No. 20-441

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Respondent barely tries to deny that the questions presented are cert-worthy. Instead it contends that they are not raised by this case. That is plainly wrong.

I. The Commerce Clause Issue Warrants Certiorari.

A. Respondent Identifies No Barrier to Certiorari.

The Petition demonstrated that the Ordinance Amendment discriminates against interstate commerce three times over—in effect, in purpose, and facially—by allowing local silica sand to be mined for all uses that are common locally but not for use as a proppant in hydraulic fracturing, which occurs only in other States.

Respondent contends that "none of those arguments is outcome-determinative," BIO 24, because the majority below held that, if it had concluded that the Ordinance's exemption for "local construction" mining discriminates against interstate commerce, the majority would have stricken the word "local" and therefore allowed sand to be mined for *construction* uses anywhere. App. 17-24 (majority opinion Section II.A). According to Respondent, this would dispose of all the Commerce Clause issues in this case. BIO 24-25. That is incorrect.

First, striking the word "local" and thus allowing sand to be used for "construction" purposes everywhere would do nothing to lift the ban on using the sand for

"industrial" purposes, including fracking. Hence, the primary question of discriminatory effect is still squarely presented: Does the Ordinance Amendment discriminate against interstate commerce in practical effect by allowing silica sand to be mined for all the "construction" uses that actually occur locally, while prohibiting its mining for hydraulic fracturing, the most prominent interstate use? See Pet.12.

Second, striking the word "local" would likewise do nothing to alter the record showing why the Ordinance was enacted. The question whether it discriminates in purpose is also squarely presented.

The majority opinion below recognized that striking the word "local" leaves the practical-effect and purposeful-discrimination claims unaffected and undecided by analyzing those claims in a separate, later section in which the possibility of striking the "local" limitation on "construction" uses is never mentioned. App. 24-29 (Section II.B). In short, those claims are squarely presented.

Finally, although we press the practical-effect and discriminatory-purpose claims as the principal Commerce Clause issues for certiorari, even the facial-discrimination issue remains to be decided because the majority below did not actually strike the word "local," and its reasons for rejecting the facial-discrimination claim are (at the least) highly suspect.[1]

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[1] Respondents repeat the majority's assertion that a county may ban non-"local" commerce if its "local" area spills over

B. Respondent's Merits Arguments are Plainly Wrong.

1. The Ordinance Amendment discriminates against interstate commerce in practical effect.

The Petition explained that the heart of the Ordinance Amendment's discrimination against interstate commerce is that it allows silica sand to be mined for the uses that commonly occur in the County, but it prohibits mining the same sand in the same way for use in hydraulic fracturing—a use that occurs only in other States.

The County responds with two factual arguments that do nothing to lessen the discrimination. First, it argues that not all "construction sand" is "silica sand," and that other types of sand can be used for construction purposes. BIO 14. That is true but irrelevant, because when it comes to silica sand—the only sand in dispute here—the County's authorization to mine turns exclusively on whether the sand will be used for

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slightly into another State. BIO 19-20. But that still facially discriminates against the vast majority of interstate commerce, so it cannot be squared with the constitutional requirement of a national common market, or with this Court's precedents striking down laws that limit the distance over which commercial transactions may occur. See Pet.20-22 & n.15. Respondent also suggests, for the first time in this litigation, that the "local construction" language might ban mining only for construction projects that physically extend across a state or national boundary. BIO 19-20 n.4. None of the Minnesota courts adopted that unlikely reading, but regardless, it would also patently discriminate against interstate commerce.

a common local use (construction) or a use that occurs only in other States (fracking). Indeed, it is undisputed that the silica sand that Minnesota Sands wishes to extract can fall squarely within the definitions of *both* "construction minerals" *and* "industrial minerals," and that the only distinguishing characteristic that determines the Ordinance Amendment's disparate treatment is the sand's intended use. Compare Pet.5-8 with BIO 3.

