IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S222620

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,
Defendant and Appellant.

After an Opinion by the Court of Appeal,
Third Appellate District
(Case No. C074662)

On Appeal from the Superior Court of Plumas County
(Case No. M1200659, Honorable Ira Kaufman, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WESTERN MINING ALLIANCE, AND SISKIYOU COUNTY IN SUPPORT OF BRANDON RINEHART

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation (PLF), Western Mining Alliance (WMA), and Siskiyou County request leave to file the accompanying brief in support of Respondent Brandon Rinehart. Amici are familiar with the arguments and believe the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICI CURIAE

PLF is the oldest and largest donor-supported public interest law foundation of its kind. Founded in 1973, PLF provides a voice in the courts for those who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide.

PLF attorneys have been regular participants in this Court, including *Property Reserve, Inc. v. Superior Court*, No. S217738 (amicus brief filed Jan. 9, 2015); *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014); *City of Perris v. Stamper*, No. S213468 (granted

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[1] Pursuant to California Rule of Court 8.520, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

Nov. 13, 2013); and the U.S. Supreme Court, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

WMA was formed in 2011 in response to the suction dredge moratorium at issue here. It represents the interests of independent miners throughout the West on environmental issues that affect their ability to work their claims. WMA promotes a more even-handed approach to regulation which pursues the goals of environmental protection while being attentive to the burdens placed on individuals. Toward that end, it engages in public information campaigns, political advocacy, and litigation.

Siskiyou County is the fifth largest county in California by area and has multiple rivers and streams which provide an important source of industry, tourism, recreation, and agricultural production. It also contains numerous federal areas, including parts of five national forests, that contain streambed mining claims. As such, its residents and economy are significantly impacted by the moratorium. Siskiyou County is gravely concerned that its residents face ongoing threats of criminal prosecution if they exercise their rights to conduct limited mining activities as supported by federal law.

Amici's experiences will provide the Court a useful perspective on the central issue in this case: whether California's ban on the use of suction dredge mining is preempted by federal law. As explained in their brief, Amici chart a middle way between the state's position, which would deny federal

mining law any preemptive effect, and the Court of Appeals' decision preempting any regulation that renders the most marginal mining claim commercially impracticable to work. Federal law accommodates state interests by allowing for regulation of mining's environmental impacts. But it does not permit the state to ban mining in lieu of regulating it or impose regulatory burdens far out of proportion to its impacts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal law encourages the discovery and commercial extraction of mineral resources on federal lands. *See* Mining Act of 1872, 30 U.S.C. §§ 22-42; *see also United States v. Coleman*, 390 U.S. 599, 602 (1968). Apparently, California disagrees with this policy. It has a permanent ban[2] on the use of suction dredges, the only practicable means to use federal streambed mining claims. Fish & Game Code §§ 5653, 5653.1. Consequently, it has set up a clear conflict with federal policy and, under the Supremacy Clause, state law must yield. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

Despite the state's protestations to the contrary, this case doesn't threaten state authority to regulate the environmental impacts of mining. The

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[2] Although the state would focus on the then-temporary moratorium in place when Rinehart was charged, the state has created rolling moratoria that are the functional equivalent of a permanent ban and should be treated as such. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (describing rolling moratoria and noting that the Court could not consider the moratorium at issue as one because of the unique posture of that case).

U.S. Supreme Court has already recognized that authority. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593-94 (1987). The ban doesn't regulate any purported impacts of mining. Rather, it's only in place because the Legislature hasn't given the Department of Fish and Wildlife the authority it says it needs to regulate these impacts. Department of Fish and Wildlife, *California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code*, 3 (Apr. 1, 2013) (Department Report).[3] Whatever the Legislature's reasons for not establishing a state regime to regulate these impacts, this choice can't justify frustrating federal policy. Though federal law accommodates state interests by permitting states to regulate mining's impacts, it does not permit states to ban mining in lieu of regulating it. *See Granite Rock*, 480 U.S. at 587.

