Nos. 23-4106 & 23-4107

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH, et al., *Plaintiffs-Appellants*,

ZEBEDIAH GEORGE DALTON, et al., *Consolidated Plaintiffs-Appellants*,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, et al., *Defendants-Appellees*,

HOPI TRIBE, et al., *Defendant Intervenors-Appellees*,

On Appeal from the United States District Court
for the District of Utah, No. 4:22-cv-59

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND DEFENDANTS-INTERVENORS-APPELLEES IN FAVOR OF AFFIRMANCE

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AMICI CURIAE'S STATEMENT OF INTEREST

Amici are law school professors who are experts in the field of public land law and natural resources law. Most have written and published extensively in these fields. Through our teaching and scholarship, we promote understanding of the law governing management of federal public lands, and the history of the law's development.

This case presents fundamental questions about the administration of the Antiquities Act. Central to the resolution of this case is an understanding of the history of the Antiquities Act and the manner in which federal courts have reviewed the exercise of Presidential discretion under the Act. The amici law professors are uniquely situated to assist this Court in resolution of this case.

Pursuant to Fed. R. App. P. 29(a)(4)(D)-(E), amici file this brief with the consent of all parties. No party's counsel authored this brief in whole or in part, and no person—including any party or party's counsel—contributed money or otherwise funded the preparation and submission of this brief. An appendix listing the names of the amici law professors is included after the conclusion of this brief.

SUMMARY OF ARGUMENT

The Antiquities Act of 1906 confers upon the President broad authority and discretion to protect objects with historic or scientific value and to reserve public land as national monuments for the protection of those important objects. Of the

twenty-one presidents who have served since the Act was passed over 117 years ago, eighteen—nine Republicans and nine Democrats—have used it to establish some 150 protected areas covering nearly 100 million acres of public lands.[1] Over that entire period, Congress has never amended its primary terms. To the contrary, Congress has often confirmed and expanded protections presidents have put in place through the Act. Indeed, about half of the nation's 63 "crown jewel" national parks that Congress has legislated were first protected by presidents using the Act. No federal court has ever declared a Presidential proclamation to be in violation of the Act, and each year, tens of millions of people visit these areas. In short, the Antiquities Act has proven to be one of the most important and enduring pieces of public land legislation in U.S. history, resulting in the protection of vast numbers of fragile and irreplaceable resources across the country, for the benefit of future as well as present generations.

Invoking this authority, President Biden issued two proclamations restoring Bears Ears and Grand Staircase-Escalante National Monuments in Utah. Both areas are dense with cultural artifacts, and they are sacred to the Tribes of the desert southwest region. The Bears Ears Inter-Tribal Coalition estimates that Bears Ears is

[1] *See* Congressional Research Service, *National Monuments and the Antiquities Act* (updated Jan. 2, 2024), http://sgp.fas.org/crs/misc/R41330.pdf.

home to over 100,000 Native American archaeological and cultural sites.[2] They are also important scientifically because of their unique geologic, palaeontologic, and ecological values. The paleontological resources in Grand Staircase-Escalante National Monument rank among the world's most important.[3] The President's proclamations protecting both monuments are fully consistent with the provisions of the Antiquities Act and its history.

Appellants, however, are unhappy with this outcome. They challenged those proclamations in federal district court, seeking to have it substitute its judgment for that of the President and to declare for the first time since the Act was enacted that Presidents lack authority to protect natural resources like geologic features, flora, and fauna as objects of historic or scientific interest. These cases are now on appeal to this Court on procedural issues relating to the availability and scope of judicial review.

This kind of broad attack on the exercise of Presidential discretion under the Antiquities Act has been rejected numerous times by modern courts, which have

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[2] *See Native American Connections*, Bears Ears Inter-Tribal Coalition, https://www.bearsearscoalition.org/ancestral-and-modern-day-land-users/ (last visited January 9, 2024).

