No. 16-35262

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA CALEB BOHMKER, et al.,

Plaintiffs-Appellants,

v.

STATE OF OREGON, et al.,

Defendants-Appellees,

ROGUE RIVERKEEPER, et al.,

Intervenor-Appellees.

On Appeal from the United States District Court
for the District of Oregon, No. 1:15-CV-01975-CL
Honorable Magistrate Judge Mark D. Clarke

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND WESTERN MINING ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, nonprofit corporations Pacific Legal Foundation (PLF) and Western Mining Alliance (WMA) state that they have no parent corporations and that no publicly held corporation owns 10% or more of the stock of either of them.

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IDENTITY AND INTERESTS OF AMICI CURIAE

PLF is the oldest 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 has represented parties or participated as amicus curiae in numerous cases involving questions of environmental and constitutional law, including cases relevant to the disposition of this case. *See, e.g.*, *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987); *People v. Rinehart*, 230 Cal. App. 4th 419 (2014); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

WMA was formed in 2011 in response to the growing threat of bans on suction dredge mining. WMA represents the interests of independent miners throughout the West on environmental issues that affect their ability to work their claims. WMA promotes an even-handed approach to regulation, pursuing the goals of environmental protection while being attentive to the burdens placed on individuals. To that end, WMA engages in public information campaigns, political advocacy, and litigation.

PLF and WMA submit this brief because they believe that their public policy perspective and litigation experience will provide an additional viewpoint with respect to the issues presented, which will be helpful to this Court.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal law encourages the discovery and commercial extraction of mineral resources on federal lands. *See* Mining Act of 1872 (Mining Act), 30 U.S.C. §§ 22-42; *see also United States v. Coleman*, 390 U.S. 599, 602 (1968). Oregon disagrees with this policy. It banned[2] the use of motorized mining equipment in its waterways, criminalizing the only profitable means of mining federal streambed claims in the state: suction dredging.[3] Excerpt of Record (hereinafter, "ER") 159. This state law

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[1] All parties, through their attorneys, have consented to the filing of this brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than Amici Curiae PLF, WMA, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] Oregon has styled its ban as a "moratorium" until 2021, ostensibly to provide enough time to establish a regulatory framework. But Oregon has made no significant progress toward a non-prohibitory solution, suggesting it intends to adopt the rolling moratoria approach of California, which was struck down as a de facto ban in *People v. Rinehart*, 230 Cal. App. 4th 419 (2014). In any case, a temporary state law is equally as preempted by federal law as a permanent one. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979) ("The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.).

[3] Suction dredges are a small, motorized form of mining equipment used to recover placer deposits from rivers throughout the West. Suction dredging first began (continued...)

strikes at the heart of federal policy encouraging the "free and open" exploration and purchase of mineral resources. *See* 30 U.S.C. § 22. When a state law conflicts with federal law, as Oregon's does, the state law must yield. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The district court below held that because federal law does not field-preempt the states from regulating the environmental impacts of mining on federal property, any state environmental regulation of such mining cannot be preempted. (ER 10). This is not so: "Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1602 (2015). Oregon's suction dredge ban clearly conflicts with federal mining policy. The district court erred by not recognizing or addressing that fact and should be reversed.

[3] (...continued)
widespread use in the 1950's when underwater breathing technology became available. A suction dredge typically consists of a lawn mower-sized engine, between three and eight horsepower, that floats at the surface while its operator uses a vacuum hose to recover deposits from the bedrock of the stream.

