

No. 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 AMICUS CURIAE LAND STEWARDSHIP PROJECT

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STATEMENT OF THE ISSUES

Amicus Curiae, the Land Stewardship Project, adopts the Statement of the Issues as presented in the principal brief of Respondent Winona County (“Respondent”).

STATEMENT OF THE CASE

LSP adopts Respondent’s Statement of the Case.

IDENTIFICATION OF *AMICUS CURIAE*, LAND STEWARDSHIP PROJECT

This appeal—addressing the constitutionality of Winona County’s Zoning Ordinance Amendment regulating the mining, processing, and transportation of “industrial minerals,” including silica sand (the “Ordinance Amendment”)—carries serious implications for the health, safety, and welfare of Winona County residents, due in part to the unique topography of the karst region within which the County is situated. The concerns of Winona County and its residents are also felt by hundreds of members of *amicus curiae*, the Land Stewardship Project (“LSP”), and directly relate to the harmful risks posed by industrial mineral mining.¹

¹ Pursuant to Rule 129.03, LSP certifies that this brief was not authored, in whole or in part, by counsel for either party to this appeal. No other person or entity, besides LSP, has made a monetary contribution to its preparation or submission.

Amicus curiae, LSP, is a private, nonprofit membership-based organization founded in 1982 to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop healthy communities.² At the core of LSP's work are the values of stewardship, justice, and democracy.

LSP provides policy development, research, and organizing expertise on issues of concern identified by local communities. LSP's work supports the type of public participation in county government decision making that is vital for ensuring that residents are able to promote and protect their interests in maintaining safe, healthy, and prosperous communities. As of November 2018, LSP had 5,595 members in 3,956-member households, including 393 Winona County individuals in 255-member households.

The events leading up to the adoption of the Ordinance Amendment reflect a joint effort by LSP and hundreds of Winona County residents who sought to protect their community from the harmful effects of industrial silica sand mining. Many Minnesotans had witnessed the devastation inflicted upon rural Wisconsin communities after the mining industry there had exploded from several silica sand operations a decade ago to more than 100 in 2016.

² With the exception of the most current LSP member statistics, the facts cited in this section are taken from the Affidavit of Johanna Rupprecht, which can be found in the record at Doc. 50.

In 2015, LSP's "Winona County Organizing Committee" made its central focus encouraging the Winona County Board of Commissioners (the "County Board") to adopt a prohibition against industrial silica sand mining. Over the course of 2015 and 2016, LSP organized four public meetings to raise awareness about the dangers of industrial mineral mining and to encourage community involvement. The collective attendance at these meetings exceeded 309 people. Also during this time, approximately 840 individuals – who had never before been in contact with LSP – were added to LSP's list of those supporting a ban on industrial silica sand mining.

LSP's collaboration with Winona County residents led to widespread community participation, including the following: (1) 53 County residents wrote letters to the editors of Winona County newspapers expressing their desire for the County to prohibit industrial silica sand mining; (2) 43 residents, including LSP members, publicly addressed the County Board at their regular meetings, urging them to adopt the County-wide prohibition against industrial silica sand mining; (3) at least 122 residents submitted postcards to the County Board expressing their individual reasons for supporting the prohibition of industrial mining; and (4) 72 residents and LSP members spoke at the County Board's June 30, 2016 public hearing, with 80 percent of the residents expressing their desire for the Board to prohibit industrial silica sand mining in Winona County.

Throughout these efforts, LSP worked diligently alongside Winona County residents to provide the County Board with detailed evidence regarding the dangers that industrial silica sand mining poses to the health and safety of the community and its environment. On November 22, 2016, after weighing all of the evidence, the County Board voted to amend the County zoning ordinance by legislatively enacting the Ordinance Amendment that is the subject of the present litigation.

STATEMENT OF THE FACTS

Although LSP adopts Respondent's Statement of the Facts, it is submitting the following additional evidence from the record, which demonstrates the health, safety, and environmental risks associated with industrial mining – and specifically silica sand mining – in Winona County.

Southeastern Minnesota is home to a unique karst topography, which includes numerous dolostone, limestone, and sandstone aquifers. Doc. 125, WC2387. Large volumes of groundwater flow throughout these aquifers, traveling to springs, wetlands, lakes, rivers, trout streams, and domestic and municipal wells. Doc. 125, WC2387. The karst features of this region make it “highly vulnerable to pollutants entering the aquifers with very limited filtering or biological treatment.” Doc. 125, WC2387, WC2450.