[3] *See*, *e.g.*, *Grand Staircase-Escalante National Monument: 25th Anniversary*, BUREAU OF LAND MANAGEMENT, https://www.blm.gov/national-conservation-lands/utah/gsenm-25-anniversary#:~:text=Fossils%20found%20generated%20paleontological%20information,rich%20history%20of%20ancient%20inhabitants (last viewed January 9, 2024).

never allowed the litigation to proceed beyond the pleadings stage. *See*, *e.g.*, *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002); *Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004). Because the Antiquities Act does not provide for judicial review, federal courts have wrestled with the availability and scope of nonstatutory judicial review of Presidential monument proclamations. The D.C. Circuit Court of Appeals has developed a useful framework that can serve as a guide for this court, conducting a facial review of the proclamations for purely legal questions as to whether the President acted within delegated statutory authority. For other claims that implicate questions of fact or that may intrude into the President's discretion, courts have refrained from deciding the ultimate question as to the availability or scope of nonstatutory judicial review of Presidential action.

The claims at issue in this appeal are similar in all material respects to these cases from the D.C. Circuit Court of Appeals. Appellants ask this court to go far beyond the proper boundaries for judicial review and to substitute its judgment for that of the President. Those arguments as to the proper role of the federal courts should be rejected on the same basis that they were in the D.C. Circuit.

The federal government asks this Court to go farther than any previous court has done in restricting judicial review, and to address heretofore unresolved

questions of law that would have broad implications for separation of powers. It is not necessary for this Court to address these questions. Even if it simply assumes that limited review of the President's exercise of discretion under the Antiquities Act might be available, it can readily find that Appellants have failed to allege facts calling that discretion into question.

ARGUMENT

I. In passing the Antiquities Act, Congress adopted flexible language that grants to the President broad discretion to protect a wide array of resources and features found on public lands as national monuments.

Appellants purport to challenge the types of objects that can be protected under the Antiquities Act and the size of the reservations. As discussed in more detail further below, their claims have been rejected by every court to consider those issues. As a preliminary matter, however, Appellants attempt to prop up their flawed claims with an incomplete and inaccurate recitation of the legislative history, which misrepresents the discretion granted to the President by Congress. We therefore start with background context on the Antiquities Act and the process that led to its adoption by Congress in 1906.

The Antiquities Act of 1906 authorizes the President to:

> *in the President's discretion*, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments.

54 U.S.C. § 320301(a) (emphasis added). The plain language of the Act, materially unchanged since enactment, extends far beyond archaeological artifacts. Instead, it gives the President discretion to identify "objects of historic or scientific interest" that warrant protection, as well as the authority to identify areas of public land that are in the President's judgment "the smallest area compatible with the proper care and management of the objects to be protected." *Id*. at § 320301(b).

The Act was the product of many years of deliberation by Congress. That extended history included congressional consideration and rejection of language that would have much more tightly restricted the President's discretion. *See, e.g.,* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 476-86 (2003); John D. Leshy, *OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS,* 253-58 (Yale University Press 2022); Ronald F. Lee, Nat'l Park Serv., *THE ANTIQUITIES ACT OF 1906* (1970). For example, H.R. 8195, 56th Cong. (1900), was limited to "any aboriginal antiquity or prehistoric ruin on [] public lands" and did not provide for reservations of federal land to protect the antiquities. H.R. 9245, 56th Cong. (1900), another proposal introduced in the same Congress, would have authorized reservations of land limited to 320 acres, and only to protect prehistoric ruins.

These early proposals were referred to the House Committee on Public Lands, chaired by Congressman John Lacey (R-Iowa), who conferred with the Department

of the Interior and the General Land Office. Lee, *supra* at 52. Lacey then offered a competing bill, H.R. 11021, 56th Cong. (1900), that included a much broader grant of authority to protect resources on public land, authorizing the President to

> [s]et apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relicts, or other objects of scientific or historic interest, or springs of medicinal or other properties it is desirable to protect and utilize in the interests of the public; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The language addressing "objects" with scientific or historic values thus appears to have originated in H.R. 11021 most likely at the request of the Department of the Interior, which "was plainly seeking broad discretionary authority for the President to reserve a wide range of resources for public use." Lee, *supra* at 54; *see also* Squillace, *supra*. at 482-83; *Utah Ass'n of Cntys.*, 316 F. Supp. at 1178 (tracing the legislative history of the Antiquities Act).

