No. 16-970

In the
Supreme Court of the United States

BRANDON RINEHART,

Petitioner,

v.

PEOPLE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the Supreme Court of California err in holding, in conflict with decisions of the Eighth Circuit, Federal Circuit, and Colorado Supreme Court, that the Mining Law of 1872, as amended, does not preempt state bans of mining on federal lands despite being "an obstacle to the accomplishment and execution of the full purposes and objectives" of that law?

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INTRODUCTION

The purpose of the Mining Law of 1872 is to encourage productive mining on federal lands. *See United States v. Coleman*, 390 U.S. 599, 602 (1968) (describing "the obvious intent" of the Mining Law as "to reward and encourage the discovery of minerals that are valuable in an economic sense"). This purpose has endured for 150 years, even as Congress has updated the law to accommodate environmental regulation. *See* Pub. L. No. 91-631, 84 Stat. 1876, § 2 (Dec. 31, 1970), *codified at* 30 U.S.C. § 21a; *see also* Pet. 8-10 (discussing the Federal Land Policy Management Act and other statutes that have updated the Mining Law).

Although acknowledging this purpose, the Supreme Court of California held that states are free to frustrate it by banning mining, without regard to the particular activity's environmental impacts or whether they can be regulated. Pet. App. at A-25 to A-26. It did so despite the long line of precedent preempting state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In opposing *certiorari*, California prematurely argues the merits, waffling between defending the decision below and arguing that a court could reach the same result for different reasons. California's arguments are unconvincing. But, more to the point, they cast no doubt on the obvious conflict between the decision below and decisions from the Eighth Circuit, Federal Circuit, and Colorado Supreme Court. *See South Dakota Mining Ass'n v. Lawrence Cnty.*, 155 F.3d 1005 (8th Cir. 1998); *Skaw v. United States*, 740

F.2d 932 (Fed. Cir. 1984); *Brubaker v. Bd. of Cnty. Comm'rs*, 652 P.2d 1050 (Colo. 1982); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (suggesting, but not deciding, that a state regulation "so severe" that it would render mining "commercially impracticable" would be preempted). And, as evidenced by the amici who urge the Court to review this case,[1] the question presented is of national importance. Therefore, this Court should grant *certiorari* to settle the conflict and reverse the decision below.

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT, FEDERAL CIRCUIT, AND COLORADO SUPREME COURT

The decision below established a conflict of authority on whether states may freely frustrate Congress' purpose in enacting the Mining Law. The Supreme Court of California alone says "yes." The Eighth Circuit, Federal Circuit, and Colorado Supreme Court say "no."

California stresses factual distinctions between the cases but no meaningful differences that could cast the existence of that conflict into doubt. It is undeniable. Whereas other courts have respected the Mining Law's purpose by giving it preemptive effect

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[1] *See* Brief of Amicus Curiae American Exploration & Mining Association in Support of Petitioner; Brief of Amici Curiae Western Mining Alliance, American Mining Rights Association, and Waldo Mining District in Support of Petition for Writ of Certiorari; Brief of Amicus Curiae Southeastern Legal Foundation in Support of Petitioner.

when states go too far, the Supreme Court of California held that states may frustrate this purpose without limit. *See* Pet. 16-19.

The decision below plainly conflicts with *South Dakota Mining*'s holding that state mining regulations which are "prohibitory, not regulatory"—and therefore "completely frustrate[] the accomplishment of . . . federally encouraged activities"—are preempted. *South Dakota Mining Ass'n*, 155 F.3d at 1011. California attempts to distinguish the case because it "concerned a zoning amendment that singled out a particular area of land" whereas California's ban "appl[ies] statewide." Opp. 26. But this distinction cuts the other way. *South Dakota Mining* preempted a geographically limited ordinance for frustrating the Mining Law's purpose. 155 F.3d at 1011. A law frustrating that purpose more—by banning mining over a wider area—would fare worse, not better, under *South Dakota Mining*. Particularly where, as here, the state law singles out mining for this disfavored treatment and exempts the same activities if undertaken for other purposes. *See* Cal. Fish & Game Code § 5653.1(d).[2]

