No. 20-_____

In The
Supreme Court of the United States

MINNESOTA SANDS, LLC,

Petitioner,

v.

COUNTY OF WINONA, MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state or local government impermissibly discriminate against interstate commerce when it allows a mineral to be mined for all uses that are common locally but prohibits mining the same mineral in the same way for a use that occurs only in other States?

2. Does a mineral estate in land that is subject to local permitting requirements qualify as "property" protected by the Takings Clause—as the Federal Circuit and the courts of three States have held—or do permitting requirements eliminate the existence of a federally protected property interest unless and until the permits are granted, as the Supreme Court of Minnesota held here?

PARTIES TO THE PROCEEDINGS

Petitioner Minnesota Sands, LLC, was the plaintiff in the trial court, and the petitioner in the Minnesota Court of Appeals and in the Supreme Court of Minnesota.

Respondent the County of Winona, Minnesota, was the defendant in the trial court, and the respondent in the Minnesota Court of Appeals and in the Supreme Court of Minnesota.

STATEMENT OF RELATED CASES

- *Minnesota Sands, LLC* v. *County of Winona, Minnesota*, No. A18-0090, Supreme Court of Minnesota. Judgment entered May 4, 2020.
- *Minnesota Sands, LLC* v. *County of Winona, Minnesota*, No. A18-0090, Minnesota Court of Appeals. Judgment entered July 30, 2018.
- *Minnesota Sands, LLC* v. *County of Winona, Minnesota*, No. 85-CV-17-771, Winona County District Court. Judgment entered November 17, 2017.
- *Southeast Minnesota Property Owners* v. *County of Winona, Minnesota*, No. 85-CV-17-516, Winona County District Court. Judgment entered November 17, 2017.

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PETITION FOR A WRIT OF CERTIORARI

In 2016, Winona County, Minnesota, simultaneously banned the mining of "sand [that] is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas," but allowed the mining of the very same sand for "local construction" uses. A sharply divided Supreme Court of Minnesota held that this ban does not violate either the Commerce Clause or the Takings Clause. These holdings conflict with clear rulings of this Court and of other lower courts, and threaten an industry that is vital to the Nation's energy supply.

First, the County's ban starkly discriminates against interstate commerce. Under Winona County's ordinance, sand may be mined for the uses that commonly occur in the County, but the same sand cannot be mined in exactly the same way for use in hydraulic fracturing—a use that occurs only in other States. The discrimination is obvious not only on the face of the County's ordinance but also in its purpose and effect, which discriminate in favor of common local uses of silica sand but forbid extractive activity that would support a disfavored out-of-state use.

This Court has long since established that the Commerce Clause prevents States and local governments from enacting trade embargoes. As the Court has explained, "[t]o what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines." *Pennsylvania* v. *West*

Virginia, 262 U.S. 553, 599, aff'd on reconsideration, 263 U.S. 350 (1923). That, the Constitution does not permit.

In this case, a local government has levied an embargo for the express purpose of choking off a disfavored economic activity that occurs solely in other States. This attempt by one locale to use its resources to control the policy choices of other States is antithetical to our federalist system, and the Court should grant review to address whether it is permissible under the Commerce Clause.

Second, the mining ban is a paradigmatic regulatory taking because it eliminates virtually all value in Petitioner's mineral rights in Winona County. Minnesota, like many States, recognizes a mineral estate in a parcel of land that is distinct and severable from its surface estate. But the Supreme Court of Minnesota held below that a mineral estate does not qualify as "property" under the Takings Clause unless and until the owner has obtained all government permits needed to use the estate—i.e., to start mining. Because Petitioner had not received all the necessary permits before Winona County banned outright its intended mining use, the court below held that there was no "property" interest for the Takings Clause to protect.

This sharply splits with decisions from the Federal Circuit and three other States. Those courts recognize that government-permitting requirements for the use of a mineral estate are relevant to the measure of

"just compensation" for the estate—but not to whether it qualifies as property in the first place. The Supreme Court of Minnesota here held the opposite.

Moreover, this Court's longstanding precedents establish that denial of a land-use permit can be a regulatory taking. The decision below conflicts with that rule because it holds that an unfulfilled permit requirement prevents a property interest from existing at all.

The Court should grant review to resolve these conflicts.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reproduced in the Appendix at App. 1–68, and is reported at 940 N.W.2d 183. The opinion of the Minnesota Court of Appeals is reproduced in the Appendix at App. 69–119, and is reported at 917 N.W.2d 775. The opinion of the trial court is not reported but is reproduced in the Appendix at App. 120–146.

JURISDICTION

The Supreme Court of Minnesota entered its judgment on May 4, 2020. Pursuant to this Court's order of March 19, 2020, the time for filing this petition for certiorari was extended to 150 days from the date of the judgment.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution, provides in relevant part that Congress shall have the power "To regulate Commerce ... among the several States."

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that "private property" shall not "be taken for public use, without just compensation."

The challenged portions of the Winona County, Minnesota Zoning Ordinance are lengthy and are reproduced in the Appendix at App. 194–201.

STATEMENT OF THE CASE

As amended, Winona County's zoning ordinance bans the mining of a mineral known as "silica sand" if the sand will be used in oil and gas extraction, in the process known as hydraulic fracturing or "fracking," but not if the sand will be put to common local uses. Petitioner Minnesota Sands owns mineral rights that the ordinance makes worthless.