Southeastern Minnesota is also replete with sand deposits, which serve as resources for a number of small mines that produce sand for cattle bedding and construction needs. Doc. 125, WC2389. In 2011, however, the demand for a particular type of sand – silica sand – experienced a boom in this part of Minnesota due to the increased need for such sand by the oil and gas industry. Resp. Add. 3, ¶ 10; Doc. 125, WC2386. Silica sand, which is found in large deposits throughout southeastern and south-central Minnesota, including in Winona County, is one of the preferred materials – known as a proppant – that is processed, often with chemicals, in order to assist in the type of oil and gas extraction known as hydraulic fracturing. Doc. 125, WC2385.

Although the raw material of silica sand can be used for a variety of purposes, the methods by which industrial silica sand is mined, processed, and transported is fundamentally different from that of small-scale construction mining operations that rely on a variety of sands and gravel for uses in animal bedding and construction fill. Doc. 125, WC2389.

Construction sand mining, as explained by the Minnesota Department of Natural Resources (“DNR”), is usually intermittent or episodic in nature, and typically does not require underground mining, blasting, nor any washing or

processing with chemicals called flocculants.³ Doc. 125, WC2389. Although construction sand may include silica sand grains within its composition – a result not uncommon when raw minerals are dug up from the earth – construction sand mining operations do not need to mine specifically for silica sand, nor must such mining comply with industry requirements relating to the sand’s shape, uniformity, size, or purity. For this reason, construction sand mining requires no chemical processing. Doc. 125, WC2389, WC2421.

By contrast, industrial silica sand mining, which produces silica sand that can be used for industrial purposes such as hydraulic fracturing, must meet specific American Petroleum Institute requirements as to its purity, grain size, shape, and intactness. Doc. 125, WC2389. In order to meet these standards, the silica sand must be processed, often in unlined sedimentation ponds, using chemicals and upwards of 4,500 to 6,000 gallons of water per minute. Doc. 125, WC2389; *see also* Doc. 129, WC0456-WC0458. Unlike construction mining, industrial mining of silica sand is usually conducted over a longer period of time and can involve underground mining and blasting, in addition to producing waste wash water that contains chemical flocculants. Doc. 125, WC2389.

³ Flocculants are chemicals that are used to accelerate the settling of fine-grains from sand washing water. Doc. 125, WC2484.

The type of silica sand at issue in this case, and contained in the Ordinance Amendment, is defined by Minn. Stat. § 116C.99(d), Minnesota's statute that provides for the development of model standards and criteria for silica sand mining in the state. Under this statute, silica sand is "well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals." Minn. Stat. § 116C.99(d). Importantly, "[s]ilica 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." Minn. Stat. § 116C.99(d).

The County Board ultimately adopted the Ordinance Amendment after listening to the concerns of hundreds of County residents, and receiving a vast amount of evidence regarding the potential negative effects of industrial silica sand mining. Doc. 126, WC0845-WC0847.

For example, the most common chemical flocculants used in the processing of industrially-mined silica sand are formed from acrylamide and diallyldimethyl aluminum chloride (DADMAC), both of which pose risks to aquifers and drinking water. Doc. 125, WC2389. Acrylamide, in particular, is classified by the EPA as a "well-established human neurotoxin and a probable human carcinogen" and is very mobile, especially in low oxygen environments like underground karst aquifers. Doc. 125, WC2390. These chemical flocculants

are highly water soluble and can deeply infiltrate aquifers. Doc. 125, WC2390. In other words, the process by which silica sand for hydraulic fracturing is mined, washed, and sorted – particularly in the karst areas of southeastern Minnesota – “raise[s] considerable concerns about both overburdening local aquifers and risking their contamination with chemicals which could then easily reach the groundwater and, in a karst landscape, rapidly travel to lakes, streams, rivers and even wells that provide drinking water.” Doc. 125, WC2389. For these reasons, the County Board explicitly found that the Ordinance Amendment would “help to maintain, protect and improve the quality of groundwater resources in Winona County.” Resp. Add. 18, ¶53.

