FILED
December 6, 2018
OFFICE OF APPELLATE COURTS

A18-0090
STATE OF MINNESOTA
IN SUPREME COURT

Minnesota Sands, LLC,

Appellant,

vs.

County of Winona, Minnesota, a Political Subdivision of the State of Minnesota,

Respondent.

BRIEF OF APPELLANT MINNESOTA SANDS, LLC

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SUMMARY OF ARGUMENT

The federal Constitution creates a nationwide free-trade zone. Under the Commerce Clause, state and local governments may not ban exports of goods produced within their boundaries. Unfortunately, Winona County has done just that. The County contains large deposits of valuable silica sand, but its zoning ordinance facially bans mining except for "local" uses. The same ordinance also discriminates against interstate commerce in practical effect; the County bans mining silica sand for uses that occur in other states, while exempting from the ban a long list of uses that occur locally. The Commerce Clause does not permit that.

The Court of Appeals majority erred by holding otherwise. Its conclusion was based on a fundamental misunderstanding of the ordinance at issue here. The majority wrongly stated that the ordinance "even-handedly" bans all silica-sand mining—but no party to the case has ever contended that. Silica sand from Winona County is currently being mined and used for a variety of permitted "local" purposes, and the County concedes that the ordinance allows this. But although the very same sand is suitable for out-of-state industrial uses, Winona County bans mining it for that purpose.

In addition, the County's mining ban makes Appellant Minnesota Sands' mineral rights worthless, or nearly so. This is a textbook regulatory taking, for which the state and federal Constitutions require compensation. The Court of Appeals majority held otherwise only by concluding that Minnesota Sands' leasehold interests had not "accrued" yet. That was a plain misreading of the leases.

STATEMENT OF THE ISSUES

(1) **Commerce Clause.** Winona County allows silica sand to be mined for "local" uses, but bans mining the very same sand for export. Silica sand is widely used in other states for oil and gas extraction, but Winona County prohibits such sand from being sold in those interstate markets, while allowing its sale for a long list of uses that occur within the County. Does this export ban violate the federal Commerce Clause?

Minnesota Sands raised the issue in its motion for summary judgment in the district court and in opposition to the County's motions to dismiss and for summary judgment. *See* Index # 82 at 35-39; Index # 144 at 19-22. The most apposite cases are:

Hughes v. Oklahoma, 441 U.S. 322 (1979)

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992)

Philadelphia v. New Jersey, 437 U.S. 617 (1978)

(2) Minnesota Sands' mineral rights have been made worthless, or nearly so, by Winona County's ban on mining the minerals for their principal uses in the national economy. Has the County "taken" the mineral rights, so as to owe just compensation under the state and federal Constitutions?

Minnesota Sands raised the issue in its motion for summary judgment in the district court and in opposition to the County's motions to dismiss and for summary judgment. *See* Index # 82 at 39-45; Index # 144 at 22-29. The most apposite cases are:

Lucas v. S.C. Coastal Council., 505 U.S. 1003 (1992)

Northpointe Plaza v. Rochester, 465 N.W.2d 686 (Minn. 1991)

Wensmann Realty, Inc. v. Eagan, 734 N.W.2d 623 (Minn. 2007)

Interstate Cos., Inc. v. Bloomington, 790 N.W.2d 409 (Minn. Ct. App. 2010)

STATEMENT OF THE CASE AND FACTS

A. Minnesota Sands Proposes to Mine Silica Sand.

The hilly "Driftless Area" on the southern part of the Minnesota-Wisconsin boundary has rich deposits of valuable silica sand. *See* Index # 85 at WC0794 ¶ 12; Index # 99 at 1. This sand is useful for a wide variety of applications, including in buildings, for road paving, as animal bedding, in glass-making, and on golf courses. Index # 85 at WC0794 ¶ 12. Index # 99 at 1. As described by the Minnesota Department of Natural Resources:

> Silica sand is found in the southeastern portion of the state. Five mines are currently known to extract silica sand for industrial applications. An unknown number of silica sand mines produce silica sand for construction and agricultural uses....
> ... In Minnesota, all silica sand mines that produce industrial and agricultural sand operate as surface quarries using similar equipment as aggregate mines.

Index # 99 at 1. Some of Minnesota's silica-sand deposits are in Winona County. *See, id.*; Index # 92 ¶ 21. Local quarries in the county have long mined silica sand for construction and agricultural purposes. *See*, Index # 99 at 1; Index # 92 ¶ 38.

This same silica sand also is useful in oil and gas extraction, in the process known as hydraulic fracturing or "fracking." Index # 99 at 1. Fracking extracts oil and gas through fractures in the surrounding rock. Index # 92 at ¶ 12. This requires filling the

fractures with a "proppant": a substance that is strong enough to prop the fractures open, and yet porous enough to allow hydrocarbons to flow out through them. Index # 92 at ¶¶ 13-14. Silica sand is one of the relatively few substances that meets these requirements, and the sand from the Driftless Area in southeast Minnesota is among the highest-quality silica sand in North America. Index # 99 at 2.

The same silica sand that is useful for fracking can also be used for the other applications noted above. Index # 92 ¶ 10. Indeed, "[t]he same characteristics" of silica sand are useful in both fracking and livestock operations: because the sand is porous, it allows hydrocarbon migration, and it also allows fluids produced by cattle to drain away from animals lying on the sand. ADD-92-103. Regardless of what the silica sand is ultimately used for, "[t]he process to mine [it] ... does not differ in any material way." *Id.* ¶ 9. Nothing about mining for frac sand requires the operation "to be larger in size or scope than a sand and gravel mine ... for construction purposes." *Id.* ¶ 36. Sand for fracking typically, but not always, requires some processing after being dug up, but this need not occur at the mine site—it can be done at the fracking site itself or at a third-party processing location. Index # 79 at WC0443.

In June 2013, the Winona County Board of Commissioners approved a new mine, known as the "Nisbit mine," for extraction of industrial silica sand. Index # 101 at WC1266. Sand from the Nisbit mine meets the American Petroleum Institute's specifications for use as a fracking proppant, *see* Index # 92 ¶ 38, and the mine owner's proposal was to sell most of the sand for fracking and other interstate uses and the rest for local agricultural purposes. *See In re Envt'l Impact Statement*, 849 N.W.2d 71, 84 (Minn.

Ct. App. 2014). The road-use agreement that the Nisbit mine reached with the County also contemplated that its sand could be used for a variety of industrial, construction, and agricultural purposes. ADD-106 at WC2368. Nisbit sand currently is sold for use as livestock bedding. ADD-101 ¶ 53.[1]

The County carefully regulates the Nisbit mine. When demand for silica sand began growing in 2011 and 2012, Winona County developed a "Silica Sand Mining and Processing Application packet, [a] Road Use Agreement," and numerous other legal and technical requirements for mining—36 conditions in all. Index # 25 at 4; Index # 79 at WC0610. In a memo to the County Board and Planning Commission, the Winona County Attorney described these requirements as "detailed and comprehensive silica sand mining and processing ... requirements," and stated that they create "a rather intensive application process." Index # 123 at WC0593, WC0599. The County applied these conditions, plus some additional ones, to permitting the Nisbit mine. Index # 79 at WC0610. The County crafted the Nisbit mine permit to protect water quality and to control dust, noise, light pollution, and erosion. *See* Index # 101 at WC1267; *Envt'l Impact Statement*, 849 N.W.2d 71. The County also limits truck traffic from the Nisbit mine on county highways and requires the Nisbit mine operator to defray part of the financial cost of wear and tear on its roads. *See* Index # 101 at WC1269. Additionally,

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[1] The Nisbit Mine is allowed to sell sand as a fracking proppant, but Minnesota Sands is informed and believes that the Nisbit sand currently is sold *only* as livestock bedding. The Winona County Board was told as much during the legislative process that led to the ordinance being challenged here. Index # 125 at WC2422.

the County required a detailed reclamation plan, and full performance bonds for the Nisbit mine's road-maintenance and reclamation obligations. Index # 101 ¶ 32. In subsequent litigation, the Court of Appeals found that additional steps were not required to permit the Nisbit mine. *Evn'tl Impact Statement*, 849 N.W.2d at 81, 84. The Nisbit mine continues in operation to this day.

