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

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Summary of Argument

For nearly one hundred fifty years, it was blindingly obvious that states could not prohibit mining on federal land. Oregon's decision to ban motorized mining that can be conducted in perfect compliance with all applicable pollution control standards is simply not the reasonable, standards-based environmental regulation authorized by *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 587 (1987).

The conflict is also obvious between the majority opinion and *Granite Rock*—as is the conflict with all the other circuits and state supreme courts that have found federal preemption in similar circumstances. Oregon reaches its conclusion that the Ninth Circuit correctly "applied well-settled law" (Respondent's Brief in Opposition ("Resp. Br.") at 1) only by ignoring most of the cases and statutes cited in the Petition and misinterpreting those it does address.

While a narrow majority in *Granite Rock* opened the door to state-law-based permitting to allow consideration of reasonable environmental permit conditions,[1] Oregon's attempt to shove

[1] As explained in the Petition (at 22-23), Congress provided a vehicle for consideration of such conditions without ceding ultimate decisionmaking to the states, and reconsideration of *Granite Rock* to limit states to the advisory role intended by Congress would clarify and streamline decisionmaking, supporting the Nation's mineral development objectives.

categorical *bans* through that door is only supported by a handful of very recent, and palpably erroneous, decisions.

Inasmuch as the conflicts raised by the majority opinion and the importance of this case are apparent, Oregon emphasizes the position taken by the Solicitor General below. That position was clearly erroneous and stands in striking contrast to the Solicitor General's prior position in *Granite Rock*, correctly interpreting the very same set of statutes.

Oregon and the intervenors also claim that factual issues militate against a grant of review, but this case arises from a grant of summary judgment, and there are no factual issues that present any obstacles to review. This Court can review a simple and concise record plainly demonstrating—as Oregon conceded below—that Oregon implemented a *de facto* ban on mining in the areas on federal lands where it prohibited motorized mining.

The majority's decision to allow any imagined "risk" of environmental impact to support a categorical ban on a use of federal land utterly undermines the Congressional design for uses of those lands. The misinterpretation of federal mining law embedded in the opinion even gives states free rein to prohibit any mining for any reason whatsoever. Because of the Ninth Circuit's unique and expansive jurisdiction over federal land

decisions,[2] this Court's review is particularly urgent.

Response to the "Perceived Misstatements of Fact"[3]

The factual quibbling by Oregon and the intervenors is of no significance to this Court's decision whether to grant the Petition. At all relevant times, it has been obvious that banning motorized mining in the prohibited zones interferes with the objectives of federal mining law and constitutes a dedication of federal land to fish habitat use forbidden by federal land management laws.

Oregon notes that the final mining ban was slightly narrower than the initial moratorium, extending to the "line of ordinary high water". (Resp. Br. 2.) (This "means the line on the bank or shore to which the high water ordinarily rises annually in season" (ORS 274.005(3)).) There was no dispute, however, that for historical reasons, "the richest deposits of gold likely present in Oregon for the small-scale miner are located deep underwater" (ER120).

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[2] The Brief Amicus Curiae of Pacific Legal Foundation, *et al.*, in Support of Petitioners, filed February 27, 2019, reports that the federal government owns more than half the land in many states under Ninth Circuit jurisdiction, but very little in other circuits. *Id.* at 17.

[3] Brief of [Intervenor-]Respondents Rogue Riverkeeper, *et al.*, ("Rogue Br.") at 1.

That some miners have mining claims that contain areas out of the water, or even other mining claims not covered by the ban, is irrelevant. As a regulation of the use of federal land, the ban is categorically preempted; obstacle preemption arises from interference with accomplishment of the "*full* purposes and objectives of Congress" (*Granite Rock*, 480 U.S. at 581; emphasis added), and does not permit a state to engage in partial obstruction. The Nation's mineral deposits are to be "free and open" for development, not "free and open to the extent permitted by state law". *See* 30 U.S.C. § 22.