California also attempts to distinguish this case from *South Dakota Mining* because, there, evidence showed that the prohibition precluded the only mining method that had been used in the area for years. *See South Dakota Mining*, 155 F.3d at 1007. California's

[2] California downplays the singling out of mining by noting that other uses of suction dredge equipment are subject to the Clean Water Act, Endangered Species Act, and other environmental regulations. Opp. 26 n.17. Of course, suction dredge mining is subject to these other regulations too. *See* Pet. 10-11 (discussing regulations imposed on suction dredge mining under the Clean Water Act).

argument smacks of unfairness as the trial court forbade Rinehart from introducing similar evidence when it denied Rinehart's preemption defense. *See* Pet. 14-16; *see also* Pet. App. at C-24. California's argument also ignores that the decision below placed no weight on this distinction. According to the Supreme Court of California, state mining bans are not preempted as an obstacle to the Mining Law's purpose in any circumstances. *See* Pet. App. at A-24 to A-26 (rejecting *South Dakota*'s reasoning).

The decision below conflicts with the Federal Circuit's decision in *Skaw v. United States*, which also concerned a state ban on suction dredge mining. 740 F.2d 932. California argues *Skaw* is distinguishable because it arose in the context of a takings claim against the federal government rather than a direct challenge to the state ban. *See id.* at 934-35. But to determine whether the miners had property protected by the Takings Clause, the Federal Circuit first had to address the legality of the state's broad ban on suction dredge mining. *Id.* It squarely held that it was preempted as an obstacle to the Mining Law's purposes. *See id.* That holding plainly conflicts with the decision below.

Similarly, the decision below conflicts with the Colorado Supreme Court's decision in *Brubaker*, which preempted a county ordinance under the Mining Law. 652 P.2d at 1056. California claims the case is distinguishable because, there, a county ordinance prevented the owner of a mining claim from establishing that his claim contained valuable minerals, which threatened to invalidate the claim. Opp. 21-22. But California ignores the rationales of both the Colorado Supreme Court and the decision

below. *Brubaker* held the county ban preempted because it sought "not merely to supplement the federal scheme [by regulating mining], but to prohibit the very activities contemplated and authorized by federal law." 652 P.2d at 1056. Likewise, here, California is not supplementing the federal scheme by regulating suction dredge mining's environmental impacts but has instead opted to ban mining. *See* Pet. 11-13. Contrary to *Brubaker*, the decision below holds that the Mining Law preempts no mining prohibitions, no matter how burdensome.

California's last attempt to avoid the obvious conflict created by the decision below is to imply this Court already settled the question in *Granite Rock*. Not so. *Granite Rock* considered only whether the Mining Law preempts all state regulation of mining under express preemption and field preemption. 480 U.S. at 593.[3] This Court did not hold that states may freely ban federally encouraged activities on federal lands. Indeed, it specifically denied that the decision could be construed to "approve any future [state regulation] that in fact conflicts with federal law." *Id.* at 594; *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000) (nothing that *Granite Rock* "did not involve conflict pre-emption"); *id.* at 908 n.23 (Stevens, J., dissenting) (agreeing that *Granite Rock* did not consider obstacle preemption).[4]

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[3] Although *Skaw* and *Brubaker* predate *Granite Rock*, they are entirely consistent with this Court's decision and thus remain good law. *See* Pet. 25-26; *but see* Pet. App. at A-24 (dismissing these cases because they predate *Granite Rock*).

[4] This Court has also previously denied that *Granite Rock* limits obstacle preemption to where Congress or an agency expressly (continued...)

Rinehart does not argue that all state regulation of mining is preempted. On the contrary, he acknowledges states may regulate mining to address its environmental impacts. He challenges their power to ban mining in lieu of regulating it. As the Eighth Circuit, Federal Circuit, and Colorado Supreme Court have held, such bans pose an obstacle to the Mining Law's purpose that regulations do not.