The County likewise argues that some quarries *might* operate at a larger scale, use different extraction techniques, or engage in different post-extraction processing if the intended use of the silica sand were for hydraulic fracturing rather than construction. BIO 14-15. But again, this is irrelevant because the Ordinance Amendment does not regulate mining based on scale, extraction techniques, or post-extraction processing. See Pet.12-13. Instead, it regulates solely based on intended use—allowing silica sand to be mined for local uses, but prohibiting the mining of the same sand, *at the same scale and in the very same ways*, if its intended use is for hydraulic fracturing. Indeed, if the very same quarry operator in Winona County wanted to sell half of its silica sand for local use as livestock bedding and the other half for use in hydraulic fracturing, its operations would be legal as to the sand sold for livestock bedding but illegal as to the sand sold for hydraulic fracturing. This is the very definition of discrimination.

At bottom, the problem is that the County may not pursue even legitimate regulatory ends by discriminatory means. If the County was concerned about the size of quarries within its borders or the mining techniques used, it could regulate those concerns directly and neutrally. Indeed, it could have accepted the recommendation of its own Planning Commission on those matters. See Pet.10. What the County did instead is reserve its own local resource for its own local uses, to the prejudice of out-of-state purchasers. This type of discrimination against interstate commerce is subject to "a virtually *per se* rule of invalidity." *Associated Indus.* v. *Lohman*, 511 U.S. 641, 647 (1994) (internal quotation marks omitted).

Respondent's final argument, that the amendment does not "provide in-state entities an economic advantage against out-of-state entities," BIO 22; see *id.* at 23, is simply wrong. That is precisely what it does. In-state entities are permitted to mine (or buy) Winona County's silica sand for all the ways they commonly use it. Moreover, they are protected against interstate competition for purchasing the sand by the Ordinance Amendment's ban on production for the most valuable out-of-state use. See Pet.11-12. That has the direct, discriminatory effect of preserving a state resource for in-state buyers, and it is precisely the type of economic balkanization that the dormant Commerce Clause precludes.

2. The Ordinance Amendment discriminates against interstate commerce in its purpose.

There also is overwhelming evidence that the Ordinance Amendment purposely targets the mining of sand for use in interstate hydraulic fracturing. The express text of the amendment prohibits mining "silica sand" that "is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas." App. 196. The County's own official documents described the proposed amendment as a "frac sand ban." See Pet.10. And the legislative record included testimony that "the only use of industrial sand [from] Winona County is for hydraulic fracturing." Pet.11 (quoting ADD-109 at 911).

Against this, the County argues that it cannot be found to have acted out of "animus" against hydraulic fracturing because its official findings did not criticize "the hydraulic fracturing industry." BIO 8; see *id.*, at 12. Moreover, says Respondent, it wanted to avoid negative effects on its local environment. BIO 8, 17, 26. But once again, the County cannot pursue even legitimate ends through the unlawful means of discriminating against interstate commerce: "the evil of protectionism can reside in legislative means as well as legislative ends," *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 626 (1978), and so a state or local government may not pursue even "a presumably legitimate goal . . . by the illegitimate means of isolating the State from the national economy." *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 341-42 (1992) (internal quotation

marks omitted). So here. Whatever policy Winona County was trying to pursue by adopting the Ordinance Amendment, its text and legislative record leave no doubt that the County pursued that policy by purposely discriminating against interstate commerce. That, the Commerce Clause does not allow.

C. This Court Should Grant Review to Reconcile the Conflict with Its Precedents, and to Prevent Economic Conflicts Between the States.

By allowing discrimination against interstate commerce, the decision below sharply breaks from this Court's precedents on a matter of national importance.