Debate continued until 1906, when the Act finally became law. The final bill, H.R. 11016, 59th Cong. (1906), was drafted at Lacey's request by Edgar Lee Hewett, a prominent archaeologist at the time, who had earlier prepared for the General Land Office the first comprehensive review of the antiquities on federal lands across the desert southwest. Lee, *supra* at 69; Leshy, *supra* at 256-57.

Congressman Lacey (H.R. 13349, 58th Cong. (1904)) and Senator Thomas Patterson (D-Colo) (S. 4698, 59th Cong. (1906)) introduced bills that contained the language Hewett drafted, which eventually became the legislation approved by

Congress and signed by President Theodore Roosevelt. Whereas earlier versions of the bill "had been limited to historic and prehistoric antiquities and made no provision of protecting natural areas[,] * * * Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to include the phrase 'other objects of historic or scientific interest.'" Lee, *supra* at 74. This language was intended by its drafters to include the protection of important geologic and other natural resources.

> The act made clear that such 'objects' were not confined to specific items of antiquity like artifacts or structures, because Hewett shrewdly borrowed language from one of the broader bills that had been introduced in 1900 to allow the president to reserve public land to protect not only 'historic landmarks' and 'historic and prehistoric structures,' but also 'other objects of historic or scientific interest.'

Leshy, *supra* at 258. Moreover, the bill rejected strict limits on the size of monuments and instead chose a more "flexible provision that permitted the President to establish larger areas if justifiable * * *." Lee, *sura* at 75; *see also Utah Ass'n of Cntys*, 316 F. Supp. 2d at 1178.

This legislative history, which has been well documented by scholars, thoroughly refutes Appellants' argument that Congress intended to sharply confine presidential power,[4] such as Garfield County's assertion that the Act was intended

[4] The Garfield appellants quote a passage from Professor Squillace's article out of context (Garfield Br. at 5-6) and omit his conclusion that "the final bill reflected at least some of the Department's long-held views on the need for more expansive legislation." Squillace, *supra* at 477; *see also* Federal Def. Br. at 15 n.17.

to cover only "rare items" and "discarded broader categories." Garfield Br. at 38. To the contrary, Congress adopted flexible language and rejected proposals that either would have limited the President's authority to protect only a narrow category of "antiquities," or would have placed strict limitations on the amount of public land that could be reserved to provide such protections.

II. Throughout the 117-year history of the Antiquities Act, Presidents have exercised their authority under it to protect a vast array of natural and cultural features as objects of historic or scientific interest, altogether comprising many tens of millions of acres of public land.

Starting with the first proclamation after the passage of the Antiquities Act up until the current day, Presidents have regularly used their authority under the Antiquities Act to protect geologic features, flora, and fauna as "objects of historic or scientific interest" and to reserve significant areas of public land for the proper care and management thereof. This extensive historic context is largely ignored by Appellants in their briefs, and it strongly undercuts their efforts to rewrite the Antiquities Act under the guise of statutory interpretation.

Within four months of enactment, President Theodore Roosevelt used the Act to establish the first national monument – Devil's Tower in Wyoming – declaring:

> And, whereas, the lofty and isolated rock in the State of Wyoming, known as the "Devils Tower," situated upon the public lands owned and controlled by the United States is such an extraordinary example of the effect of erosion in the higher mountains to be a natural wonder and an object of historic and great scientific interest and it appears that the public good would be promoted by reserving this tower as a National

> monument with as much land as may be necessary for the proper protection thereof:

Proclamation No. 658, 34 Stat. 3236 (1906).

A short time later, in 1908, President Roosevelt designated the Grand Canyon as an 800,000+ acre national monument, finding it "is an object of unusual scientific interest, being the greatest eroded canyon within the United States * * *." Proclamation No. 794, 35 Stat. 3236 (1908); *see also Squillace*, 37 Ga. L. Rev. at 490. The Supreme Court ultimately upheld the proclamation against a claim that the President lacked authority to take that action. *Cameron v. United States*, 252 U.S. 450 (1920).