Minnesota Sands wishes to conduct similar mining. Over the past several years, Minnesota Sands has invested millions of dollars sampling and testing Winona County sand, obtaining several mineral leaseholds,[2] conducting environmental-review activities, developing operating plans, and buying and maintaining purchase options for transport and processing sites. Index #s 92-93. Minnesota Sands estimates these expenses have been at least $2,595,500.00, and the actual value likely is significantly higher. *See* ADD-98 ¶ 29.

Minnesota Sands' proposal is to sell the sand on the interstate market for use in fracking. It currently has leasehold interests to mine Winona County silica sand that is suitable for use as a proppant. Index # 92 ¶ 38; ADD-93 ¶ 6. Each of Minnesota Sands' mineral leases in Winona County contains identical language, limiting its rights "solely to min[ing] Frac Sand to be used by Tenant for commercial purposes." *See, e.g.*, Index # 107 § 5(a)). Since Minnesota has no significant deposits of oil or gas within its borders, Minnesota Sands' proposed business is selling silica sand for export to other States.

[2] The leases were mostly obtained by Minnesota Sands' member Richard Frick in late 2011 and early 2012. Mr. Frick assigned the leases to Minnesota Sands, with the consent of the landlords, in February 2012. *See* ADD-93-97 ¶¶ 12-24.

Index # 92 ¶ 16. After the mining is complete, Minnesota Sands proposes to restore the mined land to prairies and farmland. ADD-103 ¶ 70.

B. Winona County Bans Silica-Sand Exports.

Minnesota Sands fully expected that the County would require reasonable environmental and transportation safeguards in connection with its mining, as it does with the Nisbit mine. Minnesota Sands was (and is) prepared to negotiate and comply with such requirements. In 2012, Minnesota Sands initially applied to Winona County for conditional-use permits and began preparing the required Environmental Assessment Worksheets. ADD-100 ¶¶ 44, 46. Winona County, however, told Minnesota Sands to wait on its permit request and to seek an Environmental Impact Statement first. *Id.* ¶ 46. The permitting process started and stopped in the ensuing years, depending on market conditions for silica sand.

But instead of seeing the permitting process through, Winona County completely banned silica sand exports.

1. The legislative push for a "frac sand ban."

In 2016, in response to Minnesota Sands' proposed operations, the Winona County Board considered additional regulation of silica sand mining. The ensuing legislative process and public debate focused on a single issue: whether Winona County should ban mining silica sand for use in fracking. The Winona County Board initially considered a regulation drafted by the Land Stewardship Project. The initial draft expressly banned all mining for "frac sand," which it defined as "[s]ilica sand that, when processed, is suitable for use as a proppant [in fracking] and that is intended to be sold or

used as such," but as *excluding* "silica sand that is intended to be sold or used for construction, agriculture, or other applications where its use is other than as frac sand." Index # 86 at WC0701. The County Board members also described this is a frac sand ban. Index # 23 at 1; Index # 120 at WC0699. Much of the public support for the ban apparently was motivated by silica-sand mining in Wisconsin, which occurs at a far greater scale than anything Winona County has ever considered. Index # 121 at WC0193, WC0206, WC0281 (26 mines in neighboring Trempealeau County, ranging in size from approximately 180 to 1,300 acres).

Revisions in the legislative process did not materially change the proposal. The Winona County Attorney recognized that the County lacks jurisdiction to try to prevent fracking in other states and, as a result, found the first proposal to be "minimally viable" because it lacked a rational connection to the County's legitimate government purposes. Index # 4 at 1, 5. She attempted to re-write the proposal to provide that connection without changing its effect. Her revision eliminated the direct reference to "frac sand," but left the substance of the ban in place: the revised language banned mining for "industrial minerals" while allowing mining for "local" uses. Index # 85 at WC0787. The County Planning Commission considered this revision and asked a representative of the Land Stewardship Project why it did not expressly mention fracking. Her response: "[t]he County Attorney thought the current language was preferable and has the same effect." ADD-109 at WC0911. The Land Stewardship Project supported the County Attorney's revised proposal and continued referring to it as a "frac-sand ban" throughout the legislative process. Index # 117 at WC0110 ("[W]e ask that you adopt a ban on frac

sand operations, as presented to you as Option A[] in County Attorney Sonneman's memorandum")**.**

The public debate also focused almost exclusively on "frac-sand." In fact, throughout the legislative process, the most common name for the proposed ordinance was the "frac-sand ban." Of the hundreds of letters and written statements to the County Board and Planning Commission on this issue, both before and after the County Attorney's revision, almost everyone refers expressly to banning the mining of "frac-sand." Index # 121 at WC0001-70, WC0077-171; Index # 129 at WC0319-413; Index # 140 at WC1883-1990, 1997-2003; Index # 122 at 2237-56, 2922-59; *see especially* Index # 129 at WC0359-68 (letter from over 40 business owners and executives, and 11 nonprofit or community organizations, asking the county "to ban any new frac-sand mining, processing, or transportation"), WC0392 (Izaak Walton League Winona chapter asking for "a ban on any new frac-sand mining, processing, or transportation"), WC0406 (Winona State University Student Senate "supports a ban on frac-sand mining"); Index # 124 at WC0744 (Win-Cress Chapter of Trout Unlimited "support[s] a ban on frac-sand mining"). And throughout the legislative and amendment process, Winona County's own official board and planning commission minutes described public comments supporting and opposing "a Frac Sand Ban." Index # 124 at WC0745, WC0757, WC0779 WC0814; ADD-108-109 at WC0910-11; Index # 126 at 0913.

The County's Planning Commission, however, recommended a more measured approach. The Planning Commission passed a recommendation that the County limit all silica sand mining rather than banning silica sand for exports, by capping the permitted

operations at six total mines, each of 40 acres or less. Index # 88 at WC0756. Alternatively, "the County Attorney and Planning Staff" also suggested codifying "the requirements of the Silica Sand Mining and Processing Application Packet" that the County was already using in its permitting process. Index # 90 at WC0774. They told the Board that this option would "take[] into consideration all that we have learned and developed since the County was first faced with addressing silica sand mining in 2011 and 2012." *Id.*

But the Board rejected those alternatives. *See* Index # 85 at WC0786. Instead, by a 3-2 vote, the Board adopted the County Attorney's revised version of the complete ban. This revision created a new distinction between construction and industrial minerals, pulling the definition of these terms directly from the Zoning Ordinance of Minnesota's Florence Township. Index # 123 at WC0622; Index # 117 at 9. The County admitted to using this township ordinance "as a useful guide." Index # 117 at 9.[3]

In its official findings, the Board disclaimed hostility to fracking as the motivation for the ban, stating that its decision was based on "the specific impacts of activities within Winona County, not on external activities or uses." Index # 25 at 9. As a result of the

[3] The Florence Township ordinance appears to have been drafted in 2013 by David Williams, an anti-frac sand activist, LSP member, and a retired lawyer. *See* Index # 144 at 11, n.5.

ordinance, Winona County established three separate bans on the mining, processing, and transportation of minerals that would be used outside its own "local" area.[4]

2. The enacted ordinance bans mining except for "local" purposes.

In relevant part, the final ordinance amendment provides as follows:

> *CONSTRUCTION MINERALS:* The term "construction minerals" includes natural common rock, stone, aggregate, gravel and **sand that is produced and used for local construction purposes**, including road pavement, unpaved road gravel or cover, concrete, asphalt, building and construction stone, riprap, mortar sand, construction lime, agricultural lime and bedding sand for livestock operations, sewer and septic systems, landfills, and sand blasting. The term "construction minerals" does not include "industrial minerals" as defined below.
>
> *INDUSTRIAL MINERALS:* **The term "industrial minerals" includes** naturally-existing high quartz level stone, **silica sand**, quartz, graphite, diamonds, gemstones, kaolin, and other similar minerals used in industrial applications, **but excluding construction minerals as defined above**.... "Silica sand" has the meaning given in Minnesota Statutes, section 116C.99, subd. 1(d): "'Silica sand' means well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals. Specifically, **the silica sand for the purposes of this section is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas.** Silica sand does not include common rock, stone, aggregate, gravel, sand with a low quartz level, or silica compounds recovered as a by-product of metallic mining...."
> ....
> **Industrial mineral operations, which includes the excavation, extraction, mining and processing of industrial minerals[,] are prohibited in Winona County** [with an exception for pre-existing uses]....

