No. 16-970

In the Supreme Court of the United States

BRANDON LANCE RINEHART, PETITIONER

v.

STATE OF CALIFORNIA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Mining Act of 1872, 30 U.S.C. 22 *et seq.*, preempts a California law imposing a moratorium on suction-dredge mining while the State develops new regulations to mitigate the environmental impact of suction dredging.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. The Mining Act of 1872

Until 1866, miners who entered federal lands to find and extract gold and other minerals were trespassers. Pet. App. A14-A15; see *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 F. 753, 773-774 (C.C.D. Cal. 1884). Congress wanted to encourage the discovery and extraction of valuable mineral deposits, but was concerned that people would "not lend their capital to mining projects" if their property rights were uncertain because "the title to the soil is in the Government." Cong. Globe, 38th Cong., 2d Sess. 686 (1865). In 1866 and

1870, Congress enacted statutes formally opening federal lands for mineral exploration and establishing a process by which miners could acquire property rights in the mineral deposits they found. Pet. App. A14-A15.

Congress carried forward a similar process in the Mining Act of 1872 (Mining Act), 30 U.S.C. 22 *et seq.*, which remains in effect today. Pet. App. A14-A15 & n.6. The Mining Act provides that, subject to exceptions:

> [A]ll valuable mineral deposits in lands belonging to the 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.

30 U.S.C. 22. A person who discovers a valuable mineral deposit and complies with the Mining Act's other requirements for perfecting a mining claim obtains a possessory interest in the land and the right to extract the minerals. 30 U.S.C. 26, 35. The Mining Act also allows the holder of a mining claim to obtain a patent, which confers fee simple title to the land and terminates federal ownership. 30 U.S.C. 29, 37. But even without taking that step, the holder of a valid mining claim has a possessory interest and mineral rights that are "property in the fullest sense of that term." *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930).

The Mining Act thus removes obstacles to mineral development on federal lands that had been posed by federal ownership. But the Mining Act is generally silent on matters other than the process of establishing mining claims and allocating property interests among

miners and between miners and the United States. It does not, for example, regulate the process of mining, and it "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 582 (1987). Instead, those subjects have long been governed by other federal, state, and local laws. For example, in the 1880s, courts applied California nuisance law to enjoin the practice of hydraulic mining, which "involved blasting hillsides with large volumes of high-pressure water" and which imposed "substantial environmental impacts" on downstream communities. Pet. App. A18; see, *e.g.*, *Woodruff*, 18 F. at 806-809.

B. California's Moratorium On Suction Dredging

Suction dredging is a method of extracting gold and other minerals from the beds of streams and rivers. A high-powered suction hose vacuums loose material from the streambed and feeds it into a sluice box. The gold settles out, and the water, gravel, and other sediment is discharged back into the stream. Pet. App. A2. California has required a permit for suction dredging since 1961, shortly after the method first came into use. 1961 Cal. Stat. 3864. The State's permitting regime originally required a showing that the use of a suction dredge would not be "deleterious to fish." *Ibid.* California later designated certain waterways off-limits to suction dredging. Pet. App. A2.

In 2009, the California Legislature found that "suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state." Cal. Stat. 2009, ch. 62, § 2. The Legislature

accordingly suspended the permitting regime and prohibited suction-dredge mining pending an environmental review by the California Department of Fish and Wildlife (CDFW) and the issuance of new regulations. Pet. App. A3; see Cal. Fish & Game Code § 5653.1(b) (West 2013).

In 2011, the Legislature enacted an amendment providing that the moratorium would end no later than June 30, 2016. Pet. App. A3. That was the legal regime in effect when the conduct at issue in this case occurred. *Ibid.*; see *id.* at C2.

In 2012, the CDFW finished its environmental review, but determined that it did not have authority to adopt the regulations that would be required to fully mitigate the adverse impacts it had identified. Pet. App. A3; see *id.* at E23-E26. On June 27, 2012, the Legislature responded by eliminating the 2016 sunset and requiring the CDFW to submit a report on the statutory changes that would be needed to authorize the required regulations. *Id.* at A3; see Cal. Stat. 2012, ch. 39, § 7.

