No. 16-970

In the
Supreme Court of the United States

BRANDON LANCE RINEHART,
Petitioner,

v.

CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
MARK J. BRECKLER
Chief Assistant Attorney General
ROBERT W. BYRNE
Senior Assistant Attorney General
JOSHUA A. KLEIN*
Deputy Solicitor General
GAVIN G. MCCABE
Supervising Deputy Attorney General
MARC N. MELNICK
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
(415) 703-2543
joshua.klein@doj.ca.gov
**Counsel of Record*

QUESTION PRESENTED

Whether the California Supreme Court erred in determining that the federal Mining Act of 1872 does not preempt California's suspension of the issuance of permits for one method of mining, pending completion of an environmental study and the adoption of new environmental protection regulations.

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STATEMENT

1. Forty-five percent of the land in California is federally owned.[1] Where mining occurs on that land, it is subject to both federal and state laws. *See, e.g.*, *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

a. The federal Mining Act of 1872, codified at 30 U.S.C. § 22 *et seq.*, generally allows private citizens to "enter federal lands to explore for mineral deposits." *Granite Rock*, 480 U.S. at 575. A person who locates a valuable mineral deposit on federal land may perfect an unpatented claim by complying with certain requirements. *Id.*; *see generally United States v. Coleman*, 390 U.S. 599 (1968) (explaining what makes a deposit "valuable"). That allows him "'the exclusive right of possession and enjoyment of all the surface included within the lines'" of the claimed location, but "the United States retains title to the land." *Granite Rock*, 480 U.S. at 575 (quoting 30 U.S.C. § 26).[2]

The core provision applying to unpatented claims is 30 U.S.C. § 22:

> Except as otherwise provided, all valuable deposits in land belonging to the

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[1] *See* Congressional Research Service, Federal Land Ownership: Overview and Data 7 (2017).

[2] By complying with additional requirements, the holder of an unpatented claim may secure a patent, under which "legal title to the land passes to the patent holder." *Granite Rock*, 480 U.S. at 575-576.

> United States … shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, … under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The statute provides precise instructions for the geographic extent of permissible claims, *id.* §§ 23, 27, requirements for recording claims and dividing ownership interests and responsibilities among co-owners, *id.* § 28, and directions for the annual work, improvements, or fees required to maintain rights to an unpatented claim, *id.* §§ 28b-28*l*.

Miners who hold unpatented claims enjoy the "exclusive right of possession and enjoyment" of the surface and of defined subsurface components, but only "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title." 30 U.S.C. § 26. The statute further provides that miners themselves, as assembled into local "mining district[s]," may "make regulations" as long as those regulations are "not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, [or] amount of work necessary to hold possession of a mining claim." *Id.* § 28.

b. California has regulated various forms of mining, by statute and common law, since the nine-

teenth century. *See, e.g., People v. Gold Run Ditch & Mining Co.* 66 Cal. 138, 144-145, 152 (1884) (enjoining hydraulic mining due to downstream effects); 1893 Cal. Stats. ch. 223 (permitting such mining only where it can be "carried on without material injury to navigable streams, or the lands adjacent thereto"). Some of those regulations predate the federal mining law's passage. *See* Pet. App. A 11 (citing California statutes passed in 1860 through 1866).

In 1961, California enacted a permit requirement for the type of mining at issue in this case: suction dredging. *See* 1961 Cal. Stats. ch. 1816 (enacting Cal. Fish & Game Code § 5653). In its current form, California's statute covers "[t]he use of vacuum or suction dredge equipment … in a river, stream, or lake of this state"—meaning "the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals." Cal. Fish & Game Code § 5653(a), (g). The permit requirement does not "apply to, prohibit, or otherwise restrict nonmotorized recreational mining activities, including panning for gold." *Id.* § 5653(g).

Suction dredge mining involves vacuuming sediment from the bottom of a stream or lake, removing any gold, and depositing the remaining material back into the water. Pet. App. A 2. At least in California, such mining is now done largely for recreation. *People v. Osborn*, 116 Cal. App. 4th 764, 768 (2004); p. 29 n.20, *infra*. California's permit system is administered by its Department of Fish and Wildlife. Cal. Fish & Game Code § 5653(a); *see id.* § 37. Suction dredge mining without a permit, or possessing suc-

tion dredge equipment within 100 feet of an area that the Department has closed to such mining, is punished as a misdemeanor. *See id.* § 5653(a), (e); *id.* § 12000(a).

In the early 2000s, the United States and California were separately sued by groups who claimed that each government had violated statutory duties to prevent various forms of environmental harm caused by suction dredge mining. *See Karuk Tribe of Calif. v. U.S. Forest Service*, 681 F.3d 1006, 1013-1016 (9th Cir. 2012) (en banc); *Karuk Tribe v. Calif. Dep't of Fish & Game*, No. RG05 211597 (Super. Ct. Alameda County, filed May 6, 2005). The results of these lawsuits obliged each government to undertake further environmental reviews of the practice. *See Karuk Tribe*, 681 F.3d at 1030; RJN, Exh. Q, at 1-3 (state-court Order and Consent Judgment, filed Dec. 20, 2006).[3] In response to similar concerns, the California Legislature, in 2009, ordered the Department of Fish and Wildlife to temporarily cease issuing suction dredge mining permits, pending completion of the environmental review that had been ordered by the state court and the adoption of any new regulations that that the Department determined to be necessary after that review. 2009 Cal. Stats. ch. 62 (enacting Cal. Fish & Game Code § 5653.1); *see* Pet. App. A 3.

