No. 16-970

In The
Supreme Court of the United States

BRANDON LANCE RINEHART,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
Counsel of Record
LAURA JEAN BERGER
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amicus Curiae

February 24, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. This case presents an opportunity for the Court to reaffirm the federal government's constitutionally delegated power to regulate the use of federal lands 6

A. The Supreme Court of California's decision disrupts the constitutional balance of power between the states and the federal government and turns them into the mutual rivals and enemies our Founders cautioned against 8

B. The Supreme Court of California's decision calls into question the legality of all activity on federal lands, including the mining of necessary minerals such as rare earth elements 11

II. This Court should review the Supreme Court of California's decision because it validates and promotes a criminal statute which offends, if not violates, the Due Process Clause 13

TABLE OF CONTENTS – Continued

Page

A. California's criminal prohibition against the possession of suction dredges undermines notice and intent requirements of criminal liability 14

B. The California Supreme Court's denial of federal preemption intensifies the effect of lack of notice in the California statute 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia, 378 U.S. 347 (1964).....16

Brubaker v. Bd. of Cty. Comm'rs, 652 P.2d 1050 (Colo. 1982).....19

Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 1, 3

Camfield v. United States, 167 U.S. 518 (1897) 19

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).....10

Morissette v. United States, 342 U.S. 246 (1952).....14

Murray Energy Corp. v. U.S. Dep't of Def., 817 F.3d 261 (6th Cir. 2016), *petition for cert. granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299) 1

People v. Rinehart, 377 P.3d 818 (Cal. 2016).....4, 5, 16

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) 19

S.D. Mining Ass'n v. Lawrence Cty., 155 F.3d 1005 (8th Cir. 1998).....4, 19

Sturgeon v. Frost, 136 S. Ct. 1061 (2016) 1

United States v. Coleman, 390 U.S. 599 (1968).....3, 18

Util. Air Regulatory Grp., et al. v. EPA, 134 S. Ct. 2427 (2014).....1

Yates v. United States, 135 S. Ct. 1074 (2015) 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 ..... 1, 5, 13, 16

U.S. Const. art. IV, § 3, cl. 2 .....3, 4

U.S. Const. art. VI, cl. 2.....4

STATUTES

30 U.S.C. § 22 .....3, 11

30 U.S.C. §§ 181-270 11

30 U.S.C. §§ 601-615 11

Cal. Fish & Game Code §§ 5653 *et seq*.....4

Cal. Fish & Game Code § 5653(a) 4

Cal. Fish & Game Code § 5653(c).....17

Cal. Fish & Game Code § 5653(d) 4, 16

Cal. Fish & Game Code § 5653(e).....4, 16

General Mining Law of 1872, Sess. 2, ch. 152, 17 Stat. 91-96 (May 10, 1872).....*passim*

RULES

Sup. Ct. R. 37.2(a).....1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

4 William Blackstone, Commentaries.....14

Carol Hardy Vincent and Alexandra M. Wyatt, Cong. Research Serv., R44267, State Management of Federal Lands: Frequently Asked Questions (2016), https://fas.org/sgp/crs/misc/R44267.pdf 6

Edwin Meese III and Paul J. Larkin, Jr., Symposium on Overcriminalization: *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012).....14

Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933) 15

John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. Davis L. Rev. 317 (1980).....7

Marc Humphries, Cong. Research Serv., R43864, China's Mineral Industry and U.S. Access to Strategic and Critical Minerals: Issues for Congress (2015), https://digital.library.unt.edu/ark:/67531/metadc505502/m1/1/high_res_d/R43864_2015Mar20.pdf.....12

North American Energy Security and Infrastructure Act of 2015, H.R. 8, 114th Cong. (2015).....13

North American Energy Security and Infrastructure Act of 2016, S. 2012, 114th Cong. (2016).....13

TABLE OF AUTHORITIES – Continued

Page

Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014) 15, 16

The Federalist No. 21 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 8

The Federalist No. 23 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 8, 9

The Federalist No. 39 (James Madison) (Clinton Rossiter ed., 1961) 9, 10

The Federalist No. 44 (James Madison) (Clinton Rossiter ed., 1961) 9

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 3

The Federalist No. 46 (James Madison) (Clinton Rossiter ed., 1961) 2, 11

U.S. Geological Survey, Scientific Investigations Report 2010-5220, The Principal Rare Earth Elements Deposits of the United States (2010), https://pubs.usgs.gov/sir/2010/5220/ 11, 12