A. The Silica Sand Mined in Winona County for Local Purposes Became Critical to the U.S. Energy Revolution Spurred by Hydraulic Fracturing.

Winona County, in southeastern Minnesota, has considerable deposits of silica sand. Silica sand is distinguished from other sands in two respects: first, it is composed almost exclusively of quartz, which "is a very hard mineral and able to withstand high pressures"; second, its grains are rounded and "fairly uniform in size," which makes it porous.[1] The unique characteristics of silica sand have historically made it useful in a variety of applications. For instance, the sand's porosity makes it a frequent choice for animal bedding. App. 184 ¶¶53–54. Silica sand also is often used in buildings, for road paving, and on golf courses.[2]

Within the last twenty years, however, a new, more valuable use has been discovered for silica sand—hydraulic fracturing. Hydraulic fracturing is a process for extracting oil and gas by opening fractures in the surrounding rock. App. 166 ¶¶12–15. The process requires the use of a "proppant": a material that is

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[1] Minnesota Dep't of Nat. Resources, *DNR and Silica Sand*, https://www.dnr.state.mn.us/silicasand/index.html (expand "Why here?" tab at right) (last accessed Sept. 26, 2020); see also United States Geological Survey (M. Benson & A. Wilson), *Frac Sand in the United States* at 1–2, 5–7 (2015), https://pubs.usgs.gov/of/2015/1107/pdf/ofr20151107.pdf (last accessed Sept. 24, 2020).

[2] App. 189; Index 79 at 445; Industrial Minerals Association of North America, What is Industrial Sand?, https://www.ima-na.org/page/what_is_ind_sand (last accessed Sept. 26, 2020). Citations to "Index" are to the trial court's document index.

strong enough to prop open fractures in geological formations, but also porous enough to allow hydrocarbons to flow out through the propped fractures. *Ibid.* Silica sand is the most utilized proppant in the United States because of its relatively low cost, availability, and overall performance. Index 127 at 1419.[3] In recent years, silica sand has been used as a proppant in 80 to 90 percent of all U.S. hydraulic fracturing,[4] and "[t]he Great Lakes Region" contributed "approximately 70% of the silica sand used in America as a proppant."[5] It is thus no exaggeration to say that silica sand from Winona County and the surrounding region has quickly become critical to the U.S. fracking industry.

At the same time, hydraulic fracturing has become central to the Nation's energy supply. In the 2010s, the United States became "the world's largest producer of" both oil and natural gas—a development that is in large part due to fracking.[6] "From 2007 to 2019," innovation in shale production, including new hydraulic

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[3] The silica sand from Winona County is no exception. Indeed, the sand "under lease by Minnesota Sands in Winona County is of extremely high quality and value as a proppant given its high crush resistance, roundness, low turbidity, and grain size." App. 167 ¶¶19–21.

[4] U.S. Geological Survey, *Frac Sand in the United States supra* n.1, at 53–54.

[5] *Id.*, at 53; see also *id.*, at 13–15, 43 (mapping U.S. silica sand production and deposits).

[6] Council of Economic Advisers, *Value of U.S. Energy Innovation and Policies Supporting the Shale Revolution*, at 1 (October 2019), https://www.whitehouse.gov/wp-content/uploads/2019/10/The-Value-of-U.S.-Energy-Innovation-and-Policies-Supporting-the-Shale-Revolution.pdf (last accessed Sept. 26, 2020).

fracturing techniques, "brought an eight-fold increase in extraction productivity for natural gas and a nineteen-fold increase for oil."[7] As a result, by 2016 "natural gas production from hydraulically fractured wells" made up "about two-thirds of total U.S. marketed gas production," and "hydraulic fracturing account[ed] for about half of ... U.S. crude oil production."[8] The economic, national-security, and geopolitical benefits have been immeasurable.

Although Winona County and the rest of the Upper Midwest are among only "a few known places on Earth" where silica sand may be found in abundance,[9] Minnesota and its Upper Midwestern neighbors do not possess significant deposits of oil or natural gas. App. 166 ¶16. As a result, all hydraulic fracturing activity conducted with Minnesota-originated sand takes place out of state—primarily in Texas, Pennsylvania, North Dakota, Colorado, and New Mexico.[10]

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[7] *Id.*, at 1, 7.

[8] United States Energy Information Administration, *Hydraulically fractured wells provide two-thirds of U.S. natural gas production* (May 5, 2016), https://www.eia.gov/todayinenergy/detail.php?id=26112; *Value of U.S. Energy Innovation*, *supra* n.6, at 7.

[9] *DNR and Silica Sand*, *supra* n.1, at "Why here?" tab; U.S. Geological Survey, *Frac Sand in the United States*, *supra* n.1, at 8; see also *id.*, at 20 (Upper Midwest silica sand "more suitable" for fracking than alternative supply from the South-Central States); App. 191.

[10] See App. 191; *Hydraulically fractured wells*, *supra* n.8; see *City of Fort Collins* v. *Colorado Oil & Gas Ass'n*, 369 P.3d 586, 593 (Colo. 2016) ("virtually all oil and gas wells in Colorado are fracked" (citation omitted)); *Ely* v. *Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518, 523 (M.D. Pa. 2014) ("649 wells have been drilled

One thing that has *not* changed with the expanded use of silica sand in hydraulic fracturing is the method by which that sand is mined. The traditional method for mining silica sand, both in Winona County and elsewhere in the region, has been via open-pit quarries.[11] Extracting silica sand for hydraulic-fracturing purposes does not require a mining operation that is "larger in size or scope" than a mine that extracts silica sand for any other purpose. App. 170 ¶36. Indeed, "[t]he process to mine [silica sand] ... does not differ in *any* material way" based on whether the sand will be used for animal bedding, hydraulic fracturing, or any other use. App. 165 ¶9 (emphasis added).