ARGUMENT

I

THE SUCTION DREDGE BAN CONFLICTS WITH FEDERAL LAW

The Supremacy Clause requires state law to give way when it conflicts with federal law. *See* U.S. Const. art. VI, cl. 2; *Crosby*, 530 U.S. at 372. This need not be a direct conflict, *i.e.*, state law requiring what federal law forbids. State law that merely "stands as an obstacle to the accomplishment and

[3] *Available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843 (last visited Apr. 30, 2015).

execution of the full purposes and objectives of Congress" is also preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Federal law encourages the discovery and extraction of resources on federal lands under the Mining Act of 1872. *See* 30 U.S.C. §§ 22-42; *see also* Adrianne DelCotto, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket*, 40 Envtl. L. 1021, 1030-31 (2010). It makes these lands "free and open to exploration," rewarding anyone who discovers mineral deposits with a statutory right to extract and sell them. *See* 30 U.S.C. § 22; *United States v. Coleman*, 390 U.S. at 602. Simultaneously, federal law encourages more efficient use of these materials and a reduction of any adverse environmental impacts. *See* Matt A. Crapo, Note, *Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands?*, 19 J. Land Resources & Envtl. L. 249, 259 (1999); *see also, e.g.*, 36 C.F.R. § 228.1. Though federal policy balances all of these interests, one chief purpose is clear: to promote the commercially practicable discovery and extraction of minerals on federal land. *See* 30 U.S.C. § 21a; *South Dakota Min. Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1010 (8th Cir. 1998).

California doesn't share this priority. In 2009, it banned the use of suction dredges, the only cost-effective means of mining federal streambed claims. Fish & Game Code § 5653.1(e); *see Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir. 2012); *In re Suction Dredge Mining Cases*, No. DS4720, slip op. at 17 (Super. Ct. Jan. 12, 2015) (finding

that the de facto ban on the use of suction dredges rendered streambed mining commercially impracticable). Presently, state law limits owners of these claims to cost-prohibitive methods, such as gold-panning. *See* Cal. Code Regs., tit. 14, § 228(a) (limiting streambed mining to nonmotorized *recreational* mining activities). Consequently, streambed claims in California are being abandoned in favor of those elsewhere or miners are giving up their occupation entirely, undermining the federal policy throughout the state.[4]

The consequences of this conflict are significant. The federal government owns nearly 50 million acres of land in California. *See* Ross W. Gorte, et al., *Federal Land Ownership: Overview and Data*, Congressional Research Service Report No. R42346 at 4 (Feb. 8, 2012).[5] Much of it is crisscrossed with streams and channels that could hold valuable minerals. These areas contain over 10,000 active placer mining claims which, before the ban, were worked by more than 3,000 state permittees using suction dredges.

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[4] *See, e.g.*, Michelle Macaluso, *Gold-sucking technique dredges up California controversy*, FoxNews.com, Apr. 14, 2013, *available at* http://www.foxnews.com/us/2013/04/14/gold-sucking-dredges-up-californi a-controversy (last visited Apr. 30, 2015); Dawn Hodson, *As gold hits $1,700/oz. dredgers lament lost income*, Placerville Mountain Democrat, Feb. 1, 2012, at A1, *available at* http://www.mtdemocrat.com/news/as-gold-hits -1700oz-dredgers-lament-lost-income/ (last visited Apr. 30, 2015); *Gold non-Rush: California bans dredge mining*, Associated Press, Aug. 8, 2009, *available at* http://www.nbcnews.com/id/32343434/#.Uq8oQieFdF9 (last visited Apr. 30, 2015).

[5] *Available at* https://fas.org/sgp/crs/misc/R42346.pdf (last visited Apr. 30, 2015).

See Petition for Review at 3. California has ordered all of this mining to stop. Fish & Game Code §§ 5653, 5653.1. By forbidding this mining entirely and upsetting the federal policy to balance its encouragement of mining while regulating any of its negative impacts, the state is obstructing the *full* purposes of federal law. *See Hines*, 312 U.S. at 67; *compare* Fish & Game Code §§ 5653, 5653.1 *with* 30 U.S.C. §§ 22-42.