Valerie Bailey Grasso, Cong. Research Serv., R41744, Rare Earth Elements in National Defense: Background, Oversight Issues, and Options for Congress (2013), https://fas.org/sgp/crs/natsec/R41744.pdf 11

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, regularly files *amicus curiae* briefs with this Court in cases such as *Yates v. United States*, 135 S. Ct. 1074 (2015), and *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016), and litigates regularly before this Court, including such cases as *Utility Air Regulatory Group, et al. v. EPA*, 134 S. Ct. 2427 (2014), and *Murray Energy Corp. v. U.S. Department of Defense*, 817 F.3d 261 (6th Cir. 2016), *petition for cert. granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299).

Amicus asks this Court to grant certiorari because in addition to contradicting *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), the Supreme Court of California's decision undermines our country's core principles of federalism and in effect, confirms the validity of a criminal statute which offends the Due Process Clause, U.S. Const. amend. XIV, § 1. More specifically, through the California Fish

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

and Wildlife Code, the California Legislature criminalizes suction dredging, a federally allowed and encouraged activity, on federal lands. By declining to find preemption, the Supreme Court of California gives the California Legislature free rein to thwart national policy far beyond the facts of this case and criminalize any conduct on federal lands, disregarding federal law. Additionally, as *amicus* discusses, California's prohibition against the possession of a suction dredge implicates core due process concerns because it imposes criminal liability without requiring intent by the actor.

SUMMARY OF ARGUMENT

For nearly four months over the summer of 1787, delegates chosen by the state legislatures met in Philadelphia and debated, among many topics, the interplay between federal and state governments. Discarding the Articles of Confederation and starting anew, our Constitution's Framers recognized that "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." The Federalist No. 46, at 291 (James Madison) (Clinton Rossiter ed., 1961). Keeping in mind that "the ultimate authority, wherever the derivative may be found, resides in the people alone," *id.*, the delegates created a new government where "[t]he powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] [t]hose which

are to remain in the State governments are numerous and indefinite." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

While the federal government's powers "are few and defined," a rather unobjectionable, constitutionally delegated power is the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" U.S. Const. art. IV, § 3, cl. 2. To encourage exploration and mining on federal lands, Congress exercised this power and passed the General Mining Law of 1872, Sess. 2, ch. 152, 17 Stat. 91-96 (May 10, 1872). In the Mining Law, Congress declared "[a]ll valuable mineral deposits in lands belonging to the United States . . . to be free and open to exploration and purchase. . . ." 30 U.S.C. § 22. Congress not only allowed, but invited citizens of the United States to explore for, discover, and purchase valuable locatable mineral deposits on designated federal lands. As this Court itself found, Congress's "obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense." *United States v. Coleman*, 390 U.S. 599, 602 (1968).

While the Mining Law allows for state regulation of mining on federal lands, this Court has held that any state regulations must be consistent with federal law and cannot be "so severe" as to render mining "commercially impracticable." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (discussing the relationship between the Mining Law and a state environmental permitting requirement). As Petitioner

explains, the only court to address whether the Mining Law preempts a local government's complete ban of mining on federal lands held that "[a] local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages" because "to do so offends both the Property Clause and the Supremacy Clause." *S.D. Mining Ass'n v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998). Similarly, the provisions of California's Fish & Game Code at issue in this case which prohibit possession and use of suction dredges on federal lands offend the Property Clause and the Supremacy Clause, U.S. Const. art. VI, cl. 2, and undermine the delicate balance of power struck that summer of 1787.

More specifically, California criminalizes suction dredge mining on federal lands even when the federal government authorized such mining and it is the only commercially practicable mining method. *See* Cal. Fish & Game Code §§ 5653, *et seq.* Petitioner Brandon Rinehart holds two contiguous placer claims allowing him to mine for gold on federal lands in California. Pet. 13. In 2012, when Mr. Rinehart attempted to mine his claims through suction dredging, prosecutors charged him with two misdemeanors for not only the use of a suction dredge, but also the mere possession of it.[2] Pet. 14-15. Even though he obeyed all relevant federal laws

[2] *See People v. Rinehart*, 377 P.3d 818, 821-22 (Cal. 2016) (explaining that Mr. Rinehart was charged by criminal complaint for violation of California Fish and Game Code Sections 5653(a) and (d), but that in 2015 the California Legislature recodified those subsections as California Fish and Game Code Sections 5653(a) and (e)).

and engaged in valuable *and even encouraged* activity on federal lands, the trial court convicted Mr. Rinehart. Pet. 13-15.