Moreover, although sand for hydraulic fracturing often (but not always) requires some processing after being dug up, this processing need not be done near the mine—it can instead be done after the unprocessed sand is transported to the hydraulic fracturing site or a third-party processing location.[12]

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in Susquehanna County, Pennsylvania alone, 99.5% of which have been hydraulically fractured since 2009").

[11] App. 190 ("In Minnesota, all silica sand mines ... operate as surface quarries...."); App. 170 ¶38; App. 184 ¶¶52–53; Index 85 at 804 (describing existing silica sand mine in Winona County).

[12] App. 190; Index 79 at 443; *Frac Sand in the United States supra* n.1, at 7, 49.

B. Winona County Allows Mining Sand for Local Uses but Bans It for Out-of-State Hydraulic Fracturing.

Against this backdrop, Petitioner Minnesota Sands obtained several mineral leaseholds from owners of farmland in Winona County. These leaseholds give Minnesota Sands the exclusive right to remove silica sand from the ground and the right to enter and use the surface of the property for purposes of exploring for, mining, and shipping the sand. App. 6–7, 36 & n.18, 174–179 ¶¶14–19, 24.

Over several years, Minnesota Sands invested millions of dollars in cultivating its mineral rights, including by—among other things—obtaining the leasehold interests, sampling and testing Winona County sand, conducting environmental-review activities, developing operating plans, and securing purchase options for transport and processing sites. App. 166–168 ¶¶17–18, 22–28; App. 173–180 ¶¶4, 6, 13–21, 25–31.

Starting in 2012, Minnesota Sands sought regulatory approval for mining its leasehold estates. At the time, the applicable Winona County zoning ordinance required a conditional-use permit for any mining operation, so Minnesota Sands applied for such a permit. App. 7; App. 183 ¶¶44, 46–47. Working at the direction of Winona County, Minnesota Sands also began preparing environmental assessments required by state and local regulations for mines in Winona County, as well as mines in two other counties. *Ibid.* These regulatory applications progressed over the next few years,

with some pauses tied to fluctuations in market conditions for silica sand.

In 2016, however, interest groups and local activists began lobbying the Winona County Board for an amendment to the county zoning ordinance that would prohibit Minnesota Sands' proposed operations. The initial legislative proposal, drafted by an advocacy group known as the "Land Stewardship Project," was to ban mining for "silica sand that ... is suitable for use as a proppant" and that "is intended to be sold or used as such," but to allow mining for "silica sand that is intended" for "use ... other than as frac sand." App. 151–153.

The issue generated significant local controversy and protests. Both in the public debate and in the official minutes of the Winona County Board and Planning Commission, the proposed amendment was commonly referred to as a "frac sand ban." *E.g.*, Index 23 at 1; Index 124 at 699, 744–745, 757, 779, 814; Index 129 at 359–368, 392, 406.

The Winona County Planning Commission recommended against a targeted regulation of frac-sand mining. Rather than prohibiting mining based on the sand's intended end use, the Commission recommended that the County should simply limit the number and size of all sand-mining operations within its borders. App. 154–162. Ultimately, the Winona County Board rejected the Commission's alternative and by a 3-2 vote adopted a modified version of the "frac sand ban." App. 194–201.

The adopted version of the amendment modified Winona County's zoning laws to provide that "the excavation, extraction, mining and processing of industrial minerals" is "prohibited in Winona County." App. 200. As amended, the County's zoning ordinance defines "industrial minerals" as "high quartz level stone, silica sand, quartz, graphite, diamonds, gemstones, kaolin, and other similar minerals." App. 195. Of these minerals, only silica sand is actually present in Winona County in significant enough volumes to create a demand to mine. App. 165 ¶8. The ordinance further defines silica sand as "well-rounded, sand-sized grains of quartz" that are "commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas." App. 196. Testimony in the amendment's legislative record indicates that "the only use of industrial sand [from] Winona County is for fracking." ADD-109 at 911. The amended ordinance defines the prohibited "mining" in an exceptionally broad manner to include even the "transportation" of silica sand. App. 198.[13]

In contrast to this ban on mining sand for use in hydraulic fracturing, the amended ordinance expressly allows mining the very same sand for the uses that occur within Winona County. The amendment's definition of "'industrial minerals' includes ... silica sand ... but exclud[es] construction minerals." App. 195. And the ordinance's definition of "'construction materials' includes ... sand that is produced and used for local

[13] For ease of reading, we sometimes refer herein simply to a ban on "mining" silica sand. This is shorthand for the ordinance's ban on mining, processing, or transporting the sand.

construction purposes, including road pavement, unpaved road gravel or cover, concrete, asphalt, building and dimension stone ... and bedding sand for livestock operations, sewer and septic systems, landfills, and sand blasting." App. 195. This list appears to include all existing uses for silica sand within Winona County. The record does not disclose any local use that is not embraced by this exemption, and the County has not identified any in this litigation.

