No. 16-970

In the
Supreme Court of the United States

BRANDON LANCE RINEHART,
Petitioner,

v.

PEOPLE OF CALIFORNIA,
Respondent.

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

BRIEF OF WESTERN MINING ALLIANCE, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

This brief is respectfully submitted by three organizations with members in the Western United States whose mining interests have been adversely affected by the lower decision of the California Supreme Court that upholds California's ban on suction dredge mining—the only commercially feasible form of mining for those members.

Amicus Western Mining Alliance is a Nevada Corporation organized to defend the rights of individual miners in the West.[2] Founded in 2011 in response to California mining bans, the Alliance is a litigant in the ongoing legal challenges to the dredging ban in California. The Western Mining Alliance has participated in numerous settlement discussions concerning the regulation of suction dredging, and has provided testimony before the California legislature and briefings to the United States Congress on mining-related issues.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae certifies that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amici Curiae, made any monetary contribution toward the brief's preparation and submission. All counsel for parties have consented to the brief's filing in letters that are on file with the Clerk's office. Counsel for Petitioner received timely notice of intent to file; counsel for Respondent received such notice six days in advance of this filing, and waives any objection to the filing of this brief based on the notice's timing.

[2] Petitioner Brandon Rinehart is a member of Western Mining Alliance, but he did not in any way contribute to or direct the content of this brief.

The Western Mining Alliance has a unique perspective on the practice and economics of suction dredge mining. As federal mining claimants, the Alliance's members have extensive experience in the operation of the prohibited equipment for which the petitioner in this case, Brandon Rinehart, was cited, and have financially contributed to his defense. The Alliance's members have been harmed by the motorized mining bans enacted by the States of California and Oregon. The Western Mining Alliance represents the views of citizens who have operated legally for over sixty years under a federal management regime that balances state environmental concerns against a national policy promoting prospecting and mining on federal lands.

Amicus American Mining Rights Association ("AMRA") is a non-profit organization that promotes mining education, and is an advocate for mining rights and public land access. AMRA is a member-supported organization that has rapidly gained the support of thousands of public land users. AMRA's objective is to maintain access to public lands for multiple uses as envisioned by Congress. AMRA works with federal and state agencies to implement reasonable land-use regulations while promoting access to public lands.

Amicus Waldo Mining District was established on April 1, 1852, in the Oregon Territory and is recognized as the first government in southwest Oregon. The District is an unincorporated association of miners, roughly half of whom hold one or more mining claims within the Siskiyou or other national forests. Historically, and pursuant to the

Mining Law of 1872, 30 U.S.C. § 22, *et seq.*, mining districts were considered government entities, and could make binding rules and regulations within their jurisdictions. Today, one of the principal purposes of the District is to promote the interests of its approximately 125 members, many of whom the United States Forest Service has characterized as finding their livelihood, recreation and, for some, their identity, in suction dredge mining.

The decision below by the California Supreme Court will indefinitely halt the dredging operations of many members of Amici. Members will not be able to work the claims that they own, nor will prospectors be permitted to explore for new claims using suction dredging. These undesirable effects will ensue notwithstanding the fact that suction dredging is the only reasonable and commercially viable method to recover gold from underwater streambed sediments.

Amici intend to provide the Court with a reasonable and balanced perspective on the circumstances surrounding this case, from a miner's perspective.

INTRODUCTION

In 2009, the State of California issued a statewide ban on suction dredge mining—a type of mining permitted by the State for over a half century—pending environmental review of its impacts. Appendix ("App") at A-2—A-3. In 2012, the State issued a final Environmental Impact Report, *id.* at A-3, which supported continued use of suction dredges for the majority of submerged placer claims,

including Petitioner Brandon Rinehart's claim, but the State failed to establish a permitting system. The fact that California *could* have established a permitting system is evidenced by its issuance of permits for the use of suction dredge equipment from 1961 to 2009. *Id.* at A-2.

Mr. Rinehart was cited for possessing and operating his suction dredge equipment without a permit. *Id.* at A-3. In the California trial court, Mr. Rinehart claimed that the federal policy of strongly promoting mining on federal lands preempted the State's scheme purporting to require permits that were impossible to obtain. *Id.* at A-4—A-5. He made an offer of proof showing that the State's ban on suction dredging rendered a particular use of federal lands—placer gold mining—unviable. *Id.*

The trial court refused to allow a preemption defense and convicted Mr. Rinehart of the misdemeanor. *Id.* at A-5. Mr. Rinehart appealed, and the state court of appeals agreed that he should be allowed to present his preemption defense and remanded the case back to the trial court. *Id.* The State then petitioned the California Supreme Court, which held that the federal mining laws only granted a possessory right to a mining claim, but provided no right to mine. *Id.* at A-10, A-12.

