No. A18-1956

STATE OF MINNESOTA
IN SUPREME COURT

Minnesota Center for Environmental Advocacy, et al., Petitioners,
vs.
Minnesota Department of Natural Resources, Respondent,
Poly Met Mining, Inc., Respondent.

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY'S AND FRIENDS OF THE BOUNDARY WATERS WILDERNESS' PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

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INTRODUCTION

This petition arises from a challenge brought under Minnesota Statute Sections 14.44-5 by the Minnesota Center for Environmental Advocacy and Friends of the Boundary Waters Wilderness ("Petitioners") to the validity of Minnesota Rules Chapter 6132 ("Chapter 6132"). The Minnesota Department of Natural Resources ("DNR") adopted Chapter 6132 to govern nonferrous mining. In upholding the rules, the Court of Appeals decided important statewide issues regarding standards applicable to the adoption of all rules, particularly rules governing permits. Pursuant to Minn. R. Civ. App. P. 117, Petitioners respectfully request this Court to review the Court of Appeals' decision declaring Chapter 6132 valid.

STATEMENT OF LEGAL ISSUES

1. Whether under the Minnesota Administrative Procedures Act, or other law, an agency can adopt rules that lack enforceable prescriptive or performance standards.

Held: Chapter 6132 was valid even if it did not establish performance or prescriptive standards.

2. Whether Chapter 6132, which contains generalized goals and standards that do not cabin the DNR's discretion, is nevertheless valid in relation to "constitutional vagueness concerns" because it is implemented through a permitting process.

Held: Chapter 6132 was valid because "constitutional vagueness concerns" are not implicated due to the DNR's permitting process for mines.

3. Whether Minn. Stat. §§ 14.44-5 allow petitioners, who are not regulated by a rule, to bring a facial challenge to that rule as unconstitutionally vague.

Held: Minnesota law is unclear as to whether Petitioners, who own property and value natural resources that Chapter 6132 is intended to protect, but who are not directly regulated by DNR under Chapter 6132, have sufficient interests in protection and enjoyment of their property to bring a facial challenge to a rule as unconstitutionally "void for vagueness" under Minn. Stat. §§ 14.44-5.

STATEMENT OF CRITERIA

Review is appropriate under Minn. R. Civ. App. P. 117, subds. 2(a) and (d). This case presents important issues of first impression with statewide effect with regard to (1) the standards rules must meet, and (2) the Court's authority to hear rule challenges under Minn. Stat. §§ 14.44-5 from affected persons not regulated by a rule based on that rule's vagueness and excessive discretion. The Court should exercise its supervisory powers to clarify, harmonize, and develop Minnesota law regarding such declaratory judgment challenges. Absent such clarification, questions regarding the Court's authority to hear these challenges will recur, and the Court's questioning of public parties' standing to challenge rules as vague, or providing excessive discretion, will chill such parties from challenging rules that affect them.

STATEMENT OF THE CASE

DNR adopted Chapter 6132 in 1993, before any party had proposed a nonferrous mining project. (R. 1288).[1] During the rulemaking, industry representatives, the Minnesota Pollution Control Agency, and environmental representatives warned DNR that the proposed rules were vague and provided DNR with excessive discretion. (R. 186,

[1] "R" references are to the administrative record in A18-1956.

R. 199, R. 207, R. 214, R. 215, R. 251, R.328, R. 762). DNR did not change the rules in response to these comments, claiming vagueness and discretion were necessary due to the variability of mining projects. The Administrative Law Judge affirmed DNR's position, finding that "[t]he statute authorizing these rules do[es] not require specific standards for the conduct of mining operations." (R.8821-22). As a result, Chapter 6132 includes many provisions that do not include a numeric or narrative standard, and simply provide that the Commissioner will "decide" without any limiting criteria. *See, e.g.*, Minn. R. 6132.0100, subp. 3 ("adversely impact natural resources" means "an unacceptable level of impact on the natural resources as determined by the commissioner based on an evaluation which considers the value of the resource and the degree of impact"); Minn. R. 6132.2200, subp. 2 (D) (provides that "[t]he commissioner may allow variance from specific reclamation requirements of [Chapter 6132] if their use would inhibit designs necessary to meet the requirements of this part"); Minn. R. 6132.3200, subp. 2 (3), (4) and (5) (providing "or within a longer period if approved by the commissioner" exception to deadlines). Chapter 6132 also uses vague words such as "substantial" in lieu of numeric limits, *e.g.*, Minn. R. 6132.2200, subp. 2(B)(2) (design must permanently prevent "substantially all water from moving through or over the mine waste.")