Index # 132 at WC3008-3010 (emphases added).

[4] For ease of reference, Minnesota Sands sometimes refers to these bans collectively as a "mining ban." But the ordinance separately prohibits all three activities: mining, processing, and transportation.

Because the same "silica sand" that is "commercially valuable for use in ... hydraulic fracturing" is also "sand that is produced and used for local construction purposes[,]" the ordinance amendment has only one practical effect: it bans exports of silica sand. Winona County does not have significant deposits of diamonds, gemstones, or any of the "industrial minerals" listed in the statute—except for silica sand. Index #92 at ¶ 8. Moreover, the "local construction" exception appears to include all existing uses for silica sand within Winona County. The record does not disclose any use for silica sand inside Winona County that would not qualify as "local construction" under the ordinance. By contrast, the "industrial" uses covered by the ban—principally in fracking—are exclusively outside Winona County in other States. In short, Winona County prohibited mining silica sand for use outside of Minnesota, but expressly exempted all "local" uses from its ban.

Since Minnesota Sands' proposed mining is now illegal, its mineral leaseholds are essentially worthless. ADD-101-102 ¶¶ 56-59. John Manes, a minerals and business appraiser, opined in an affidavit that the market value of Minnesota Sands' leasehold interests is now "$0." Index # 100 ¶ 8. Even if its leases would still allow Minnesota Sands to mine sand for "local" purposes, the combination of capital investments needed to start mining plus local market conditions means that construction-sand "mining is not economically viable." ADD-102 ¶ 60.

C. The Lower Courts Reject Minnesota Sands' Claims.

Minnesota Sands brought this action claiming (as relevant here) that the mining ban violates the federal Commerce Clause and requires just compensation under the state

and federal Takings Clauses. *See* Index # 22. Following limited discovery, the County moved to dismiss or in the alternative for summary judgment, and Minnesota Sands cross-moved for summary judgment. The district court granted the County's motion and dismissed Minnesota Sands' claims, and the Court of Appeals affirmed in a divided decision.

1. Commerce-Clause Claim. The Court of Appeals majority first concluded that "the ordinance ... does not discriminate against interstate commerce" because "it even-handedly bans all industrial-mineral mining, which includes silica-sand mining, within the county," and because the majority found "no reason to believe that the ordinance benefits in-state interests and burdens those out-of-state." ADD-8. The majority acknowledged the ordinance's exception allowing mining for "local" use, but concluded *sua sponte* that "Minnesota Sands does not have standing to challenge" the exception. ADD-12. The majority reasoned that "[s]triking down" the local-construction exception "will not redress [Minnesota Sands'] injuries because industrial-mineral mining will continue to be unlawful," and so "the ... ordinance ... will continue to prohibit Minnesota Sands from mining." ADD-13. The majority did not acknowledge that the relief that Minnesota Sands has requested—invalidation of the export ban as to its proposed interstate transactions—would, of course, remedy its harm.

In dissent, Judge Johnson concluded that the "local construction" exception facially discriminates against interstate commerce and that the County, in fact, allows silica-sand mining "for [local] construction purposes and animal bedding." ADD-20-22 (Johnson, J. concurring in part and dissenting in part). He rejected the majority's

conclusions on standing because "Minnesota Sands plainly has suffered a financial injury by being prohibited from mining silica sand and selling it in interstate commerce." ADD-28. Judge Johnson also concluded that the ordinance is "discriminatory in practical effect," because it bans mining silica sand only for uses "that largely take place outside Minnesota, and so effectively allows silica sand to be mined and sold to local consumers but... not ... consumers in other states." ADD-26. As a result, it shelters "local market prices from reflecting out-of-state demand." *Id.* He therefore concluded that the ordinance violates the Commerce Clause.

2. Takings Claim. Turning to Minnesota Sands' takings claim, the majority concluded that "Minnesota Sands has no compensable property interest" in its mineral leases, ADD-16, because four of the six leases "were specifically conditioned upon Minnesota Sands obtaining any required zoning or government approvals." ADD-15. The majority did not address the other leases. Instead it concluded that, since "Minnesota Sands never applied for a [conditional-use] permit" to mine, it "failed to fulfill a condition precedent before its leasehold interest[s] accrued." *Id.*

Judge Johnson dissented in part. He noted that the leases state only "that Minnesota Sands' '*obligations* under this Agreement are conditioned upon'" regulatory approval, but that this "does not affect Minnesota Sands' *rights* under each lease, which have not expired." ADD-38 (first emphasis added). Judge Johnson nevertheless concluded that Minnesota Sands could not show a total regulatory taking, "because it could not prove that the county's zoning ordinance caused the complete elimination of value of any of the" leaseholds. ADD-42. He reached that conclusion by refusing to

consider the leaseholds or the mineral rights as separate property interests, but instead considering the value of "the entireties of the six properties in which Minnesota Sands has leased mineral interests." *Id.* But Judge Johnson noted that the district court had failed to consider Minnesota Sands' claim for a *partial* regulatory taking. ADD-43. He therefore dissented from the majority's rejection of that claim.

ARGUMENT

This Court reviews decisions denying summary judgment and granting a motion to dismiss *de novo*. *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (summary judgment); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811, 815 (Minn. 2011) (motion to dismiss). Summary judgment is appropriate only when the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Odenthal v. Minn. Conference of Seventh–Day Adventists*, 649 N.W.2d 426, 429 (Minn. 2002); Minn. R. Civ. P. 56.03. A motion to dismiss must fail when the complaint sets forth a legally sufficient claim for relief. *See Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). The Court will consider only the facts alleged in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

I. MINNESOTA SANDS IS ENTITLED TO JUDGMENT ON ITS COMMERCE-CLAUSE CLAIM.

The Court of Appeals majority rejected Minnesota Sands' Commerce-Clause claim partly on the merits, and partly for lack of standing. As to standing, the majority agreed that the ordinance allows "local" mining, but it held that eliminating that exception would not help Minnesota Sands. On the merits, however, the majority held that Winona County "even-handedly bans all silica-sand mining." It is difficult to reconcile these two holdings with each other—but in any event, both are wrong.

First, Minnesota sands plainly has standing to challenge this discrimination against interstate commerce. Striking down the mining ban, as Minnesota Sands has requested, would obviously redress its harm—and even if the Court of Appeals were correct to suggest that it could only strike the "local" exception, that would still eliminate the County's unlawful discrimination, which is cognizable harm as a matter of law.

Second, the ordinance violates the Commerce Clause. The ordinance is not "even-handed" because it expressly bans mining "silica sand" for out-of-state use, while allowing "sand" mining for "local" use. Moreover, the undisputed record shows that silica sand can be and is used for local purposes—and Winona County has repeatedly conceded that the ordinance allows this.

A. Minnesota Sands Plainly Has Standing to Assert Its Commerce-Clause Claim.

The majority concluded that Minnesota Sands lacks standing to bring its Commerce-Clause claim, because "[s]triking down" the local-mining exception "will not

redress its asserted injuries," since mining for interstate commerce "would continue to be unlawful." ADD-13.

The majority missed two crucial points. First, Minnesota Sands wants the courts to invalidate not the exception, but *the mining ban itself*, at least as to Minnesota Sands. That certainly would provide redress.

Second, Minnesota Sands' injury under the Commerce Clause is not only its inability to sell sand interstate. The injury is also that the County is *discriminating* in favor of intrastate commerce. The Court of Appeals failed to recognize that ending the "local" exception would indeed redress that discrimination.

1. Minnesota Sands Seeks Invalidation of the Ban, Not the Exception.

The majority concluded that "[s]triking down the [local-mining] provision of the ordinance will not redress [Minnesota Sands'] injuries." ADD-13. The majority failed to recognize that Minnesota Sands *has not asked* for that remedy. Rather, the Complaint in this case requests "an injunction restraining and enjoining Defendant from enforcing the Ordinance[,]" Compl. at 17 and defines "the Ordinance" as the mining ban itself. *Id.* ¶¶ 27-34. In other words, Minnesota Sands seeks exactly the relief that would permit it to participate in the interstate market for silica sand: an order that the County may not enforce its mining ban against Minnesota Sands. That relief plainly would redress Minnesota Sands' injuries so that Minnesota Sands plainly has standing to seek it.