The industrial mining and processing of silica sand also poses risks to air quality that could have serious effects on human health. It is well-established that enough exposure to silica particulates, which result when silica sand is mined and processed for hydraulic fracturing, can contribute to lung diseases such as silicosis, emphysema, tuberculosis, chronic obstructive pulmonary disease, and lung cancer. Doc. 125, WC2396, WC2463-WC2464; *see also* 29 C.F.R. § 1910.1053 (providing standards for occupational exposure to respirable crystalline silica). Freshly crushed silica is also more harmful to the respiratory system, and as the record evidence shows, “[b]reathing sharp, freshly-cut sand dust, such as silica at sand mining and processing sites, carries a greater risk of

pulmonary disease than breathing older, smoother particles weathered by heat, wind, and moisture....” Doc. 125, WC2397-2398. The mining of silica sand for hydraulic fracturing, in particular, poses greater risks to respiratory health because such mines typically operate for continual hours on end, and have a potential for higher concentrations of silica particles under four microns in diameter, which lodge deeper and lower in the lungs. Doc. 125, WC2396.

Although the risk of exposure to harmful silica dust is greatest for those working at silica sand operation sites, people living downwind of the mines, processing areas, or hauling routes are also at risk of exposure. Doc. 125, WC2463; Resp. Add. 19-20, ¶ 54.

Beyond the dangers to human health, industrial silica sand mining and processing poses a greater threat to agricultural lands and livestock than construction mineral mining. Silica sand mining not only can displace agricultural operations, but the mining can compete for valuable water resources, creating a high potential of polluting water that is necessary not only for farmers and their families, but for raising healthy livestock as well. Doc. 125, WC2395.

In addition, the conversion of farmland to areas used for industrial silica sand mining and processing can be “notoriously challenging, and likely impossible” to restore. Doc. 125, WC2395. The record evidence explains that “it is

very difficult to undo the profound changes to the ground surface and subsurface caused by blasting and digging, as well as to remediate soil and water pollution. Even if such efforts were to be successful, it would take a very long time (decades) to restore agricultural productivity to the land.” Doc. 125, WC2395. The reclamation process often involves returning “waste sand” that doesn’t meet the required standards to the original mining site, and such sand is frequently contaminated with chemicals like the flocculants used in processing silica sand. Doc. 125, WC2395, WC2389.

Fears over the reclamation process of silica sand mines is further evidenced by the May 21, 2018 spill at a mine in Trempealeau County, Wisconsin.⁴ Although the spill at this mine occurred after a bulldozing accident which required a three-acre holding pond to be drained, the accident resulted in an estimated ten million gallons of wastewater being released from a holding pond and spreading through the valley and into the Trempealeau River.

The County Board also considered the impact that the transport of industrial silica sand would have on the County’s roads and highways. Industrial silica sand is often transported in heavy commercial trucks, and that movement is “concentrated and continuous, unlike the dispersed truck traffic

⁴ See <https://www.wpr.org/dnr-no-citation-sand-mine-spilled-10m-gallons-wastewater-during-rescue>.

patterns created by other uses such as sand and gravel quarries . . .” Doc. 125, WC2511-WC2512. Indeed, the 2013 Environmental Assessment Worksheets (“EAWs”) of two previously-proposed silica sand mining operations in Winona County estimated that there could be up to 1200 truck trips per day on the County’s roads and highways. See Doc. 125, WC2391. The wear and tear from one fully loaded truck carrying silica sand is equivalent to approximately 9,600 cars. Doc. 123, WC0596. Such increased truck travel can accelerate the wear and damage to local roads and bridges, and if condition-based or seasonal road-weight postings are ignored, severe road damage can result. Doc. 125, WC2512.

The intensity of the potential commercial truck transport creates additional safety concerns as well. For example, there is an increased risk that community members along these routes will be exposed to dangerous silica dust, a risk that is far less with the intermittent hauling of construction minerals. Doc. 125, WC2421. Continual travel by heavy commercial trucks also increases safety concerns for local road users, especially in Winona County where the hilly landscape means that roads are often curvy with sharp turns. Doc. 125, WC2392. The dangers are especially high for recreational bikers in the area, as well for the Amish and Mennonite communities who travel the County’s roads year-round by horse-drawn buggies, wagons, or with large farm implements. Doc. 125, WC2392, WC2514, WC2518.

Finally, the County Board received evidence from neighboring Wisconsin demonstrating that regulations are often insufficient to protect communities from the harmful effects of silica sand mining. Doc. 130, WC2631-WC2632. For example, one report indicated that the Wisconsin DNR had cited at least fifteen industrial silica sand mines for violating clean water regulations in 2013. Doc. 125, WC2390. In part, these violations were the result of overflowing holding ponds that contained chemically-contaminated processing water. Doc. 125, WC2390. In addition, a 2014 report showed that over 40 percent of companies mining for industrial silica sand in Wisconsin had committed Stage 2 Violations of DNR regulations. Doc. 130, WC2633. A Stage 2 Violation means that either the company violated a DNR regulation and failed to remedy it, or the violation was severe enough that the DNR felt it warranted bypassing the protocols for the less serious, Stage 1 Violations. Doc. 130, WC2633.