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[3] RJN refers to the State's Request for Judicial Notice filed in the California Supreme Court, which that court granted in part (including with respect to Exhibit Q). CT refers to the Clerk's Transcript on appeal, and RT refers to the Reporter's Transcript of the trial court proceedings.

California's Legislature has amended the statute three times in response to subsequent developments. The version in force when the events in this case occurred provided that the moratorium on permits would end by June 30, 2016—or earlier if the State's environmental review was completed and new regulations were adopted to fully mitigate significant environmental effects and fund the permitting program through permit fees. *See* 2011 Cal. Stats. ch. 133, § 6 (effective July 26, 2011). By March 2012, the environmental review had been completed, and extensive regulations had been adopted to address many of the environmental effects that the review had identified. Pet. App. E 19.[4] The Department of Fish and Wildlife, however, determined that existing law did not give it statutory authority to address some of suction dredge mining's significant environmental effects. Pet. App. E 23, 25-26. In response, effective June 27, 2012, the statute was again amended, eliminating the 2016 sunset date and requiring the Department not only to submit a report regarding its completed environmental review but also to provide recommendations for statutory changes that would allow it to address the remaining significant environmental effects. 2012 Cal. Stats. ch. 39, § 7.

In 2015, having received the Department's report and recommendations, *see* Pet. App. E, the Legislature amended the statute, providing statutory au-

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[4] *See* Cal. Code Regs., tit. 14, §§ 228, 228.5 (new regulations); Findings of Fact of the California Department of Fish and Game as a Lead Agency under the California Environmental Quality Act for the Suction Dredge Permitting Program (Mar. 16, 2012), available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=44270&inline.

thority for the Department to address the relevant environmental effects and allowing the Department to raise fees to cover the costs of administering its permitting program. *See* 2015 Cal. Stats. ch. 680. The 2015 legislation also codified existing requirements that suction dredge miners obtain a water quality permit from the appropriate state or federal agency, unless the relevant state agency waives the permit requirement. *Id.*, § 2 (amending Fish & Game Code § 5653(b)).[5]

2. Petitioner Brandon Rinehart is a partial owner of a 120-acre unpatented mining claim in the Plumas National Forest in northern California. CT 20, 28. A stream runs through part of his claim. *Id.* at 20, 33, 72. On June 16, 2012—while the 2011 version of California's permit-moratorium statute (with the June 2016 sunset date) was in force—Rinehart mined that stream with suction dredge equipment. *Id.* at 68; *see* p. 5, *supra*. Because he did not have a permit, he was charged with two misdemeanors, for using the suction dredge equipment in violation of Fish & Game Code section 5653(a), and for possessing the equipment within 100 yards of closed waters in violation of Fish & Game Code section

[5] *See, e.g., Rybachek v. EPA*, 904 F.2d 1276, 1285-1286 (9th Cir. 1990) (Clean Water Act requires permits for placer mining because "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act"); *Northwest Envtl. Def. Ctr. v. Envtl. Quality Comm'n*, 223 P.3d 1071 (Or. Ct. App. 2009) (discussing application of Clean Water Act sections 402 and 404 to small suction dredge operations); *see generally United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007) ("simply dredging up and redepositing what was already there is sufficient to run afoul of the [Clean Water Act]").

5653(d). CT 1-2; *see* Cal. Fish & Game Code § 12000(a).

Rinehart's defense was that the prosecution was barred because California's permit moratorium was preempted by federal mining law. Pet. App. A 4-5. In support, he made an offer of proof purporting to show that this form of mining was the only economically feasible way to mine his claim. Pet. App. C 5-11. The trial court concluded that there was no preemption, and convicted Rinehart in a bench trial based on stipulated facts. Pet. App. A 5. Rinehart was sentenced to three years of probation. *Id.*; RT 57; CT 378. Payment of fines was suspended pending successful completion of probation, *id.*, which has now occurred.

3. The California Court of Appeal reversed. Pet. App. C. Without independently analyzing the federal statute's text or the history of its enactment, the court relied on *South Dakota Mining Association, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), which it viewed as requiring the invalidation of any state law that had the effect of making it "commercially impracticable" to mine an unpatented mining claim. Pet. App. C 20-24. The court ordered the case remanded for determination of whether California law prohibited the issuance of permits, and, if so, whether that prohibition "rendered commercially impracticable the exercise of defendant's mining rights." *Id.* at 24.

4. The California Supreme Court reversed the court of appeal and reinstated the trial court's judgment. Pet. App. A.

Based on a close examination of the text and structure of the Mining Act of 1872, Pet. App. A 10-13, the court concluded that the federal law was focused on settling "the real property interests of miners vis-à-vis each other and the federal government." *Id.* at 10. The court discerned no congressional intent to preempt state laws that did not interfere with those real property interests. *Id.* at 11. Instead, the court noted, several provisions of the federal act explicitly endorsed the continuing vitality of, and prospectors' ongoing obligations to abide by, state laws. *Id.* at 11-12.