As evidenced by Mr. Rinehart's conviction, the California statutes criminalizing suction dredge mining make Congress's goals as articulated in the Mining Law impossible to fulfill. Mr. Rinehart contends, and *amicus* agrees, that the Mining Law preempts the California statutes. The Supreme Court of California disagreed. *See Rinehart*, 377 P.3d at 820.

This case presents the Court with an opportunity to reassert its previous interpretation of the Mining Law, so that states may properly understand that they may not prohibit activity on federal lands that Congress permits and encourages. Allowing state law to undermine the Mining Law not only harms suction dredgers like Mr. Rinehart, but gives states a green light to prohibit and criminalize any other activities on federal lands that the federal government allows and encourages, such as the mining of rare earth elements.

Amicus writes to also highlight another important question of federal law that this case implicates – the overarching problem of overcriminalization. California's ban on possessing suction dredges fails to afford persons with proper notice of criminal liability. Thus, the Supreme Court of California's decision essentially validates and promotes a criminal statute which offends, if not violates, the Due Process Clause, U.S. Const. amend. XIV, § 1. When a state statute attaches

criminal liability to an activity Congress allows and encourages, this Court's review is all the more urgent.

ARGUMENT

I. This case presents an opportunity for the Court to reaffirm the federal government's constitutionally delegated power to regulate the use of federal lands.

Federal control of federal lands while allowing for proper state regulation leads to consistent and predictable results. The Mining Law exemplifies this system; it allows for reasonable state regulations, but still maintains overall federal control over federal lands. The interaction between federal, state, and local governance with respect to mining policy reflects the Framers' desire to create a government wherein even though most powers are reserved to the states, those powers appropriately given to the federal government are clear and intentional. The Supreme Court of California's decision undermines constitutionally delegated federal powers and our overall system of government. And, it has the potential to impact all activities on federal lands that Congress allows and encourages.

The federal government owns approximately thirty percent of the nation's land. *See* Carol Hardy Vincent and Alexandra M. Wyatt, Cong. Research Serv., R44267, State Management of Federal Lands:

Frequently Asked Questions, at 1 (2016).[3] Despite the Property and Supremacy Clauses, federal control over the vast amount of federal lands is not without controversy. For example, in 1979, in what is known as the Sagebrush Rebellion, six western states passed legislation to nullify federal land ownership within state boundaries. *See* John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. Davis L. Rev. 317, 317 & n.2 (1980).

One potential future area for conflict, slightly more related to this case, is mining for rare earth elements (REE). Referred to by the Japanese as "the seeds of technology," REE make all aspects of modern life possible. While it has become impossible to live without REE in the 21st century, the United States is almost entirely reliant on REE imported from China. Congress has taken note and through a number of bills is working to further allow and encourage mining of REE on federal lands. However, unless this Court steps in to reaffirm the Mining Law's preemptive effect and the federal government's overall power to regulate use of federal lands where delegated by the Constitution, states may outlaw this important activity at will just as the California Legislature outlawed suction dredge mining.

---

[3] https://fas.org/sgp/crs/misc/R44267.pdf.

A. The Supreme Court of California's decision disrupts the constitutional balance of power between the states and the federal government and turns them into the mutual rivals and enemies our Founders cautioned against.

Our Constitution's Framers keenly understood the many pitfalls of a system where the states retained too much control over areas best handled by the federal government. Alexander Hamilton described the possible turn of events should the states fail to ratify the Constitution: "Usurpation may rear its crest in each State and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret." The Federalist No. 21, at 135 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This "want of a mutual guaranty" from the states exemplifies the problems faced when states gain power in areas constitutionally delegated to the federal government. *Id*.

In Federalist 23, Hamilton discussed the proper duality: A federal government limited in scope to certain proper "objects," and wherever the national interests "can with propriety be confided, the co-incident powers may safely accompany them." The Federalist No. 23, at 148, 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under this premise, Hamilton knew "it is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are intrusted to its management."