Mr. Rinehart is now petitioning this Court to review the California Supreme Court's decision. If left standing, the lower court's decision will improperly extend this Court's decision in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) to allow states to dictate land use on

federal lands, by denying thousands of miners the only commercially viable method of mining their federal mining claims.

SUMMARY OF THE ARGUMENT

The petition in this case asks whether the California Supreme Court erred in holding that the General Mining Law of 1872 does not preempt a California ban on mining on federal land, contrary to the decisions of two federal circuit court of appeals decisions and a Colorado Supreme Court decision. The answer to the question turns, in part, on two sub-questions: (1) Do federal mining laws plainly evince a purpose and objective to encourage and promote mining on federal lands?, and (2) Is suction dredge mining the only commercially viable means of gold mining, such that California's ban on suction dredge mining is effectively a ban on an entire category of land use (namely, gold mining on federal lands)?

The answer to both questions is "yes." There is a venerable and robust tradition of unqualified promotion of mining on federal lands, embodied in over 150 years of federal legislation. Moreover, the only commercially feasible means of mining submerged placer[3] deposits is by way of suction dredge mining. To ban that method is to, in effect, change the land use classification of federal lands from promoting mineral-development entry to

[3] "A lode is a vein or body of minerals embedded in fixed rock. A placer is an area where minerals are found at or near the surface in loose earth, sand, or gravel, often by a riverside or in a riverbed." App. at A-4.

effectively shutting it down. In light of those undisputable facts, and the resulting court conflicts and national importance of the questions implicated by the California Supreme Court's decision below, Amici urge the Court to grant that petition.

ARGUMENT

I. THE UNITED STATES CONGRESS CONSISTENTLY HAS PROMOTED THE DEVELOPMENT OF ALL MINERAL RESOURCES ON FEDERAL LANDS, AND HAS ASSERTED FEDERAL GOVERNMENT CONTROL OVER THAT ACTIVITY AND ITS EFFECTS, FOR OVER 150 YEARS

For over a century and a half, this Nation has promoted a federal policy of encouraging the development of mineral resources on federal lands. The first comprehensive piece of federal legislation to express that policy was the General Mining Law of 1872, tellingly entitled: "An Act to promote the Development of the Mining Resources of the United States."[4] 17 Stat. 91 (May 10, 1872); *see also Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 699 (2009) ("To encourage mining in the western United States, Congress enacted the General Mining Law of 1872"). The General Mining Law allows citizens to enter federal land freely and explore for valuable minerals. 30 U.S.C. § 22. The statute

[4] Congress enacted legislation in the 1860s to begin addressing mining on federal lands, in a more limited way. The 1872 Mining Law essentially served to combine and fine-tune two earlier acts: the Lode Law of 1866 and the Placer Act of 1870.

liberally provides that "***all*** 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, by citizens of the United States." *Id.* (emphasis added). In short, the General Mining Law "creates a presumption in favor of mining that is difficult—if not impossible—to overcome" and "is the Magna Carta of mining on public land," so that "its provisions have a status higher than that of ordinary law." *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1186 (2006) (internal quotation marks omitted) (*quoting* C. Meyer & G. Riley, Public Domain, Private Dominion: A History of Public Mineral Policy in America, pp. 46, 52, 56, 78 (1985)).

Notably absent from the General Mining Law of 1872 is reference to *state power* to regulate (let alone prohibit) mining practices and activities on federal lands. Section 22, Title 30, of the United States Code makes no mention of such power. Instead, the only limitations on the otherwise free and open development of mineral resources on federal lands are "regulations prescribed by law" (of the federal variety) and "local customs or rules of miners in the several mining districts." 30 U.S.C. § 22.

Over the next 120 years following the General Mining Law of 1872, Congress enacted legislation that continued to reaffirm the Federal Government's commitment to encourage, promote, and protect all mining on federal lands, and its intent to maintain ultimate land-use authority over that important economic activity. The Mining and Minerals Policy Act of 1970—codified as a preface to the Mining

Law—succinctly states the Federal Government's objective concerning the development of the country's mineral resources:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to ***foster and encourage*** private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.
>
> For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.
>
> ***It shall be the responsibility of the Secretary of the Interior to carry out this***

> ***policy*** when exercising his authority under such programs as may be authorized by law other than this section.