The history and context surrounding Congress's enactment of the Mining Act of 1872 further supported the court's conclusion. Pet. App. A 13-17. Congress chose from among two proposals in enacting mining laws after the Civil War, and its choice reflected that its primary concern was to prevent those who were mining on federal land from having to pay exorbitant charges to the federal government. *Id.* at 14-15. Congress certainly aimed to encourage mining, but "the main inducement offered" to achieve that purpose was the allocation of real property rights to the miner—not the elimination of state regulation. *Id.* at 15-16. "The mining laws were neither a guarantee that mining would prove feasible nor a grant of immunity against local regulation, but simply an assurance that the ultimate original landowner, the United States, would not interfere by asserting its own property rights." *Id.* at 17.

Moreover, the court noted, shortly after the federal act's passage courts in California enjoined hydraulic mining due to the severe environmental damage it caused. Pet. App. A 18-19. Congress re-

acted not by prohibiting those state-law limitations, but rather by effectively endorsing the state law restrictions through a new federal permit requirement that required "assurances that mining would not harm the state's rivers and lowland communities." *Id.* at 19-21. This further supported the court's conclusions that "Congress did not deem the core purposes and objectives of the mining laws impaired by state regulation of mining methods" and that "states can place limits on effective but environmentally destructive mining methods without contravening the supremacy clause." *Id.* at 22.

Rinehart argued that a different result was required under various cases—including the three that his petition now cites as conflicting with the decision below. Pet. App. A 23; *see* Pet. 21. The court did not find those cases persuasive. Pet. App. A 24. All except *South Dakota Mining* pre-dated this Court's decision in *California Coastal Commission v. Granite Rock*, "which for the first time clearly established the states' authority to regulate on environmental grounds mining claims within their borders." *Id.* Many concerned preemption under federal laws other than the Mining Act. *Id.* And Rinehart's one post-*Granite Rock* case*, South Dakota Mining*, relied on "a cursory understanding of congressional purposes" rather than undertaking a "close examination of the text, legislative history, and historical context of the 1872 law." *Id.*[6]

[6] Rinehart also argued that California's law was preempted by 30 U.S.C. § 612. The court rejected that argument, Pet. App. A 26-28, and Rinehart does not renew it in this Court.

ARGUMENT

The California Supreme Court concluded that Congress intended to preempt state regulation of the real property interests pertaining to federal mining claims but did not intend to preempt state environmental regulations like the one at issue here. That holding rests on a correct analysis of the Mining Act's text, gives effect to the historical concerns that caused Congress to pass the act, and accords with this Court's decision in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). The decision creates no disagreement among lower courts warranting this Court's intervention. Nor does this case concern issues as important as Rinehart claims.

1. As Rinehart acknowledges (Pet. 20), in "'every pre-emption case'" the "'purpose of Congress is the ultimate touchstone.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The Property Clause gives Congress broad power to regulate activity on land owned by the federal government. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). But Congress rarely displaces state authority entirely on such lands. A "'State is free to enforce its criminal and civil laws' on federal lands so long as those laws do not conflict with federal law." *Granite Rock Co.*, 480 U.S. at 580 (quoting *Kleppe*, 426 U.S. at 543).

Thus, "even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *Granite Rock*, 480 U.S. at 593. Rinehart does not argue that California's laws conflict directly with the operation of federal law, or that Congress has occupied the relevant field. He contends only that state law presents "'an obstacle to the accomplishment and

execution of the full purposes and objectives'" of the Mining Act of 1872. Pet. i.

a. As the California Supreme Court correctly discerned, the text of the Mining Act primarily focuses on "the delineation of the real property interests of miners vis-à-vis each other and the federal government." Pet. App. A 10. The law:

> identif[ies] in detail the conditions for obtaining, and extent of, a right of occupancy (30 U.S.C. §§ 26-27), the conditions for obtaining complete title (*id.*, §§ 29, 37), the size of claims (*id.*, §§ 23, 35), the marking and recordation of claims (*id.*, §§ 28, 34), and so on.

Pet. App. A 10. This central concern of the act—settling real property interests—is unaffected by state environmental regulations.

Where the statute refers to state laws, it does so to reiterate their continuing effect. Miners may possess and enjoy the surface and subsurface aspects of their claims only "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title." 30 U.S.C. § 26. Mining districts may enact supplementary regulations only insofar as those regulations are "not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated." *Id.* § 28. And federal land is open to "exploration," "occupation," and "purchase" "under regulations prescribed by law"—and "according to the local customs or rules" of local mining districts, *id.* § 22, which must comply with state law, *id.* § 28.

Given these provisions, the California Supreme Court correctly concluded that the statute "endorses [state laws'] continuing vitality and prospectors' ongoing obligations to abide by them." Pet. App. A 11. Section 22, which Rinehart deems most pertinent (Pet. 2), cannot reasonably be interpreted otherwise. Section 22 gives controlling effect to "regulations prescribed by law." 30 U.S.C. § 22. Since the act's passage, section 22's use of the general term "law" has been understood to include more than just federal law.[7] In contrast, where the Mining Act intends a more limited and specific reference to federal law, such as in section 26, the statute uses the term "laws of the United States." *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). Indeed, section 22 uses *both* terms. "[E]xploration and purchase" shall be "*under regulations prescribed by law*, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and *not inconsistent with the laws of the United States*." 30 U.S.C. § 22 (emphasis added). In short, California's law does not interfere with "miners' rights under [federal] [m]ining [l]aw" (Pet. 26), because those federal rights have always been conditioned on compliance with all state laws that do not conflict with the federal rules.