Thus, the amended ordinance expressly bans mining silica sand for use in (out-of-state) hydraulic fracturing, and expressly permits mining the same sand for local uses. In addition to these specific provisions, the amendment's general definition of "industrial minerals" also prevents mining of silica sand for certain other users located in Minnesota, such as "manufacturers of countertops, glass, and shingles." App. 28.

Nothing in the amendment regulates *how* silica sand may be mined. At the time the amendment was adopted, Winona County's zoning ordinance already regulated how mining operations may affect water quality, topsoil conditions, human safety, and similar matters, and it did so without regard for whether the intended market for a particular mine was local construction or out-of-state hydraulic fracturing. Index 127 at 1259–1263. The amendment did not alter that uniformity of treatment, and thus the *only* effect of the amendment was to restrict mining based on the destination of the sand extracted. The net result is that silica-sand mining for "local construction" purposes is permitted, while mining the same sand for hydraulic

fracturing (in other States) is prohibited even if it is smaller-scale and quieter and safer and more environmentally protective than every local-use mine in the County.

Since Minnesota Sands' proposed frac-sand operation is now illegal, and since it "is not economically viable" for a new operator to compete with local quarries in mining sand for construction or agricultural uses, Minnesota Sands' mineral leaseholds in Winona County have become worthless. App. 185 ¶¶56–60; Index 100 ¶8.

C. A Sharply Divided Minnesota Supreme Court Upholds the Ban.

Minnesota Sands brought this action in Minnesota state court, claiming (as relevant here) that the county zoning ordinance, as amended by the "frac sand ban," discriminates against interstate commerce in violation of the Commerce Clause and is a regulatory taking of its mineral leaseholds that requires just compensation under the Takings Clause. Following limited discovery, the trial court granted summary judgment for the County. App. 121. The Minnesota Court of Appeals affirmed in a 2-1 decision. App. 69–119. The Supreme Court of Minnesota granted review and affirmed by a sharply divided vote.

Commerce Clause. The court below held that the county ordinance does not discriminate against interstate commerce in a way that violates the federal Commerce Clause. First, the court concluded that the

ordinance's "local construction" exemption does not facially discriminate against interstate commerce because "the term 'local' can be interpreted to include ... the neighboring parts of Wisconsin located across the [Mississippi] river from Winona County." App. 20.

Second, the court concluded that the amendment was not adopted with the "purpose" of discriminating against interstate commerce. It stated that there is no "concrete evidence" that Winona County "was motivated by animus toward the primarily out-of-state fracking industry." App. 25. The majority opinion noted the lack of "comments ... critical of the fracking industry" in the County Board's official findings, but it did not discuss the specific targeting of hydraulic fracturing in the text of the amendment itself. App. 25.

Third, the court stated that the mining ban "does not discriminate against interstate commerce ... in practical effect." App. 29. Although the amended ordinance specifically allows mining of silica sand for local uses and bans mining for hydraulic fracturing, which occurs only out of state, the majority held that its effect is not discriminatory because it also would prevent mining of silica sand for in-state "manufacturers of countertops, glass, and shingles." App. 28. Again, the majority did not address the amendment's express targeting of the hydraulic fracturing industry, nor did it inquire whether there had ever been any previous sales of Winona County sand to those in-state users.

The two dissenting Justices concluded that the amendment facially discriminates against interstate

commerce, noting that it "allows local mining to proceed without impairment, while selectively banning the mining of the same resource for nonlocal uses," namely, fracking. App. 48. "Because the discrimination appears on the face of the ordinance by way of an affirmative distinction drawn between local and nonlocal uses of sand," they concluded, "the ordinance is subject to per se invalidation." App. 49.

Takings Clause. By a 4-3 vote, the court below held that the amendment did not effect a taking because Minnesota Sands' mineral leaseholds are not "property" within the meaning of the Fifth Amendment. The court acknowledged that "in Minnesota the right to subsurface minerals is separable from the rest of the land," and so it treated "the right to remove frac sand" as "a separate, concrete interest in land" that can qualify as "property" under the Takings Clause. App. 33–34. The court also recognized that Minnesota Sands obtained its mineral leases when "the owners of the land affected ... partitioned their property rights, separating (at least part of) the mineral rights from their remaining rights in the land." App. 31.

Nevertheless, the majority held that Minnesota Sands' mineral rights were not "property" protected by the Takings Clause because, at the time the County enacted the ban, Minnesota Sands had not obtained zoning permits or environmental clearances for its proposed mining. The court observed that mineral rights can be exercised principally by mining the minerals. App. 31–34. Thus, the court stated, until Minnesota Sands obtained all necessary government approvals to

actually begin mining, its mineral rights were only "a contingent-use interest" that was too "inchoate" to "sustain a takings claim." App. 34, 38–42.

Three of the court's seven Justices dissented on the takings issue, stating that the majority's holding "is inconsistent with controlling Supreme Court decisions." App. 53, 65. The dissent noted that "[t]he Supreme Court has not required that a claimant obtain vested rights in a prohibited use [of land] before bringing a regulatory takings challenge." App. 60. The dissenters warned that, because the majority's ruling makes the very existence of property rights contingent on local permitting decisions, it "has subtle, but serious, implications for Takings Clause jurisprudence." App. 64.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A DANGEROUS CONFLICT WITH THIS COURT'S COMMERCE CLAUSE PRECEDENTS.