It was after weighing all of this evidence, and more, that the County Board concluded that “the mining and processing of industrial minerals, and particularly, industrial silica sand, as ‘silica sand’ and ‘silica sand project’ are defined in Minn. Stat. Section § 116.99, subd. 1(d) and (e) affects the public health, safety and general welfare of the citizens of Winona County.” Resp. Add. 9, ¶ 24. The health, safety, and environmental risks associated with the industrial mining of silica sand – and which the County Board considered – are simply not

present with construction mineral mining. For this reason, the County Board voted to adopt the Ordinance Amendment and prohibit industrial mineral mining.

ARGUMENT

LSP urges this Court to affirm the lower courts' rulings and hold that the Ordinance Amendment does not violate the dormant Commerce Clause. LSP does not address the Takings Clause issue, which has been thoroughly briefed by both the County and the League of Minnesota Cities.

I. Winona County's Legitimate Exercise of its Police Powers Must Not Be Usurped by Unwarranted Dormant Commerce Clause Scrutiny

From the outset of this Court's review, it must be noted that the United States Supreme Court has made it clear that limitations imposed by the dormant Commerce Clause are "by no means absolute." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Lewis v. Bt Inv. Managers*, 447 U.S. 27, 36 (1980)). Local government "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources" as long as it does not "needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation." *Maine*, 477 U.S. at 151 (internal quotations and citation omitted).

Under Minnesota law, counties have broad authority to enact zoning ordinances for the purpose of promoting the health, safety, and general welfare

of the community. Minn. Stat. § 394.21. This power includes the express authority to completely exclude a land use. Minn. Stat. § 394.25, subd. 2 (providing that counties may identify in their zoning ordinances those land uses that are “encouraged, regulated, or prohibited”). Counties may use their broad police powers “to impose restraints on private rights that are necessary for the general welfare.” *C & R Stacy, LLC v. Cnty. of Chisago*, 742 N.W.2d 447, 453 (Minn. Ct. App. 2007).

After lengthy and thorough review of an extensive record of evidence, which included numerous expert studies and reports, as well as detailed testimony, legal analysis, and public comment, the County Board exercised its authority under Minnesota law and enacted the Ordinance Amendment prohibiting the mining, processing, and transportation of industrial minerals. This well-reasoned exercise of the County’s regulatory authority to protect the health and safety of its citizens, and the integrity of its natural environment, must not be usurped when – as demonstrated by Respondent and LSP in their dormant Commerce Clause arguments – it has neither needlessly obstructed interstate trade nor attempted to place itself in economic isolation. Such usurpation would subvert the essential role of local governments in addressing the needs of their communities whenever the mere specter of burdening interstate trade is invoked. It would render the local government’s police powers

useless, and deny the public a crucial access point for democratic participation in government.

With regional, national, and global economies as they exist today, there are few natural resources that are taken out of the environment which do not ultimately make their way across state lines. It would be a dangerous precedent to set if the dormant Commerce Clause could be used to invalidate any local government health and safety regulation simply because someone wishes to extract and fashion a resource into a product for sale in an interstate market.

II. The Ordinance Amendment Does Not Violate the Dormant Commerce Clause

The Winona County Ordinance Amendment does not violate dormant Commerce Clause principles. The Commerce Clause provides that “Congress shall have [the] power . . . [t]o regulate Commerce with foreign [n]ations and among the several States.” U.S. Const. art. I, § 8, cl. 3. In addition to this affirmative grant of power, the United States’ Supreme Court has interpreted the Commerce Clause to incorporate a negative implication—known as the dormant Commerce Clause—that prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce. *GMC v. Tracy*, 519 U.S. 278, 287 (1997). The principal behind the dormant Commerce Clause “is driven by a concern about ‘economic protectionism— that is, regulatory measures designed

to benefit in-state economic interests by burdening out-of-state competitors.’’
State v. Integrity Advance, LLC, 870 N.W.2d 90, 93 (Minn. 2015) (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

When courts analyze a dormant Commerce Clause claim, they first ask whether the law in question discriminates against interstate commerce in a manner that benefits in-state economic interests at the expense of out-of-state economic interests. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Laws that are found to be nondiscriminatory, and which regulate evenhandedly with only incidental effects upon interstate commerce, are analyzed using a more flexible balancing test outlined in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