Id. at 152. While Hamilton described the federal government's powers as related to military matters, he extended his reasoning: "The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend." *Id.* at 151.

He was not alone in this understanding. James Madison echoed Hamilton's sentiments. In Federalist 44, Madison contrasted excessive state powers under the Articles of Confederation with the Constitution's federalist system. *See generally* The Federalist No. 44, 277-84 (James Madison) (Clinton Rossiter ed., 1961). Describing the need for the federal power to coin money, Madison pronounced: "Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; . . . and thus the citizens of other States be injured, and animosities be kindled among the States themselves." *Id*. at 278. This example describes what happens when multiple regulatory levels exist and cause confusion. Madison's cure was a supreme law of the land to counteract the "fluctuating policy which has directed the public councils." *Id*. at 279. The goal of such a system was to "inspire a general prudence and industry, and give a regular course to the business of society." *Id*.

Madison differentiated between a "national" government and a "federal" government. The Federalist No. 39, at 240-43 (James Madison) (Clinton Rossiter

ed., 1961). Certainly the United States government in existence today is "federal" because state and local governments check the federal government's powers. However, the federal government may still properly exercise its authority. Although the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects[,]" the federal government retains valid "jurisdiction extend[ing] to certain enumerated objects only[.]" *Id*. at 242. Poignant to this case, Madison articulated that the "boundary between the two jurisdictions, the tribunal . . . is ultimately to decide. . . ." *Id*. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the early Court lent its wisdom when it affirmed Madison's reasoning: "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id*. at 436.

The potential negative impact of the Supreme Court of California's decision cannot be overstated. Allowing a state government to prohibit activity on federal lands that Congress not only allows but encourages will open the floodgates and invite the very conflict between the states and federal government that Hamilton and Madison sought to avoid. With respect to control of federal lands, the decision disrupts the balance of power struck by our Founders and turns "these different establishments" into the very "mutual rivals and enemies" seeking to "usurp the authorities

of each other" that our Founders cautioned against. The Federalist No. 46, at 291.

B. The Supreme Court of California's decision calls into question the legality of all activity on federal lands, including the mining of necessary minerals such as rare earth elements.

While the Mining Law does not explicitly discuss rare earth elements, the fifteen elements with atomic numbers 57 through 71, it arguably allows for and already encourages the mining of REE on federal lands.[4] REE are necessary for iPhones, Priuses, magnets used in surgical robots, computer screens, and fiber optic cables, among other modern technologies. U.S. Geological Survey, Scientific Investigations Report 2010-5220, The Principal Rare Earth Elements Deposits of the United States (2010), at 1 [hereinafter "USGS Study"].[5] Even more importantly, REE constitute critical components for a number of key defense technologies such as "precision-guided missiles, smart bombs, and aircraft." Valerie Bailey Grasso, Cong. Research

[4] The Mining Law applies to "all valuable mineral deposits," 30 U.S.C. § 22, except those expressly excluded such as oil, and coal. *See* 30 U.S.C. §§ 181-270; *see also* 30 U.S.C. §§ 601-615 (excluding sand, gravel, stone, and several other materials).

[5] https://pubs.usgs.gov/sir/2010/5220/.

Serv., R41744, Rare Earth Elements in National Defense: Background, Oversight Issues, and Options for Congress, at 10 (2013);[6] *see also* USGS Study, at 1.

For decades, the federal government has monitored and investigated REE resources, both domestic and foreign. USGS Study, at 1 (discussing investigation by the USGS National Minerals Information Center, the Office of Industrial Policy, and congressional directives in laws such as the National Defense Authorization Act for Fiscal Year 2010 to investigate and complete reports on REE). Despite having ample REE resources, the United States is 100 percent import-reliant on key REE, with nearly all imports coming from China which produces 90 percent of the world's REE. Marc Humphries, Cong. Research Serv., R43864, China's Mineral Industry and U.S. Access to Strategic and Critical Minerals: Issues for Congress, at 5, 11 (2015).[7]

Because the United States depends largely, if not solely, on China to produce and sell REE, Congress is taking action. In addition to requesting a number of studies on the issue, last year, both the Senate and House of Representatives passed versions of the North American Energy and Infrastructure Security Act, which encouraged mining activity to promote mineral security through domestic production of crucial REE.

---

[6] https://fas.org/sgp/crs/natsec/R41744.pdf.