II

THE SUCTION DREDGE BAN CANNOT BE SUSTAINED UNDER GRANITE ROCK

The state doesn't deny that its ban undermines federal encouragement of mining. Rather, it argues that this conflict is permitted under the U.S. Supreme Court's decision in *Granite Rock*. *See* People's Opening Br. at 11-19, 29-34. It reads that decision to hold that the Mining Act has no preemptive effect whatsoever. *See id*. at 11-19. If the state is right, it may frustrate the Mining Act's policy of encouraging mining to any extent it wishes for any reason or no reason whatsoever. Nothing in *Granite Rock* supports this interpretation.

In *Granite Rock*, a mining company challenged state authority to impose *any* regulations on it. *Granite Rock*, 480 U.S. at 577. Because it sought such an aggressive rule, the company had to concede that the Mining Act expressed no legislative intent on the question. *See id*. at 582 ("Granite Rock concedes that the Mining Act of 1872, as originally passed, expressed no

legislative intent on the as yet rarely contemplated subject of environmental regulation."). Although the Mining Act clearly encourages mining, federal policy recognizes other interests, including environmental protection. *See* Crapo, *supra*, at 259. The company also had to overcome federal regulations that expressly required compliance with state environmental regulations. *See Granite Rock*, 480 U.S. at 583-84; *see also* 30 U.S.C. § 22 (requiring compliance with regulations proscribed by law). Consequently, it's unsurprising that the Supreme Court determined that the Mining Act does not deprive states of *all* authority to regulate the potentially severe environmental impacts of mining. *See* 480 U.S. at 581-84.

However, the state stretches *Granite Rock* to deprive the Mining Act of any preemptive effect. This argument conflicts with this Court's and the U.S. Supreme Court's repeated recognition that state laws which stand as an obstacle to Congress' full purposes and objectives are preempted. *See, e.g.*, *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 934-35 (2004) (state law that single-mindedly pursues one goal at the expense of others that federal law attempts to balance is preempted); *Hillman v. Maretta*, 133 S. Ct. 1943, 1949-50 (2013) (state domestic relations law that frustrates purpose of federal insurance law is preempted). Although federal policy recognizes that miners can be required to address their environmental impacts, it does not allow states to upset the balance entirely by banning a mining

practice rather than regulating it. *See* 43 C.F.R. § 3809.3;[6] *Dowhal*, 32 Cal. 4th at 934-35; *see also Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (state law that interferes with federal balancing of multiple objectives is preempted); *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1992 (2011) (Breyer, J., dissenting) ("Why would Congress, after carefully balancing [competing interests], want to allow states to destroy that balance?"). It is also belied by *Granite Rock*'s emphasis on the government's admission that a ban on mining would be preempted.[7] If Congress intended

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[6] The state asserts that 43 C.F.R. § 3809.3 confirms that federal policy has no preemptive effect except in cases where it is impossible to comply with both federal and state law. People's Opening Br. at 23-25. Yet the legally binding regulation does not go as far as the state would have it. By preserving state laws or regulations that "require[] a higher standard of protection for public lands," it allows government to regulate mining to ameliorate its environmental impacts. 43 C.F.R. § 3809.3. It's silent about state mining bans in lieu of regulation. *Cf. United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) ("While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.").

[7] *See* 480 U.S. at 586 ("[T]he Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land."); *id*. (" 'The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether* . . . .' " (quoting *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1080 (9th Cir. 1985))); *id*. (" 'The [Coastal Commission] seeks not to prohibit or 'veto,' but to regulate . . . .' " (quoting *Granite Rock Co. v. California Coastal Comm'n*, 590 F. Supp. 1361, 1373 (N.D. Cal. 1984))).

federal mining policy to have no preemptive effect, it would have said so.[8] *See Altria Group, Inc. v. Good*, 555 U.S. 70, 79 n.6 (2008) (discussing the role of saving clauses in deciding preemption questions).