Respondent concedes that this Court's precedents hold—contrary to the majority's conclusion below—that a law discriminating against interstate commerce is not immune from Commerce Clause scrutiny simply because it "may harm some in-state interests as well." Compare BIO 23 with App. 28; see Pet.19-22. But Respondent claims that the laws this Court has invalidated also benefitted some "in-state economic interests," while the "frac sand ban" here allegedly does not. BIO 23. That is incorrect. Here, the Ordinance Amendment protects local users from interstate competitors who would like to buy silica sand for its most commercially valuable use. This protectionist advantage for in-state economic interests is exactly the same as the protectionist advantages provided by the laws this Court struck down in the decisions discussed in the Petition

(at 20-22): the challenged law burdens interstate commerce, but exempts local commerce from the same burden.[2]

Were that conflict not enough, it comes on a topic of nationwide importance. Respondent baldly claims that "nothing supports" the notion "that the decision below will lead to a flood of politically motivated land-use restrictions." BIO 12. The Court need look no further than its own docket to disprove that claim. See *Montana* v. *Washington*, No. 22O152, Proposed Bill of Complaint ¶ 1 (Jan. 21, 2020) ("This is a Commerce Clause challenge to Washington State's discriminatory denial of port access to ship Montana and Wyoming coal to foreign markets. This case implicates an important purpose of the Commerce Clause: prohibiting coastal states from blocking landlocked states from accessing ports based on the coastal states' economic protectionism, political machinations, and extraterritorial environmental objectives.").

The case for review of the Commerce Clause issue is abundantly clear.

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[2] Nor can this Ordinance Amendment be distinguished from other Commerce Clause violations by the fact that the prohibition on engaging in interstate commerce falls in part on "local property owners." BIO at 23-24. All discrimination against interstate commerce operates on activities within the enacting government's geographical jurisdiction, and so necessarily burdens local actors.

II. The Takings Issue Warrants Certiorari.

The Takings issue also warrants review. As the Petition explained, the majority below held that a mineral estate qualifies as "property" under the Takings Clause only after the estate-holder has obtained all necessary mining permits. Until then, the majority held, mineral rights are too "contingent" to qualify as property. App. 2, 42. Several other courts have taken the opposite position. Pet.29-31.

Respondent claims that the majority below did not split with other courts because its decision applies only to "the terms of the particular leases involved here." BIO 2. That is plainly wrong as to both the terms of the leases themselves and the existence of a clear split of authority on this question.

A. The Court Below Squarely Held that a Permit Requirement Makes Mineral Rights too "Inchoate" to Qualify as Property.

As an initial matter, Respondent's opposition makes clear that several key points are undisputed. First, the question whether a particular interest in land is "property" under the Takings Clause is a question of federal law. Compare Pet.32, with BIO 27-31. Second, a mineral estate, severed from the surface estate, qualifies as "property" under the Takings Clause. Compare Pet.2, 32, with BIO 28 (citing App. 33-34). Third, when a party holds an unconditional mineral lease, the lease qualifies as "property" even without a

mining permit. BIO 28 (disclaiming the position that "mineral estates *generally* do not qualify as property until all required permits have been obtained"); BIO 31 (denying "that local permitting requirements eliminate the existence of a federally protected property interest").

Given these (necessary) concessions, Respondent makes the only argument left: that the mineral interest granted by "the terms of the particular leases involved here" was too "contingent" to qualify as an "effective," "existing and undisputed mineral leasehold" until Minnesota Sands received its mining permits. BIO 33; see BIO 2, 13, 28, 30, 35-36.

But that contention is completely unsupported. Each of the leases provides only that Minnesota Sands' "obligations under th[e] Agreement"—its *obligations*, not its *rights*—"are conditioned upon [it] obtaining any zoning or other governmental approvals required." Trial Ct. Exs. 108-112 ¶¶11. No provision anywhere in the lease agreements makes Minnesota Sands' *ownership rights* depend on any form of governmental approval.