In 2015, after receiving the CDFW's report, the legislature amended the statute to grant the necessary regulatory authority. Pet. App. A3; see Cal. Stat. 2015, ch. 680, §§ 2, 4. The moratorium on suction dredging remains in place pending the issuance of the required regulations. Pet. App. A3; see Cal. Fish & Game Code § 5653.1(b) (West 2013). California has stated that the process of developing those regulations is ongoing. Br. in Opp. 21.

C. The Present Controversy

1. Petitioner is the part owner of an unpatented mining claim, which was located in 2010 in the Plumas National Forest in California. On June 16, 2012, a game warden found him using a suction dredge on the claim.

Petitioner did not have the suction-dredge permit required by California law, and because of the moratorium he could not have obtained one. Pet. App. A3-A4, C2-C3.

California charged petitioner with two misdemeanors: operating a suction dredge without a permit and possessing a suction dredge in a closed area. Pet. App. A3. In a bench trial on stipulated facts, petitioner admitted to violating California law. *Id.* at A3. As relevant here, his only defense was that the Mining Act preempted California's moratorium on suction dredging to the extent it applies on federal lands. *Id.* at A4.[1] The trial court rejected that argument, convicted petitioner on both charges, and sentenced him to three years of probation. *Id.* at A5.

2. The California Court of Appeal, Third Appellate District, reversed. Pet. App. C1-C25. The court concluded that the moratorium would be preempted if it rendered gold mining on petitioner's claims "commercially impracticable." *Id.* at C24. The court remanded to allow the trial court to consider petitioner's proffer of evidence that he argued would establish that suction dredging is the only commercially viable method of mining his claims. *Ibid.*

3. The California Supreme Court granted discretionary review and upheld petitioner's conviction. Pet. App. A1-A30. The court explained that, in general, "[a] state 'is free to enforce its criminal and civil laws' on federal land, unless those laws conflict with federal legislation or regulation." *Id.* at A6 (quoting *Kleppe* v. *New*

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[1] Petitioner also argued that the moratorium was preempted by another federal mining statute, 30 U.S.C. 612(b). Pet. App. A4. The California Supreme Court rejected that argument, *id.* at A26-A30, and petitioner does not renew it in this Court.

Mexico, 426 U.S. 529, 543 (1976)). The court noted that the Mining Act "contain[s] no express preemption provision" and does not "occupy a relevant field that would foreclose state regulation" altogether. *Ibid.* Indeed, the court observed that this Court's decision in *Granite Rock* "rejected the argument that the [Mining Act] categorically forecloses states from imposing permit requirements" and other environmental regulations on mining "on federal land." *Id.* at A9 (citing *Granite Rock*, 480 U.S. at 582-584). Petitioner therefore relied solely on obstacle preemption, "the principle that a state may not adopt laws impairing 'the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at A7 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

The California Supreme Court rejected petitioner's contention that the moratorium on suction dredging is an obstacle to the accomplishment of the Mining Act's purposes. Pet. App. A9-A26. The court explained that the Mining Act focuses on "the allocation of real property interests among those who would exploit the mineral wealth of the nation's lands, not regulation of the process of exploitation—the mining—itself." *Id.* at A11. The court added that the Mining Act expressly contemplates the continued application of state law by, for example, requiring miners to comply "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; see Pet. App. A11. And after reviewing the Mining Act's history and the contemporaneous state regulation of mining activities—including California's prohibition on hydraulic mining—the court found no support for petitioner's contention that Congress sought "to confer a right to mine, immune in whole or in

part from curtailment by regulation." Pet. App. A16-A17; see *id.* at A13-A22. The court therefore held that California's temporary ban on suction dredging was not preempted by the Mining Act. *Id.* at A25-A26.

DISCUSSION

Petitioner renews his contention (Pet. 20-32) that the Mining Act preempts California's moratorium on suction dredging. Petitioner relies exclusively on obstacle preemption, asserting (Pet. 21) that the moratorium is preempted because it "frustrates the Mining Law's purpose" of promoting mining. The California Supreme Court correctly rejected that argument, and its decision neither conflicts with any decision of this Court nor implicates any division among the lower courts warranting this Court's intervention. And even if the question presented otherwise warranted this Court's review, the ongoing changes in California law would make this case a poor vehicle in which to consider it. The petition for a writ of certiorari should be denied.