ARGUMENT

I

STATE LAWS FORBIDDING MINING ARE AN OBSTACLE TO FEDERAL LAW'S ENCOURAGEMENT OF MINING ON FEDERAL LANDS

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. Federal preemption can occur when federal regulation is so pervasive that it has "occupied the field." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Preemption also occurs in light of a direct conflict, such as when state law requires what federal law forbids, *see Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). When the objective of federal law requires a balancing of multiple interests, states may not upset that balance by favoring one of those interests over others. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (state law that interferes with federal balancing of multiple objectives is preempted); *Wyeth v. Levine*, 555 U.S. 555, 609 (2009) ("[T]he ordinary principles of conflict-preemption turn solely on whether a State has upset the regulatory balance struck by the federal agency."). Determining whether a state law

is preempted "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

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; *Coleman*, 390 U.S. at 602. Simultaneously, federal law encourages more efficient use of these materials in a manner that minimizes 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* 36 C.F.R. § 228.1. Although federal policy balances all of these interests, its chief purpose is to promote the commercially practicable discovery and extraction of minerals on federal land. *See* 30 U.S.C. § 21a; *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1010 (8th Cir. 1998).

Consequently, any state law prohibiting or significantly obstructing mining on federal land must be analyzed for consistency with federal policy. *See Hines*, 312 U.S. at 67. Because federal law attempts to balance competing interests, state laws

that upset that balance—by pursuing one interest to the complete exclusion of others—frustrate federal policy. *See, e.g.*, *Arizona*, 132 S. Ct. at 2505; *Wyeth,* 555 U.S. at 605; *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). As shown below, the district court failed to properly consider whether Oregon's ban on suction dredge mining impermissibly disrupts the balance struck by federal law.

II

THE SUPREME COURT HAS NOT EXEMPTED ALL STATE "ENVIRONMENTAL" LAWS FROM PREEMPTION BY FEDERAL MINING POLICY

The Supreme Court most recently considered the preemptive effect of federal mining law in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). The district court opinion draws heavily upon *Granite Rock* as authority for its holding that the federal mining laws do not preempt state environmental laws whatsoever. The district court's holding severely misconstrues *Granite Rock*.

In *Granite Rock*, a mining company challenged the applicability of the California Coastal Act to operators of federal mining claims along California's coast. *Id*. at 577. The California Coastal Act gives the Coastal Commission discretion to impose environmental and land use conditions on use of coastal property. *Id*. at 576. Before the Coastal Commission issued any specific permit requirements, Granite

Rock facially challenged California's ability to apply *any* environmental or land use regulations, arguing that the Mining Act and federal land use statutes preempted them. *Id*. Because no actual permit conditions had been imposed, the Court noted that "[t]he only issue in this case is this purely facial challenge to the Coastal Commission permit requirement." *Id*. at 580. Due to the case's posture, the Court needed to decide only the narrow "question whether *any possible* set of conditions attached to the Coastal Commission's permit requirement would be pre-empted." *Id*. at 588 (emphasis in original).

The Court answered that narrow question with a narrow holding. Because the Court found insufficient evidence in the Mining Act that Congress intended to preempt the field of environmental regulation of mining, the Court held that it did not preempt *all* environmental regulation of mining. *Id*. at 586. The Court assumed that federal land use statutes preempt *all* state land use regulations, but declined to extend this field preemption to state environmental regulations. *Id*. at 593. Because the court could conceive of environmental regulations that were not so severe as land use regulations, the Coastal Commission's application of reasonable environmental permit conditions would not necessarily be preempted by the federal land use laws. *See id*. at 587-88.

The hypothetical "reasonable environmental regulations" the Court referred to were merely those *conceivable* regulations neither conflict-preempted for conflicting

unreasonably with federal objectives nor field-preempted for falling on the land-use side of the "not always [] bright" line separating environmental regulation from land use regulation. *Id*. at 587. The Court did not draw that line, as it sufficed for the facial challenge before it to merely recognize the distinction and that the Coastal Commission was capable of imposing conditions that were not land use controls. *Id*. Perhaps most important to the present case, though, the Court did not—and under the posture *could not*—address conflict preemption: "We hold only that the barren record of this facial challenge has not demonstrated any conflict." *Granite Rock*, 480 U.S. at 594.

