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 OF RESPONDENTS ROGUE RIVERKEEPER, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does federal law preempt a state prohibition on motorized mining in portions of some streams that flow through unpatented mining claims on federal lands, where other feasible forms of mining are allowed in the same portions of the streams, and motorized mining can and does occur within other parts of the same mining claims?

PARTIES

The Respondents-Intervenors listed below are parties to this Brief in Opposition. They are not-for-profit fishing and conservation groups that work in part to protect and restore wild salmon and steelhead trout in Oregon.

- Rogue Riverkeeper
- Pacific Coast Federation of Fisherman's Associations
- Institute for Fisheries Resources
- Oregon Coast Alliance
- Cascadia Wildlands
- Native Fish Society

The full list of Petitioners and State Respondents is stated in the Petition at ii.

CORPORATE DISCLOSURE STATEMENT

Respondents Rogue Riverkeeper et al. certify that none issues stock.

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STATEMENT OF THE CASE

In 2013, Oregon enacted a moratorium (Senate Bill "SB" 838) on motorized mining in portions of streams designated as "essential indigenous salmonid habitat" ("ESH")[1] for anadromous salmon and steelhead trout, in streams that provide habitat for resident bull trout, and on motorized mining within 100 yards of the high-water mark of both sets of streams. Ninth Cir. ECF No. 8, Excerpts of Record ("ER") 159. Oregon noted that the number of motorized mining operations in certain streams had recently "increased significantly," and noted concern about cumulative impacts on fish. *Id.* SB 838 applied to streams that flow through private, state, and federal lands. *Id.* Nevertheless, SB 838 applied to less than one-third of the instream mining locations in Oregon. ER 41. And where it did apply, SB 838 did not prohibit other feasible, non-motorized methods of mining in designated streams, such as sluicing or using a trommel, nor did it prohibit motorized mining in upland areas outside of the setbacks. ER 159; Ninth Cir. ECF No. 50, Supplemental Excerpts of Record ("SER") 19.

Some Petitioners hold unpatented mining claims on federal lands through which streams designated as ESH flow. ER 101-149.[2] In the district court, Peti-

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[1] Essential indigenous salmonid habitat includes "those portions of a stream reach that fill all or part of the basic or indispensable spawning or rearing needs" of salmon and steelhead, and "are necessary to prevent" their depletion. Or. Admin. R. § 141-102-0040(1).

[2] These federal lands are administered by either the Forest Service or the Bureau of Land Management ("BLM"). ER 13.

tioners asserted that SB 838 is preempted by the federal mining laws. Pet. App. at 83a-108a. The district court ruled that SB 838 is not preempted. *Id.*

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. In addition to the parties' briefs, the United States filed a brief as *amicus curiae* in support of Oregon. Pet. App. at 2a. Oregon, and the United States, asserted that the federal mining laws do not preempt SB 838. *Id.*

Before the court of appeals heard oral argument, Oregon enacted SB 3, which repealed SB 838 and permanently banned motorized mining in portions of streams designated as ESH. Ninth Circuit ECF No. 63 at 3-5. In contrast to SB 838, SB 3 does not apply to streams that provide habitat for bull trout, and it leaves all upland areas open to motorized mining. *Id.* SB 3 is currently in effect, and applies to roughly 20% of the streams in Oregon, regardless of whether they flow through federal, state, or private lands. *Id.* By contrast, roughly 80% of the streams in Oregon remain open to motorized mining operations. *Id.*

In the court of appeals, the parties agreed that enactment of SB 3 did not moot the case, because it did not change the general legal issues related to federal preemption. ER 63, 65, 68. After oral argument, in a 2-1 panel decision, the court of appeals held that the federal mining laws do not preempt SB 3. Pet. App. at 1a-78a. Petitioners sought *en banc* review in the court of appeals. *Id.*, at 81a. No court of appeals judge other than the panel's dissenting judge voted for *en banc* review. *Id.*, at 82a. Petitioners timely filed their petition.

REASONS FOR DENYING THE WRIT

I. PERCEIVED MISSTATEMENTS OF FACT

Petitioners mischaracterize the record to assert that SB 3 is a complete ban on motorized mining in Oregon. In their Questions Presented for Review, Petitioners assert that Oregon prohibits "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." Pet. at i; *see also* Pet. at ii (Question Presented: "Whether state statutes prohibiting any and all motorized mining on federal mining claims are pre-empted. . . . "). These broad assertions are incorrect for multiple reasons.