That same year, President Roosevelt protected Muir Woods National Monument in California. Proclamation No. 793 (35 Stat. 2174). The proclamation notes that "an extensive growth of redwood trees embraced in said lands is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age, and size of the trees." *Id*. Muir Woods and its towering redwood trees remain a cherished national monument 115 years later and, like most areas protected by presidents under the Act, attracts large numbers of visitors every year. Muir Woods has had nearly 800,000 visitors annually in recent years; Grand Canyon, nearly 5 million.[5]

[5] Annual visitor use statistics for sites managed by the National Park Service are available at https://irma.nps.gov/Stats/ (last viewed January 9, 2024).

These new national monuments were not limited to the western United States. For instance, in 1916, President Wilson created the Sieur de Monts National Monument, which Congress would soon designate as Acadia National Park, on the coast of Maine.

> Whereas, the lands embrace about five thousand acres adjacent to and including the summit of Mt. Desert Island, which island was discovered by Samuel de Champlain and upon which he first landed when, acting under the authority of Sieur de Monts, he explored and described the present New England coast, and exploration and discovery of great historic interest. The topographic configuration, the geology, the fauna and the flora of the island, largely embraced with the limits of the Monument, also, are of great scientific interest.

Proclamation No. 1339, 39 Stat. 1785 (1916). It has attracted on the order of four million visitors annually in recent years.

And then there is Glacier Bay National Monument established by President Coolidge in 1925, which protected "tidewater glaciers of the first rank in a magnificent setting of lofty peaks." Proclamation No. 1733, 43 Stat. 1988 (1925). The monument area also included "a great variety of forest covering consisting of mature areas [and] bodies of youthful trees which have become established since the retreat of the ice," providing opportunities for "the scientific study of glacial behavior and of resulting movements and development of flora and fauna and of certain valuable relics of ancient interglacial forest." *Id*. The original monument was 1,820 square miles (1.16 million acres). President Franklin Roosevelt added 904,960 acres in 1939. Proclamation 2330, 55 Stat. 2534 (1939). President Jimmy Carter

added approximately 550,000 acres in 1978. Proclamation 4618, 93 Stat 1458 (1978). Two years later, in the Alaska National Interest Lands Conservation Act (ANILCA), Congress enlarged the protected area to approximately 3.3 million acres and relabeled it the Glacier Bay National Park and Preserve. Pub. L. No. 96-487 (1980). Because it is not accessible by road, visitors must arrive by boat, and before the pandemic sharply limited such traffic, the area was attracting well over half a million visitors annually.

There are many dozens of other examples, but these suffice to make the point. Appellants insist that so-called "generic geological items" like sandstone cliffs are not eligible for protection. Garfield Br. at 21. They assert that "a living creature" is "too amorphous" to be protected under the Antiquities Act. Dalton Br. at 17. They even suggest that a monument must not exceed 160 acres. Garfield Br. at 49. Such incredible assertions turn a blind eye to more than 100 hundred years of history and the numerous proclamations in which Presidents have protected not only a columnar tower, sandstone canyons, the flora and fauna of granite islands, redwood trees, and tidewater glaciers, but a vast array of other cultural and natural features of "historic or scientific interest." Because Appellants cannot reconcile their claims with the full weight of this history, they choose to ignore it. The proclamations restoring Bears Ears and Grand Staircase-Escalante National Monuments are fully consistent with this rich historical legacy, which has resulted in the protection of vast areas of

majestic and irreplaceable public lands across the country that the Antiquities Act has safeguarded for future generations to enjoy and steward.

III. The Supreme Court has made clear that the President may protect natural as well as cultural resources as objects of historic or scientific interest.

A trio of Supreme Court cases have settled the central legal claim brought by Appellants in this case, holding unequivocally that the President retains discretion under the Act to protect geologic formations, flora, and fauna as objects of historic or scientific interest. *See Cameron*, 252 U.S. at 450; *Cappaert*, 426 U.S. 128 (1976); *Alaska v. United States*, 545 U.S. 75 (2005).

In *Cameron*, the United States sought to enjoin Cameron's occupancy of a tract of public land at the head of the most popular hiking trail within Grand Canyon National Monument. One of Cameron's defenses was that the President lacked authority to create the monument in the first instance. The Supreme Court flatly rejected that argument without a single dissent.