30 U.S.C. § 21(a) (emphasis added).

Thus, the Mining and Minerals Policy Act of 1970, which remains in full force and effect, restates—almost 100 years after the General Mining Law—the Federal Government's encouragement and promotion of mining. And it reaffirms the federal policy favoring *federal* land-use regulation of mining activities. If California has effectively banned gold mining on federal lands by banning the only commercially viable means of engaging in that activity (which it has, as explained *infra*), then that ban must by definition be at odds with the federal policy embodied in the Mining and Minerals Policy Act of "foster[ing] and encourag[ing] private enterprise in . . . the development of economically sound and stable domestic mining."[5]

That same federal objective is upheld time and again in other federal legislation. 43 U.S.C. § 1701(a)(12) ("Federal Land Policy and Management of 1976," reaffirming that "the policy of the United States" is that "the public lands be managed in a

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[5] The California Supreme Court concluded that section 21(a) of the Mining and Minerals Policy Act does not convey Congress's intent for "mining to be pursued at all costs." *People v. Rinehart*, 1 Cal. 5th 652, 664 (2016). But that is not the same as saying that Congress intended to allow states to effectively ban particular mining activities altogether—without regard to environmental impacts and the availability of mitigation. The Mining and Minerals Policy Act does not endorse that view.

manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands ***including implementation of the Mining and Mineral Policy Act of 1970***" (emphasis added)); 16 U.S.C. § 528 ("Multiple-Use Sustained-Yield Act of 1960," which establishes a federal regulatory regime for the development and administration of renewable surface resources for multiple use and sustained yield of products and services, but reaffirming that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests"); *see also* Barry Burkhardt & Melody R. Holm, "Multiple Use of National Forest System Lands—Is Minerals Part of the Mix?," U.S.D.A. Forest Service at 4 (March 10, 2013)[6] ("References to mineral resource management in key laws cited herein indicate that in most cases, minerals need to be a primary consideration in multiple use management of NFS lands and should not be unduly constrained by management prescriptions for other resources. . . . . ***In short, mineral resources are to be managed on an equal—if not priority—basis with other resources.***" (emphasis added)).

In its decision, the California Supreme Court tried to cast doubt on that long-standing and consistent federal policy promoting the development of all mineral resources on federal lands. *People v. Rinehart*, 1 Cal. 5th 652, 667-70 (2016). As an

[6] Available at www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5167484.pdf (last visited on March 3, 2017).

example, it cited *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 F. 753 (D. Cal. 1884).[7] In that case, a federal court granted a property owner an injunction against a mining company, on public nuisance grounds, for dumping mining debris into rivers, causing flooding of nearby properties. *Id.* at 808-09. The issue there was not whether federal policy encourages and promotes mining in a manner that precludes state ***bans*** on mining practices, irrespective of their environmental impacts. Indeed, the case involved no state action purporting to ban a mining method or mining altogether in spite of federal policy to the contrary. Rather, the case involved only the narrow question of whether the company had the right to mine in a way that constituted a ***public nuisance***. *Id.* at 806 ("We are simply to determine whether the complainant's rights have been infringed, and, if so, afford him such relief as the law entitles him to receive, whatever the consequence or inconvenience to the wrong-doers or to the general public may be."); *see also id.* at 810 (Deady, J., concurring) ("Undoubtedly the acts of the defendants constitute a public nuisance, and the plaintiff being specially injured thereby, both in his farm and city property, has an undoubted right to maintain this suit for relief.").

The decision below by the California Supreme Court asserts that *Woodruff* "had the practical effect of banning the mining practice" of hydraulic mining, with the consent of the Federal Government; from that premise, the decision concludes that there must

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[7] The case also is known as the "Sawyer decision," after Judge Lorenzo Sawyer, who wrote the opinion.

be no federal policy encouraging or promoting mining to the preclusion of state bans. *See Rinehart*, 11 Cal. 5th at 668. Setting aside for the moment that *Woodruff* was not a "state ban" case, the California Supreme Court's historical account is simply inaccurate.