[7] https://digital.library.unt.edu/ark:/67531/metadc505502/m1/1/high_res_d/R43864_2015Mar20.pdf.

See North American Energy Security and Infrastructure Act of 2016, S. 2012, 114th Cong. (2016) and *North American Energy Security and Infrastructure Act of 2015*, H.R. 8, 114th Cong. (2015) (different versions passed by both chambers but differences never resolved).

While Congress debates the precise language of these bills and while China threatens the United States' importing of REE, the United States' domestic REE supply now faces a new and preventable challenge – state prohibition of mining these essential minerals where allowed and encouraged by the federal government. The Supreme Court of California's opinion gives California and other states a roadmap to prohibiting mining of REE on federal lands. This case provides this Court with an opportunity to clarify federal law's vital preemptive effect to the contrary.

II. This Court should review the Supreme Court of California's decision because it validates and promotes a criminal statute which offends, if not violates, the Due Process Clause.

California's ban on possession of suction dredges offends the Due Process Clause because it subjects individuals possessing a suction dredge to criminal liability without proper notice of such liability. This lack of notice stems from both the statutory text and California's application of the statute to activity on federal

lands. Because the statute fails to provide proper notice, the ordinary person has no way to know if his possession of a suction dredge while on federal lands constitutes a crime. Allowing the Supreme Court of California's decision to stand invites other states to enact statutes that not only undermine federal law, but also attach criminal liability in so doing.

A. California's criminal prohibition against the possession of suction dredges undermines notice and intent requirements of criminal liability.

That "ignorance of the law is no excuse" has underscored the English common law and its American successor for centuries. *See Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (describing the relationship between the defense of ignorance of the law and the requirement of *mens rea*); *see also* Edwin Meese III and Paul J. Larkin, Jr., Symposium on Overcriminalization: *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 726-27 (2012) (examining the ancient pedigree of the notion that ignorance of the law is no excuse dating back to the Roman empire). This ancient maxim assumes that an act subject to criminal liability is widely known as inherently morally wrong, and anyone held criminally liable for the act made a knowing choice between right and wrong in committing the act. Stated succinctly, a crime consists of a "vicious will" and "an unlawful act consequent upon such vicious will." 4 William Blackstone, Commentaries *21. This conscious choice provides notice to

the wrongdoer that the conduct in question will likely give rise to criminal liability.

As times have changed, so have crimes. In the modern era, criminal liability attaches to offenses ranging from the most severe moral wrongs to strict liability regulatory offenses. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 55 (1933) (describing the proliferation of regulatory crimes as "a steadily growing stream of offenses punishable without any criminal intent whatsoever"). Valid arguments exist to support public welfare offenses when the temptation of profit regardless of the means by which it is acquired may create incentive for general societal *ills*; yet the problems with this rationale as applied to the hard realities of overcriminalization are as complex as the web of statutes and regulations attaching criminal liability at both the state and federal level. *See generally* Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014) (describing the infirmities of federal criminal law, including numerosity of crimes in the federal code and regulations, complexity of regulatory schemes, and defective *mens rea* aspects). These problems are so severe that they have the potential to undermine core due process requirements.

Federal law alone contains innumerable criminal offenses. "Some commentators have estimated that there are more than 4000 statutes and more than 300,000 regulations that define conduct as criminal or otherwise bear on the proper interpretation of the laws

that do." *Id*. at 750. State criminal codes add another layer of possible criminal liability.[8] This vast body of laws makes it impossible for an individual to have proper notice consistent with due process as to whether she will be held criminally liable for some unknown, uncontemplated act or omission. It is under this crushing duality that the Supreme Court of California upheld Mr. Rinehart guilty of a crime with no intent requirement whatsoever.

The trial court convicted Mr. Rinehart for violation of California Fish & Game Code § 5653(e),[9] possession of "a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges." Section 5653(e) lacks any intent requirement even though the conduct (or arguable lack thereof) criminalized is not inherently morally blameful. A suction dredge is a common tool used in a common mining method, Pet. 4, and is Mr. Rinehart's only commercially viable way to mine his claims. *Id*. at 14-15. Possession of a suction dredge is not inherently morally blameworthy consistent with *mens rea*. Therefore, notice of any criminal penalties must be provided

[8] This Court employs the Due Process Clause to ensure the states do not unforeseeably expand criminal liability. *See Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (holding that the state's interpretation of its own statute violated due process when the state's interpretation did not meet the plain language interpretation of a statute regarding notice of criminal liability).