In contrast, the district court's decision gives *Granite Rock* the categorically state-friendly reading that the Supreme Court itself has rejected. It construed *Granite Rock* to create a wholesale exemption from *all* federal preemption analysis—whether field or conflict—for state environmental regulation of mining on federal claims. (ER 18) ("As decided by the Court in *Granite Rock*, federal mining laws and environmental regulations do not preempt this type of state law."). Thus, according to the district court, so long as Oregon's suction dredge ban is not a land-use regulation, it is not preempted by the Mining Act. ER 18-19. Noting the stated environmental purpose of the suction dredge ban, the court held that it was not preempted, even going so far as to say the extent to which the law renders mining impracticable is simply not "a factor." *Id*. at 22. The only circumstance, according

to the decision below, where a state environmental regulation *could* be preempted is where the state law is a wholesale ban on all forms of mining. *Id*. If any method is allowed, no matter how impracticable, state law is not preempted. *Id*.

Granite Rock provides no support for that result. As explained above, *Granite Rock* was limited to field preemption and did not hold that the Mining Act endorses state laws that *actually* frustrate federal encouragement of mining. *See Granite Rock*, 480 U.S. at 581-84; *Geier v. Am. Honda Motor Co. Inc.*, 529 U.S. 861, 884 (2000). To the contrary, the Court expressly acknowledged that state environmental regulations could go too far and thus upset the federal balance. *Granite Rock*, 480 U.S. at 587 ("[O]ne may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable."). The Court also repeatedly emphasized the state's admission that particular regulations, if they go too far, would be preempted. *Id.* 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))).

In a different context, this Court also has cautioned against the approach adopted by the district court, affirming that "it is not the nature of the state regulation, but the language and congressional intent of the specific federal statute" that informs whether a state law is preempted. *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998). The decision in *City of Auburn* explains that, especially where federal law evinces a broad purpose, distinctions among the natures of various state laws "begin[] to blur" and add little to preemption analysis. These distinctions are unhelpful because state authorities may often achieve the same end through a supposedly non-preempted environmental regulation as through a field-preempted economic or land-use regulation. *See id*.

Perhaps anticipating that lower courts might misread its decision (as the district court did in this case), the Supreme Court cautioned in *Granite Rock* that the case should not be construed to "approve any future [state regulation] that *in fact conflicts* with federal law." *Granite Rock*, 480 U.S. at 594 (emphasis added). Hence, nothing in *Granite Rock* alters the application of traditional conflict preemption principles to state environmental regulations of mining. Consequently, consistent with *Granite Rock*, Oregon's ban on suction dredge mining must be analyzed for whether it conflicts with federal law's balance between encouraging mining and mitigating its environmental impacts.

III

OREGON'S BAN ON SUCTION DREDGE MINING GOES TOO FAR BECAUSE IT CREATES AN OBSTACLE TO FEDERAL POLICY

Several decisions have explained when "enough is enough" and a state regulation has gone too far. For example, in *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905), the Supreme Court invalidated state regulation of mining claims to the extent that they were not "entirely consistent with the Federal laws." *Id*. at 125. Although recognizing that it had upheld the general validity of supplementary state regulation of mining claims, the Court specified that such laws are of "no effect" when they are "arbitrarily exercised" or impose "conditions so onerous as to be repugnant to the liberal spirit of the congressional laws." *Id*. Similarly, in *Granite Rock*, the Supreme Court observed in dicta that state environmental regulations that are "so severe that a particular land use would become commercially impracticable" are preempted. *Granite Rock*, 480 U.S. at 587.

Since *Granite Rock*, only one circuit has applied the "commercially impracticable" standard. In *South Dakota Mining Ass'n Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the Eighth Circuit invalidated a county ban on surface mining. *Id*. at 1010-11. Because the *effect* of the ordinance would be a de facto ban on mining, the court of appeals determined that the ordinance would be "a clear obstacle" to the "exploration and mining of valuable mineral deposits located on

federal land" and the "economic extraction and use of th[o]se minerals." *Id.* at 1011. As in this case, the state law at issue in *South Dakota Mining Association* was a complete ban on the only commercially practicable method for mining a certain type of federal claim. Thus, it was held to be preempted.