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[7] *See O'Donnell v. Glenn*, 19 P. 302, 306 (Mont. 1888) ("[t]he expression, 'under regulations prescribed by law'" in section 22's previous codification, Rev. Stat. 2319, "is ample enough to embrace, not only the laws of congress, but also those of the territory").

b. Rinehart likewise fails to show any error in the California Supreme Court's analysis of other indications of congressional intent. The Mining Act was designed to solve a specific historical problem. For years during and after the gold rush, prospectors who entered federal land to mine operated without federal regulation or approval. Pet. App. A 13-14. Because they had no formal rights, they were in fact trespassing on federal land. *See Woodruff v. Bloomfield Gravel Mining Co.*, 18 F. 753, 774 (C.C.D. Cal. 1884) (the Mining Act "legalized what were before trespasses upon the public lands, and made lawful, as between the occupants and the United States, that which before was unlawful").

After the Civil War, Congress considered two competing proposals. "[E]astern legislators pushed a measure that would have put mining land up for public auction, selling out from under miners the territory they had explored and developed." Pet. App. A 14. Western legislators advocated a system "under which miners would be granted a right to occupy and, for a small fee, acquire title to the land they mined." *Id.* The 1866 mining act adopted a version of the latter approach, and its principles and language were the basis of the 1872 act on which Rinehart relies. *Id.* at 14-15.[8]

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[8] Rinehart points to section 22's declaration that federal land is "free and open" to prospecting. Pet. 3, 13. As this history makes clear, that language focuses not on eliminating state regulation, but on legalizing mining activity that was previously a trespass. As the statute makes clear, federal lands are "free and open" to entry for mining—but only "under regulations prescribed by law." 30 U.S.C. § 22; *see* p. 12 & n.7, *supra*.

The law's focus is thus to confer on miners "specific property rights"—an "interest in land." Pet. App. A 17; *see Colvin Cattle Co., Inc. v. United States*, 67 Fed. Cl. 568, 571 (2005) ("As the Supreme Court recognized in *Jennison v. Kirk*, 98 U.S. 453, 457 (1878), the purpose of the Mining Act is to 'give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.'"). But the fact that Rinehart enjoys property rights does not exempt him from state regulation. As the California Supreme Court explained, "the grant of a real property interest does not ordinarily carry with it immunity from regulation." Pet. App. A 17.

Indeed, shortly after Congress passed the Mining Act, a series of cases effectively shut down hydraulic mining throughout California, based on state-law challenges to that practice's harmful effects. *See* Pet. App. A 17-21 (discussing *Woodruff*, 18 F. 753, and *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884)). The injunctions effectively crippled the hydraulic mining industry. *Id.* at 19-20. Yet rather than supersede the State's requirements, Congress effectively incorporated them into federal law. *Id.* at 20-21.

c. Rinehart maintains that the Mining Act's "general purpose" was "to encourage the discovery and profitable mining" of mineral resources on federal lands. Pet. 7. Because California's law has the effect of discouraging him from mining his particular claim, Rinehart argues, California's law defeats Congress's purpose and must be invalidated.

But the purpose of federal mining law is not as single-minded as Rinehart suggests. The "continuing policy of the Federal Government" is to foster not only the development of domestic mining industries, but also "the orderly and economic development of domestic mineral resources … to help assure satisfaction of industrial, security *and environmental* needs." 30 U.S.C. § 21a (emphasis added).

In any event, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (emphasis omitted). This Court has therefore reasoned, for example, that federal statutes evincing a purpose of "encouraging the use of coal" do not "demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981). "[I]t is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Id.* at 634.

Moreover, any understanding of Congress's purpose must take into account Congress's express decision to preserve a role for state law. *See* pp. 11-12, *supra*. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (internal quotation marks omitted). For instance, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Develop-*

ment Commission, 461 U.S. 190, 221 (1983), this Court discerned that Congress's "primary purpose" in passing the Atomic Energy Act was "the promotion of nuclear power." That did not mean, however, that nuclear power was to be promoted "'at all costs.'" *Id.* at 222. Particularly in light of the statute's express acknowledgement of a role for state regulation, the Court held that Congress's purposes were not obstructed by state laws under which the State could "allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id.* at 223. Here, as explained above, the federal Mining Act retains a role for state regulation, insisting only that the state regulation be "not inconsistent" with federal law. *See* p. 12, *supra*.[9]

2. The California court's conclusion also accords with this Court's decision in *Granite Rock*. That case involved a company that held unpatented mining claims on federal land, and whose plan of operations for mining had been approved by the U.S. Forest Service. 480 U.S. at 576. The California Coastal Commission instructed the company to apply for a coastal development permit for its mining activities. *Id.* The company sued, claiming that the state-law permit requirement was preempted. *Id.* at 577. This Court rejected that argument, holding that California's permit requirement did not conflict with federal law. *Id.* at 593-594.