[9] Formerly California Fish and Game Code § 5653(d). *See Rinehart*, 377 P.3d at 821.

by the statute itself – if the reader can even be expected to find it.

Pursuant to the statute, possession is "unlawful," but the statute fails to mention in what way. Notably, Section 5653(c) states: "If a person *uses* vacuum or suction dredge equipment other than as authorized . . . that person is guilty of a misdemeanor." Cal. Fish & Game Code § 5653(c) (emphasis added). Thus, while the statute lacks mention in subsection (e) of the criminal penalty for *possession* of a suction dredge, the drafters properly provided in subsection (c) the criminal penalty for the *use* of a suction dredge. Even if an individual exercised so much due diligence as to actually look up the statute, he still has no way to know the penalty attached to the *possession* of a suction dredge – felony, misdemeanor, or civil fine, the reader is left guessing and cannot be properly on notice.

Even if this omission is simply sloppy drafting as opposed to willful obfuscation, this Court should not allow the California Legislature so much grace. This analysis makes it all the more likely that Mr. Rinehart had no notice that mere possession of a suction dredge in a certain area could subject him to criminal liability, even if he knew of such liability attaching to its use. When a statute imposes criminal liability, proper drafting puts the reader on notice as due process requires.

B. The California Supreme Court's denial of federal preemption intensifies the effect of lack of notice in the California statute.

The California Legislature's imposition of criminal liability if not preempted worsens the sting of Mr. Rinehart's conviction. Putting the statute's textual due process deficiencies aside, the statute also undercuts notice and due process when applied on federal lands as opposed to state land because Congress explicitly encourages mining on federal lands. *See Coleman*, 390 U.S. at 602. In Mr. Rinehart's case, if this Court grants the Petition and ultimately finds preemption and remands the case, the state court will likely clear Mr. Rinehart of his conviction. But, if this Court declines to hear the case, Mr. Rinehart's conviction will undoubtedly stand despite its arguable due process violations.

Through this lens, the problematic lack of notice for criminal liability is clear. Mr. Rinehart complied with a complex federal statutory scheme to legally mine his placer claims. Pet. 13. His diligence in complying with federal law gives further credence to a lack of ill intent; he did not squat on the land or try to circumvent the strict and detailed federal requirements. Rather, he is a prime example of an individual attempting to comply with the law.

Mr. Rinehart's compliance speaks to his lack of notice of the criminally outlawed conduct in which he engaged. His case, however, involves more than the

commonplace problems of overcriminalization, such as the complexity of the federal regulatory scheme or overly broad statutory terms. His lack of notice directly relates to Congress's encouragement of the activity in which he engaged. When the federal government states no objection to and in fact permits and encourages an activity, state criminal liability should not attach.

Unless this Court steps in to resolve this important question, the practical effect of the Supreme Court of California's decision is that Mr. Rinehart may not be the only person subject to criminal liability under this unjust duality. Any mining activity that could come under the umbrella of the Mining Law – or any federal law regulating use of federal lands – may be unknowingly burdened by a strict state law with prohibitions and pitfalls similar to California's. Federal law may be overly burdensome and at times unjust in its own right, but its application on federal lands is at least consistent; on federal lands, one can reasonably assume that federal law applies and governs. *See Camfield v. United States*, 167 U.S. 518, 524-26 (1897) (describing the federal government's ability to regulate federal lands in a manner analogous to use of state police powers). The added layers of complex state statutes vary fiftyfold, and what may be illegal in one state may be perfectly acceptable in another. *See generally*, *e.g., S.D. Mining Ass'n*, 155 F.3d 1005; *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984); *Brubaker v. Bd. of Cty. Comm'rs*, 652 P.2d 1050 (Colo. 1982).

This case presents an opportunity to ensure that no individual will be subjected to criminal liability for taking Congress at its word. To find otherwise, like the Supreme Court of California, undermines our Constitution and brings instability to our overall system of government.

CONCLUSION

For the foregoing reasons and those stated by Petitioner Brandon Rinehart, *amicus* respectfully requests that this Court grant Petitioner's writ of certiorari.

Respectfully submitted,

KIMBERLY S. HERMANN
Counsel of Record
LAURA JEAN BERGER
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amicus Curiae

February 24, 2017