II

WHETHER STATES ARE FREE TO FRUSTRATE THE PURPOSES OF THE MINING LAW IS A QUESTION OF NATIONAL IMPORTANCE

In one sense, the importance of the question presented can be measured in acres. The federal government owns roughly 640 million acres in the United States. Pet. 28. Congress' choices on the use of this land are often controversial. Pet. 30. By denying Congress' decisions preemptive effect unless Congress adequately foresees the future conflict and expressly addresses it, the decision below threatens to increase conflict and encourage states to frustrate Congress' choices. *Id.* at 31; *cf. Geier*, 529 U.S. at 885 ("To insist on a specific expression of [] intent to pre-empt . . . would be in certain cases to tolerate conflicts that . . . Congress[] is most unlikely to have intended.").

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[4] (...continued)
preempts state law. *See Geier*, 529 U.S. at 884 ("[T]hough the Court has looked for a specific statement of pre-emptive intent . . . to displace *all* state law in a particular area . . . the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." (citations omitted)). Yet the Supreme Court of California relied on precisely this rationale. *See* Pet. App. A-25.

Ironically, it could also undermine federalism by eroding the states' historic role in supplementing regulation of federal lands within their borders. *See Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905). Since federal land use statutes remain in effect for many decades, denying preemptive effect to Congress' purposes will give Congress little choice but to preempt the state role broadly out of concern for what unforeseen conflicts may someday arise. Pet. 31. Here, for instance, the conflict did not arise until nearly 150 years after the statute was enacted.

California downplays the importance of the question presented by focusing on its narrow application to suction dredge mining. California notes that, like fishing and hunting, most suction dredge mining permits have been given to recreational miners. Opp. 29. However, this does not mean that fishing, hunting, and suction dredge mining are not economically significant nor that no one makes their living from them.

Moreover, the decision did not give any special significance to suction dredge mining. *See id.* at A-9 to A-26 (discussing the Mining Law and preemption generally). The Supreme Court of California held that the Mining Law has no preemptive effect on state regulations or prohibitions, no matter how much they may undermine its purpose. *See* Pet. App. at A1 to A-2 (holding that the Mining Law only "protect[s] miners' real property interests"; it does not limit interference from "the states' police powers"). Therefore, the decision below affects all forms of mining, not just suction dredge mining—a fact demonstrated by the amici supporting *certiorari*. If the Supreme Court of California's rationale applies to other federal land use

statutes, many other activities would also be implicated. *See* Pet. 31-32.

III

CALIFORNIA'S PREMATURE ARGUMENTS ON THE MERITS HIGHLIGHT THE MANY WEAKNESSES OF THE DECISION BELOW

As the petition's introduction states, this case is not about whether states may regulate mining to reduce its environmental impacts. That authority is clear from *Granite Rock* and Rinehart does not contest it. 480 U.S. at 593. Rather, this case concerns whether states may broadly prohibit mining without regard to whether it has any environmental impacts or whether they can be regulated. In its effort to avoid this Court's review, California skips straight to arguing the merits. Yet much of its argument conflates whether states may regulate mining at all with whether they may do so in ways that frustrate the Mining Law's purpose.

For instance, California claims that the decision below is supported by the history of state mining regulation before and after the Mining Law's adoption. However, this history only shows states may regulate mining to reduce its environmental impacts. *Granite Rock*, 480 U.S. at 593. California has regulated suction dredge mining for decades. Pet. 10-11. The federal government and many of the states regulate suction dredge mining today—to address California's precise concerns—without banning mining.[5] Using nuisance

[5] *See* EPA, *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, General Permit No. IDG-37-0000 (effective May 6, 2013), http://www3.epa.gov/region10/pdf/ (continued...)

law, states and federal courts have also required miners to mitigate their impacts before resuming their activities, but none have broadly forbade mining of federal claims. *See id.* at 17-18. In the case of hydraulic mining, Congress responded by providing a federal permitting process with the creation of dams to protect downstream property owners from debris, contrary to the claim that Congress simply acquiesced in severe state restrictions on mining. *See id.* at 17 n.7; Brief of Amici Curiae Western Mining Alliance, et al. 11-14.