A. The Ordinance Amendment Does Not Discriminate on its Face Because Construction Sand and Industrial Silica Sand are Different Products Sold in Different Markets

The arguments proffered by Appellant and its supporting *amici curiae*, Aggregate and Ready Mix Association of Minnesota and The Minnesota Industrial Sand Council (“ARM and Industrial Sand”), assert that the Ordinance Amendment discriminates on its face against interstate commerce by prohibiting industrial mineral mining but allowing the mining of construction minerals. Such arguments reflect a misapplication of the law governing what constitutes discrimination under dormant Commerce Clause principles.

In its brief, Respondent has persuasively argued that Appellant's position is wrong, and that the Ordinance Amendment does not constitute the type of protectionist, discriminatory measure that runs afoul of the Commerce Clause. Resp. Brief pp. 15-28. LSP seeks only to add a few additional points to Respondent's argument.

For purposes of a dormant Commerce Clause analysis, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994). "Negatively affecting interstate commerce is not the same as discriminating against interstate commerce," and laws that do not favor in-state industry over out-of-state industry do not directly burden interstate commerce. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

As the Supreme Court has noted, however, "[a]ny notion of discrimination under the Commerce Clause assumes a comparison of substantially similar entities. When the allegedly competing entities provide different products, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *GMC v. Tracy*, 519 U.S. 278, 289 (1997). The *Tracy* Court goes on to explain, "[t]his is so for the simple reason that the difference in the products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If

in fact that should be the case, eliminating the tax or *other regulatory differential* would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its resident or resident competitors." *Tracy*, 519 U.S. at 299 (emphasis added).

The discriminatory comparison Appellant attempts to make is between entities producing sand for construction purposes and those producing silica sand for use in industrial operations such as hydraulic fracturing. However, as in *Tracy*, the products that are ultimately sold in these two markets are different, and it is those very differences that compelled the County Board to regulate the mining of construction minerals and industrial minerals differently.

The pure silica sand that is sold on the hydraulic fracturing market is silica sand that has been washed, filtered and sorted, often with the use of chemical flocculants. Doc. 125, WC2389. The most common flocculents used are formed from acrylamide and diallyldimethyl aluminum chloride, both of which pose severe human and wildlife health risks if they enter lakes, rivers, or streams, or reach groundwater used for human consumption. Doc. 125, WC2389-WC2390. Acrylamide, in particular, is classified by the EPA as a "well-established human neurotoxin and probably human carcinogen." Doc. 125, WC2390. These chemical flocculants are highly water soluble and can deeply infiltrate aquifers. Doc. 125,

WC2390. They are also very mobile, especially in low oxygen environments like the underground karst aquifers found in Winona County. Doc. 125, WC2390.

Silica sand is not a suitable for sale in the hydraulic fracturing market until it undergoes the processing, filtering, and sorting that creates the purity and size specifications necessary to meet the standards set by the American Petroleum Institute. Doc. 125, WC2389. On the other hand, sand that is sold in construction or agricultural markets is not the same product as silica sand used in hydraulic fracturing, because such sand does not require the same level of processing in order to meet specific standards. *Amici curiae*, ARM and Industrial Sand, concede that the washing and sorting process is different for construction sand products and industrial silica sand products, lending support to defining these two minerals as separate end products that enter separate markets. ARM and Industrial Sand Br. 13.

Applying the Supreme Court's analysis in *Tracy* to these facts, it is clear that because the sand used for construction and agricultural purposes is a different product than the processed silica sand used for hydraulic fracturing, these products will be sold in different markets. Accordingly, they should not be compared under the dormant Commerce Clause to determine whether discrimination exists.

Moreover, it was after recognizing these differences between construction sand and industrial silica sand, and their respective mining and processing, that the County Board ultimately chose to prohibit all industrial mineral mining. Specifically, the County Board weighed the following concerns, all of which are exclusive to the mining of silica sand intended for the hydraulic fracturing market: (1) the highly water soluble and toxic chemical flocculants that are used to process industrial silica sand before it is transported out of state, Doc. 125, WC2390; (2) the unique karst landscape of Winona County, which leads to a greater potential for water pollution from flocculent chemicals used in the processing of silica sand intended for hydraulic fracturing, Doc. 125, WC2387, WC2450; (3) the larger scale and frequency at which industrial silica sand is mined as compared to the mining of construction minerals, Doc. 125, WC2389; (4) the health risks associated with exposure to freshly-cut silica sand dust at the levels commonly present at industrial silica sand mining operations, Doc. 125, WC2396-WC2398; (5) the potentially irreversible impact that industrial silica sand mining can have on agricultural lands, especially because the reclamation of industrial mining sites often involves returning chemically-laden waste-sands back to the land, making it very difficult to remediate the soil and water pollution caused by the mining operations, Doc. 125, WC2395; and (6) the potential for huge increases in truck transport along the County's highways and