First, the record built in the district court addresses SB 838, which is no longer in effect, and is different than SB 3 in scope. As noted, SB 838 prohibited motorized mining in bull trout habitat, as well as streams designated as ESH, and also on uplands adjacent to both sets of streams, as far back as 100 yards. By contrast, SB 3 applies more narrowly, to only those portions of streams designated as ESH, and only up to the high-water mark.

The difference matters because Petitioners' unpatented mining claims are "placer claims," which are typically 20 acres in size, corresponding to the "legal subdivisions of the public lands." 30 U.S.C. § 35. However, their claims can (and do) range in size up to 120 acres. *See*, *e.g.*, SER 30-32 (Petitioner Grothe holds a 120-acre claim). SB 3 prohibits only one form of mining

in the claims in this case, and only in relatively small areas within the claims. *See*, *e.g.*, SER 33 (map of Golden 35 claim showing that more than two-thirds is open to motorized mining).

Given these changes in the law, the record fails to support Petitioners' broad assertion that SB 3 "prohibits any and all motorized mining on federal mining claims." *Cf.* Pet. at ii. For example, Petitioner Van Orman declares that he is a part owner of five placer claims along Althouse Creek in the Siskiyou National Forest, but he declares nothing about exploring or mining upland parts of his claims where SB 3 does not apply. ER 101-02. Mr. Van Orman declares only that, in his view, "the best deposits left are most likely to be located underwater." ER 102. Similarly, Petitioner Coon declares that he owns one placer claim along the Calapooia River and one along Vincent Creek, both on Forest Service lands. ER 150. But only part of Vincent Creek is designated as ESH. *Id.* Mr. Coon declares nothing about the prospect of mining the portion of Vincent Creek that is not designated as ESH, and therefore unaffected by SB 3, nor does he declare anything about the other upland areas where SB 838 applied, but SB 3 does not. ER 149-50. The same is true with other Petitioners' declarations. *See* ER 141-43, ER 215-17.

Moreover, at least one Petitioner is in fact currently conducting motorized mining on his mining claim while SB 3 is in effect. Petitioner Gill is approved to conduct motorized mining on parts of his claim in the Siskiyou National Forest. ER 138; SER 36-47. Josephine Creek, which is designated as ESH, flows through part of his claim. ER 138. But Mr. Gill is mining the

uplands above the creek, which are unaffected by SB 3. Accordingly, the record does not prove that SB 3, "as a practical matter, foreclose[s] mineral development of the Miners' mining claims. . . ." *Cf.* Pet. at 2. Indeed, the record shows the opposite, that motorized mining is ongoing with SB 3 in effect.

Second, Petitioners misrepresent that "[t]he mining and prospecting activities of the Miners, as conducted under regulation prior to the State's ban, pose no environmental risk of any remaining regulatory significance to rational regulators." Pet. at 4. To the contrary, when Oregon adopted SB 838, it found that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." ER 159 (emphasis added).

Third, although Petitioners correctly note that SB 3 is limited to ESH, they assert that "in practice those zones were drawn expansively to include many areas inaccessible to anadromous fish." Pet. at 5. To support this assertion, Petitioners do not cite evidence from a qualified fish biologist, but instead rely on a declaration from a miner who is president of the Waldo Mining District, and who declares that in one part of one creek, and in one national forest, "I have never seen any spawning salmon or redds [fish nest sites]," and that "[i]t is surprising that this habitat is deemed 'essential,' much less habitat at all." *Id.*, citing ER 117. However, the Oregon Division of State Lands, which designates ESH, is required to "consult annually" with the Oregon Department of Fish and Wildlife

to ensure "the accuracy of the ESH designations." Or. Admin. R. § 141-102-0040(1). Anyone can submit "new or higher quality data" as to the accuracy of designations. Or. Admin. R. § 141-102-0040(1). There is no probative record evidence that any ESH is inaccurate.