Nine years after *Woodruff*, a new federal law—the Caminetti Act of 1893—was enacted. 33 U.S.A. § 661, *et seq.* The Act again reasserted federal control and regulation over mining, with a specific focus on the hydraulic practice that was at issue in *Woodruff*. It established the California Debris Commission, consisting of officers of the Army Corps of Engineers. *Id.* § 661. The Act granted the Commission jurisdiction over mining "carried on by the hydraulic process . . . in the territory drained by the Sacramento and San Joaquin River systems in the State of California." *Id.* § 663. The Act also declared "prohibited" and "unlawful" any hydraulic mining that "directly or indirectly injur[es] the navigability of said river systems" without a permit as required by the Act. *Id.* Finally, consistent with federal policy promoting the development of all mineral resources on federal land, the Act regulated the effects of hydraulic mining (i.e., the mining debris it produces) and reiterated that such regulation "shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method in use . . . on March 1, 1893." *Id.* § 670. Notably, the Caminetti Act did not require that the Commission consult with or seek approval from any state agency for permitting hydraulic operations.

Contrary to the narrative of the decision below, hydraulic mining persisted after *Woodruff*. In its first year of operation, the California Debris Commission issued over 60 permits to operate hydraulic mines and by 1896 had issued 166 permits to operate. The Federal Government, through the California Debris Commission built over 20 debris storage reservoirs on the tributaries of the Sacramento and San Joaquin rivers. Many of these reservoirs still exist today. *See* Joseph J. Hagwood, Jr., "The California Debris Commission: A History," U.S. Army Corps of Engineers, Sacramento District, at 32-33 (1981).[8]

As important, the creation and operation of the California Debris Commission reflected the federal policy that regulation of the effects of mining would occur at the federal, not state, level. As one U.S. Army Corps of Engineers historian wrote:

> The Commission was an extremely powerful body, and, in cases dealing with hydraulic mining, it constituted judge, jury and executioner. It was the supreme authority in all matters related to the subject. In addition, the three Corps of Engineers officers were empowered to establish their own operating procedures and to interpret them as they deemed appropriate. Finally, the Commission was granted the right to use any of the public lands of the United States, or any rock, stone, timber, trees, brush or

[8] Available at http://www.dtic.mil/dtic/tr/fulltext/u2/a436413.pdf (last visited on March 5, 2017).

> material thereon, or therein, for any of the purposes of this act . . . . Few groups in history have been afforded such absolute authority over a private commercial sector of society as was given the California Debris Commission.

Hagwood, *supra*, at 31 (internal quotation mark omitted).

Eventually, miners shifted from hydraulic mining to other technologies, including suction dredging. By the 1920s, gold produced by the hydraulic method dropped in value from $10,000,000 to $122,000 annually. *Id.* at 38. But hydraulic mining's fate was not the result of a ***state ban*** on that method of mining. And importantly for this case, whatever the reasons for hydraulic mining's eventual unviability, Congress expressed a clear intent to preempt state laws restricting or banning hydraulic mining on federal lands. The Caminetti Act, among other federal legislation, is evidence of that purpose and objective.

II. SUCTION DREDGING REPRESENTS THE ONLY COMMERCIALLY VIABLE WAY TO MINE FOR SUBMERGED PLACER GOLD

A key question in this case is whether California's ban on suction dredge mining is a "state environmental regulation [that is] so severe that a particular land use would become commercially impracticable." In *Granite Rock Co.*, 480 U.S. at 587, the Court suggested that such a regulation would be preempted. This is the case to test the important

preemption boundary that *Granite Rock* identifies. Here, the land use in question is gold mining on federal lands. And there is no question that California's ban on suction dredging renders that particular land use—which federal mining laws have consistently promoted over the last century and a half— "commercially impracticable."

A suction dredge is akin to a floating vacuum cleaner. Its operation is simple: A hose sucks rocks, gravel, sand and gold from a river bed and processes the material through a sluice box, which filters out the gold and deposits the rest back into the water. *See, e.g.*, *Siskiyou Regional Educ. Project v. Rose*, 87 F. Supp. 2d 1074, 1081 (D. Oregon 1999) (describing in detail the method of suction dredging).

Given its elegant simplicity, suction dredging emerged in the 1950s as an inexpensive and efficient means of mining. California Department of Fish and Game, Draft Subsequent Environmental Impact Report for Suction Dredge Permitting Program (hereinafter, "DEIR"), Ch. 3, at 3-1 (February 2011).[9] The number of general suction dredge permits issued annually by the Department "increased dramatically from 3,981 in 1976 to a peak of 12,763 in 1980, echoing the steep rise in gold prices in the late 1970s." *Id.* The Department issued, on average, about 3,200 suction dredge permits to California residents *annually* from 1994 to 2009, when the

[9] Available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27392&inline (last visited on March 5, 2017).

state's ban on suction dredging took effect. *Id.*, 3-1—3.2.