The Court of Appeals said very little about this issue. It addressed the issue only by citing a single decision from this Court which, according to the Court of Appeals'

parenthetical, "sever[ed] as little as possible of an unconstitutional law." ADD-13 (citing *Back v. State*, 902 N.W.2d 23, 31 (Minn. 2017)). Apparently, the panel majority believed that Minnesota Sands is not allowed even to ask for invalidation of the mining ban as a whole, rather than the local exception.

That was error. When part of a statute is invalid, there is no ironclad rule that courts always must remove the smallest possible number of words to make the remaining words valid. In fact, the Legislature has specified that the courts *should* strike additional words or provisions from the statute, if they are

> so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or [if the valid provisions alone] are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. § 645.20; *see Nightclub Mgmt., Ltd. v. City of Cannon Falls*, 95 F. Supp. 2d 1027, 1037 (D. Minn. 2000) ("This provision governs severability with respect to municipal ordinances as well as state law.")

Under this rule, when the courts find a statutory provision invalid, they do regularly strike down other provisions as inseverable.[5] Indeed, in the very *Back* case

[5] *E.g., State v. Kuhlman,* 722 N.W.2d 1, 7 (Minn. Ct. App. 2006) (photographic red-light enforcement ordinance); *Cellco P'ship v. Hatch,* 431 F.3d 1077, 1084 (8th Cir. 2005) (regulation of cell-phone contracts); *Thunderbird Mining Co. v. Ventura,* 138 F. Supp. 2d 1193, 1201 (D. Minn. 2001) (labor legislation for mines); *Archer Daniels Midland Co. v. State ex rel. Allen*, 315 N.W.2d 597, 600 (Minn. 1982) ("If [only] the unconstitutional language of the Act were stricken ... th[e] legislative intent would be completely frustrated."); *Bang v. Chase,* 442 F. Supp. 758, 771 (D. Minn. 1977) (campaign-finance statute).

cited by the Court of Appeals majority, this Court expressly "d[id] *not* adopt the narrowest option" of striking the minimum possible unconstitutional language from the statute. 902 N.W.2d at 31 (emphasis added). Instead, the Court struck down a larger portion of the statute, concluding that "[w]e do the least damage to the statutory scheme, as well as to the separation of powers itself, when we refrain from speculating as to what the Legislature could have done and instead rely on what the Legislature actually did." *Id.* at 32.

This Court's *Chapman* decision sets forth the proper remedial inquiry for cases of this type. Like this case, *Chapman* involved unconstitutional discrimination against interstate commerce: the legislature enacted differential tax rates with the intent both to benefit intrastate transactions (with lower taxes), and to raise more revenue from interstate ones (through higher taxes). This Court explained that, since "both aspects of the legislature's intent cannot be effectuated without violating the Commerce Clause," the remedial question was "which option the legislature would have chosen if it had known it could not do both." *Chapman v. Comm'r*, 651 N.W.2d, 825, 837 (Minn. 2002).

Here, the answer to that question should have been easy. From start to finish, Winona County's avowed purpose has been to ban mining of "frac-sand," not to regulate silica-sand mining across the board. The first draft of the challenged zoning amendment prohibited "frac-sand" mining directly and expressly. Index # 86 at WC0701. The county's attorney revised the statute to try to protect it from legal challenge, but not to change its effect. Index # 85 at WC0787. And public comments overwhelmingly were concerned with interstate uses of sand: to the limited extent that commenters expressed

any views on local sand mining at all, they almost uniformly said they had no objection to it. Index # 121 at WC0012 ("I have no problem with the necessary quarrying for local use. Massive mining for export—as proposed—is simply unacceptable."), WC0094 ("I support the frac sand ban ... that allows dairy farmers to obtain the sand they need and provides sand to builders for construction purposes."); WC0102 (opposing "mining ... for hydro-fracking at some far-flung location"); WC0150 ("Sand for local uses should, of course, be allowable."); Index # 140 at WC1961 (the ban "differentiates this commercial sand from the other uses our county mines typically provide the area"), WC1999 ("[S]mall-scale sand mining operations will continue to operate, [but] it is time to pass a ban on large-scale industrial sand mines"). During the legislative process, even the Land Stewardship Project reassured Winona County that "a zoning ordinance that prohibits the use of land for frac sand operations need not interfere with the ability of property owners to use that land to mine, transport, and sell silica sand for other uses such as in agriculture and construction." Index # 125 at WC2419.

In short, there is little if any indication that the County had any concern about existing or local mining operations. Even with an exception for such operations, the ordinance amendment passed by only a single vote. If the County had known that its regulations to frac sand mining would have to apply even-handedly to local mining as well, it surely would have gone back to the drawing board rather than implementing a complete ban. Striking down the mining ban would give the County just that opportunity, and so that is the appropriate remedy here.

But even if this remedial question were more difficult, the Court of Appeals majority was still wrong to treat it as a jurisdictional issue. The Court of Appeals suggested that it lacks jurisdiction to strike any more language out of the ordinance than is strictly necessary to eliminate its constitutional infirmity. Section 645.20, along with the many cases cited above, refutes that proposition: the statute affirmatively *authorizes* courts to decide when it is appropriate to strike additional language, and it sets criteria to govern the inquiry. If the Court of Appeals was uncertain whether this case met those criteria, it could have directed additional proceedings on that question. But there was no basis for finding a lack of jurisdiction to consider it.

2. Unlawful Discrimination Is Itself a Cognizable Injury.

The panel majority's denial of standing must be wrong, "for it would effectively insulate underinclusive statutes from constitutional challenge." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989). Whenever "a statute [is] challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties." *Orr v. Orr*, 440 U.S. 268, 272 (1979). That second option obviously would benefit Minnesota Sands less than the first, but it still redresses the injury: "The 'injury in fact'... is the denial of equal treatment ..., not the ultimate inability to obtain the benefit." *Ne. Fla. Ch. Assoc. Gen. Contractors v. City of Jacksonville,* 508 U.S. 656, 666 (1993). Because a "right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against," a plaintiff has standing to seek

"withdrawal of benefits from the favored class." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984).

To be sure, these are principles of federal law, often from equal-protection cases. But they certainly apply also to Minnesota law and to discrimination under the Commerce Clause. This Court regularly strikes down local benefits that violate the Commerce Clause—even though such a ruling would not directly benefit the plaintiff—without suggesting there is any jurisdictional problem. *Chapman,* 651 N.W.2d at 837 ("the unconstitutional discrimination of allowing a deduction for Minnesota charitable contributions but not for others can be cured either by making all charitable contributions deductible or by making none deductible;" this Court held that no donations should be deductible even though that did not reduce plaintiffs' tax bill); *Johnson Bros. Wholesale Liquor Co. v. Comm'r of Revenue*, 402 N.W.2d 791, 793 (Minn. 1987) ("the disadvantage suffered by relators could have been corrected either by extending the lower [tax rate] to all wine producers or by ... raising taxes for merchants of Minnesota wine;" the Court raised the Minnesota tax rate even though it did not reduce plaintiff's tax bill); *Archer Daniels Midland Co. v. State ex rel. Allen*, 315 N.W.2d 597, 600 (Minn. 1982) (this Court could have "extended the Act's tax reduction to [interstate producers of] gasohol," but instead "eliminat[ed] the tax reduction for all producers of gasohol" even though it put no money in plaintiff's pockets).

The same is true here. Even if striking down Winona County's local-mining exception were the only remedial option (and it is not, as explained above), that would still directly eliminate the discrimination that Minnesota Sands is suffering. It also would

provide significant *indirect* benefits to Minnesota Sands. As long as the discriminatory ban is in place, local mining interests may view Minnesota Sands as unwanted competition to be kept out. But if the ban were nondiscriminatory—if it were required to be an all-or-nothing proposition covering local mining as well—those same local interests likely would become influential allies for Minnesota Sands in seeking the ban's repeal.

B. As a Facial Export Ban, The Ordinance Amendment Is *Per Se* Unconstitutional.

The federal Constitution's Commerce Clause creates an "overriding requirement of a national 'common market.'" *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977) (citation omitted). "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will, by customs duties or regulations, exclude them." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). As a result, "facial discrimination" against interstate commerce "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), and the courts "appl[y] a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade." *Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994) (citation omitted). Regulations also violate the Commerce Clause if they "discriminate[] against interstate commerce ... in practical effect." *Hughes*, 441 U.S. at 336; *Hunt*, 432 U.S at 350 (invalidating

regulation that "has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them").