Finally, Petitioners' assertion that Oregon has banned motorized mining in all streams "better suited for use as fish habitat" is false. *Cf.* Pet. at iv. There are hundreds of miles of streams in Oregon that fish inhabit, but that are not designated as ESH, and are not covered by SB 3. *See*, *e.g.*, ER 41. By contrast, every one of the streams flowing through Petitioners' mining claims—except one—is not only designated as ESH, but has also been designated by the National Marine Fisheries Service ("NMFS") as "critical habitat" for salmon or steelhead trout listed as threatened with extinction under the Endangered Species Act ("ESA"). SER 27 & 29.[3] The ESA generally requires NMFS to "conserve" listed species, 16 U.S.C. § 1532(3), and for coho salmon in southern Oregon, NMFS adopted a recovery plan recommending "special closed areas, closed seasons, and restrictions on [motorized mining] methods and operations" in the streams where coho spawn. SER 51. In at least this respect, Oregon's law is consistent with the full purposes and objectives of Congress, which include the ESA.

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[3] The exception is the three claims held by Petitioner Willamette Valley Miners on Dads Creek in the South Umpqua River basin. SER 29. Although the parts of the creek the claims overlay are not designated as critical habitat, they are ESH, because they provide habitat for winter steelhead trout, which Oregon has designated as a "sensitive" species. *Id.*

II. ISSUES RAISED AND PRESERVED FOR REVIEW

In the court of appeals, Petitioners asserted that SB 838 is preempted for reasons inconsistent with those they now assert. Here, in their statement of the case (but not in their Questions Presented for Review), Petitioners quote this Court's opinion in *United States v. Locke*, 471 U.S. 84, 105 (1985), that "the property right here [granted by Congress] is a right to flow of income from production of the claim." Pet. at 4. Later in their petition, they suggest SB 3 implicates the commercial practicability of mining their claims. Pet. at 28. However, in the court of appeals, in their challenge to SB 838, Petitioners were unequivocal: their "appeal is not about profitability, but about prohibition." Ninth Cir. ECF No. 57 at 41.

Further, here, Petitioners characterize SB 3 as a blanket "prohibition" on all mining of any kind on their claims, Pet. at 2, but in the court of appeals, Petitioners were explicit that to prevail, they "need not demonstrate that [Oregon's ban] makes it impossible to conduct any and all mining; they merely need to demonstrate the obvious proposition that banning motorized equipment is an obstacle to the full and complete accomplishment of Congressional objectives." Ninth Cir. ECF No. 7 at 18.

Accordingly, the issue actually raised and preserved for review is relatively nuanced: Does federal law preempt a state prohibition on motorized mining in portions of some streams that flow through unpatented mining claims on federal lands, where other feasible forms of mining are allowed in the same portions of the streams, and motorized mining can and does occur within other parts of the same mining claims?

III. THE DECISION BELOW CREATES NO CONFLICTS WITH COURT PRECEDENT

This Court has held "that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (internal quotations omitted). Here, preemption exists only if SB 3 "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012).

Petitioners try to shoehorn a record that does not support their broad assertions to attempt to match parts of this Court's opinion in *Granite Rock* suggesting when the federal mining laws may preempt state law. Pet. at 11-15. Petitioners' primary argument is that the federal mining laws occupy the field of "land use control on federal lands" and, therefore, SB 3 is an impermissible land use ordinance. Pet. at i, 12-14. Petitioners are wrong for two independent reasons. First, the federal mining laws do not occupy the field of mining regulation on federal lands. Second, SB 3 is not a land use ordinance, and it is consistent with *Granite Rock*.

A. The Federal Mining Laws Anticipate State Regulation

Petitioners mischaracterize the federal mining laws when they assert repeatedly that states have only an "advisory" role related to mining operations on federal lands. Pet. at 3, 21, 22 n.7. To the contrary, Section 2 of the Mining Law of 1872, which requires that federal lands be "free and open" to exploration

and mining, also requires that all mining occur "within regulations prescribed by law." 30 U.S.C. § 22. In this context, as established over a century ago, "law" does not mean only federal mining laws, it means state laws as well. *O'Donnell v. Glenn*, 19 P. 302, 206 (Mont. 1888). As both the Ninth Circuit's opinion below, and the United States' brief as *amicus curiae* establish in detail, the federal mining laws anticipate state regulation of mining on federal lands as a valid exercise of state authority.