The Supreme Court of Minnesota here approved a zoning ordinance amendment that bans mining sand "for use in the hydraulic fracturing of shale"—which occurs exclusively in other States—but allows mining the very same sand "for local construction purposes." App. 10, 195–196. The majority below concluded that, because the amendment would also prohibit mining for a few in-state uses of silica sand, it does not discriminate against interstate commerce. App. 27–28. That

holding conflicts with over a century of this Court's precedents and, if left unreviewed, will encourage other States and localities to use their natural resources to coerce other parts of the country into following their preferred policy positions, just as Winona County has. This Court's review is needed.

A. The Commerce Clause Establishes, and Secures from State Interference, a National Common Market.

Since at least the 1850s, "it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.'" *Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 370–371 (1976) (quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946)) (citing *Cooley* v. *Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851)); see also *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 537–538 (1949) ("This principle that our economic unit is the Nation ... has as its corollary that the states are not separable economic units").

Simply put, "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). "Our system," therefore, "is that every farmer and every craftsman shall be encouraged to produce by

the certainty that he will have free access to every market in the Nation, [and] that no home embargoes will withhold his export." *Hood*, 336 U.S., at 539.

This case concerns just such a "home embargo" on the export of "raw materials" needed for economic activity in several of Minnesota's sister States. To be sure, because "states serve their own interests best by sending their produce to market, the cases in which this Court has been obliged to deal with prohibitions or limitations by states upon exports of articles of commerce are not numerous." *Id.*, at 535. Yet the decisions that *do* exist make clear that Winona County's export ban impermissibly fragments the national common market that the Commerce Clause secures.

One such decision is *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593, aff'd on reconsideration, 263 U.S. 350 (1923). There, the Court struck down a West Virginia statute requiring natural-gas pipeline operators to fill in-state orders before selling interstate. This Court explained that the Commerce Clause does not permit a State "to subordinate [interstate business] to the local business" or to "attempt to regulate the interstate business to the advantage of the local consumers." *Id.*, at 597–598.[14]

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[14] See also *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (invalidating on Commerce Clause grounds a state law that sought to "conserve" natural gas for in-state residents); *id.*, at 255–256 ("[T]he welfare of all of the States, and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State

Even closer on point is *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 8 (1928). There, Louisiana banned the export of shrimp unless the shrimp had been processed in-state, even though the main processing facilities had previously been located outside Louisiana. *Id.*, at 8–9. This Court directed the district court to enjoin the export ban because it impermissibly "favor[ed] the canning of the meat ... in Louisiana by withholding raw or unshelled shrimp from [out-of-state] plants," and so its "practical operation and effect ... will be directly to obstruct and burden interstate commerce." *Id.*, at 13–14.

An even more extreme brand of mischief is at issue here. Whereas Louisiana at least allowed its natural resource (shrimp) to be exported after having been processed in-state, here Winona County has flatly banned its native resource (silica sand) from being mined, transported, or sold for a use important in other States.

B. The Ordinance Amendment's Possible In-State Effect Does Not Excuse Its Discrimination Against Interstate Commerce.

The court below concluded that the mining ban does not discriminate against interstate commerce "in purpose or in practical effect," within the meaning of

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with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States").

this Court's precedents. App. 29.[15] It could do that only by closing its eyes to both the plain text of the ordinance and a long line of this Court's decisions.

For more than a century, this Court has made clear that a law discriminating against interstate commerce is not saved merely because it also has some effect on some in-state commerce. One of the Court's earliest decisions in this area was *Brimmer* v. *Rebman*, in which Virginia imposed an inspection fee on meat only if it came from animals "slaughtered one hundred miles or over from the place at which it is offered for sale." 138 U.S. 78, 80 (1891). By its terms, the fee applied to long-distance intrastate transactions and did not apply to interstate transactions occurring near Virginia's borders. But the Court held that this did not matter: the statute could not "be brought into harmony with the constitution by the circumstance that it purports to

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[15] The majority stated that, if the statute's exemption for "local construction" mining were held to constitute facial discrimination against interstate commerce, it would cure that defect by "eliminat[ing] the 'local' restriction" in order to allow mining "sand ... for *any* construction purposes." App. 23–24 (brackets omitted). Regardless of whether that would mask the facial discrimination, it would do nothing to alleviate the purpose or practical effect of the ordinance in discriminating against interstate commerce since "local" uses would still be allowed and the purely interstate use of "frac sand" would still be banned.

More to the point, the majority did not actually strike the word "local" from the statute. Instead, it held that the "local" exemption does not discriminate against interstate commerce because a small part of the "local" area is in Wisconsin. App. 20–22. But the Commerce Clause does not allow a government to escape a claim of discrimination by designating one tiny part of one other State as the only permitted interstate market for its goods.

apply alike to the citizens of all the states, including Virginia," because its effect was still "to obstruct the bringing into that state" of meat that had been processed elsewhere. *Id.*, at 83.

The Court has repeatedly applied the same rule in more recent decades. It has struck down a city's ban on the sale of milk bottled more than five miles away, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 350, 356 (1951), and later explained that "[t]he fact that the ordinance also discriminated against all [in-state] producers whose facilities were more than five miles from the center of the city did not mitigate its burden on interstate commerce," *Ft. Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Nat. Res.*, 504 U.S. 353, 362 (1992).