One of the longest-established consequences of this non-discrimination rule is that state and local governments may not ban exports of their natural resources. *E.g.*, *Hughes*, 441 U.S. at 329, 337 (minnows); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598 (1923) (natural gas); *Vandalia Coal Co. v. Special Coal & Food Comm'n of Indiana*, 268 F. 572 (D. Ind. 1920) (coal); *Haskell v. Kan. Nat. Gas Co.*, 224 U.S. 217, 224 (1912) (natural gas). Simply put, a state may not "force those outside the State to bear the full costs of 'conserving' [resources] within its borders when equally effective nondiscriminatory conservation measures are available." *Hughes*, 441 U.S. at 337. Nor may a state discriminate against "businesses catering to a primarily interstate market." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575-76 (1997).

Winona County has squarely violated these basic constitutional safeguards.

1. Winona County Is Directly Discriminating Against Interstate Commerce.

On its face, Winona County's zoning amendment bans mining except for "local" purposes. And the practical effect of the ordinance is exactly the same. The County has prohibited mining for the "industrial" uses that occur in other states, while carving out a convenient exception for the "construction" and agricultural uses that occur in Minnesota. That runs directly afoul of well-established Commerce Clause principles.

The Court of Appeals majority was able to characterize the ordinance as "even-handed" only through an impossibly-strained reading of both the ordinance itself and the underlying facts. The ordinance bans the mining of "silica sand." But it *permits* mining of "sand that is produced and used for local construction purposes." Silica sand obviously is one variety of sand. Therefore, the ordinance facially allows silica sand to be mined for "local" purposes, but not for any other purpose.

The record bears this out, as explained above. *See supra* Statement of Facts Pt. A. As Judge Johnson observed, "both before and after the 2016 amendments to the zoning ordinance, silica sand has been and continues to be used for both 'local construction purposes' and 'industrial' purposes." ADD-20-21. Indeed, the County's planning commission heard evidence "that there is no geological difference between the industrial mineral 'silica sand' and construction mineral 'sand' and that the only distinction in the ... Ordinance between 'construction minerals' and 'industrial minerals' is how they are used." ADD-21. Public comments also reflected an understanding that the statute banned some uses for silica sand but not others. *E.g.*, Index # 129 at WC0403 ("the ban ... doesn't prohibit all silica sand operations, but only industrial sand operations"). The Land Stewardship Project—the legislation's original drafter and main proponent—took the same position. In a memo to Winona County, the LSP distinguished "between the impacts of frac sand operations and the impacts of small-scale mining of sand (**even if it may include silica sand**) for local or regional uses such as construction or agricultural bedding." Index # 125 at WC2419 (emphasis added). And the Winona County Planning

Commission's minutes reflect the following exchange between a commissioner and a representative of the Land Stewardship Project:

> [Commissioner] E. Hanson stated that silica sand used for fracking is one industrial use but questioned whether we would not have a similar problem if using **same silica sand out of the same pile** for other purposes—for example, dairy bedding. How is it different? Response: Dairy cattle bedding is not an industrial use, and the only use of industrial sand introduced in Winona County is for fracking. Small mining for dairy bedding and construction is different ....

ADD-109 at WC0911 (emphasis added)**.**

In this litigation, Winona County has consistently admitted that the same sand subject to the mining ban can be lawfully mined for "local" use. As Judge Johnson noted, in the district court "the county's own zoning administrator"—who is responsible for interpreting the ordinance—"executed an affidavit in which he stated that sand and gravel considered by the zoning ordinance as a construction mineral may include silica sand, as silica sand is found throughout the County and used for construction purposes and animal bedding." ADD-22; *see* Index # 119 ¶¶ 3, 11, 13. And in its Court-of-Appeals briefing, the County repeatedly re-stated that position (emphases added):

- "The Ordinance Amendment also allows for construction mineral operations, **which can include mining for silica sand."** Winona Cnty. Ct. App. Br. at 39.
- "[U]nder the challenged Ordinance Amendment ... Appellant **could engage in construction mineral operations** under its current leases." *Id.* at 41; *see id.* at 44.
- "Appellant ... asserted ... that **'silica sand' defined as an industrial mineral is identical to sand permitted to be used for construction purposes** .... This is consistent with the Zoning Administrator's interpretation of the Ordinance Amendment." *Id.* at 41.

See also id. at 25 ("silica sand sold as a construction mineral and silica sand sold as an industrial mineral operate in separate commercial markets").

In other words, the Court of Appeals saved the constitutionality of Winona County's ordinance by re-writing it in a way that Winona County had never asked for. If the County had banned mining silica sand for any purpose, that would have raised different constitutional questions regarding equal protection, due process, and takings. But the ordinance does not say that, and the County has never enforced that. Instead, the ordinance must be judged as the County has written, interpreted, and enforced it: as a ban on mining for interstate commerce, with an exception for "local" use.

2. Even Valid Environmental Concerns Must Be Addressed in a Non-Discriminatory Manner.

The County has no justification for this discrimination against interstate commerce. It has argued that the mining ban is motivated not by hostility to the interstate commercial activity (fracking), but instead by concern for the local environment and public health. But those concerns do not license the County to discriminate against interstate commerce. "[T]he evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). As a result, state or local government may not pursue even "a presumably legitimate goal ... by the illegitimate means of isolating the State from the national economy." *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 341-42 (1992) (citation omitted). "[A]n ordinance is not valid 'simply because it professes to be a health measure.' If it were, the Commerce Clause would be unable to reach discriminatory state action 'save for the rare instance

where a state artlessly discloses an avowed purpose to discriminate against interstate goods.'" *Nat'l Ass'n of Fundraising Ticket Mfrs. v. Humphrey*, 753 F. Supp. 1465, 1472 (D. Minn. 1990) (citations omitted).

Under that rule, the U.S. Supreme Court has repeatedly held that environmental and public-health interests do not support discrimination against interstate commerce. State and local governments often invoke such concerns—very similar to the County's here—in banning or restricting imports of various kinds of garbage or waste products. The Supreme Court recognizes that states may legitimately deal with these concerns in non-discriminatory ways, such as by "slowing the flow of *all* waste into the State's remaining landfills"—but they may not "discriminat[e] against articles of commerce coming from outside the State[.]" *Philadelphia*, 437 U.S. at 617, 626. Put simply, when the government's "concern [about] environmental conservation and the health and safety of its citizens ... does not vary with the point of origin of the waste," it may not "saddle those outside the State with most of the burden of" conservation. *Chem. Waste Mgmt.*, 504 U.S. at 345-46 (citation omitted); *accord Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 367 (1992) ("Michigan could ... limit the [total] amount of waste that landfill operators may accept each year. There is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State.") (citation omitted).

Those principles govern this case as well. Winona County may address its environmental, public-health, or economic concerns by directly regulating the size,

number, and operations of mines within its borders. That is the practice of neighboring counties with respect to silica sand mining. Index # 85 at WC0799; Index # 90 at WC0774. That is what Winona County itself does with respect to the Nisbit mine. And that is what the County's Planning Commission expressly recommended in the very legislative process that instead led to the challenged ordinance. But what the County may *not* do is address environmental or public-health concerns by sealing itself off from interstate commerce, while continuing to allow mining for local purposes. If the County could do that, states and localities across the country would find other local problems that could be "solved" by their own embargoes, quarantines, or boycotts of interstate commerce. That is incompatible with the national common market that the Commerce Clause creates. *Hunt*, 432 U.S. at 350; *H.P. Hood*, 336 U.S. at 538-39. The court below erred by concluding otherwise.

C. The District Court's Alternative Theories for the Ban Are Also Erroneous.

The Court of Appeals majority did not rely on two alternative theories for the ordinance's legitimacy that the district court had advanced. The district court said that frac-sand and construction-sand mining are "two different markets for the sand" and that Winona County may regulate the two markets differently, regardless of the impact on interstate commerce. ADD-17. The district court also said that the ordinance does not discriminate against interstate commerce at all because the permitted "local" uses "could include ..Wisconsin," across the river from Winona County. ADD-18-19. Neither argument withstands scrutiny.

