredge mining in the St. Joe River. The Federal Circuit reversed, concluding that the "state of Idaho could not lawfully deny plaintiffs the right to mine." *Id.* at 940. Because the Idaho law would be preempted by the Mining Act of 1872, Idaho's ban did not affect the plaintiffs' takings claim against the federal government. *Id.*

Unlike this case, the central issue in *Skaw* was the takings claims against the United States, not the validity of the state law. At oral argument, the United States "virtually abandoned any defense" based on the Idaho law and would take no position on whether the law was preempted. *Id.* at 940 n. 3. More importantly, that case was decided before *Granite Rock*. *Skaw* did not address the states' power to issue environmental regulations of mining activity on federal land and appeared to consider *any* state permit requirement that prohibited a form of mining to be preempted by the Mining Act. That conclusion is contrary to this Court's discussion in *Granite Rock*, 480 U.S. at 588–89.

The other case petitioners cite, *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982),

was also decided before *Granite Rock*. In that case, the county denied the petitioners' permit to drill for core samples to validate their mining claims after federal agencies had authorized the drilling to proceed. *Id*. at 1052–53. The county denied the permit on the ground that the proposed activities were inconsistent "with the long-range land use plans of El Paso County and with existing, surrounding uses." *Id*. The Colorado Supreme Court viewed the county's denial not as an effort "to regulate but to prohibit the appellants' core drilling activities." *Id*. In so doing, the county was "attempting to frustrate implementation of the very scheme of disposition of federal mineral lands that is at the core of 30 U.S.C. § 22." *Id*. at 1058. That is not the case here, where petitioners' use of motorized mining equipment is not specifically authorized and Senate Bill 3 does not seek to extend Oregon's land use system onto federal property.

C. The United States and the federal agencies responsible for managing public lands agree that Senate Bill 3 and similar laws are permissible environmental regulations under *Granite Rock*.

This Court denied a petition for certiorari just last year in *People v. Rinehart*, where the California Supreme Court upheld that state's moratorium on permits for suction dredge mining in state waters under *Granite Rock*. *Rinehart*, 377 P.3d at 824. At this Court's request, the United States filed an *amicus* brief responding to the *Rinehart* petition and urged the Court to deny review.

The United States, like the court of appeals in this case, explained that the federal mining laws expressed no Congressional intent to preempt state environmental regulations. Brief of the United States as Amicus Curiae, No. 16-970, at 8–9. The United States highlighted that regulations promulgated by the Forest Service and the Bureau of Land Management require mining activities on federal land to comply with state environmental regulations. *Id*. at 9–11. The United States concluded that California's moratorium on suction dredge mining was a permissible environmental regulation under *Granite Rock*. *Id*. at 12–15. The United States also rejected the petitioner's assertion in *Rinehart* that California's moratorium was an impermissible land use law. Although the United States noted that the field preemption questions that the petition raised were not actually presented in the case, the brief went on to explain that the petitioner could not "plausibly assert" that California's law was impermissible land use planning under *Granite Rock* because the "moratorium does not purport to dictate the use of particular parcels of federal land; instead it prohibits the use of a mining technique throughout the State." *Id*. at 17. The same is true for this case.

Petitioners assert that the United States suggested in its *Rinehart* brief that this case "would provide a superior and broader vehicle for review of the important Constitutional questions presented." Pet. 10. The United States did no such thing. Rather, its *amicus* brief simply noted that petitioners had raised

field preemption questions under NFMA and FLPMA in this case, whereas *Rinehart* did not raise the federal land use laws. Brief of the United States as Amicus Curiae, No. 16-970, at 22 n. 7. The United States did not suggest that this case would present any review-worthy questions.