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[9] The enforceability of state law in national forests, such as the one where Rinehart's claim is located, is also recognized by 16 U.S.C. § 480, which preserves States' "jurisdiction, both civil and criminal," and provides that "the State wherein any … national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof … be absolved from their duties as citizens of the State."

a. In arguing that the decision below conflicts with *Granite Rock* (Pet. 22-23), Rinehart ignores the portion of that opinion that is most relevant here: this Court's *rejection* of the company's claim for preemption under the Mining Act of 1872, including 30 U.S.C. § 22. *See Granite Rock*, 480 U.S. at 582-584. In considering preemption under that law, the Court noted the mining company's "conce[ssion] that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Id.* at 582. As a result, *Granite Rock* looked to the regulations that federal agencies had promulgated, reasoning that "[i]f … it is the federal intent that [miners] conduct [their] mining unhindered by any state environmental regulation, one would expect to find the expression of this intent in these … regulations." *Id.* at 582-583. But the regulations, too, "not only are devoid of any expression of intent to preempt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." *Id.* at 583. As examples, the Court noted federal regulatory provisions requiring compliance with state air quality, water quality, and solid waste standards, as well as general state environmental protection laws—regulations which remain in place today. *See id.* at 583-584 (citing 36 C.F.R. §§ 228.5(b), 228.8(a), (b), (c) & (h)).

The text of the Mining Act has not changed so as to reveal a new "legislative intent on the … subject of environmental regulation." 480 U.S. at 582. Nor have federal regulations changed so as to establish a greater preemptive scope for any ambiguity; the regulations *Granite Rock* recognized as ratifying a state regulatory role continue to exist, and other federal

regulations likewise recognize state authority.[10] Indeed, the Bureau of Land Management, the federal agency with nationwide authority over mining claims on federal land, has concluded that "States may apply their laws to operations on public lands," and that a state law or regulation is preempted "only when it is impossible to comply with both Federal and State law at the same time." Mining Claims under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,008-70,009 (Nov. 21, 2000) (Bureau of Land Management final rule). The Bureau has explained that "no conflict exists if the State regulation requires a higher level of environmental protection" than federal law. *Id.* at 70,008; *see* 43 C.F.R. § 3809.3 ("there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart"). These views are consistent with *Granite Rock*'s rejection, *see* 480 U.S. at 594, of the view that federal law does not permit a regime whereby "state regulators, whose views on environmental and mining policy may conflict with the views of the Forest Service, have the power, with respect to federal lands, to forbid activity expressly authorized by the Forest Service," 480 U.S. at 606

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[10] *See* 36 C.F.R. § 228.8 (requiring miners to comply with state air quality, water quality, and solid waste standards); 43 C.F.R. § 3802.3-2(a)-(c) (similar); 43 C.F.R. § 3715.5(b) (requiring miners to comply with "all applicable … state environmental standards"); *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998) (in determining whether a federal mining claim is "valuable" and therefore valid, "the costs of compliance with all applicable Federal and State laws are properly considered": "[i]f the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid," and "[u]nder no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable").

(Powell, J., concurring in part and dissenting in part). It is not surprising, therefore, that in this case, the United States expressly urged the California Supreme Court to uphold California's law. *See* Br. of United States as Amicus Curiae, *People v. Rinehart*, No. S222620 (Cal. Sup. Ct., filed Aug. 31, 2015), available at 2015 WL 5166997.

b. Rinehart claims that the California Supreme Court opinion conflicts with another portion of *Granite Rock*, which he says "implied" that "'a state regulation so severe' that it would render mining 'commercially impracticable' … would be invalid under obstacle preemption." Pet. 23; *see Granite Rock*, 480 U.S. at 587 ("The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable."). But the language Rinehart relies on does not address preemption under federal mining laws. Rather, it comes from *Granite Rock*'s discussion of preemption claims under two "federal land management statutes"—the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Forest Management Act (NFMA). *See* 480 U.S. at 585. "For purposes of [that] discussion and without deciding [the] issue," the Court "assume[d] that the combination of the NFMA and FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." *Id.* at 585. But Rinehart does not claim preemption under the FLPMA or NFMA—or indeed under any similar law. His sole claim is for preemption under the Mining Act of 1872 (Pet. i), which this part of *Granite Rock* has nothing to do with.

In any event, the *Granite Rock* statement on which Rinehart relies takes as its premise the principle that state land use laws and state environmental regulations are "different." 480 U.S. at 587. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* Under that formulation, California's moratorium is an environmental regulation, which by its terms will end when the "identified significant environmental effects" are mitigated. Cal. Fish & Game Code § 5653.1(b)(4)

The temporary nature of California's permitting moratorium reinforces its permissibility. *Granite Rock* allows States to impose permit requirements on mining. 480 U.S. at 594. As this Court has observed, a temporary moratorium on permits is similar to a delay in the permitting process. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 337 n.31 (2002) (noting, in the takings context, the lack of any "persuasive explanation for why moratoria should be treated differently from ordinary permit delays"). The moratorium at issue here has always been designed to allow appropriate administrative authorities to assess the situation and consider how to frame regulations that could allow mining to resume while alleviating harmful environmental effects. Each version of the moratorium has specified that the Department should resume issuing permits once environmental analysis is complete and adequate regulations are in place. *See* pp. 4-6, *supra*.

The version of the statute that is pertinent in Rinehart's case is the one that prohibited him from receiving a permit when he mined without one on June 16, 2012. That moratorium was set to expire in 2016 even if no new regulations had been issued. *See* p. 5, *supra*. Although the statute was subsequently amended so as to eliminate that definite sunset date, the relevant state agencies continue to make progress. California's State Water Resources Control Board has begun implementing the statute, and a new framework for issuing permits could be in place by the spring of 2018.[11]

3. Rinehart argues that the California Supreme Court's decision diverges from three decisions by other lower courts: *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982), *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), and *South Dakota Mining Association, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). Pet. 23-27.

a. *Brubaker* and *Skaw* concerned state power to effectively invalidate federal mining claims and permanently deprive a miner of his real property interest—something that is not at issue here, and that the California Supreme Court did not address.