roads – increases that could produce up to 1200 truck trips per day and amplify the danger to others traveling those roads by car or, in the case of the Amish and Mennonite communities, by horse-drawn buggies. Doc. 125, WC2391, WC2518.

Finally, Appellant has no intention of competing in the market for construction sand products. Doc. 90, ¶ 60. Thus, dormant Commerce Clause principles would not be served by removing the “regulatory differential” between how construction minerals and industrial minerals are treated under the Ordinance Amendment. Eliminating what Appellant says is the preferential advantage of the Ordinance Amendment – the opportunity for mining sand as a construction mineral – would not further the Commerce Clause’s fundamental objective of preserving a national competitive market for industrial mineral mining that is “undisturbed by preferential advantages conferred by a State upon its resident or resident competitors.” *Tracy*, 519 U.S. at 299. This is so because the Ordinance Amendment’s total prohibition against industrial mineral mining applies to both in-state and out-of-state interests equally.

In summary, construction sand and industrial silica sand are two different end products that are sold in two separate markets. Accordingly, the regulations governing their mining and processing, as outlined in the Ordinance Amendment, should not be compared when determining whether discrimination exists under the dormant Commerce Clause. Rather, the only applicable

regulation to Appellant in this matter – the prohibition against industrial mineral mining – is evenhanded and does not favor in-state economic interests at the expense of out-of-state interests. The Ordinance Amendment therefore does not run afoul of the dormant Commerce Clause.

B. The Ordinance Amendment Survives *Pike* Scrutiny

As demonstrated by Winona County’s brief and in the above argument, the Ordinance Amendment does not unconstitutionally discriminate against interstate commerce. This Court’s dormant Commerce Clause review should therefore end at this juncture because Appellant has not argued in its briefing whether or not the Ordinance Amendment survives the more flexible *Pike* test.⁵ Nonetheless, should this Court go beyond consideration of the facial challenge, LSP offers the following *Pike* analysis, which supports the conclusion that the local concerns addressed by the Ordinance Amendment, and which are well supported by the record, far outweigh any incidental burdens on interstate commerce that the Ordinance Amendment may impose.

When laws do not overtly discriminate against interstate commerce they may still be subject to the more flexible balancing test set forth in *Pike v. Bruce*

⁵ Appellant failed to raise – in its briefing to the Court of Appeals as well as to this Court – the issue of whether the Ordinance Amendment survives the less rigorous *Pike* balancing test. Due to its lack of briefing, the Court of Appeals found that Appellant had “forfeited” the argument, and the court declined to conduct a *Pike* analysis. App. Add. 13-14. This Court should do the same.

Church, Inc., 397 U.S. 137, 142, (1970). Under the *Pike* test, courts will uphold a nondiscriminatory law “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *United Haulers Ass'n*, 550 U.S. at 346 (quoting *Pike*, 397 U.S. at 142). “The extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *Pike*, 397 U.S. at 142)). State and local laws frequently survive *Pike* scrutiny. See *Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008).

Under the *Pike* test, the party challenging the law bears the burden of demonstrating that the burden on interstate commerce is clearly excessive in relation to the local benefits. See *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 528 (9th Cir. 2009); *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 (4th Cir. 1980); *Kansler v. Miss. Dep't of Revenue*, No. 2017-CA-01295-SCT, 2018 Miss. LEXIS 464, at *21-22 (Nov. 29, 2018); *Nat'l Ass'n of Fundraising Ticket Mfrs. v. Humphrey*, 753 F. Supp. 1465, 1468 n.3 (D. Minn. 1990). No such showing has been made in this case.