On November 1, 2018, DNR issued the first nonferrous mining permit under Chapter 6132 to Poly Met Mining, Inc. ("PolyMet"). DNR adopted findings affirming its discretion to permit mining at variance with Chapter 6132's reclamation goals and standards. Add. 31-2 (Findings 51-52), Add. 33-4 (Finding 567-576), Add. 35 (Finding 609), Add. 36-37 (Findings 727-731). In particular, DNR asserted that Chapter 6132's

"goals" statements did not cabin its discretion to approve a mine that does not meet a reclamation goal. Add. 37 (Finding 729). Petitioners therefore brought this challenge under Minn. Stat. §§ 14.44-5. PolyMet intervened. On January 10, 2019, DNR and PolyMet ("Respondents") moved to dismiss arguing Petitioners lacked standing and the case was untimely.

In its opinion filed August 5, 2019, the Court of Appeals denied Respondents' motions to dismiss, but questioned Petitioners' jurisdictional standing to challenge the rules' constitutionality as "void for vagueness," finding it "not clear" (1) whether Minn. Stat. §§ 14.44-5 allows non-regulated entities to bring a constitutional claim; (2) whether Petitioners' property and environmental interests are "protected property rights warranting due-process protections"; (3) whether Petitioners can assert a facial vagueness challenge without specific conduct-based facts; and (4) whether *this* case supports a facial challenge. Add. 19-22. The Court then affirmed DNR's authority to adopt "flexible rules" based on the legislative policy in Minn. Stat. § 14.002 and a 1964 case citing the "modern tendency" towards granting discretion to administrative officers.[2] Add. 18. The Court also assumed the DNR would use the rule's "goals" statements to guide its application of the rule requirements. *Id.* The Court did not examine any of the specific rules that Petitioners identified as providing excess discretion to the DNR. Add. 15-18. Finally, the Court concluded Petitioners failed to prove that Chapter 6132 is fatally vague in view of the "safeguards" of the permitting process, citing *Can Mfrs. Inst., Inc. v. State*, 289

[2] In fact, the "modern tendency" is to keep a close eye on agency discretion. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-18 (2019). While scholars dispute that agencies deliberately adopt vague rules, *id.* at 2421, here we have a prime example.

N.W.2d 416, 422-24 (Minn. 1979) (legislative review of agency rules) and *Coal. Of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 165-7 (Minn. App. 2009) (approving rule's use of "may" because permittees can challenge denial in contested case or appeal). Add. 18, 22.

ARGUMENT

This Petition meets the criteria for this Court to undertake discretionary review under Rule 117, subdivision 2 (a) because the question presented is an important one upon which the Supreme Court should rule, and (d) because a decision by the Supreme Court will help develop, clarify, or harmonize the law and will have statewide impact, with questions likely to recur unless resolved by the Supreme Court.

I. THE ABOVE-CAPTIONED CASE PRESENTS IMPORTANT QUESTIONS OF STATEWIDE IMPACT.

This case presents important questions with substantial grounds for difference of opinion and statewide impact. *See Emme v. C.O.M.B.*, Inc., 418 N.W.2d 176, 180 (Minn. 1988) (interpreting the language "important and doubtful" for certified questions under Minn. R. App. P. 103.03(i)).