A. The California Supreme Court Correctly Held That The Mining Act Does Not Preempt California's Moratorium On Suction Dredging

The Mining Act's text, relevant federal regulations, and this Court's decision in *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987), all make clear that the Mining Act does not displace state environmental regulation of mining on federal land. The California Supreme Court thus correctly held that the State's moratorium on a method of mining that raises environmental concerns is a permissible regulation. Petitioner's attempt to equate that narrow measure with an impermissible total ban on mining is unpersuasive.

1. The Mining Act contemplates continued state regulation of mining on federal land

a. The Mining Act seeks to encourage the discovery and extraction of valuable mineral deposits on federal lands. See *United States* v. *Coleman*, 390 U.S. 599, 602 (1968). But as this Court has often instructed, "no legislation pursues its purposes at all costs." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). "Congressional intent" therefore must be "discerned primarily from the statutory text." *Ibid.* The text of the Mining Act makes clear that "Congress was concerned principally with removing federal obstacles to mining, and specifically the threat of a property sale." Pet. App. A16. The Mining Act thus opens federal lands to exploration by miners, 30 U.S.C. 22; prescribes detailed requirements for taking, perfecting, and maintaining mining claims, *e.g.*, 30 U.S.C. 23-28*l*; and allows the holder of a mining claim to obtain a patent conferring fee simple title to the land, 30 U.S.C. 29, 37. Those provisions encourage the exploitation of valuable minerals by creating a scheme that defines and allocates property rights in the minerals and the lands where they are found. But the Mining Act does not address "the process of exploitation—the mining—itself." Pet. App. A11.

Nor does the Mining Act reflect any intent to displace state regulation of mining. Just the opposite: Congress expressly provided that the exclusive rights granted to petitioner and other holders of unpatented mining claims are conditioned on compliance "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. And the provision on which

petitioner relies likewise contemplates the continued application of state law by specifying that federal land is open to exploration for mining "*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); see *O'Donnell* v. *Glenn*, 19 P. 302, 306 (Mont. 1888) ("The expression, 'under regulations prescribed by law,' is ample enough to embrace, not only the laws of congress, but also those of the territory.").

That understanding is reinforced by a more recent statute expressly setting forth the objectives of the federal mining laws. In the Mining and Minerals Policy Act of 1970, 30 U.S.C. 21a, Congress declared "that it is the continuing policy of the Federal Government" to foster "economically sound and stable domestic mining industries." *Ibid.* Congress was particularly focused on large-scale industrial mining that could reduce or eliminate the Nation's dependence on foreign sources of valuable resources. H.R. Rep. No. 1442, 91st Cong., 2d Sess. 2-4 (1970). But Congress also emphasized the Nation's "environmental needs," and it articulated a policy of reducing the "adverse impact of mineral extraction and processing upon the physical environment." *Ibid.*

b. The federal lands covered by the Mining Act are primarily administered by the Bureau of Land Management (BLM) in the Department of the Interior and the Forest Service in the Department of Agriculture. Both agencies have promulgated regulations governing mining operations, and those regulations require compliance with state environmental laws—including California's moratorium on suction dredging.

The BLM's regulations specify that they preempt conflicting state law, but expressly provide that "there is no conflict if the State law or regulation requires a higher standard of protection for public lands." 43 C.F.R. 3809.3. In promulgating that regulation, the BLM explained that "States may apply their laws to [mining] operations on public lands," and it specifically identified a Montana law banning a particular mining method, "cyanide leaching," as the sort of permissible regulation that would "operate on public lands." 65 Fed. Reg. 69,998, 70,008-70,009 (Nov. 21, 2000); see Mont. Code Ann. § 82-4-390 (2015).

The Forest Service's regulations likewise require compliance with state environmental regulations, including "State air quality standards," 36 C.F.R. 228.8(a); "State water quality standards," 36 C.F.R. 228.8(b); and "State standards for the disposal and treatment of solid wastes," 36 C.F.R. 228.8(c); see also 36 C.F.R. 228.5(b) (referring to "compliance with the requirements of Federal *and* State laws") (emphasis added). See *Granite Rock*, 480 U.S. at 583 (discussing these Forest Service regulations). And, as particularly relevant here, the Forest Service has informed miners that it "recognizes [California's] state ban on suction dredge mining" and that "as long as the state moratorium is in effect," suction dredging is not permitted "within National Forest System lands" in California.[2]

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[2] Forest Serv., *In Search of Gold: Panning, Dredging and Mining: Stanislaus National Forest* 1 (Aug. 2013), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd534692.pdf; see Forest Serv., *Mining: Plumas National Forest* 1 (Feb. 2013), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5435954.pdf (similar).