In fact, the United States—and specifically the Department of Agriculture and the Department of the Interior, the agencies responsible for the management of federal public land— filed an *amicus* brief in the court of appeals here, arguing that Oregon's law is a permissible environmental regulation under *Granite Rock*. Brief of the United States as Amicus Curiae, Ninth Cir. 16-35262, 7–14. As to NFMA and FLPMA, the United States explained that Oregon's law was not an attempt to "supplant the land-use policy of the United States." *Id*. at 10. The court of appeals relied on the United States' brief extensively in rejecting petitioners' preemption argument. *See* App 37a, 51a, 54a.

In *Granite Rock*, this Court concluded that the federal laws governing mining "expressly contemplated coincident compliance with state as well as with federal law." 480 U.S. at 584. The United States' support for Oregon's law shows that there is no conflict between state and federal law and thus belies petitioners' argument that Senate Bill 3 interferes with the management of mining on federal public lands in Oregon. That support also shows that petitioners' argument that the court of appeals has disregarded or

misinterpreted both *Granite Rock* and numerous federal statutes is overwrought and incorrect.

D. Petitioners' arguments turn on factual disputes that make this case a poor vehicle for this Court's review.

The heart of petitioners' argument—and the focus of the dissent in the Ninth Circuit—is that Senate Bill 3 is a land use law and not a reasonable environmental regulation. Pet. 10–11, 26. That argument, however, turns on at least two *factual* assertions about Senate Bill 3 that are contested and that the court of appeals majority correctly rejected. And regardless whether the court of appeals' decision was correct, this Court's review is not warranted to resolve factual disputes that would apply only to the particular statute at issue here and not a class of laws more generally.

First, petitioners' arguments turn on a narrow factual dispute about the legislative intent behind Senate Bill 3. Petitioners assert that Senate Bill 3 is not really focused on protecting the environment—the text of the statute notwithstanding—and assert instead that the law was actually motivated by animus against mining as a use of federal land and against miners as a politically unpopular group. Pet. 4–5. The court of appeals, however, correctly rejected that contention and held that the legislative purpose behind Senate Bill 3 was protection of the environment, as the text of the statute and legislative materials reflected. App. 32a–36a. Even if that were debatable,

which it is not, petitioners' highly fact-specific argument about the motives of the Oregon legislature with respect to one particular statute would not warrant this Court's review.

Second, petitioners' arguments turn on a dispute about the practical effect of Senate Bill 3. Petitioners assert that Senate Bill 3 functions, for all practical purposes, as a ban on mining and developing their claims on federal land. Pet. 4. But that assertion is not supported by the record. The court of appeals acknowledged, based on the summary judgment standard of review, that the statute will "mak[e] it effectively impossible for at least *some* of [petitioners] to recover the valuable mineral deposits present on their claims." App. 55a (emphasis added). But the record also shows that some petitioners will be able to mine under Senate Bill 3, whether by using non-motorized methods or because their mining claims include upland areas that are not impacted by the in-stream prohibition on motorized equipment. *See* App. 30a n. 7 (citing evidence from petitioners concerning their mining activities and scope of their claims). The fact that some miners may be unable to work their claims under Senate Bill 3 does mean that this case presents a review-worthy question under *Granite Rock*.

Even if there were some merit to petitioners' factual assertions about Senate Bill 3, which there is not, this case would be a poor vehicle for this Court's review. Although Oregon agrees that the core legal issue in plaintiffs' preemption challenge is the same

for Senate Bill 3 and Senate Bill 838, and so the case is not moot, the fact remains that the record below was developed based on the effects of Senate Bill 838 on the miners' claims. The provisions of Senate Bill 3 are different and are significantly narrower than Senate Bill 838. *See* App. 7a–8a (discussing differences). For example, Senate Bill 838 imposed restrictions on motorized mining in uplands within 100 yards of essential salmon habitat and also applied to bull trout habitat; Senate Bill 3 applies only to instream motorized mining in essential salmon habitat and does not apply to bull trout habitat. To the extent that the facts might matter to an analysis of whether the law crosses the line into land use planning—and petitioners assert that they do, Pet. 33–34—this record is not adequately developed as to Senate Bill 3.

CONCLUSION

This court should deny the petition for writ of certiorari.

Respectfully submitted,

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