1. The U.S. Supreme Court has not Implicitly Overturned the Constitutional Prohibition on Export Bans.

The district court's "different markets" theory cannot be used to overturn the longstanding prohibition on export bans. Minnesota Sands has described that long line of cases above. In positing its "different markets" theory, the district court cited other precedents that involve taxes rather than outright bans on commerce, and that did not involve overt discrimination against interstate commerce. In *Alaska v. Arctic Maid,* Alaska imposed different levels of tax on wild-caught salmon depending on whether it was frozen on-shore or on-ship, and the Supreme Court concluded that "[n]o 'iron rule of equality' between taxes laid by a State on different types of business is necessary." 366 U.S. 199, 205 (1961) (citation omitted). Similarly, in *General Motors Corp. v. Tracy*, the Court allowed Ohio to impose different tax rates on natural gas retailers and wholesalers, because "the different entities serve different markets," and so there was no discrimination for Commerce-Clause purposes. 519 U.S. 278, 299, (1997).

Arctic Maid and *General Motors* are markedly different from this case. This case involves express discrimination in favor of "local" commerce and an outright ban on other commerce. Those cases involved neither—they were about facially-neutral taxes that were alleged to impact interstate markets more than local ones. Those decisions do not purport to overrule the well-established line of cases striking down export bans, and they certainly have not been interpreted to do so. Indeed, the Supreme Court's prominent *Hughes* decision—striking down Oklahoma's ban on the export of minnows as violating the Commerce Clause—came 18 years after *Arctic Maid*, and the *Hughes* Court did not

even see the need to cite that decision. Similarly, *General Motors* involved a *tax* on natural gas sellers *within* a state, but the Supreme Court has long since held that states may not *ban exports* of natural gas. *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 255 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-97 (1923). The *General Motors* Court did not purport to overrule these precedents.

On the district court's reading, the Supreme Court has implicitly changed the rules so that Florida can ban exports of its oranges, or Texas its oil, or Michigan its cars. That finds no support in law or logic.

2. Allowing Exports to the "Local" Area of Wisconsin Still Discrimates Against Interstate Commerce.

Second, the district court was gravely wrong to suggest that the commerce clause allows Winona County to ban commerce with the entire United States except the "local" part of Wisconsin. As an initial matter, that is a misinterpretation of the ordinance's exception for "local" commerce. In Minnesota, "'[l]ocal government' usually refers to counties, towns, and cities." Deborah A. Dyson, House Research: Terms Used in Local Government Legislation, Oct. 2016, *available at* http://www.house.leg.state.mn.us/hrd/pubs/ss/sslgterms.pdf. So when a *local* government uses that word, as here, it naturally is referring to its own geographical jurisdiction, not to areas in other States.

But more importantly, allowing exports to a tiny sliver of Wisconsin—but nowhere else—would still facially discriminate against interstate commerce. The district court cited nothing, and Minnesota Sands is aware of nothing, that allows a state or local

government to specify one small area of one other state as the exclusive lawful export market for its goods. The U.S. Supreme Court's longstanding jurisprudence regarding export bans would mean almost nothing if it could be evaded so easily. Indeed, the Supreme Court has stated that the Constitution prohibits limiting commerce even to a *group* of States. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("[T]he dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region[.]").

All of this is even more true given the practical circumstances of this case. The part of Wisconsin just across the river from Winona County has its own rich supply of silica sand. And it has no oil or gas reserves of the kind that generate much of the nationwide market for this sand. Index # 79 at 5. Shipping a few truckloads of Winona-County sand across the border would not open the County to the "interstate market" in any meaningful way.

In short, if a local government allows commerce with only a tiny sliver of the rest of the country, while banning it with the remaining out-of-state areas and permitting local commerce, it is still facially discriminating against interstate commerce. The Commerce Clause does not permit that.

II. WINONA COUNTY HAS DEPRIVED MINNESOTA SANDS OF THE VALUE OF ITS LEASES WITHOUT COMPENSATION.

Even if the Court finds that the ordinance amendment does not violate the commerce clause, it is a taking of Minnesota Sands' property for which just

compensation must be paid under both the state and federal Constitutions.

The Court of Appeals erred in finding that Minnesota Sands had no compensable property interest. It noted that "[l]ease rights are compensable property rights to which the Takings Clause applies." ADD-16. But it erroneously found that Minnesota Sands, by not obtaining regulatory approvals before the zoning ordinance was enacted, had lost its leasehold interests in its six leases to mine frac sand. This is inconsistent with the plain language of the leases, as well as Minnesota and federal case law. The panel majority dismissed Minnesota Sands' takings claim on these grounds without reaching either a *Lucas* or a *Penn Central* analysis of property rights deprivation. Minnesota Sands has suffered the loss of any economically-viable use of its leasehold interest. Under either test, Minnesota Sands is entitled to compensation.

A. Minnesota Sands Has a Compensable Property Interest Because It Holds Unexpired Leases to Mine Frac Sand.

Minnesota Sands did not lose the value of its leasehold interests simply because it had not obtained a permit before frac-sand mining was banned. Under Minnesota law, Minnesota Sands has protected property rights in its mineral leaseholds, even without a Conditional Use Permit (CUP) in hand.

1. Minnesota Sands was not Required to Obtain Regulatory Approvals Before the Ban Went into Effect to Maintain its Leasehold Interest.

Minnesota Sands has a compensable property interest because it has six unexpired leases to mine frac sand in Winona County. *See* ADD-93-97 ¶¶ 12-24; ADD-38 (Johnson, J., concurring in part and dissenting in part). The Court of Appeals ruled that Minnesota Sands had no leasehold interest—and therefore no compensable property

interest—because it failed to fulfill the condition precedent of obtaining a CUP prior to the amendment of the zoning ordinance. ADD-15-16 (citation omitted). Therefore, the Court of Appeals never reached the issue of whether Minnesota Sands' property had been taken. That was error.

"Generally speaking, state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010). As Judge Johnson articulated, Winona County's failure to obtain a CUP prior to the date Winona County made it illegal to do so does not deprive Minnesota Sands of its rights under the leases. ADD-38. Instead, Minnesota Sands' obligation to pay royalties to the property owners is conditioned on Minnesota Sands obtaining the required zoning or government approvals. *Id.* That is consistent with the express terms of Minnesota Sands' lease agreements. *E.g.*, Index # 107 ("Tenant's obligations under this Agreement are conditioned upon ... zoning or other governmental approvals"). Minnesota Sands' rights—which include the right to mine frac sand—are still intact. *See Metro. Sports Facilities Com'n v. Gen. Mills, Inc.*, 470 N.W.2d 118 (Minn. 1991) (finding that a condition precedent could apply to a particular obligation and not affect the other rights of the parties).

As Judge Johnson's dissent explained, the majority's ruling is inconsistent with settled Minnesota and Federal case law. In *Wensmann Realty*, "[t]he supreme court did not state that a pre-existing right to engage in a regulated activity is a prerequisite of a takings claim." ADD-36 (Johnson, J. concurring in part and dissenting in part) (citing *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632-34 (Minn. 2007)).

Instead, this Court ruled in favor of the property owner, remanding to the district court for further proceedings even though the city's comprehensive plan prohibited the property owner from developing his property. *Wensmann Realty*, 734 N.W.2d at 634-37; *see also St. Genevieve Gas Co. v. Tennessee Valley Auth.*, 747 F.2d 1411 (11th Cir. 1984) (finding a taking had occurred even where mineral owners were not actively mining); *Eagle Lake Imp. Co. v. United States*, 141 F.2d 562 (5th Cir. 1944) ("[A] mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory.").

Hundreds or thousands of leases in the state of Minnesota likely contain similar language requiring parties to obtain regulatory approvals like the CUP process in this case. If such a clause causes the leases to become invalid when the activity is banned, it will give the government a free pass to take property without compensation. It will also incentivize parties to exclude such clauses from their leases – surely not a policy the Court of Appeals intended to promote. The Court of Appeals' rule that a leaseholder's failure to obtain regulatory approvals before an activity was banned deprives them of their compensable property interest should be reversed.