References by Oregon and the intervenors to assertedly "feasible" methods of non-motorized mining ignore the fact that the underwater deposits "can only be developed, as a practical matter, through the use of suction dredges, which permit an operator to work under water . . ." (ER120-21; *see also* ER216). Undisputed expert testimony below confirms that "without motorized equipment, many valuable deposits are for all practical purposes totally inaccessible for the small-scale miner—they might as well be on the Moon" (ER123). Numerous miners also testified that they could only develop their claims with motorized equipment. *E.g.,* ER102 ("The only way to reach these underwater deposits is with the use of motorized mining equipment"); ER129 ("cannot recover more than trace amounts of gold without the use of motorized suction equipment"); ER134 ("the only gold in the Golden 35 claim is in the creek bottom. It is impossible to get at this gold without motorized mining equipment").

The intervenors' claim that "less than one-third of the instream mining locations in Oregon" are covered by the ban (Rogue Br. at 1) is not supported in the record; the map they cite shows large numbers of instream mining operations shut down by the ban all over Oregon. The dozen counties and mining associations appearing as amici curiae confirm the significant impact on not only thousands of rural miners, but also the communities in which they operate.

Oregon and the intervenors nevertheless dispute that the ban is a "*de facto* ban on mineral development" (*e.g,* Resp. Br. 10 n.1 (citing Petition)), apparently referring to shutting down mining in the entire State, *but they do not and cannot dispute that it is a de facto ban in the banned areas.* At the end of the portion of oral argument that Oregon cites (*see id.*), Oregon acknowledged that the ban "extinguishes the miners' ability to mine within [so-called] essential salmon habitat that runs through their claims". The majority properly assumed that the ban extinguished all practicable means of mining in the banned areas, and so can this Court.

Finally, Oregon attempts to disguise the radical departure from settled law in the majority opinion below by narrowing the Question Presented. Oregon eliminates reference to the statutory conflicts and attempts to restrict this Court's focus to what it calls "use of motorized equipment within streams that are important habitat for salmon".

The assertion of "significant risks" to salmon (Rogue Br. 5 (quoting SB 838)) is preposterous with respect to many specific mining claims at issue in this case (*see*, *e.g.,* ER116-17). The intervenors cite regulatory procedures for designating "essential" or "critical" habitat, but this Court is well aware that modern environmental regulators claim habitat has these characteristics even when neither inhabited nor inhabitable by listed species. *E.g., Weyerhaeuser v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018) (regulators claim habitat is "critical").

Nearly all federal land can and will be characterized as "important" to various wildlife, and nearly any use of such land can and will be characterized as creating environmental "risks" of regulatory significance. The opinion below allows such characterizations under state law to overpower all federal land management authority.

Reasons for Granting the Petition

I. OREGON'S MISINTERPRETATIONS OF *GRANITE ROCK*, *LAWRENCE COUNTY*, AND OTHER CASES CANNOT OBSCURE THEIR CONFLICT WITH THE OPINION BELOW.

Neither Oregon nor the intervenors explain (or could explain) how a categorical ban of all motorized mining in state-designated areas is consistent with *Granite Rock's* careful explanation that allowable environmental regulation "only requires that, however the land is used, damage to the

environment is kept within prescribed limits". *Granite Rock*, 480 U.S. at 587. A categorical ban of a particular use, with no opportunity to meet environmental standards or limits, is categorically preempted under federal law. There is no dispute that motorized mining is allowed under federal law—the United States having even granted mining claims—and that Oregon frustrates entirely the mineral development Congress intended to occur on those claims.

Oregon attempts to distinguish *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), by asserting that the South Dakota ban "was targeted specifically at federal lands" and "lack[ed] an environmental justification". Both assertions are, in substance, made up out of the whole cloth, and Oregon's ban on mining can fairly be said to target the federal lands occupied by prospectors and claimholders.