The Department of the Interior's implementation of the Mining Act presupposes the application of state environmental regulations in another respect. The Mining Act applies only to "valuable mineral deposits," 30 U.S.C. 22, and a person seeking to perfect a mining claim thus must show that it contains minerals that are "valuable in an economic sense." *Coleman*, 390 U.S. at 602. "Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation" cannot support a valid mining claim. *Ibid.* In applying that standard, the Department of the Interior has long taken into account the costs of extraction in compliance with all applicable laws, including state "environmental protection laws." *United States* v. *Pittsburgh Pac. Co.*, 30 I.B.L.A. 388, 393, 404-405 (1977); see, *e.g.*, *Great Basin Mine Watch*, 146 I.B.L.A. 248, 256 (1998) ("[T]he costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit.").

c. This Court's decision in *Granite Rock* confirms that the Mining Act does not preempt state environmental regulations. In that case, a mining company argued that a state permitting requirement was preempted by several different federal statutes. See 480 U.S. at 581-582. In the portion of its decision addressing the Mining Act, the Court rejected the argument that the Mining Act confers a right to conduct mining on federal land "unhindered by any state environmental regulation." *Id.* at 582. The Court emphasized that the applicable Forest Service regulations "expressly contemplate coincident compliance with state as well as

with federal law," and it concluded that those regulations confirm that the Mining Act does not displace state environmental regulation. *Id.* at 584.

2. California's moratorium on suction dredging is a permissible environmental regulation

Petitioner does not dispute that "states have authority to regulate the environmental impacts of mining on federal lands." Pet. 4; see, *e.g.*, Pet. 22 n.9; Reply Br. 6. The States have long exercised that authority. Pet. App. A17-A23. And like California's restrictions on hydraulic mining in the 1880s and Montana's more recent prohibition on cyanide leaching, California's moratorium on suction dredging is not preempted by the Mining Act. Petitioner provides no sound reason to conclude otherwise.

a. Petitioner's most basic argument is that because the Mining Act seeks to "encourage productive mining on federal lands," state laws that interfere with such mining are preempted. Reply Br. 1; see, *e.g.*, Pet. 3-4, 20-21. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526. This Court has thus rejected preemption claims grounded in broadly formulated statutory purposes like the one petitioner invokes here. For example, the Court held that federal statutes establishing a national policy "to encourage and foster the greater use of coal" did not preempt a state tax on

coal extracted from federal lands. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 633 (1981) (citation omitted).[3]

So too here. The Mining Act seeks to encourage mining on federal lands, but that general policy cannot sensibly be read to preempt a state law merely because that law limits particular mining methods. It would be especially unsound to infer such a sweeping preemptive intent from a statute that explicitly contemplates the continued application of state laws regulating mining. See 30 U.S.C. 22, 26.

Ultimately, petitioner does not appear to disagree. He acknowledges (Pet. 4) that "federal law gives states ample room to regulate suction dredge mining—and any other form of mining—to mitigate environmental impacts." Because regulations mitigating those impacts may make mining more difficult—and may entirely prevent mining in particular areas, or using particular methods—the mere fact that a state law has that consequence cannot be sufficient to establish that it is preempted.

b. Petitioner's other principal argument is that California's moratorium is preempted because it is a "mining ban" rather than an environmental regulation. Indeed, the characterization of the California law as an "outright ban[] on mining" pervades the petition. Pet.

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[3] See, *e.g.*, *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 221 (1983) (rejecting an argument that that all state regulation limiting the use of atomic energy is preempted by a federal statute "encourag[ing] widespread participation in the development and utilization of atomic energy") (citation omitted); *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 132-134 (1978) (rejecting the argument that because the federal antitrust laws favor free competition as a "basic national policy," a state law regulating retail distribution of gasoline was preempted).

21; see, *e.g.*, Pet i, 5, 20, 25, 27; Reply Br. 1, 5, 6, 8, 9, 10. But petitioner's proffered distinction between a permissible "regulation" and an impermissible "ban" does not withstand scrutiny.