Brubaker involved mining claims whose validity the federal government had challenged for allegedly lacking valuable mineral deposits. 652 P.2d at 1052-1053. The Interior Department's Board of Land Appeals required the claim owners to conduct "core drilling" to determine the quantity and marketability of minerals present, so that the claims' validity could

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[11] *See* http://www.swrcb.ca.gov/water_issues/programs/npdes/suction_dredge_mining.shtml.

be resolved. *Id.* at 1053. After federal authorities approved a plan of operation for the drilling, the county denied the owners' application for the "special use permit" required for mineral extraction under the county's zoning ordinance. *Id.* The county viewed drilling as inconsistent with its long-range plans for the land and incompatible with existing uses on surrounding properties. *Id.* The Colorado court concluded that this application of the county zoning ordinance was an attempt "by the County to substitute its judgment for that of Congress concerning the appropriate use of these lands," and to "prohibit the very activities contemplated and authorized by federal law." *Id.* at 1056.

In *Skaw*, miners in Idaho brought a takings claim against the United States after a federal statute "'withdr[ew] from all forms of appropriation'" the minerals located on a scenic river where the plaintiffs had unpatented mining claims. 740 F.2d at 934-935. Although those claims could not be mined without a state permit and Idaho had stopped issuing those permits in 1977, the court considered that fact immaterial to the miners' claims against the federal government. *Id.* at 940. It reasoned that the unpatented mining claim gave the right to "mine to exhaustion" the minerals therein, and any state law making it "impossible … to exercise" that right would be invalid. *Id.* at 940.[12]

Brubaker and *Skaw* addressed applications of state or local law that would have effectively extin-

[12] The court reached that conclusion without the benefit of adversarial argument: the federal government "express[ed] no views" as to whether Idaho's law was preempted, *id.* at 940 n.3, and Idaho was not a party to the litigation.

guished particular federal mining claims and eliminated the miner's entire real property interest—in *Brubaker* by making it impossible to conduct the core drilling that the Interior Department viewed as necessary to defend against an invalidity proceeding (which would have completely eliminated the miner's rights), and in *Skaw* by allowing the federal government to withdraw all rights associated with a previously perfected mining claim without paying compensation. Whatever the merits of those decisions, California law does not operate to extinguish Rinehart's federal property rights or invalidate his unpatented claim.[13] He remains able to mine his claim by other means—and may eventually be able to resume suction dredge mining as well, if he can comply with new state permitting requirements that appropriately mitigate environmental harms.[14]

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[13] At earlier stages of this litigation, Rinehart argued that California law made it impossible for him to expend labor on mining, and thus conflicted with the requirement, in 30 U.S.C. § 28, that miners conduct "$100 worth of labor" each year to retain a claim. In light of authorities establishing numerous other ways to maintain his claim during the pendency of the moratorium, *see* 30 U.S.C. § 28f(a); 43 C.F.R. § 3836.12, Rinehart has abandoned that argument. *See* Rinehart's Answering Br. on the Merits 30 (Cal. Sup. Ct., filed April 21, 2015) (conceding that "[i]t is certainly not impossible to comply with § 28 without suction dredging").

[14] Amicus curiae American Exploration & Mining Association (p. 9) states that "a mining claim cannot be located or maintained without an intent to mine" under 30 U.S.C. § 612(a). Section 612(a) states that an unpatented mining claim "shall not be used … for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." The statute prohibits the acquisition or maintenance of unpatented claims as a ruse to support other uses—as the authorities

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In any event, *Brubaker* and *Skaw* predate this Court's decision in *Granite Rock*, as Rinehart acknowledges. Pet. 25. Before *Granite Rock*, there may have been disagreement between *Brubaker* and *Skaw*, on the one hand, and cases that upheld state regulations affecting mining on federal land.[15] The leading case stating the *Brubaker* and *Skaw* view was *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), which *Brubaker* and *Skaw* followed. *See Brubaker*, 652 P.2d at 1056; *Skaw*, 740 F.2d at 940. *Brubaker* relied in particular on *Ventura County*'s holding that a local permit requirement as to off-

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cited by amicus demonstrate. *See United States v. Nogueira*, 403 F.2d 816, 824 (9th Cir. 1968) (finding bad faith where claim was occupied "for personal residence purposes and not for mining development at all"); *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 33 (1983) ("'If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law.'" (emphasis omitted)). Section 612(a) is not implicated in this case, because Rinehart presumably does not intend to use his claim for purposes "other than" mining.

[15] *See, e.g., Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n*, 693 P.2d 227, 234-235 (Wyo. 1985) (upholding state regulation of oil wells on federal lands against a preemption challenge based on the Mineral Lands Leasing Act of 1920, the National Environmental Policy Act of 1969, and the Environmental Quality Improvement Act of 1970, because "Congress, far from excluding state participation, has prescribed a significant role for local governments in the regulation of the environmental impact of mineral development on federal land"); *State ex rel. Andrus v. Click*, 97 Idaho 791, 796-797 (1976) (rejecting preemption challenge to statute that allowed State to deny a permit application if "a dredge mining operation" would not be in the public interest with respect to factors such as recreational use and fish and wildlife habitat).

shore drilling was preempted because "'[t]he federal Government has authorized a specific use of federal lands, and [a county] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.'" *Brubaker*, 652 P.2d at 1056 (quoting *Ventura County*, 601 F.2d at 1084).