2. The Lack of a CUP to Engage in Mining is not a Bar to Minnesota Sands' Takings Claim.

In a highly regulated industry like mining, it is not unusual to find permitting requirements like the CUP Winona County required the Nisbit mine to obtain before it began mining silica sand. But under Minnesota law, a company like Minnesota Sands is not required to have a CUP in order to hold a compensable property interest. When "the

applicant for a [land use permit] complies with the specified permit requirements, approval of a permitted use follows as a matter of right." *Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 689 (Minn. 1991);[6] *accord, e.g., Snaza v. St. Paul*, 548 F.3d 1178, 1183 (8th Cir. 2008) ("if the permit application meets local requirements," "a conditional use permit in Minnesota generally follows as a matter of right"); *Scott Cty. Lumber Co. v. Shakopee*, 417 N.W.2d 721, 727 (Minn. Ct. App. 1988) ("Where a zoning ordinance specifies standards which must be applied in determining whether or not to grant a conditional use permit, and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law."); *Hay v. Grow Tp., Anoka Cty.*, 206 N.W.2d 19, 22 (Minn. 1973) (same); *see Energy Mgmt. Corp. v. City of Shreveport*, 397 F.3d 297 (5th Cir. 2005) (finding the claimant's "right to exploit its mineral interests by seeking a drilling permit from the LOC is a legally protected property right.").

[6] For purposes of the Due Process Clause, *Northpointe Plaza* actually "recognize[d] a constitutionally protected property interest in an application for a land use permit" when the applicant meets the legal requirements. 465 N.W.2d 686, 689 (Minn. 1991). The Court need not decide whether this is also a property interest within the meaning of the takings clause. *See Hay v. Andover*, 436 N.W.2d 800, 804 (Minn. Ct. App. 1989) ("property" is defined differently for due-process and takings purposes). The point is that Minnesota Sands certainly had a legal right to mine in compliance with conditional-use requirements—so when the city eliminated that right, it destroyed the value of the mining leaseholds. Under well-established law, that is a regulatory taking.

This right still exists even if the "specified permit requirements" may be open-ended and somewhat discretionary in nature. In *Northpointe Plaza*, for instance, the ordinance required that a "proposed use will not be detrimental to or endanger the public health, safety, convenience, or general welfare," that it would "not be injurious to the use and enjoyment of other property in the neighborhood," and that "[t]he applicant ... agree to such limitations or conditions as may be deemed appropriate by the approving body." 465 N.W. at 687 (quoting Rochester Code of Ordinances § 61.301). Here, Winona County's conditional-use requirements for mining are considerably more detailed and concrete. ADD-76-81 §§ 9.10.3-9.10.6. Minnesota Sands thus had a legal right to mine in compliance with those requirements. The ban does not merely reiterate a land-use restriction that was already in place.

Lucas v. S.C. Coastal Council., 505 U.S. 1003, 1028-1029 (1992) (finding that "we have refused to allow the government to decree [a restriction] anew (without compensation)…though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title"). When Winona County enacted the ban, it specifically stated that "[t]he amendment would apply only to future industrial mineral mining operation requests, not existing permitted operations, such as the Nisbit mine in Saratoga Township. Mining for construction and agricultural bedding purposes would not be affected by the amendment." Index # 85 at WC0804. The fact that the County went to pains to describe what would *not* be changed makes it clear that the zoning ordinance was a new land-use restriction that affected Minnesota Sands' property rights.

At the very least, whether Minnesota Sands was eligible for a conditional-use mining permit is a disputed issue of material fact. The County presented no evidence that Minnesota Sands did not or would not satisfy the specified permit requirements. Therefore, at minimum, a trial of that issue was necessary.

B. The County Has Made a Partial Regulatory Taking of Minnesota Sands' Property.

Winona County has effected at least a partial taking of Minnesota Sands' property. Banning the mining of silica sand for fracking while permitting it only for "local construction purposes" eliminates the economically-valuable mineral rights in the land, and severely interferes with Minnesota Sands' investment-backed expectations. It is therefore a compensable taking. The Court of Appeals majority did not reach this analysis. Judge Johnson correctly noted that the district court had not applied the three-factor *Penn Central* test (discussed below) to this case, and that he would reverse and remand so that the district court could do so. ADD-43.

The U.S. Supreme Court set forth the test for the doctrine now known as "regulatory takings" in *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978). The factors considered under Minnesota's constitutional test are similar, *see Wensmann Realty, Inc. v. Eagan*, 734 N.W.2d 623, 632 (Minn. 2007), but Minnesota's test applies the factors more leniently, making it easier to show a taking. *Interstate Cos. v. Bloomington*, 790 N.W.2d 409, 413 (Minn. Ct. App. 2010) ("[E]ven if a takings claim fails under ... a *Penn Central* analysis, the property owner may be entitled to compensation under the Minnesota Constitution, based on its more restrictive

language."). Minnesota's takings clause extends compensation not just to property that has been taken, but property that has been destroyed or damaged as well. Minn. Stat. § 117.025, subd. 2 (2016).

Accordingly, under both the federal and state tests, the relevant factors are: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Wensmann*, 734 N.W.2d at 632-33 (citation omitted). The "approach is flexible," to accurately assess "the severity of the burden that government imposes upon private property rights." *Id*. at 633 (citation omitted). The overall goal "is to ensure that the government does not require some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 632 (citation omitted). Here, as Minnesota Sands argued in the District Court and Court of Appeals, all three factors indicate that banning fracsand mining is a compensable taking.

First, the economic impact of the ban on mineral rights-holders is enormous. Under this prong, the question is "whether the city's decision leaves any reasonable, economically viable use of the property." *Id.* at 635. Mr. Frick explained in the district court that the mining that remains legal "is not economically viable given the anticipated capital investments needed to get these mines into operation." ADD-102 ¶ 60. And that is not surprising. The land in question contains no valuable minerals except silica sand. *See* ADD-91 ¶ 8. There is no evidence that Winona County was facing any kind of shortage of silica sand for "local construction purposes"; existing quarries evidently are

filling that need adequately. And as Judge Johnson noted, the mining ban itself dramatically affects local prices for silica sand by insulating local buyers from nationwide competition. As a result, the economics of selling silica sand locally would be very different from selling nationally. At a minimum, this was a question for trial, not for summary judgment.

Second, Minnesota Sands had very weighty investment-backed expectations that the mining ban frustrated. Minnesota Sands has invested nearly $3 million in this project, beginning many years before the ban was enacted. ADD-98 ¶ 29-31. Indeed, when Mr. Frick entered the leases in 2011, Winona County was already considering a CUP application for the Nisbit mine to produce silica sand "as a proppant for hydraulic fracturing." *Envtl. Impact Statement*, 849 N.W.2d at 84. And Winona County ultimately *granted* that CUP. *See* Index # 101 at WC1266. It was reasonable for Minnesota Sands to invest, in the expectation that it could obtain a similar permit if it followed a similar process. The mining ban completely upends that expectation.

Third, the *Penn Central* analysis considers "the *nature* rather than the merit of the governmental action." *Wensmann*, 734 N.W.2d at 639 (citation omitted). The district court, therefore, was categorically mistaken to suggest that an ordinance can never be a taking if it "substantially advances a state interest" or is a "reasonable land use regulation[]." ADD-19. The U.S. Supreme Court has expressly abandoned "the 'substantially advances' formula" as "regrettably imprecise," concluding "that this formula prescribes an inquiry in the nature of a due process, not a takings test, and ... has no proper place in our takings jurisprudence." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S.

528, 540, 542 (2005). And that makes perfect sense. "[W]hether a regulation of private property is *effective* in achieving some legitimate public purpose" simply "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Id.* at 542. Building a road, establishing a park, or operating an airport can be perfectly reasonable state interests—but of course taking land to do those things still requires just compensation.

Properly considered, the nature of the mining ban here indicates that it is a taking. Winona County has only one minable mineral: silica sand. The ordinance leaves only a sliver of an opportunity to mine that mineral. As a result, the practical effect of the ordinance is that Winona County has all but abolished mineral rights within its borders. That is no traditional regulation of property rights. It is a taking that requires compensation.

As Judge Johnson pointed out, the trial court did not apply the *Penn Central* factors to Minnesota Sands' case. ADD-43. At the very least, this case should be remanded with instructions to the trial court to perform that analysis.