Prior to *Granite Rock*, the Supreme Court of Colorado had held that a ban on a mining method can conflict with federal mining laws. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1056-57 (Colo. 1982). The decision in *Brubaker* concerned a prohibition on core drilling, which "is directed to obtaining information vital to a determination of the validity of the appellants' mining claims." *Id.* at 1056. Because banning core drilling would render miners and potential miners less able to explore for minerals, the ban conflicted with the federal purpose of making exploration "free and open." *Id*.

The Oregon law challenged in this case prohibits the use of "motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of the state" including such waters that flow through federal land. S.B. 838 § 2(1) (Or. 2013). This ban includes "all pumps, powered sluice boxes, high-bankers, suction dredges, back-hoes, excavators, dozers, trommels, wash-plants, and even small hand-fed battery operated concentrators." Compl. ¶ 32, *Bohmker v. Oregon*, No. 1:15-CV-01975-CL, 2015 WL 6383730 (D. Or. Oct. 20, 2015). It prohibits all profitable methods of mining

stream beds in Oregon, preserving only noncommercial, recreational methods—like panning by hand.

Oregon's ban goes too far and renders streambed mining commercially impracticable. As in *Brubaker*, Oregon's ban prohibits the essential method for exploring for minerals in streambeds—a method important not only to small-scale dredgers, but also because it is the only way to reliably indicate where the significant up-front costs of large-scale mining operations is warranted. ER 124, Kitchar Decl. ¶ 32 ("[T]he prudent miner will not invest hundreds of thousands of dollars' worth of equipment . . . based on hand-dug or panned samples"). As in *South Dakota Mining Ass'n*, the effect of Oregon's ban will be to negate the profit motive that federal policy relies upon to ensure a supply of extracted minerals. Consequently, the ban is an obstacle to the accomplishment of the Mining Act's objectives.

Further reinforcing the conclusion that Oregon's complete ban on economically viable mining is preempted is a comparison to federal and state regulations that regulate environmental impacts, without resorting to a ban that completely upends federal policy's balance. The federal government, for instance, regulates suction dredge mining's potential environmental impacts through time, place, and manner regulations. *See* EPA, *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, General Permit No. IDG-37-0000 (effective May 6,

2013).[4] Many states followed the federal government's lead, by regulating the size of dredges that may be used, when they may be used, and imposing reporting requirements. *See* Alaska Department of Natural Resources, Division of Mining, Land & Water, Fact Sheet: *Suction Dredging* (Feb. 2012);[5] Idaho Department of Water Resources, Recreational Mining Permits;[6] Montana Department of Environmental Quality, *General Permit for Portable Suction Dredging*, Permit No. MTG370000 (Feb. 12, 2010).[7] These regulations respect federal law's encouragement of mining on federal lands, by regulating the activity's impacts rather than banning the activity entirely. The Oregon law challenged in this case, like the county ordinance at issue in *South Dakota Mining Association*, crosses the line between regulating and banning an activity expressly encouraged by federal law. In crossing that line, the Oregon law triggers federal preemption.

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[4] http://www3.epa.gov/region10/pdf/permits/npdes/id/IDG37_final_permit_mod_2014.pdf

[5] http://dnr.alaska.gov/mlw/factsht/mine_fs/suctiond.pdf

[6] https://www.idwr.idaho.gov/files/stream_channel/2016-Recreational-Mining-Letter-Permit.pdf

[7] http://deq.mt.gov/Portals/112/Water/WPB/MPDES/General%20Permits/MTG370000PER.pdf

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and hold that S.B. 838 is preempted by federal law.

DATED: July 20, 2016.

Respectfully submitted,

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9th Circuit Case Number: 16-35262

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