Even if the Court were to go beyond Appellant's facial challenge, the Ordinance Amendment would survive constitutional scrutiny under *Pike*. It is essential in analyzing the Ordinance Amendment under the *Pike* test that the

Court recognize that Winona County was exercising its legitimate police powers when it enacted the Ordinance Amendment. As emphasized earlier in this brief, the County used its broad statutory authority to enact zoning ordinances for the purpose of promoting the health, safety, and general welfare of the community. See Minn. Stat. § 394.21. Specifically, the County exercised its express authority under Minnesota Law to prohibit a particular land use, the mining of industrial minerals. See Minn. Stat. § 394.25, subd. 2. This restraint on private rights in order to protect the general welfare is an acceptable use of the County's broad police powers. See *C & R Stacy, LLC v. Cnty. of Chisago*, 742 N.W.2d 447, 453 (Minn. Ct. App. 2007) ("Both the state and its municipalities have a wide discretion in resorting to that [police] power for the purpose of preserving public health, [and] safety . . .") (quoting *State v. The Crabtree Co.*, 15 N.W.2d 98, 100 (Minn. 1944)).

This Court has acknowledged that there are differing approaches as to how to apply the *Pike* test. *Can Mfrs. Inst., Inc. v. State*, 289 N.W. 2d 416, 420 (Minn. 1979). One view requires the actual balancing of the burdens on interstate commerce against the local benefits provided by the regulation. *Id.* This approach is "largely concerned with regulations which affect transportation and flow of goods" and which could disrupt a nationwide flow of goods. *Id.* at 422. Another approach maintains that if the regulation's aim is to promote a legitimate state interest, and that interest is neither illusory nor problematical, courts should not

second guess the legislative judgment. *Id.*; see also *Davis*, 553 U.S. at 360 (“The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law's local benefits, and the ‘balancing’ should therefore be left to Congress.”) (Scalia, J., concurring in part).

In reconciling these different approaches, this Court has emphasized that under the *Pike* test, “a regulatory scheme will be upheld against asserted burdens on interstate commerce if a compelling and legitimate state objective is involved, if the asserted state justification is not illusory or slight, and if the regulations do not discriminate in favor of local interests or conflict with actually existing state statutes.” *Can Mfrs. Inst., Inc.*, 289 N.W.2d at 420.

In *Can Mfrs. Inst., Inc.*, 289 N.W.2d at 420, this Court found that Minnesota’s Package Review Act, and corresponding regulations, survived *Pike* scrutiny because the laws did not operate in favor of local interests, were not designed to interfere with interstate commerce, and undoubtedly effectuated legitimate state interests. In reaching this conclusion, the Court noted that the “plaintiffs’ Commerce Clause attack would be persuasive only if it were clear on the record that the state's interests in reviewing packages as an element of its solid waste management program are illusory.” *Id.* at 421. And to this end, the Court stated that “[t]here can be little doubt that the package review process is

designed to effectuate a legitimate state interest, for a regulatory scheme designed to conserve resources, decrease pollution, and protect the environment unquestionably deals with state interests of great magnitude.” *Id.* at 420.

Here, the County’s exercise of its police powers in enacting the Ordinance Amendment was an evenhanded regulatory measure that serves compelling public interests. Namely, the Ordinance Amendment aims to protect not only the environment, as in *Can Mfrs. Inst., Inc.*, but also the health and safety of the County’s residents. As such, the public interest objectives of the Ordinance Amendment are neither illusory nor discriminatory.

As described earlier in this brief, and discussed in LSP’s extensive references to the record, the County Board considered a substantial amount of evidence showing the well-founded risks that industrial mineral mining, and industrial silica sand mining in particular, pose to human health, safety, and the environment. Among other things, the County Board weighed the following concerns: (1) the risk of pollution to the surface waters, aquifers and drinking water given the County’s karst landscape, particularly when a common flocculent used in the washing of silica sand contains acrylamide, which the EPA has classified as a “well-established human neurotoxin and a probable human carcinogen.” Doc. 125, WC2387, WC2389-WC2390, WC2450; (2) the risks to human respiratory health that exist with exposure to silica dust generated by

industrial-level mining and processing of silica sand. Doc. 125, WC2396-WC2398, WC2463-WC2464; (3) the impact that industrial silica sand mining could have on the County's agricultural lands, including the "challenging, and likely impossible" undertaking of restoring farmland to viable use after it has been mined. Doc. 125, WC2395; and (4) the dangers that a substantial increase in heavy commercial truck traffic poses to the County's community members and others traveling along its roads (including those traveling by bicycle and horse-drawn buggy, a common form of transportation for the County's Amish and Mennonite communities). Doc. 125, WC2392, WC2514, WC2518.