Since federal policy recognizes that mining's environmental impacts can be regulated, courts must distinguish state regulation of these impacts (which are consistent with federal policy) from bans on mining without regard to them (which are not). *See Brubaker*, 652 P.2d at 1055-59 (state or local regulation of mining activity is permissible, prohibitions are not). In *South Dakota Mining Association, Inc. v. Lawrence County*, for example, the Eighth Circuit considered a preemption challenge to a per se ban on a mining practice. *See* 155 F.3d 1005, 1011 (8th Cir. 1998). The Eighth Circuit treated this wholesale prohibition against the only commercially practicable means of exploiting mining claims as what it is—a ban on mining—and not a regulation of mining's impacts. *See id*. As such, the state law was preempted by federal mining policy. *See id*. Similarly, *Granite Rock* suggested that regulations that make mining commercially impracticable, though adopted under the guise of

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[8] The Mining Act's reference to "regulations prescribed by law," 30 U.S.C. § 22; *see also* People's Opening Br. at 14-19, at most allows states to *regulate* mining. *See Stock v. Plunkett*, 181 Cal. 193, 194 (1919) (interpreting this language to incorporate existing common law rules and local customs to define the bounds of a mining claim); *Brubaker v. Bd. of Cnty. Comm'rs, El Paso Cnty.*, 652 P.2d 1050, 1058 (Colo. 1982) (30 U.S.C. § 22 "merely recognize[s] a role for nonconflicting state and local laws; [it does] not authorize state regulations that would bar the very activities authorized by the mining laws."). Neither the statute nor any of the regulations cited by the state authorize it to ban mining in lieu of regulating it.

protecting the environment, are preempted. *See* 480 U.S. at 587 ("[O]ne may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable."); *see also id.* at 586 (noting the Coastal Commission's concession that a ban on mining would be preempted).

Granite Rock and *South Dakota Mining* identify a serious problem that arises from recognizing state power to regulate mining's environmental impacts. Armed with it, states could use environmental impacts as a pretext for banning mining. For example, a state could impose incredibly burdensome regulations on highly-productive forms of mining based only on de minimis impacts. *See Brubaker*, 652 P.2d at 1059 ("This is not denial of a permit because of failure to comply with reasonable regulations supplementing the federal mining laws, but reflects simply a policy judgment as to the appropriate use of the land."). Or it could impose an interminably long and expensive environmental permit process so that mining is effectively prohibited. *See Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905) (State restrictions so onerous that they are repugnant to the Mining Act's liberal encouragement of mining are invalid.). When *Granite Rock* and *South Dakota Mining* refer to state laws that make mining "commercially impracticable," this is what they mean—regulations that frustrate mining without regard or out of proportion to its impacts. *See id.*; *South Dakota Min.*, 155 F.3d at 1011. This Court should not dismiss this concern lightly.

Contrary to the state's assertion, *South Dakota Mining* would not forbid environmental regulations from rendering marginal mining claims commercially impracticable to work. People's Opening Br. at 34-36. And this Court need not establish such a rule to find preemption here—California's ban can be easily distinguished from a regulation of mining's impacts. This Court should hold that the state may regulate the environmental impacts of mining but may not ban mining or regulate to an extent that cannot be justified by any such impacts. When the latter happens, the state is attempting to render mining commercially impractical, not regulating it. *See Granite Rock*, 480 U.S. at 587; *South Dakota Min.*, 155 F.3d at 1011. This rule ensures that the state can protect its interests without allowing it to completely upset the balance between encouraging mining on federal lands and minimizing its impacts. *See Whiting*, 131 S. Ct. at 1993 (Breyer, J., dissenting).

III

A STATE LEGISLATURE'S DECISION TO LIMIT THE AUTHORITY OF A STATE AGENCY CANNOT JUSTIFY A CONFLICT WITH FEDERAL LAW

Suction dredge mining is currently banned in California for one reason: the Legislature has not given the Department of Fish and Wildlife the authority it says it needs to regulate the practice's purported environmental impacts.[9] In

[9] The state repeatedly asserts that the reason for the moratoria is to allow the Department to study mining's impacts and determine how to regulate it. That (continued...)

an April 2013 report to the Legislature, the Department explained that it lacks the statutory authority required because it can only regulate suction dredge mining to protect fish. *See* Department Report at 3-4. It cannot adopt regulations to ameliorate any impacts on other wildlife, water quality, cultural resources, or noise levels. *See id*. at 3. The Department gave no indication that, if it had the proper authority, suction dredge mining could not be regulated to avoid environmental impacts. *See id*. at 14-19. But the Legislature has withheld this authority.[10]

Therefore, the state errs when it claims that holding the suction dredge mining ban preempted would deprive the state of the necessary authority to protect the environment. People's Opening Br. at 1. If the Legislature wanted to regulate any such impacts, it need only adopt mitigation requirements or authorize a state agency to do so. *See, e.g.*, Pub. Res. Code § 3981 (requiring

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(...continued)
study concluded three years ago and the Department provided the Legislature with its recommendations two years ago. All the while, federal policy has been frustrated by the suction dredge mining ban.