The United States agrees that a state prohibition on all mining within its borders would be preempted as applied to unpatented mining claims on federal land because it would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Mining Act. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). But California has not adopted such a ban, and the California Supreme Court did not hold that it could do so. Instead, California adopted, and the California Supreme Court upheld, a moratorium on the use of a specific apparatus, the suction dredge. Suction dredges are used to mine particular minerals (here, gold) in a particular location (rivers and streams). The ban on the use of suction dredges leaves undisturbed all mining operations on land, and all other methods of extracting minerals from streams and rivers. It thus cannot reasonably be equated with the sort of total prohibition on mining that would frustrate the operation of the Mining Act. And that is particularly true because even with respect to gold, the specific mineral at issue here, the ban leaves undisturbed the land-based operations that account for the large majority of California's total production. See Br. in Opp. 29-30 & nn.20-21.

c. Petitioner also asserts that, rather than imposing a general moratorium, California should have adopted more targeted restrictions to mitigate "suction dredge mining's potential environmental impacts." Pet. 24; see Pet. 4. But state environmental regulations may take the form of prohibitions on harmful activities, mitigat-

ing regulations, or some combination of the two. Montana, for example, chose to prohibit rather than merely regulate cyanide leaching. See Mont. Code Ann. § 82-4-390 (2015). Nothing in the Mining Act suggests that Congress denied States the ability to make those policy choices.

Petitioner's argument is particularly misplaced here because California *is* in the process of developing a more targeted system of rules to "regulate suction dredge mining's potential environmental impacts" (Pet. 24). The State's initial prohibition on suction-dredge permits was enacted in 2009, after a state court held that the prior permit regime violated state environmental laws. Pet. App. A3; Br. in Opp. 4. The Legislature was concerned that suction dredging "contributed to mercury contamination of both fish and humans," and it found that suction dredging "'results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state.'" Pet. App. A3 (citation omitted). And although the moratorium has been amended several times, in all of its forms it has been set to expire once the State implements a revised set of regulations that adequately mitigates those harms. *Ibid.*

B. The California Supreme Court's Decision Does Not Warrant Further Review

Petitioner contends (Pet. 22-32) that further review is warranted because this case provides an opportunity to resolve questions left unanswered in *Granite Rock*, because the California Supreme Court's decision creates a conflict among the lower courts, and because this case is a vehicle to resolve a question of national importance. All of those contentions lack merit.

1. This case provides no occasion to address the questions left open in **Granite Rock**

Petitioner first asserts (Pet. 23) that this case presents "an opportunity to resolve [a] question left open by *Granite Rock*." That question is not presented here because petitioner has not relied on the federal statutes at issue in the relevant portion of this Court's opinion in *Granite Rock*.

In *Granite Rock*, this Court rejected a mining company's preemption challenge to a California statute requiring a permit to conduct mining anywhere in the State's coastal zone, including on National Forest System lands. 480 U.S. at 576-577. Like petitioner, the plaintiff in *Granite Rock* argued that the permit requirement was preempted by the Mining Act. *Id.* at 582-584. Unlike petitioner, however, the *Granite Rock* plaintiff also relied on two *other* statutes, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949. See *Granite Rock*, 480 U.S. at 584-586. The discussion on which petitioner relies (Pet. 22-23) appears in the Court's analysis of those land-management statutes, not the Mining Act.

Specifically, the Court assumed without deciding that "the combination of the NFMA and the FLPMA pre-empts the extension of state *land use plans* onto unpatented mining claims in national forest lands." *Granite Rock*, 480 U.S. at 585 (emphasis added). In so doing, the Court distinguished such potentially impermissible "land use planning" from permissible "environmental regulation." *Id.* at 587. The former "chooses particular uses for the land"; the latter "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." *Ibid.* In the sentence on which petitioner relies, the Court stated: "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." *Ibid.* But the Court had no occasion to define that boundary with greater specificity, because it concluded that, at least on its face, the permit requirement at issue in *Granite Rock* was environmental regulation rather than land use planning. *Id.* at 588-589.