The Court likewise struck down an attempt by Hawaii to impose a tax on sales of liquor generally, but to exempt sales of liquor "distilled from the root of ... an indigenous shrub of Hawaii." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 265 (1984). Although "[l]ocally produced sake and fruit liqueurs [we]re not exempted from the tax," that did not make the tax non-discriminatory under the Commerce Clause. *Id.*, at 256, 273.

Likewise, in *Fort Gratiot*, the Court invalidated "a Michigan law that prohibits private landfill operators from accepting solid waste that originates outside the county in which their facilities are located." 504 U.S., at 355. The court of appeals had "found no discrimination against interstate commerce because the statute 'does not treat out-of-county waste from Michigan any differently than waste from other states.'" *Id.*, at 358.

But this Court rejected that rule, holding that "a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State." *Id.*, at 361.

Winona County's ordinance discriminates against interstate commerce in the same way as all these laws that the Court has struck down. The court below conceded that no hydraulic fracturing occurs in Minnesota—and yet the ordinance *expressly prohibits* mining for "sand ... [that] is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas." App. 195–196, 200. Moreover, the ordinance expressly *allows* mining the very same sand for all uses that commonly occur locally. It is difficult to imagine a clearer instance of discriminatory purpose and effect.

The ordinance's discriminatory purpose and effect are not changed by the majority's observation below that the ordinance would also prohibit mining of silica sand for a few purposes within Minnesota, such as making "countertops, glass, and shingles." App. 28. The majority did not inquire how extensive this in-state application of the mining ban might be, or even whether Winona County silica sand has *ever* been used in any of those in-state industries. Instead, it simply concluded that the mere possibility of in-state applications "obviates any concern" under the Commerce Clause. App. 28.

That runs squarely afoul of this Court's precedents discussed above. Winona County left nothing to the imagination as to the main thrust of its ordinance: it expressly targeted hydraulic fracturing, an exclusively out-of-state use of silica sand, and expressly exempted a long list of local uses of the same sand. *Brimmer* and its progeny make perfectly clear that this discrimination is invalid even if the ordinance also may prevent some other in-state (but out of Winona County) uses of sand. There is nothing to distinguish Minnesota-made glass or shingles in this case from the "[l]ocally produced sake and fruit liqueurs" that "[we]re not exempted from the [discriminatory] tax" in *Bacchus Imports*, 468 U.S., at 265, or from the prohibited in-state commerce in *Brimmer* and *Dean Milk*. As this Court made clear in *Fort Gratiot*, Winona County "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State." 504 U.S., at 361.

In short, the majority below upheld a law that plainly discriminates against interstate commerce, and it did so based on a rationale that this Court has repeatedly rejected. To make matters worse, that holding paves the way for interstate restrictions on a commodity—frac sand—that is crucial to the national energy supply. That should not be allowed to stand.

C. The Court Should Grant Review to Prevent a Proliferation of Similarly Destructive Economic Conflicts.

The stark conflict between the decision below and this Court's precedents, along with the national importance of hydraulic fracturing, warrant certiorari on their own. But adding to the urgency of this case is the reason for the embargo here. Winona County is discriminating against interstate commerce not just to hoard resources but also to force other States to follow its policy views on fracking. In this age of polarized opinion, it is increasingly tempting for American jurisdictions to export their policy views by constraining exports of their natural resources. The Court should grant review to make clear that the Commerce Clause protects our federalism from that result.

In the past, this Court has struck down restrictions on interstate commerce that were motivated by economic protectionism. This case highlights another reason that one State or locality might try to constrain the flow of goods in interstate commerce: to prevent other States from engaging in, and benefitting from, economic activity that the first State (or locality) disapproves of on policy grounds. This is a common occurrence with hydraulic fracturing, which some residents in particular States (often, the States where it does not occur) disapprove of. The challenged ordinance acts on that disapproval by singling out the fracking industry as the target of its restriction on the mining, transportation, and sale of sand.

The ordinance thus is part of a recent and concerning trend: attempts by state or local governments to discriminate against interstate commerce in order to squelch disfavored economic activity occurring in a sister State. See, *e.g.*, *North Dakota* v. *Heydinger*, 15 F. Supp. 3d 891, 915 (D. Minn. 2014), aff'd 825 F.3d 912 (8th Cir. 2016) (Minnesota restricted in-state electricity purchases in an attempt to reduce carbon emissions "regardless of where they occur"); *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96 (2d Cir. 2003) (invalidating on Commerce Clause grounds a Vermont prohibition on certain transfers of pornography); *District of Columbia* v. *Beretta USA Corp.*, 872 A.2d 633 (D.C. 2005) (en banc) (upholding against Commerce Clause challenge a law making weapon manufacturers strictly liable for gunshot injuries sustained in the District). The Court should grant review in order to clarify that its anti-discrimination precedents apply to such restrictions with the same force they carry in cases of economic protectionism.

Allowing state and local governments to engage in this kind of economic conflict would have serious nationwide consequences. Most concretely, it would lead to a patchwork of economic restrictions that would quickly degrade the national common market. See *Pennsylvania*, 262 U.S., at 599 ("To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines").

But just as serious would be the threat to the federalist underpinnings of our republic. When public

opinion on a question of economic or industrial policy varies across the Nation, our federalism fosters the development of legal and economic regimes reflecting that diversity. In States and localities where the activity in question is unpopular, the government may regulate or ban it within their own borders. Conversely, in States where the opposite view prevails, the government may allow or encourage that same activity. Here, the several States have done just that with respect to hydraulic fracturing: some ban it within their borders,[16] while others allow or encourage it.[17] That is federalism in action.