[10] After the Court accepted this case for review, a bill was introduced to allow the State Water Resources Control Board to regulate some of the impacts of suction dredge mining. *See* S.B. 637 (introduced Feb. 27, 2015). The mere introduction of this bill does not change the preemption analysis for several reasons. First, the bill has only been proposed, not adopted. Second, nothing in the proposal would terminate the ban. *See id.* § 1(d) (the bill "does not affect any other law"); Fish & Game Code §§ 5653, 5653.1. Third, the bill gives the Board another two and a half years to develop any regulations, all the while the ban will remain in place. *See* S.B. 637. And, fourth, the bill expressly authorizes the Board to permanently ban suction dredge mining at the conclusion of that time. *See id*.

hydraulic mining to be "carried on without material injury to navigable streams or the lands adjacent thereto"). Its failure to act—and not a decision from this Court that the ban is preempted—would be the cause of the problem the state raises. *See* Department Report at 14-19.

Thus, this case is easily distinguished from *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753, 756 (C.C.D. Cal. 1884). In that case, a mining company's practice of dumping significant amounts of debris into rivers during the hydraulic mining process was found to constitute a nuisance and enjoined. *Id*. at 756-57. Yet the Court did not hold that hydraulic mining would be banned per se. Rather, this mining could not occur until its impacts were mitigated. *Id*. at 808-09 ("But as it is possible that some mode may be devised in the future for obviating the injuries . . . so as to be both safe and effective, a clause will be inserted in the decree giving leave . . . to apply to the court for a modification or suspension of the injunction."). This decision was wholly consistent with federal law's attempt to balance mining and other interests. Consequently, it's unsurprising that legislative history gives no indication that Congress rejected the *Woodruff* decision. *See* People's Opening Br. at 18.

The state identifies no binding or persuasive authority for the proposition that a state can prohibit activity which federal policy encourages

to avoid establishing a state regime to regulate that activity's impacts.[11] If this were permitted, states could too easily frustrate federal policy, causing much mischief. For example, a state could forbid goods that fully comply with federal regulations from being sold in that state unless the seller meets a more precise standard or obtains a waiver, then fail to establish any such waiver process. *Cf. Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 880-86 (2000) (state tort action to establish duty for car manufacturers to install airbags preempted because it conflicts with federal policy promoting a range of choices for manufacturers). It could forbid employers from hiring immigrant workers unless a state agency first determined that the workers are legally present, then fail to give the agency power to make that determination. *Cf. Whiting*, 131 S. Ct. at 1980-85 (a state may require employers to participate in a voluntary federal verification program for immigrant workers because it does not conflict with the federal program). Or, finally, it could forbid its industries from importing or exporting goods without first registering the sales with a nonexistent state agency. *Cf. Crosby*, 530 U.S. at 388 (state cannot regulate

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[11] The only support for that proposition is a cursory response to a comment on a proposed regulation. People's Opening Br. at 23-25; *see* 65 Fed. Reg. 70,009 (Nov. 21, 2000). Unlike the legally binding statute and regulation, this brief analysis should not bind this Court because it doesn't evince the agency's understanding of the nature of the state regulation at issue, its purposes, or what lines the agency might have drawn to distinguish that example from this one. Since courts cannot defer to an agency's *mere conclusion* on preemption, reliance on this cursory analysis would be inappropriate. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009).

its own agencies to impose a de facto sanction on a foreign country). In each of these examples, the state would be frustrating federal policy rather than regulating to ensure both state and federal interests are advanced.