That same statement from *Ventura County* was the basis of the Ninth Circuit's preemption decision in *Granite Rock*. *See Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1082 (9th Cir. 1985). This Court reversed that decision, notwithstanding the dissents' advocacy of the *Ventura County* view. *See Granite Rock*, 480 U.S. at 606 (Powell, J., concurring in part and dissenting in part) (criticizing the Court's opinion for allowing a "twofold authority with respect to environmental matters" concerning mining on federal land); *id.* at 610 (Scalia, J., dissenting) (citing *Ventura County*). *Granite Rock* thus superseded the *Ventura County* line of lower court authority, and effectively settled the previous disagreement.[16]

b. The Eighth Circuit's post-*Granite Rock* decision in *South Dakota Mining* involved an initiative that amended a county's zoning laws to ban new or amended permits for "surface metal mining extractive industry projects" in the "Spearfish Canyon Area"—a location that was 90% federal land. 155 F.3d at 1007. The county supported the plaintiffs' attempt to invalidate the initiative, and stipulated that surface mining was the only conceivable mining method

[16] *See* 1 George C. Coggins & Robert L. Glicksman, Public Natural Resources Law § 5:28 (2d ed. 2007 & 2016 Supp.) ("[T]he *Granite Rock* opinion as a whole apparently reduces *Ventura County*'s precedential value to nil.")

in that area, because the area's mineral deposits were all at the surface. *Id.* at 1007-1008 & n.3. The court of appeals held the initiative preempted on the ground that it interfered with federal mining law's policy of "encourag[ing]" mining on federal land. *Id.* at 1011.

The Eighth Circuit's resolution of the challenge in *South Dakota Mining* presents no direct conflict with the California Supreme Court decision here, because the law struck down in *South Dakota Mining* is nothing like California's suction dredge moratorium. *South Dakota Mining* concerned a zoning amendment that singled out a particular area of land that was overwhelmingly federally owned; the California provisions at issue here are environmental regulations that apply statewide, including on state-owned and private land.[17] The initiative in *South Dakota Mining* banned surface mining permanently, 155 F.3d at 1007, whereas California has only suspended the issuance of permits pending consideration of reg-

[17] *Cf. United States v. County of Fresno*, 429 U.S. 452, 455 (1977) ("[T]he economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on other similarly situated constituents of the State."). California's statute does not "provide new authority for the [D]epartment [of Fish and Wildlife] to close or regulate suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes governed by other state or federal law." Cal. Fish & Game Code § 5653.1(d). But that limitation simply recognizes that the environmental ramifications of such large-scale activities already receive extensive scrutiny under other laws, such as the federal Clean Water Act and Endangered Species Act and the California Environmental Quality Act.

ulations to mitigate significant environmental effects, *see* pp. 4-6, *supra*. The law in *South Dakota Mining* banned all mining at the surface. 155 F.3d at 1007. The California law here, in contrast, simply restricts the use of particular equipment in rivers, streams, and lakes, and does not affect mining on land at all. It is by no means clear that the Eighth Circuit would have reached a decision contrary to that of the California Supreme Court on the very different facts of this case.

Rinehart claims that the reasoning of *South Dakota Mining* creates a conflict more generally, in that it bars state laws that are "'prohibitory, not regulatory'" with respect to mining. Pet. 24. The question of "prohibitory" local laws was at issue in *South Dakota Mining* because the ordinance there applied to one specific area (the "Spearfish Canyon Area") and, by stipulation, banned the only feasible mining method in that area. 155 F.3d at 1007. California's moratorium on suction dredge mining permits applies statewide—including in areas that, with or without the moratorium, would be mined exclusively by other means. It is no more prohibitory of mining in general than are countless other laws of general applicability that may make it uneconomical to mine claims with certain characteristics—such as restrictions on the use of explosives or poisonous chemicals, wage and hour requirements, and state tax laws. *See Forbes v. Gracey*, 94 U.S. 762, 767 (1876) (rejecting argument that miners are exempt from state taxes on federal mining claims).

In any event, the California Supreme Court engaged in an extensive examination of multiple provisions of the Mining Act, as well as the history of that act's passage. To the extent that examination led to

more precise conclusions about federal mining law's purposes than *South Dakota* reached, the more recent decision is also the better considered. In the absence of any decision expressly considering and rejecting the California Supreme Court's thorough parsing of the act's text and historical record, there is no reason for further review by this Court.[18]

4. Finally, Rinehart and his amici significantly overstate the importance of this case. Pet. 27-32. Except for the 1998 decision in *South Dakota Mining*, they point to no post-*Granite Rock* decision in alleged conflict with the California Supreme Court's understanding of federal law.[19] Rinehart's observations

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[18] *South Dakota Mining*'s most prominent error was its broad reliance on the acknowledged congressional goal of promoting mining without examining the precise language and structure of the statute. *Compare South Dakota Mining*, 155 F.3d at 1011 (reasoning that the law at issue obstructed congressional goals because "Congress has encouraged exploration and mining of valuable mineral deposits" and "encourages the economical extraction and use of these minerals"), *with Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981) (courts considering preemption must "look beyond general expressions of 'national policy'"), *and Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers [a] statute's primary objective must be the law" (emphasis omitted)).