But the ability of States to take diverse approaches depends upon the national common market created by the Commerce Clause. If the people of one State or locale are permitted to choke off the supply of goods needed by an industry or practice in *another* State simply because they disagree with that other State's policies, then local sovereignty would be

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[16] See, *e.g.*, N.Y. Envtl. Conserv. Law §23-501(3) (McKinney 2020); 29 Vt. Stat. Ann. tit. 29, §571 (West 2012); Md. Code Ann., Envir. §14-107.1 (West 2017); Beverly Hills Mun. Code §10-5-324 (2014); Hawai'i County Code 1983 §14-121 (2016 Edition, as amended).

[17] See, *e.g.*, New Mexico Energy, Minerals and Natural Resources Department, *Oil and Gas Education*, http://www.emnrd.state.nm.us/OCD/education.html ("in New Mexico hydraulic fracturing takes place in both the San Juan and Permian Basins") (last accessed Sept. 24, 2020); Pennsylvania Department of Environmental Protection, *Hydraulic Fracturing Overview*, http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/MarcellusShale/DEP%20Fracing%20overview.pdf (last accessed Sept. 24, 2020).

impaired and regional policy differences would flare into nationalized economic conflicts. Such policy disagreements, no less than protectionism, can create the "tendencies toward economic Balkanization," *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015), and the "multiplication of preferential trade areas," *Dean Milk Co.*, 340 U.S., at 356, that the Commerce Clause guards against. "However available such methods [may be] in an international system of trade between wholly sovereign nation states, they may not constitutionally be employed by the States that constitute the common market created by the Framers of the Constitution." *Great Atl. & Pac. Tea Co.*, 424 U.S., at 380. This Court should grant review to reaffirm that principle in the context presented here.

* * *

Minnesota Sands respectfully submits that, like the validity of West Virginia's natural-gas export restrictions, the question presented here "is an important one," because "what one state may do others may, and ... what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used." *Pennsylvania*, 262 U.S., at 596.

Review of the first question presented is warranted.

II. REVIEW IS WARRANTED TO RESOLVE CONFUSION IN THE LOWER COURTS OVER WHETHER A MINERAL ESTATE QUALIFIES AS "PROPERTY" PROTECTED BY THE TAKINGS CLAUSE BEFORE A MINING PERMIT IS ISSUED.

A bare majority below held that a mineral estate in land cannot qualify as "property" under the Fifth Amendment unless and until the owner has obtained all necessary mining permits. That conflicts with holdings from the Federal Circuit and three other States. It also is irreconcilable with this Court's longstanding rule that the mere enactment of a permit requirement is not a regulatory taking, but the denial of a permit itself may be a taking of property.

A. The Decision Below Conflicts with the Decisions of Courts in Several Other Jurisdictions.

The holding below conflicts with takings rulings from the Federal Circuit, from the Supreme Court of Ohio, and from the appellate courts of Pennsylvania and Utah.

It is well settled that the protection of the Takings Clause extends to mineral estates in land. App. 33. As the court below explained, Minnesota is one of many States where property rights in land are composed of a surface estate and a separable mineral estate. *Ibid.* Of course, the use of each of these estates often is subject to state or local regulations. Just as the owner of a

surface estate may need zoning approval or a building permit before engaging in surface construction, the owner of a subsurface estate may need various approvals or permits before mining any materials. In the decision that began this Court's regulatory takings jurisprudence,[18] the Court recognized that the Fifth Amendment requires a state to pay compensation for mineral rights "if regulation goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); see *id.*, at 412 (explaining that the case involved a mineral interest severed from the surface estate).

Nevertheless, government defendants in takings cases have sometimes argued that mineral rights do not qualify as compensable property unless and until the owner has obtained any mining permits that may be required. Multiple States and the Federal Circuit have rejected this argument and found mineral estates to be protected by the Takings Clause regardless of permit status.

For example, in *United Nuclear Corp.* v. *United States*, the Department of the Interior withheld regulatory approval for a mining plan for years, until the relevant mineral leases expired. 912 F.2d 1432, 1433–1435 (Fed. Cir. 1990). When the mining company filed suit, the trial court concluded that it had no property interest in the mere "expectation that it would be permitted ... to engage in mining," but the Federal Circuit

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[18] See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002) ("[I]t was Justice Holmes' opinion in *Pennsylvania Coal Co*.... that gave birth to our regulatory takings jurisprudence").

reversed, holding that "the property interest ... is [plaintiff's] leasehold interest in the minerals, which the government took by preventing [plaintiff] from mining under the leases." *Id.*, at 1435–1437.

Similarly, in *John R. Sand & Gravel* v. *United States*, the government argued that "because, at the time of the alleged taking, plaintiff did not possess the necessary Metamora Township permits to mine ... as required by its Lease and because mining would be illegal anywhere on the property, plaintiff does not have a valid property right." 62 Fed. Cl. 556, 562 (2004), vacated on other grounds 552 U.S. 130 (2008). Again, the court disagreed, holding that "defendant's argument regarding ... state and local permission to mine is best characterized as a damages argument." *Id.*, at 568; see also *id.*, at 564 (quoting *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003)).