Petitioners note that the California Court of Appeals, finding federal preemption, concluded the *Lawrence County* case was "'nearly directly on point'" with California's ban; the California Supreme Court only overturned its decision by frankly disagreeing with the Eighth Circuit. *People v. Rinehart*, 1 Cal.5th 652, 671 (2016) (quoting appellate opinion). That disagreement was based, among other things, on the remarkable assertion that Congress expressly "committ[ed] miners to continued compliance with

state and local laws" in the 1872 Mining Act. *Id.* at 672.[4]

The intervenors push this revolutionary interpretation of the 1872 Mining Act as well (Rogue Br. at 8-9), but this merely highlights the importance of this Court's review. Arguments that early "federal mining laws anticipate[d] state regulation of mining on federal lands" (*see id.* at 9) are flat repudiations of this Court's declaration in *Granite Rock* that the 1872 Mining Act "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation". *Granite Rock*, 480 U.S. at 582. While the majority upholds a statute for asserted environmental reasons here, the legal interpretation of federal mining law embedded in the

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[4] Consistent with the Ninth Circuit's unusual procedural approach below (Petition at 33-25), the California Supreme Court's opinion is marred by its misuse of extra-record material concerning historical state regulation of mining in California reviewed in R.L. Kelly, *Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (Clark 1959). The California Supreme Court ignored the fact that the miners involved "had been given United States patents for their land, which was taken by many as tacit approval of their operations" (*id.* at 59, 159), while federal preemption was not even invoked; indeed, the first significant lawsuit was remanded from federal court back to state court for want of a federal issue (*id.* at 106).

The magistrate's opinion in *Pringle v. Oregon*, No. 2:13-CV-00309-SU (D. Or. Feb. 25, 2014), cited by Oregon, also arises in unusual circumstances. It was a case brought by a *pro se* litigant engaged in the unauthorized practice of law who failed entirely to argue (among other things) that Oregon's Scenic Waterways Act was a land use restriction categorically preempted under FLMPA and the NFMA.

opinion gives states veto power over any and all mining on federal land for any reason whatsoever—a result shockingly inconsistent with the entire Congressional design and the century of precedent interpreting it.

Oregon tries to distinguish *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984) on the basis that the United States "virtually abandoned" any argument that the state law ban was not preempted (*id.* at 940 n.3), but this confirms how well-settled the authority supporting Petitioner's case was.

Oregon's attempt to distinguish *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) on the basis that "Petitioner's use of motorized mining equipment is not specifically authorized" (Resp. Br. 12) makes no sense; neither was the core drilling in *Brubaker*. There, as here, use of motorized devices is necessary to implement the federal mining statutes by validating the existence of mining claims (*see* ER121, ¶ 21)—as well as developing them.

In short, the majority opinion below following in the footsteps of the California Supreme Court, mounts a revolutionary attack on a proposition that all previously regarded as obvious: states cannot prohibit mining on federal land. This revolutionary principle, unless addressed promptly by this Court, threatens to interfere with the national interests in the use and development of federal lands all over the Western United States.

II. THE POSITION OF THE UNITED STATES BELOW IS AN ABERRATION.

Since *Granite Rock* was before this Court, none of the pertinent statutes necessary to assess federal preemption have been amended in any relevant way. All that has changed is identity of the Executive Branch officials entrusted under our Constitution to "take Care that the Laws be faithfully executed". U.S. Const., Art. II, § 3.

In August 1986, the Solicitor General (now Harvard Law Professor) Charles Fried, analyzed the statutes in detail, and expressly rejected the claim that the Mining Act of 1872 authorized application of state law to restrict mining.[5] This Court rejected Solicitor Fried's position that federal statutes *categorically* preempted any and all state attempts to implement a permitting scheme, but this Court's express recognition that even environmental regulation could become "so severe" as to be preempted (*Granite Rock*, 480 U.S. at 485) largely accepted the Solicitor General Fried's careful analysis of Congressional intent in the several statutes involved.

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[5] Brief of the United States as Amicus Curiae Supporting Appellee in *Granite Rock*, No. 85-1200, filed Aug. 1, 1986, at 25-26; *see generally id.* at 20-30. Petitioner requests that this Court take judicial notice of this brief and stands ready to e-mail a copy to the Clerk upon request.