Petitioner asserts (Pet. 22-23) that this case presents the opportunity to determine the point at which a state environmental regulation becomes too "severe." But petitioner has not argued that California's moratorium on suction dredging is preempted by the NFMA or the FLPMA, and the California Supreme Court did not address those statutes. Nor could petitioner plausibly assert that California's moratorium on suction dredging is the sort of potentially impermissible "land use planning" this Court contemplated in *Granite Rock*. The moratorium does not purport to dictate the use of particular parcels of federal land; instead, it prohibits the use of a mining technique throughout the State. This case thus presents no occasion to address the questions left open by the Court's decision in *Granite Rock*.[4]

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[4] The California Court of Appeal relied on the same portion of this Court's opinion in *Granite Rock* to hold that an environmental regulation is preempted if it renders mining on a particular claim "commercially impracticable." Pet. App. C24. Petitioner correctly declines to defend that holding. The commercial viability of mining on a particular mining claim necessarily depends on a host of factors, including the market price of the mineral and the cost of extraction.

2. The California Supreme Court's decision does not conflict with any decision of another state court of last resort or a federal court of appeals

Petitioner asserts (Pet. 23-27) that the California Supreme Court's decision conflicts with decisions of the Eighth and Federal Circuits and the Colorado Supreme Court. But the holdings of those cases are distinguishable, and any conflict in their reasoning does not warrant this Court's review—particularly because two of the three decisions pre-dated *Granite Rock*.

a. Petitioner principally relies (Pet. 23-25) on the Eighth Circuit's decision in *South Dakota Mining Ass'n* v. *Lawrence County*, 155 F.3d 1005 (1998). That case involved a county zoning ordinance that prohibited surface metal mining in the "Spearfish Canyon Area." *Id.* at 1007. Ninety percent of that area was National Forest System land; the remaining ten percent contained "privately owned patented mining claims." *Ibid.* The Eighth Circuit concluded that because surface metal mining was the only practical method to mine in the affected area, the zoning ordinance was "a de facto ban on mining in the area." *Id.* at 1011. In holding that the ordinance was preempted, the court purported to rely on the Mining Act. *Ibid.* But the Eighth Circuit rested its decision on *Granite Rock*'s distinction be-

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In a location where extraction is sufficiently costly, the added expense of complying with *any* environmental regulation—or, for that matter, a state tax or minimum wage law—could render mining commercially impracticable. But it does not follow that those regulations would be preempted. The Mining Act was "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 A17.

tween a permissible environmental regulation and a potentially impermissible land use regulation—a distinction that was based on the preemptive effect of the FLPMA and the NFMA, not the Mining Act. See *ibid.* (citing *Granite Rock*, 480 U.S. at 587).[5]

The Eighth Circuit's decision thus sheds little light on the Mining Act's preemptive scope. And the court's holding that a zoning ordinance prohibiting *all* mining in a specific area was an "impermissible land use regulation," *South Dakota Mining Ass'n*, 115 F.3d at 1011, does not suggest that it would invalidate a law like the one at issue here. Unlike that zoning ordinance, California's moratorium cannot be characterized as "land use regulation," because it does not single out specific federal land or distinguish between parcels of land at all; instead, it regulates a method of mining on *all* land in the State. And because it bans only a single method, it is not "a de facto ban on mining." *Ibid.* Accordingly, although the California Supreme Court rejected aspects of the Eighth Circuit's reasoning—or at least the broad understanding of that reasoning urged by petitioner, Pet. App. A24-A26—there is no conflict between the two decisions.

b. Petitioner also relies (Pet. 25-27) on decisions of the Colorado Supreme Court and the Federal Circuit. But those decisions could not create a conflict warranting this Court's review because they pre-dated *Granite Rock*. As petitioner acknowledges (Reply Br. 8), *Granite Rock* made it "clear" that "states may regulate mining to reduce its environmental impacts," including

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[5] The Eighth Circuit's imprecise preemption analysis may be attributable to the fact that the county had conceded that its ordinance was preempted and that the United States did not participate in the litigation. *South Dakota Mining Ass'n*, 115 F.3d at 1008 & n.3.

through permitting requirements. To the extent that statements in the decisions on which petitioner relies suggest otherwise, they are no longer good law. And those decisions are, in any event, distinguishable.