The same is true here. California has undermined federal policy by banning suction dredge mining rather than establishing a state regime to regulate its environmental impacts. *See* Department Report. Under the ban, harmless incidents of suction dredge mining are forbidden just the same as destructive ones.[12] Fish & Game Code §§ 5653, 5653.1. This despite the fact that other states and the federal government regulate suction dredge mining's impacts without a ban. Many states, for instance, regulate the size of suction dredges that may be used, the times of year that this mining can occur, and impose self-monitoring and reporting requirements. *See* Alaska Department of Natural Resources, Division of Mining, Land & Water, Fact Sheet: Suction Dredging (Feb. 2012);[13] Idaho Department of Water Resources, Recreational

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[12] In its 2012 Final Environmental Impact Report, the Department acknowledged that suction dredge mining's environmental impact can vary based on how the device is used and stream conditions. *See* Department of Fish and Game, Suction Dredge Permitting Program FSEIR 4-33 (Mar. 2012), *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43702 &inline. The Report also acknowledges that, depending on these circumstances, suction dredge mining can be an environmental boon, including by removing mercury. *See id.* at 4-41. Nonetheless, under the ban, even this environmentally beneficial mining is forbidden.

[13] *Available at* http://dnr.alaska.gov/mlw/factsht/mine_fs/suctiond.pdf (last visited Apr. 30, 2015).

Mining Permits;[14] Montana Department of Environmental Quality, General Permit for Portable Suction Dredging, Permit No. MTG370000 (Feb. 12, 2010).[15] Similarly, the federal government regulates the number of suction dredges that may be used and when. *See* EPA, Authorization to Discharge Under the National Pollutant Discharge Elimination System, General Permit No. IDG-37-0000 (effective May 6, 2013).[16] California regulated suction dredge mining's impacts for decades prior to the ban, issuing tens of thousands of permits. And it admits that, if the Legislature ever establishes a regime to regulate these impacts, mining could resume subject to time, place, and manner restrictions. *See* People's Opening Br. at 33-34 (speculating that at some uncertain time in the future mining will resume "subject to appropriate time, place, and manner regulations"); Department Report. Each of these are environmental regulations aimed at mitigating mining's purported impacts. California's ban is not. Thus, this is precisely the type of case that *Granite Rock* and *South Dakota Mining* presage—a state law that makes mining commercially impracticable in lieu of regulating its environmental impacts.

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[14] *Available at* https://www.idwr.idaho.gov/WaterManagement/StreamsDams/Streams/DredgingPermit/DredgingPermit.htm (last visited Apr. 30, 2015).

[15] *Available at* http://deq.mt.gov/wqinfo/MPDES/General%20Permits/MTG370000PER.pdf (last visited Apr. 30, 2015).

[16] *Available at* http://www.epa.gov/region10/pdf/permits/npdes/id/small_suction_dredge_idg370000_fp.pdf (last visited Apr. 30, 2015).

CONCLUSION

To be clear, this case is not about whether the state retains any authority to protect the environment from mining. That authority is clearly established. Rather, the question is whether the state can ban an activity that federal law encourages, simply because the state has chosen not to regulate it. This Court should reject this unprecedented argument and look for a middle way between the state's approach, denying federal law any preemptive effect, and the court below's, preempting any regulation that renders the most marginal mining claim commercially impracticable to work. It should hold that federal law allows states to regulate mining to fully mitigate its impacts but does not permit them to ban mining in lieu of regulating it or to adopt burdensome regulations wholly out of proportion to those impacts.

DATED: May __, 2015.

Respectfully submitted,

JAMES S. BURLING
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Amici Curiae Pacific Legal Foundation, Western Mining Alliance, and Siskiyou County

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WESTERN MINING ALLIANCE, AND SISKIYOU COUNTY IN SUPPORT OF BRANDON RINEHART is proportionately spaced, has a typeface of 13 points or more, and contains 4,517 words.

DATED: May __, 2015.

/s/ Jonathan Wood
JONATHAN WOOD

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On May __, 2015, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WESTERN MINING ALLIANCE, AND SISKIYOU COUNTY IN SUPPORT OF BRANDON RINEHART were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this ____ day of May, 2015, at Sacramento, California.

_____
TAWNDA ELLING