First, whether Minn. Stat. § 14.002 or other law allows agencies to adopt rules that contain neither "prescriptive" nor "performance" or "outcome-based" standards[3] is

[3] An "outcome-based" rule is one that "requires a particular environmental result, but allows the regulated companies themselves full discretion to figure out how to get there." Dennis D. Hirsch, A Holistic Policy Agenda to Promote Green Business: Reflexive Law Fills the Gap, 42 ENVTL. L. REP. NEWS & ANALYSIS 10228, 10232–33 (2012). Professor Hirsch provides an example: the Corporate Average Fuel Economy standard (CAFE). *Id.* at 10239. This rule requires automakers to achieve *a specified numeric fuel*

important and has statewide impact on state agencies authorized to adopt rules. The Office of Administrative Hearings ("OAH") has remanded numerous rules to state agencies that employed phrases such as "the Commissioner may approve an exception" because they were vague and conferred excess discretion. *See, e.g.*, *Proposed Rules of the Minn. Pollution Control Agency Governing Compost Facilities* (Office of Admin. Hearings June 16, 2014) (No. OAH 11-2200-31142), 2014 WL 3697669, at *55. If Minnesota law or the constitution do not allow such discretion, the Supreme Court should affirm the standards employed by OAH and reverse this decision.

Second, whether a vague rule can be salvaged by (1) procedures, such as a permit comment process or the ability to request a contested case,[4] or (2) legal recourse, such as a certiorari appeal, is an important question with statewide implications. Petitioners submit that without adequate rule standards, neither the OAH, nor the courts, will have the necessary grounds to determine the adequacy of a permit even if such procedural or appeal rights exist.[5]

Finally, whether or not petitioners can challenge rules facially under Minn. Stat. §§ 14.44-5 for failure to meet constitutional due process standards is important. If vagueness can only be challenged by persons regulated under a rule, an agency and regulated parties can simply agree to a cryptic regulatory regime that does not protect the

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economy standard by a date certain, but gives the automakers full discretion as to how to reach the numeric limit.

[4] The public's right to request a contested case may be limited. *See, e.g.*, Minn. Stat. § 93.483.

[5] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 659–60 (1996).

public, and the resulting rule could not be challenged. The Supreme Court should clarify the law to preserve public rights and court review.

II. REVIEW WILL HELP DEVELOP, CLARIFY, AND HARMONIZE THE LAW.

Granting this Petition will help clarify and harmonize the law. This Court has already allowed a facial vagueness challenge under Minn. Stat. §§ 14.44-5. *See, e.g.*, *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 404-5 (Minn. 1992). So has the Court of Appeals. *See Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 106-7 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). But here, instead of holding these cases to be dispositive, the Court of Appeals questioned Petitioners' right to do so in light of "as applied" challenges, *e.g.*, *State, City of Minneapolis v. Reha*, 483 N.W.2d. 688, 690-1 (Minn. 1992), and identified four points where the Court of Appeals determined the law lacked sufficient clarity. Add. 19-21. The Court's questioning will have a "chilling effect" on parties affected by rules and discourage vagueness challenges.

Granting this Petition will develop the law regarding vague rules subject to facial challenges under Minn. Stat. ch. 14, on which there is little case law, and clarify the differences between "as applied" and "facial" challenges.

III. APPLICATION OF A NEW PRINCIPLE OR POLICY.

This Court has never interpreted (1) Chapter 6132's rules, (2) nor the impact of Minn. Stat. § 14.002 on rulemaking, (3) nor whether Minn. Stat. §§ 14.44-5 allows non-regulated parties to challenge rules as vague under the constitution. Granting review

allows this Court to adopt new legal principles to inform agencies and the public on the standards applicable to rules, who can challenge them, and when they can be challenged.

IV. THESE QUESTIONS ARE LIKELY TO RECUR UNLESS RESOLVED.

Unless resolved, questions regarding the affected public's right to challenge an agency rule under Minn. Stat. §§ 14.44-5 because the agency has excess discretion will recur.

CONCLUSION

This Court should review this case to ensure that rules adopted to protect the public can be challenged by the public, and that we have "a government of law and not of men." *In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. App. 1990). A new regulatory program, such as one governing nonferrous mining, should not be built on a foundation that allows an agency's arbitrary and unreviewable exercise of power.

Dated: August 28, 2019

Respectfully submitted,

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