The evidence weighed by the County Board is replete with support for the Ordinance Amendment's stated purposes of protecting "water resources, aquifers, streams, and rivers from excessive contamination and appropriation," "resident's health, safety, and general welfare," as well as "agricultural land and farming activity." Resp. Add. 26-17, ¶ 9.10. These stated justifications are far from illusory; they form a compelling basis for the County's legitimate exercise of its zoning authority. As such, the Ordinance Amendment must be upheld against purported burdens on interstate commerce. *See Can Mfrs. Inst., Inc.*, 289 N.W.2d at 420.

Upholding the Ordinance Amendment is particularly appropriate in this instance, where the County Board's findings illustrate that the Ordinance

Amendment was crafted specifically to ensure that it does not impede the interstate or intercounty flow of industrial minerals coming into, or passing through, Winona County. Resp. Add. 21-22, ¶ 57. Industrial silica sand that is mined outside of Winona County may still travel upon the County's roads and utilize the City of Winona's port. Resp. Add. 21-22, ¶ 57.

In addition to ensuring that industrial minerals may still move freely through Winona County, the County Board also concluded that the Ordinance Amendment was the only certain means to achieve its objectives to protect the public health, safety, and natural environment from the potentially devastating impacts of industrial mineral mining.

After weighing its options, the County Board ultimately decided to use its police powers to provide the most assured method of protecting the community from the myriad dangers posed by industrial mineral mining – a total prohibition against such mining. Although the Board considered other options, such as the use of conditional use permits (“CUPs”), regulating through CUPs involves considerable administrative and financial burdens, as the County would need to expend significant resources to analyze every industrial mineral mining application on a case-by-case basis, while also providing the public with an opportunity to comment on each proposal. Doc. 125, WC2423; *see also* Doc. 123, WC0598-0600. Importantly, conditional use permitting does not provide a

complete guarantee against the harms associated with industrial mineral mining. The County's interests would therefore not be "promoted as well" using CUPs as they would be with an outright prohibition against industrial mineral mining. *See Pike*, 397 U.S. at 142. The recent spill at a silica sand mine in Trempealeau County, Wisconsin, which released roughly ten million gallons of liquid used in the processing of silica sand, highlights the risks that remain even when a mine is regulated.⁶

Moreover, the record reveals that the County Board was presented with evidence demonstrating that regulations are often ignored or abused by mining companies in the industrial silica sand business. For example, the Board received a report indicating that the Wisconsin DNR had cited at least fifteen industrial silica sand mines for violating clean water regulations in 2013. Doc. 125, WC2390. In part, these violations were the result of overflowing holding ponds that contained chemically-contaminated processing water. Doc. 125, WC2390. In addition, a 2014 report reveals that over 40 percent of silica sand companies operating mines in Wisconsin had violated DNR regulations. Doc. 130, WC2633. These companies committed Stage 2 Violations, meaning that they either violated a regulation and failed to remedy it, or that the violation was serious enough that

⁶ See <https://www.wpr.org/dnr-no-citation-sand-mine-spilled-10m-gallons-wastewater-during-rescue>.

the DNR bypassed its Stage 1 Violation protocol and moved directly to Stage 2. Doc. 130, WC2633. The 2014 report also quoted a Wisconsin county-level regulator as saying, “ citations are pretty much ineffective for this industry.” Doc. 130, WC2631.

In conclusion, should the Court’s analysis go deeper than Appellant’s facial challenge, the Ordinance Amendment must be upheld under *Pike* because it is a legitimate exercise of the County’s police powers and – as the County Board recognized – it is the only certain way to meet its compelling interests in protecting the public health, safety, and natural environment from serious harms caused by industrial mineral mining.

CONCLUSION

In summary, construction sand and industrial silica sand are two different end products that are sold in two separate markets. As such, the regulations governing their mining and processing should not be compared when determining whether discrimination exists under the dormant Commerce Clause.

The only regulation applicable to Appellant in this matter – the prohibition against industrial mineral mining – is even-handed and does not favor in-state economic interests at the expense of out-of-state interests. Rather, the Ordinance Amendment reflects the County’s legitimate exercise of its police powers, and

the only certain means available to protect the natural environment and the health, safety, and welfare of the County's citizens against the demonstrated harms of industrial silica sand mining.

For these reasons, the Ordinance Amendment does not violate dormant Commerce Clause principles. This Court should therefore affirm the lower courts' rulings and the judgment in favor of Winona County on Appellant's dormant Commerce Clause claim.

Dated: January 22, 2019

Respectfully submitted by,

/s/ Scott W. Carlson

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No. 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.

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