Suction dredge miners mine for valuable placer deposit that is submerged in streambeds. Suction dredge mining accounts for the majority of gold mining on federal lands in California, with the other kind of mining consisting of lode (i.e., "hard rock") mining. In contrast to the 3000+ suction dredge permits issued to California residents annually from 1994 to 2009, in 2000-2001, there were only *16* registered lode mines throughout the entire State. California Geological Survey, "Map of California Active Gold Mines: 2000-2001."[10]

As the experience of Amici's many members attests, suction dredging is the most cost-effective and efficient method to recover minerals from underwater streambed sediments (which, again, is where the vast majority of gold mining occurs). Amici are not aware of a single river placer miner who uses any equipment other than a suction dredge. It also creates the least environmental impact. In fact, Mr. Rinehart's claim underwent a full Environmental Impact Report in 1994 and a second full Environmental Impact Report in 2012. In both reports, the location of his claim was determined to be permissible. In a unique Catch-22, California issued regulations which would have allowed Rinehart to operate a suction dredge on his claim, but refused to establish a permitting system whereby he could obtain a permit.

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[10] Available at http://www.conservation.ca.gov/cgs/geologic_resources/mineral_production/Documents/yellowau.pdf (last visited on March 7, 2017).

Multiple claim validity tests undertaken by the United States Forest Service conclude that suction dredge equipment is the only commercially viable means of recovering mineral deposit—and the least environmentally harmful. *See, e.g.*, Internal Mining Report, "Mineral Examination of the RMH #1 Placer Mining Claim, Shasta-Trinity National Forests" (March 13, 1989) ("The only reasonable mining method available for working the alluvial [i.e., placer] gravels within the active river channel in the RMH #1 PMC would be the use of a small suction dredge, with an intake no larger than 6 inches."). In fact, both the State of California and the Forest Service have attested to the fact that, in some cases, suction dredge mining *improves* the environment. *See, e.g.*, Salmon River Ranger District, Klamath National Forest, "Environmental Analysis Report: Suction Dredging" (1979) ("Representatives of the California Department of Fish and Game and the State Water Quality Control Board have stated that the actual dredging operation is more beneficial than harmful to the aquatic environment. The reason for this is that heavily sedimented areas do not provide the interparticle spaces needed for good habitat and fish spawning areas.").

The suction dredge is affordable, with commercial versions start at less than $1,700.[11] The average suction dredge miner spends a mere $6,000 to purchase all the necessary equipment to start a suction dredge mining operation. Cal. Dep't of Fish

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[11] PRO-MACK MINING SUPPLIES, https://www.promackmining.com/mining_supplies/ (last visited Feb. 16, 2017).

and Game, Suction Dredge Permitting Program, Literature Review 4.6-1 (2009) (on file with the California Department of Fish and Game). That small investment is all it takes to start a business that has the potential to strike gold, which currently sells for more than $1,200 per *ounce*.[12] That low capital investment, coupled with the efficiency of a suction dredge, makes this the only reasonable and commercially practicable method of mining for placer gold.

As an allegedly viable alternative to suction dredge mining, California has proposed that miners return to 1848 methods and pan for gold. Without reference to any competent evidence from experienced miners or experts in the industry, California has argued that using a gold pan is commercially practicable. Amici are unaware of any commercial mining operation that uses gold pans.

In yet another ill-conceived proposal, the United States—who participated in the proceedings before the California Supreme Court—has argued that the alternative mining methods of "bucket-line dredging, dragline, or floating a backhoe and feeding a sluice" are viable substitutes for the banned suction dredge. Brief of the United States As Amicus Curiae, p. 27, *Rinehart*, 1 Cal. 5th 652. It strains credulity to believe that the State would permit a bucket line dredge operating on a river when it refuses to permit a lawnmower-sized device. The proposed

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[12] NASDAQ LATEST COMMODITY PRICES, http://www.nasdaq.com/markets/commodities.aspx (last visited Feb. 16, 2017).

alternatives are also considerably more environmentally harmful than suction dredging. The proposal made by the United States in proceedings before the California Supreme Court in this case merely reflects a lack of expertise in mining techniques rather than a legitimate alternative.

California's ban on suction dredge mining is tantamount to a state banning engine-powered flight and then arguing that the airline industry will survive, because alternative methods of air transportation exist. While it may be true that hang gliders can get people from point A to B, the airline industry—and air travel itself—would be wiped out. The same is true here. There exists no other economically practicable method of river mining other than suction dredging, and thus any ban on that method amounts to a ban on river mining.

CONCLUSION

For the reasons stated above, and those stated in the petition, the Court should grant the petition.

DATED: March 2017 Respectfully submitted,

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