In *Brubaker* v. *Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) (en banc), the plaintiffs were seeking to establish the validity of their mining claims, a question that turned on "whether they had made a qualifying discovery of valuable mineral deposits under federal mining law." *Id.* at 1052. To answer that question, the relevant federal agencies had "authorized core drilling to obtain samples from the sites so that marketability could be determined." *Id.* at 1053. The Colorado Supreme Court held that the county in which the mining claims were located could not withhold the permit necessary to allow "the test drilling necessary to determine the validity of the[] claims." *Id.* at 1052. In so holding, the court repeatedly emphasized that the drilling at issue was "directed to obtaining information vital to a determination of the validity of the [relevant] mining claims." *Id.* at 1056. The court thus held that the county was "attempting to frustrate implementation of the very scheme of disposition of federal mineral lands that is at the core of 30 U.S.C. § 22." *Id.* at 1058; see *id.* at 1060 (Dubofsky, J., concurring). Unlike the drilling at issue in *Brubaker*, suction dredging in California's waterways is neither specifically authorized by a federal agency nor "vital to a determination of the validity" of petitioner's claim under the Mining Act. *Id.* at 1056.[6]

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[6] In addition, as in the Eighth Circuit's decision in *South Dakota Mining Association*, the Colorado Supreme Court's preemption holding also appeared to rest in part on a conclusion that the county's denial of the permit based on its "long-range plan" for the lands at issue was an impermissible "attempt by the County to substitute

In *Skaw* v. *United States*, 740 F.2d 932 (Fed. Cir. 1984), holders of unpatented mining claims filed a suit against the United States asserting that a federal statute prohibiting "[d]redge or placer mining" in the area where their claims were located was a taking for which the government owed just compensation under the Fifth Amendment. *Id.* at 934-935 (citation and emphasis omitted). The Federal Circuit rejected the Claims Court's conclusory holding that the federal statute could not have effected a taking because Idaho had stopped issuing the permits required for suction dredging before the federal statute was enacted. *Id.* at 940. In so doing, the Federal Circuit stated that the Idaho law withholding permits was preempted because the state "could not lawfully deny plaintiffs the right to mine." *Ibid.*

Skaw thus arose in an unusual posture, and the validity of the Idaho law was not the focus of the litigation. See 740 F.2d at 940 n.3. The Federal Circuit's core holding—that the state permitting restriction would not eliminate the plaintiffs' asserted property rights in their unpatented mining claims or otherwise foreclose their takings claim—does not conflict with the decision below. And to the extent that the Federal Circuit concluded that *any* state permitting requirement that prohibited a particular type of mining in a particular area is preempted, its holding did not survive *Granite Rock*. See 480 U.S. at 588-589.

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its judgment for that of Congress concerning the appropriate use" of particular lands—that is, to engage in land-use planning. *Brubaker*, 652 P.2d at 1056.

3. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it

Petitioner asserts (Pet. 31) that the California Supreme Court's decision would allow unlimited state regulation of a wide range of uses of federal lands. That is not so. Petitioner has relied only on the Mining Act, and the California Supreme Court's decision addressed only that statute. Many other federal statutes, including the land-management statutes at issue in *Granite Rock*, also govern federal lands on which the mining laws apply. The preemptive scope of those statutes is not at issue here—and the preemptive effect of federal statutes governing *other* activities, such as "oil drilling" and "livestock grazing" (Pet. 31), is even further afield. This case presents only the question whether the Mining Act preempts a state moratorium on suction dredging.

Even if that narrow question otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. Petitioner was convicted of two misdemeanors for conduct that occurred in June 2012. Pet. App. C2. The validity of those convictions turns on whether federal law preempted the California moratorium as it existed at that time. But California has now amended the moratorium, and the State is in the process of developing new regulations that may lift it altogether. The validity of California law as it stood five years ago is not a question of continuing importance.[7]

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[7] Petitioner observes (Pet. 30) that Oregon recently adopted a prohibition on suction dredging. A challenge to that law is currently pending in the Ninth Circuit. See *Bohmker* v. *Oregon*, No 16-35262 (filed Apr. 7, 2016). Unlike petitioner, the plaintiffs in *Bohmker* have not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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relied exclusively on the Mining Act, but have also argued that the Oregon law is preempted by federal land-management statutes. See Br. of Plaintiffs-Appellants at 35-44, *Bohmker*, *supra* (No. 16-35262)