California's suction dredge mining ban, and the decision below upholding it, go far beyond the states' historic role of supplementing federal regulation on federal land. By flatly prohibiting suction dredge mining, without regard to a particular miner's impacts or whether they can be regulated, California has crossed the line between supplementing federal law and frustrating it. *See Butte City Water Co.*, 196 U.S. 125 (states have the "right to supplement Federal legislation" by regulating mining but not "the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws"). California's argument turns the maxim that "the greater power implies the lesser power" on its head,

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[5] (...continued)
permits/npdes/id/IDG37_final_permit_mod_2014.pdf; Alaska Department of Natural Resources, Division of Mining, Land & Water, Fact Sheet: *Suction Dredging* (Feb. 2012), http://dnr.alaska.gov/mlw/factsht/mine_fs/suctiond.pdf; Idaho Department of Water Resources, Recreational Mining Permits, https://www.idwr.idaho.gov/files/forms/2017-recreational-mining-letter-permit.pdf; Montana Department of Environmental Quality, *General Permit for Portable Suction Dredging*, Permit No. MTG370000 (May 28, 2015), http://deq.mt.gov/Portals/112/Water/WPB/MPDES/General%20Permits/MTG370000PER.pdf.

implying a broad power to ban mining from the limited power to regulate it.

Finally, California pivots from defending the decision below to arguing for the same result for different reasons. It argues that its ban is not preempted because it may someday prove to have only been temporary. This argument has significant flaws. First, the decision below did not rely upon it. Therefore, even if California were correct, the decision below would still need to be reversed.

Second, California's characterization elides over several facts, including:

> (1) If California had asked the Secretary of Interior to withdraw areas from mining, as permitted by 30 U.S.C. § 1281(c), the delay could only have been for a maximum of 2 years, *see* Pet. 19 n.8;
>
> (2) California's ban has been in place for 8 years, with much of the delay caused by the Legislature demanding an agency issue regulations as a condition of lifting the ban while withholding the power to do so, *see* Pet. 12;
>
> (3) After all this time, no regulations have even been proposed;[6]
>
> (4) The little progress made toward lifting the ban was influenced by the California Court of Appeal holding the ban preempted, which made it "urgent that the Legislature act," *see* S.B. 637, Cal. Stats. 2015, ch. 680 (enacted Oct. 9, 2015);

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

(5) California has eliminated the statutory deadline for resuming the issuance of permits, allowing the ban to remain in place indefinitely, *see* Pet. 12;

(6) The law was recently amended to permit agencies to issue regulations that could lift the ban but imposes no requirement that they do so or act within a particular time frame, *see id.* at 12-13; and

(7) The recent amendment also expressly authorizes a state agency to permanently prohibit suction dredge mining, *see* Cal. Water Code § 13172.5(b)(3).

For these reasons, Rinehart is confident that this argument would fail on remand if this Court granted *certiorari* and reversed the decision below. This Court's review remains urgent because, until the decision below is reversed, California may have no incentive to ever lift its ban.

CONCLUSION

The decision below upheld California's ban on suction dredge mining on a theory that would freely permit states to regulate or ban mining at will, completely undermining Congress' purposes in enacting the Mining Law. Pet. App. at A-1 to A-2. The Supreme Court of California's holding conflicts with decisions from the Eighth Circuit, Federal Circuit, and Colorado Supreme Court. And the question presented is of national importance. Both of these factors call for this Court to weigh in and settle whether states are free to undermine the Mining Law's purpose or

whether for this statue, as with every other, "any state legislation which frustrates the full effectiveness of federal law is rendered invalid." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

The petition for certiorari should be granted and the decision below overturned.

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Respectfully submitted,

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