Unsurprisingly, then, nothing in the majority opinion below suggests that it turned on some idiosyncrasy of these particular leases. To the contrary, the "specific [lease] conditions" that the majority relied on to demote Minnesota Sands' mineral rights from protected property to a "speculative" "expectancy," App. 38, are commonplace in mineral estates. The majority noted that the leases give Minnesota Sands the rights

to explore for minerals, to "prepare for mining," and to actually mine, App. 36 & n.18, but otherwise preclude Minnesota Sands from "us[ing] or possess[ing] the land until it was able to engage in silica sand mining," App. 37, and reserve to the surface-estate owner the right to "continue . . . farming" on all land not affected by mining. App. 36. These terms are not, as Respondent insists, white-rhino provisions rarely seen in the field of mineral rights. To the contrary, they are the *defining features* of a severed mineral estate: the right to explore for and extract minerals, but not to do anything else with the surface estate.[3]

The majority below relied on "*[t]hese* lease terms" and no others to conclude that Minnesota Sands has no property interest. App. 37 (emphasis added). So its holding is ineluctable and clear: if a party holds mineral rights allowing it to mine but not to use the surface estate for other purposes, then the lack of a required mining permit makes that interest too "contingent" or "inchoate" to qualify as property under the Takings Clause. App. 2, 42. This holding applies to

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[3] To the extent the BIO argues that the Takings Clause protects only present *possession* of property, it conflicts with decades of this Court's settled precedents. Compare, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979) ("right to exclude" is "property"), with, *e.g.*, Trial Ct. Ex. 108, ¶8 ("Landlord . . . has not previously leased or assigned the mineral rights . . . to any other party and covenants not to [do so]"). See also generally *Hodel* v. *Irving*, 481 U.S. 704, 715-17 (1987) (right to pass on undivided fractional interest in land is "property"); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) (prospective creditors' shares of accrued interest on debtor assets paid into court are "property").

mineral estates generally, making it clear that the issue presented for this Court's decision is one of broad importance.

B. The Decision Below Conflicts with those of Other Jurisdictions and of This Court.

As the Petition explained, other jurisdictions have reached the opposite conclusion: that mineral rights *are* property even before a mining permit is issued. Pet.29-31. Moreover, this Court has made clear that the denial of a regulatory permit *can* be a taking, which requires that a property interest must exist before the permit is issued. Pet.33-35. The decision below conflicts with both strands of precedent.

Respondent's only attempt to distinguish these decisions is to argue that Minnesota Sands, unlike the Takings claimants in those cases, had no "'active'" mineral rights and no "'effective leases that made [it] the owne[r] of the [mineral] estate.'" BIO 33 (quoting *United Nuclear Corp.* v. *United States*, 912 F.2d 1432 (Fed. Cir. 1990), and *PBS Coals, Inc.* v. *Dep't of Transp.*, 206 A.3d 1201, 1223 (Pa. Cmwlth. Ct. 2019)); BIO 34 (protesting that *Diamond B-Y Ranches* v. *Tooele County*, 91 P.3d 841 (Utah App. 2004), did not involve "an entity that lacks any existing leasehold interest in the underlying minerals"). But far from introducing a distinction, that argument simply highlights the split of authority because in those cases, just like in this one, the plaintiff had obtained a private conveyance of the right to mine but lacked government approval to do. In

all the cases, the question was whether the rights qualified as "property" under the Takings Clause given that approval to mine had not yet been granted. The majority below held they did not, while the other courts held the opposite.[4]

In sum, the majority below improperly reformulated this Court's settled Takings analysis, treating a factor that should have informed the *amount* of just compensation as a basis for concluding that no regulatory taking had occurred. Regrettably, this is far from the first time that lower courts have attempted such an imaginative reconstruction of the Takings inquiry. *E.g.*, *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 747-48 (1997) (Scalia, J., concurring in part and in the judgment). But enough is enough. Review of the second question is warranted.

[4] Respondent similarly errs in waving off *Ohio ex rel. R.T.G., Inc.* v. *Ohio*, 780 N.E.2d 998 (2002) (en banc) (plurality opinion). BIO 33-34. *R.T.G.* found a taking of hundreds of acres despite the lack of a permit to mine most of that tract.

CONCLUSION

The Court should grant certiorari and reverse.

Respectfully submitted,

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