Another such decision is *PBS Coals, Inc.* v. *Department of Transportation*, in which mineral-estate owners sued for a *de facto* taking after Pennsylvania built a road that prevented all access to their parcels, but the State argued that there had been no taking because "the Coal Companies had not applied for any mining permits" before the road was built. 206 A.3d 1201, 1204–1205 (Pa. Cmwlth. Ct. 2019), allocatur granted 218 A.3d 373 (Pa. 2019) (table). The court rejected that reasoning as "irrational," and held that whether the plaintiffs "were likely to obtain a mining permit for" the property was relevant only "at the damages/valuation stage." *Id.*, at 1223–1224.

The courts of Ohio and Utah also require just compensation for takings of mineral rights, regardless of permitting status. In *Ohio ex rel. R.T.G., Inc.* v. *Ohio*, the Ohio Supreme Court found a regulatory taking of mineral rights in "approximately 500 acres" of land, even though the owner had previously obtained regulatory approval to mine only "21.8 acres" of it. 780 N.E.2d 998, 1001–1002 (Ohio 2002) (en banc) (plurality opinion). Likewise, in a case involving unsevered mineral rights, Utah's appellate courts held that the denial of a mining permit would itself be a regulatory taking if it left no economically viable use of the land. *Diamond B-Y Ranches* v. *Tooele Cty.*, 91 P.3d 841, 847 (Utah Ct. App. 2005) ("[I]f the effect of denying the permit is to 'leave its property economically idle, Diamond has suffered a taking'" (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992))).

The decision below squarely contradicts these cases. The majority below held that Minnesota Sands' mineral estates are too "inchoate" and "contingent" to be a compensable property interest because its "right to remove frac sand" had not yet been perfected through a zoning permit and environmental approvals. App. 34, 38–43. At least one other court has reached a similar conclusion in another case. *Seven-Up Pete Joint Venture* v. *Montana*, 2002 WL 34447228 (D. Mont. Dec. 9, 2002) (mineral "leases did not create a property right that was taken away" because, "[p]ursuant to those leases, the Venture could begin mining operations only if they received an operating permit").

To be sure, the rights that Minnesota Sands has in the minerals at issue are determined by Minnesota law. App. 37–38, 42–43. But those state-law rights are not in dispute here: the court below recognized that Minnesota Sands owns valid mineral estates under Minnesota law but has not obtained regulatory approval to mine them. App. 33–34, 38–42.[19] The disputed question is whether this bundle of state-law rights qualifies as "property" within the meaning of the Takings Clause—and it is *federal* law that determines that issue. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003–1004 (1984) ("to the extent that Monsanto has an interest in its ... data [that is] cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause"); cf. *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1944 (2017) ("[T]he Court has expressed caution [about] the view that property rights under the Takings Clause should be coextensive with those under state law").

In short, the Supreme Court of Minnesota interpreted the Fifth Amendment to mean that a mineral estate is not "property" in the absence of a mining

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[19] Because Minnesota has recognized these rights in land, any ruling by the Minnesota courts diminishing them would be a judicial taking. See *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (plurality) ("States effect a taking if they recharacterize as public property what was previously private property"); *id.*, at 715 ("[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking").

permit. The Federal Circuit, and the courts of Pennsylvania, Ohio, and Utah hold the opposite.

B. The Decision Below Conflicts with This Court's Precedents Applying Regulatory Takings Law to Permit Requirements.

This confusion among the lower courts is by itself enough to warrant certiorari. There is no reason why the Takings Clause should mean different things for mineral-rights owners in different States. But if more were needed, review is especially appropriate here because the court below took the wrong side of the split. By making the existence of property contingent on a local permitting decision, the holding below conflicts with this Court's settled regulatory takings precedents.

Under this Court's precedents, "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense.... Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); accord *Knick* v. *Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2169–2170 (2019). Thus, this Court has repeatedly held that permitting decisions themselves can be regulatory takings. *E.g.*, *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–606 (2013) (discussing *Nollan* v. *California Coastal Comm'n*, 483

U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994)).

Moreover, the Court has established that these principles are as valid for mineral rights as for any other property interest. *Hodel* v. *Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (mining regulation is not a taking until mineral owner "seek[s] administrative relief"); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736–737 (1997) ("*Hodel* ... held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim"). These decisions establish that a regulatory permitting requirement does not eliminate the existence of a compensable property interest.

The ruling below contradicts these settled rules. According to the Minnesota Supreme Court, when a state or local government enacts a requirement for mining permits, that converts mineral rights in the relevant jurisdiction from property to an "inchoate" non-property interest. By that logic, the original enactment of the permitting requirement would be a compensable taking (contrary to this Court's precedents), while the decision to deny a permit could *never* be a compensable taking—again, contrary to this Court's precedents.

Unless this Court grants review, Minnesota citizens' property rights will be seriously endangered. Under this Court's decisions, a mineral-rights owner is not likely to succeed if it brings a facial takings

challenge to an ordinance that requires a permit to conduct mining. But under the decision below, a mineral-rights owner *also* cannot succeed if it brings an as-applied takings challenge to later government actions that withhold a mining permit, or that (as here) eliminate even the possibility of getting one. The decision below therefore turns takings litigation into a shell game for mineral-rights owners and opens the door for local governments to eliminate immensely valuable mineral rights without paying any compensation at all through a simple, two-step process of first enacting a permitting requirement, then later enacting a total ban. This is not, and cannot be, the law under the Takings Clause.

CONCLUSION

The Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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