[19] Nor can Rinehart point to conflicting decisions regarding the legality of state regulation of suction dredge mining in particular. So far as we are aware, every case to have considered the issue since *Granite Rock* has upheld the state law. *See Bohmker v. Oregon*, 172 F. Supp. 3d 1155 (D. Or. 2016); *Pringle v. Oregon*, 2014 WL 795328 (D. Or. 2014); *Beatty v. Washington Fish & Game Comm'n*, 341 P.3d 291, 306-308 (Wash. Ct. App. 2015). In one of these cases, an appeal has been fully briefed and is awaiting argument. *Bohmker v. Oregon*, No. 16-35262 (continued…)

about the scope of federal land ownership (Pet. 28) thus simply underscore the rarity with which the issue arises.

Moreover, Rinehart's question presented asks this Court to review the legality of "state bans of mining on federal lands." Pet. i. But California does not ban mining on federal lands. The State currently prohibits only a particular *method* of mining: suction dredge mining of streams, rivers, and lakes. Rinehart and his amici do not demonstrate that that particular method constitutes a substantial proportion of the nation's, or California's, mining industry. To the contrary, "[r]ecreational suction dredging represents 90 percent of all suction dredging." *People v. Osborn*, 116 Cal. App. 4th 764, 768 (2004).[20] The gold that

(…continued)
(9th Cir.).

[20] More recent survey results bear this out. As part of its environmental review of suction dredge mining, the California Department of Fish and Wildlife commissioned a survey of suction dredge miners' activity in 2008. That survey revealed that 82% of suction dredge miners considered themselves "recreational" miners for whom gold recovery was not a significant source of income, 16% considered themselves semi-commercial dredgers for whom gold recovery served as a supplemental source of income, and just 2% considered themselves commercial dredgers. *See* Socioeconomic Report: Suction Dredge Permit Program Environmental Impact Report 5 (Nov. 19, 2010), available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27421&inline. Nonmotorized mining, whether for commercial or noncommercial purposes, remains possible under California's statute, *see* p. 3, *supra*, and various methods of such mining are in widespread use, *see* Brian Clark Howard, *California Drought Launches New Gold Rush*, National Geographic (Aug. 15, 2014), available at http://news.nationalgeographic.com/news/2014/08/140814-california-drought-gold-rush-water-climate-mining-panning/.

could be recovered by suction dredging pales beside the much larger amounts mined by commercial mining methods that are unaffected by this law.[21] And California's current law is not a permanent ban even on suction dredging, but a moratorium designed to allow further study and with the objective of issuing new permitting regulations.[22] This case therefore provides no opportunity to decide whether a permanent restriction would be preempted.

One amicus notes that the economic importance of mining has spawned congressional consideration of statutory changes to bolster the extraction of "rare earth" metals. *See* Southeastern Legal Foundation Br. 11-13. But that does not demonstrate that this Court's intervention is needed here. To the contrary, it demonstrates that Congress can take action if it is concerned that state laws might create any actual interference with congressional goals.[23]

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[21] *Compare* Socioeconomic Report, *supra*, at 5 (average gold recovery of a suction dredge operation was 3.4 ounces per year in 2008, and half of dredgers recovered one ounce or less), *with* https://www.goldenqueen.com/project/soldedad-mountain (one currently active hardrock mine projects production of 74,000 ounces of gold per year). Given such extreme differences in productivity, Amicus Western Mining Alliance's statement (p. 16) that there are only 16 registered lode mines in California is beside the point.

[22] American Exploration & Mining Association incorrectly claims (p. 17 n.6) that the California Supreme Court, while stopping short of deciding the issue, nevertheless "appeared to assume" that the moratorium was a *de facto* ban. The portion of the opinion that the amicus cites does not imply any such assumption. *See* Pet. App. A 2-5.

[23] The Southeastern Legal Foundation further suggests (pp. 13-20) that this case presents an opportunity to review a (continued…)

Another amicus implies that this case provides an opportunity to decide broader issues about preemption, because the California Supreme Court "appl[ied] a presumption against preemption" and "elevated the state's police powers above Congress's Property Clause powers." American Exploration & Mining Association Br. 22 & n.7. But the California Supreme Court expressly declined to apply any presumption, because "the conclusion we would reach with or without the presumption is unchanged." Pet. App. A 9. It also fully acknowledged Congress's plenary power over federal land, *id.* at 5, agreeing that "in the event of a conflict," "'state laws must recede,'" *id.* at 6 (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)). It held against Rinehart not because it viewed state law as superior, but because, after careful consideration, the best indications of congressional intent established that there is no conflict between federal purposes and state law. *Id.* at 10-23. There is no need for further review by this Court.

(…continued)
due process challenge to California's law. But Rinehart has never raised such a claim, and the lower courts have not ruled on it. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'"). Contrary to the Foundation's claim (p. 17), California's statutes make clear that possessing suction dredge equipment in a closed area will be punished as a misdemeanor. Cal. Fish & Game Code §§ 5653(d), 12000(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
MARK J. BRECKLER
Chief Assistant Attorney General
ROBERT W. BYRNE
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
GAVIN G. MCCABE
Supervising Deputy Attorney General
MARC N. MELNICK
Deputy Attorney General

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