C. The County Has Rendered Minnesota Sands' Mineral Leases Worthless.

As just explained, Winona County has taken at least a substantial part of Minnesota Sands' mineral rights. In fact, under the proper test, the County has committed a total regulatory taking. "[W]hen the owner of real property has been called upon to sacrifice all economically-beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C.*

Coastal Council, 505 U.S. 1003, 1019, 1026 (1992). Here, Winona County's zoning amendment had exactly that effect. Minnesota Sands holds leasehold interests to mine frac sand. The County has now made that illegal, meaning that Minnesota Sands' leases are worthless. The majority below did not reach this question because it wrongly held that Minnesota Sands had no property interest at all. But the reasons for rejecting a total-takings claim given by the concurrence below, and by the district court, are incorrect.

1. Mineral Rights are Property for Takings Purposes.

Judge Johnson, to the extent he concurred below, rejected Minnesota Sands' claim that the County has taken its mineral rights, because he thought that "mineral interests may not be severed from non-mineral interests" for the takings analysis. ADD-42. As a result, he would have applied the takings analysis to "the entireties of the six properties in which Minnesota Sands has leased mineral interests"—including the surface estates in those properties, which the mining ban does not affect at all. *Id.*

The great weight of authority contradicts that approach. In *Pennsylvania Coal Co. v. Mahon*, for instance, the U.S. Supreme Court considered a takings challenge to a Pennsylvania statute that "forbids ... mining ... in such way as to cause the subsidence of" certain surface structures where "the surface is [not] owned by the owner of the underlying coal." 260 U.S. 393, 412-13 (1922). If the relevant parcel for the takings analysis had been a combination of the surface estate and mineral rights, the case should have been easy, since the statute significantly *enhanced* the value of the surface estate. But the Supreme Court saw things otherwise. It stated that the statute "make[s] it

commercially impracticable to mine," and that this was a taking. *Id.* at 414-15.[7] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court rejected a facial challenge to a different anti-subsidence law, and it addressed the "denominator problem" head-on:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.

480 U.S. 470, 497 (1987). Addressing that issue, the Court held that "[w]hen the coal that must remain beneath the ground [to prevent subsidence] is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that ... they have [not] been denied the economically viable use of that property." *Id.* at 499. The Court did refuse to subdivide mineral rights into an even smaller "support estate"—but nowhere did it suggest that the mineral rights themselves were not a property interest at all or had to be combined with the surface estate to determine the takings "denominator."

To the extent that the U.S. Supreme Court has not expressly addressed this issue, the lower courts have filled the gap. The U.S. Court of Federal Claims has special expertise in takings law, and it has stated that "[t]here is no question ... that mineral rights are property subject to the Fifth Amendment's taking clause." *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 405 (1989), *corrected*, 20 Cl. Ct. 324 (1990) (rejecting as

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[7] Other Supreme-Court takings cases involving mining interests likewise include no suggestion that the value of the surface estate is even relevant. *E.g.*, *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958).

"completely off the mark" the argument that a taking had not occurred when mineral rights were eliminated but a surface estate remained); *accord Foster v. United States*, 607 F.2d 943, 944 (Ct. Cl. 1979) (finding taking where plaintiff had only mineral rights and government prevented their use).[8]

This position is the only one that makes sense. If Minnesota (or any other jurisdiction) passed a law abolishing mineral rights within its boundaries, surely that would be a taking even though it left surface estates unaffected. But that outcome is possible only if the mineral estate is a separate unit of "property" for takings-clause purposes.

The cases that Judge Johnson cited do not show the contrary. *See* ADD-41-42. *Apollo Fuels, Inc. v. United States* held that the mineral leases in question retained some value, but it did not combine them with the corresponding surface estates to reach that conclusion. 381 F.3d 1338, 1346 (Fed. Cir. 2004). *Stephenson v. United States* declined to sever mineral rights in a single piece of land into separate "deep and shallow" estates (although it held out the possibility that state law might permit such an outcome), but it

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[8] Minnesota law also recognizes a clear distinction between a mineral estate and a surface estate. "Where there is a reservation or conveyance of mineral lands severing the mineral estate from the surface estate, the minerals become a separate freehold estate of inheritance." *Wichelman v. Messner*, 83 N.W.2d 800 (1957). This distinction between the mineral estate and surface estate is so ingrained in Minnesota law that the state, by law, retains the mineral rights as a separate estate whenever it conveys real property. "Thus, when a private party purchases land from the state, a severed estate results in those cases where the state had mineral rights for the parcel. Minn. Stat. §§ 16B.286, 93.01–.04, 94.14 (2012). In those cases, the private party acquires only the surface estate." *In re Envtl. Assessment Worksheet for 33rd Sale of State Metallic Leases in Aitkin, Lake, Saint Louis Ctys.*, 838 N.W.2d 212 (Minn. Ct. App. 2013).

did not suggest that the surface state must be combined as well. 33 Fed. Cl. 63, 69-70 (Fed. Cl. 1994). Admittedly, in *Machipongo Land & Coal, Inc. v. Pennsylvania*, the Pennsylvania Supreme Court misread *Keystone* to prohibit any distinction for takings purposes between mineral and surface estates. 799 A.2d 751, 766 (Pa. 2002). And Judge Johnson cited one other case in which a judge of the Court of Federal Claims expressly disagreed with *Whitney Benefits*. *See Cane Tennessee, Inc. v. United States*, 54 Fed. Cl. 100, 104-09 (Fed. Cl. 2002). But these cases cannot carry the day; they are simply too contrary to the Supreme Court's decisions and to good sense. And even if there were some question under the federal Constitution, Minnesota's broader takings clause should protect mineral rights.

2. Minnesota Sands Cannot Realistically Mine for Construction Sand.

That leaves Judge Johnson's alternative theory, which the district court also adopted; that Minnesota Sands cannot have suffered a total taking because, even under the current zoning rules, it can still mine silica sand for local construction purposes. That theory also fails for two reasons.

First, and most importantly, neither the district court nor the concurrence below considered whether construction-sand mining is an economically realistic use of Minnesota Sands' leaseholds. For a total-regulatory-takings claim, the question is not whether there is any possible lawful use of the property left. There almost always is; it is difficult to imagine a law that would prevent a landowner from doing *anything* with or on the property. In the Supreme Court's foremost total-regulatory-takings case, for instance,

the state had prohibited building new structures on the plaintiff's land. *Lucas v. S.C. Coastal Council*, 505 U.S. at 1007. There was no indication that it prohibited the plaintiff from using the land for other purposes (*e.g.*, taking walks, watching birds, holding campouts or outdoor parties). Nevertheless, the regulation was a total taking because it deprived the landowner of "all economically beneficial use" of the property and required him to "leave [it] economically idle." *Id.* at 1019.

Thus, as the concurrence below acknowledged, the relevant inquiry is whether "the county's zoning ordinance caused the complete elimination of value of" Minnesota Sands' mineral rights. ADD-42. The concurrence and the district court said that it did not, "because sand may be mined at each of the six properties so long as it is sold for 'local construction purposes.'" *Id.* But even assuming construction mining is *legal*, the district court and the concurrence failed to ask the crucial question: whether it is *economical*, so as to impart value to the leaseholds. There is substantial evidence in the record that it is not. Minnesota Sands' executive Mr. Frick testified that construction mining is not a viable option, and Minnesota Sands' expert witness calculated that the leases have no value under the industrial-mining ban. *See supra*, Statement of the Case and Facts. I f the trier of fact credited that testimony, then under *Lucas* and its progeny that would establish a total regulatory taking. The district court and the concurrence below failed to grapple with this evidence, and thus wrongly rejected Minnesota Sands' total-takings claim. At a minimum, remand is necessary for a trial on this issue.

Second, the theory that there is no total taking because Minnesota Sands can still mine for "construction" sand is inconsistent with the Court of Appeals' actual holding on

the Commerce Clause. If the panel majority had been correct that the ordinance "outlaws all silica-sand mining—not just silica sand to be processed and used in fracking[,]" ADD-9, then there unquestionably would be no value remaining in Minnesota Sands' mineral rights. The panel majority avoided this issue on the mistaken ground that Minnesota Sands had no leasehold rights at all. But once that error is set aside, the choice is unavoidable. If the mining ban is discriminatory as Minnesota Sands has explained, then it violates the Commerce Clause; if it were "even-handed," as the Court of Appeals suggested, then it would be a total regulatory taking.

CONCLUSION

The judgment should be reversed, and the case remanded for entry of judgment in favor of Minnesota Sands. At a minimum, the judgment should be reversed, and the case remanded for trial.

Dated: December 6, 2018

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