Indeed, in *Granite Rock*, this Court explicitly recognized that states can regulate mining on federal claims. When it rejected the mining company's argument that federal agency regulation of mining occupies the field and preempts state regulation, this Court reasoned that, if Congress intended that states could not regulate mining, federal agency mining regulations would show such intent. *Id.* 480 U.S. at 582-83. As this Court noted, Forest Service mining regulations "explicitly require all operators within the national forests to comply with state air quality standards, state water quality standards, and state standards for the disposal and treatment of solid wastes." *Id.*, 480 U.S. at 583 (citing 36 C.F.R. § 228.8(a), (b), (c)). This Court determined that "[i]t is impossible to divine from these regulations . . . an intention to pre-empt all state regulation of unpatented mining claims . . . ." *Id.* at 584.

Moreover, since *Granite Rock*, the BLM has promulgated regulations making it even clearer that states can require a "higher standard of protection" from the harmful effects of mining than the BLM may require, and that "there is no conflict" between such pro-

tective state provisions and federal law. 43 C.F.R. § 3809.3. When the BLM adopted its regulations, it stated that "[o]ne purpose of subpart 3809 is to [enable the BLM to] establish a minimum level of protection for public lands." *Final Rule, Mining Claims Under the General Mining Laws; Surface Management*, 65 Fed. Reg. 69,998, 70,008 (Nov. 21, 2000). The BLM then cited *Granite Rock* for the correct proposition that there is no conflict between the BLM's choice to require merely a "minimum" level of protection related to mining operations, and its recognition that a state may then require a "higher level of protection." *Id.*[4]

Based in part on these provisions, as the United States noted in its *amicus* brief, "[t]here can be no dispute that federal law anticipates, and in some instances requires, compliance with state environmental laws that may in some ways restrict or limit mining activity. The entire field of regulation of mining activity on federal lands has not been so occupied by federal law that any attempt by a state to impose concurrent restrictions on those activities is automatically preempted." Brief of the United States as *Amicus Curiae*, Ninth Cir. ECF No. 36 at 7. The United States' position in this case is consistent with the position taken by the Department of the Interior over 18 years ago, when it affirmed that Montana could prohibit a single type of harmful mining–use of cyanide leach processes—on federal mining claims. 65 Fed. Reg. at 70,009. There, the Department stated it "believes that this is consistent with the [Federal Land Policy

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[4] Petitioners attack this regulation too, calling it "patently unlawful." Pet. at 25.

and Management Act], the mining laws, and the decision in the *Granite Rock* case." *Id.*

B. SB 3 is Consistent with *Granite Rock*

Petitioners focus on the discussion (not holding) in *Granite Rock* that "[t]he line between environmental regulation and land use planning will not always be bright. . . . 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." Pet. at 11-12 (citing 480 U.S. at 585). In SB 3, Oregon has not chosen "particular uses" for Petitioners' mining claims. As even Petitioners concede, their claims can be mined, including with motorized equipment. Pet. at 5 (SB 3 "singles out small scale precious metals mining for closure while allowing other uses of motorized equipment to continue. . . . "). In fact, certain of their claims are currently being mined with motorized equipment. ER 138; SER 36-47. And for still other claims, SB 3 does not apply to portions of the streams, so it does not prohibit any motorized mining in those areas. ER 150. It is only in the portions of streams designated as ESH that SB 3 limits one type of mining, in order to protect imperiled species of fish.

When SB 3 is correctly characterized, it is clearly consistent with *Granite Rock*. It is not a broad land use ordinance that prohibits all mining on claims and thereby "mandates particular uses of the land." *Id.*, 480 U.S. at 585. SB 3 does exactly what this Court in *Granite Rock* noted acceptable environmental regulation can do: keep "damage to the environment . . . within prescribed limits." *Id.* SB 3 is consistent not

only with the interpretation of the United States in this case, but also with the Department of the Interior's explication, in similar circumstances decades ago, of the extent of permissible state regulation of federal mining claims. 65 Fed. Reg. at 70,009.

CONCLUSION

Petitioners have not demonstrated any basis for this Court to review the decision below. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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MARCH 28, 2019

CERTIFICATE OF WORD COUNT

No. 18-979

Joshua Caleb Bohmker, et al.,

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March 28, 2019

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