Solicitor General Fried had acknowledged that the statutes, as interpreted by at least one federal agency, may allow a state to "impose certain valid, neutrally prescribed pollution control standards to mining activities".[6] In contrast, the position of the Solicitor General below, which Oregon repeatedly and somewhat misleadingly represents as the view of the "federal agencies charged with administering the federal lands" (Resp. Br. 1, 5, 14), slavishly adopted California's revolutionary reinterpretation of federal law as authorizing any and all prohibitions of mining on federal land without regard to environmental impacts or compliance with standards.

The position of the present Solicitor General concerning this case is unknown. His remarks about a California statute banning a specific "mining technique" (*see* Resp. Br. 13) are not controlling where Oregon has pushed even further through the *Granite Rock* door to identify large zones on federal land where no motorized mining of any kind may proceed. And there is no dispute that the Solicitor General took the position that this case presented a broader record for review than *Rinehart*, invoking the federal land management statutes that clarify Congressional intent concerning standards-based state environmental regulation.

In any event, it falls to this Court to assess the conflict between state and federal law, not fallible

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[6] *Ibid.* at 28 n.27 (citing 36 C.F.R. § 228.8).

Executive Branch officials.[7] Judicial review turns on Congressional intent, which may be clearly discerned from multiple statutes addressing the role of states in this context.

III. THE NINTH CIRCUIT'S SUMMARY JUDGMENT RULING CONFIRMS THE ABSENCE OF ANY FACTUAL OBSTACLES TO THIS COURT'S REVIEW.

Oregon claims that the Ninth Circuit majority "correctly rejected" what it calls "two *factual* assertions about Senate Bill 3 that are contested". (Resp. Br. 15; emphasis in original.) Oregon does not explain how the court could properly do this in reviewing a motion for summary judgment. Neither issue raised by Oregon, however, constitutes an obstacle to this Court's review.

Most importantly, there is no genuine issue of fact as to the *effect* of the state law. Oregon acknowledges that even the majority concluded that the law made it "effectively impossible for at least some of [Petitioners or their members] to recover the valuable mineral deposits on their claims". (Resp. Br. 16 (citing App. 55a; emphasis deleted).) Questions about the precise geographical scope of the ban are irrelevant in assessing either "whether the

[7] The intervenors cite a response to comments in a Federal Register notice "by the Department of Interior over 18 years ago concerning a mining ban in Montana". (Rogue Br. 10.) The mining in question was to occur on state land, not federal land. *See Seven Up Pete Venture v. Montana*, 2005 Mont.146 (Mont. 2003).

law crosses the line into land use planning" (Resp. Br. 17) or "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" (*Granite Rock*, 480 U.S. at 581.) It is enough to know that underwater mining is effectively prohibited, foreclosing development of the most valuable mineral deposits in the banned areas.

The question of Oregon's true motives in legislating is a red herring. Oregon banned motorized mining use of federal land in favor of its chosen use, fish habitat, in a fashion that stands as an obstacle to mineral development. The precise and limited Congressional intent to give effect to environmental standards cannot support use prohibitions justified by an appeal to the environment, whether or not an environmental motive actually drove decision-making. In their Petition, Petitioners did not attempt to distract this Court with motive testimony from those involved in Oregon's legislative processes; nor will they do so in merits briefing.

Finally, the intervenors repeatedly attempt to distract this Court with arguments about the profitability of or income from mining (Rogue Br. at 7), but this does not have any bearing on the "issue actually raised and preserved for review" (*id.*). The undisputed testimony in the record leaves no doubt that, *as the majority found* (App. 55a), Oregon's ban completely foreclosed the mineral development of specific federal mining claims within the prohibited areas.

Conclusion

The many amici curiae who stand before this Court from rural areas throughout the West, including multiple county governments, demonstrate the immediate importance of restoring the Constitutional balance. More importantly, absent this Court's grant of review, states will make more and more effectively unreviewable vetoes to any use of federal land to which environmental objections are raised, utterly frustrating the design of Congress and invading the land management authority of federal agencies.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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