> The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic and scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.' It is the greatest canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

Cameron, 252 U.S. at 455-56; *see also* Leshy, *supra* at 259-60.

More than fifty years later, the Supreme Court heard a case involving Devil's Hole, a deep cavern in Death Valley National Monument containing an underground pool that provided habitat to an imperiled fish species. *Cappaert*, 426 U.S. at 128. The Cappaerts owned private land nearby and their withdrawal of groundwater from an underground aquifer was drastically lowering the pool's water level, threatening the fish with extinction. Much like the appellants here, the Cappaerts argued that the Antiquities Act empowered the President to "reserve federal lands only to protect archaeological sites." Once again, the Supreme Court unanimously rejected this narrow reading of the Act.

> However, the language of the Act which authorizes the President to proclaim as a national monument 'historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government' is not so limited. The pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'

Id. at 141-42 (*citing Cameron*, 252 U.S. at 455-56).

In 2005, the Supreme Court addressed the Antiquities Act in a case involving a dispute over submerged lands in Glacier Bay National Monument. *Alaska*, 545 U.S. at 75. The State of Alaska brought a quiet title claim against the United States under the Quiet Title Act of 1972, 28 U.S.C. § 2409a. The State sought to clarify ownership of submerged lands beneath the inland waters of Glacier Bay, which had been included in the national monument President Coolidge had established in 1925 and FDR had enlarged in 1939, as discussed above. The case hinged on whether the

federal government evidenced an intent to retain title to the submerged lands by reserving them before Alaska was admitted to the Union in 1959. *Id*. at 79.

The Alaska Statehood Act included a provision stating that the United States would retain ownership of "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife * * *." *Id*. at 104 (citing Section 6(e) of the Alaska Statehood Act). The Supreme Court rejected Alaska's argument that Glacier Bay was not set aside to protect wildlife resources:

> Because Glacier Bay National Monument serves as habitat for many forms of wildlife, it was set aside in part for its preservation. Any doubt as to this conclusion is dispelled by reference to the Presidential proclamations setting aside the monument, for the proclamations identify the study of flora and fauna as one of the express purposes of the reservation.

Id. at 109.

Thus, in a series of three cases, the Supreme Court upheld proclamations that declared as objects of historic or scientific interest a large canyon complex, an underground pool, an imperiled species of fish, wildlife resources in Alaskan inland waters, and the "flora and fauna of the region." Following this guidance, lower courts have unanimously rejected assertions that the President lacks authority under the Antiquities Act to protect natural and geologic resources as "objects of historic or scientific interest." *See*, *e.g.*, *Mass. Lobstermen's Ass'n*, 945 F.3d at 545 (plaintiffs were "grasping at straws" in arguing that an ecosystem was not an "object" under the Antiquities Act); *Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1186 n.8

(citing "unambiguous Supreme Court precedent"); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D. C. Cir. 2002) (plaintiffs' argument "fails as a matter of law in light of Supreme Court precedent").

IV. The D.C. Circuit Court of Appeals provides for facial review of Presidential proclamations to ensure that the President acted within the bounds of statutory authority.

None of the Supreme Court decisions discussed in the previous section directly addressed the availability or scope of judicial review when a party makes a direct challenge to a Presidential proclamation establishing a national monument. But in a trio of opinions, the D.C. Circuit Court of Appeals has addressed those issues, and in the process established a useful framework for nonstatutory review of Presidential monument proclamations issued under the authority granted to the President in the Antiquities Act. *See Mass. Lobstermen's Ass'n*, 945 F.3d at 535; *Tulare County*, 306 F.3d 1138 (D.C. Cir. 2002); *Mountain States Legal Found.*, 306 F.3d at 1132. In the most recent of these, the D.C. Circuit Court noted:

> Our court set out a framework for reviewing challenges to national monument designations in two companion cases, *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) and *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002). There, we drew a distinction between two types of claims: those justiciable on the face of the proclamation and those requiring factual development. The former are resolved "as a matter of law" because they turn on questions of statutory interpretation. *Tulare*, 306 F.3d at 1140. As for the latter, although the precise "scope of judicial review" remains an open question, at a minimum, plaintiffs' pleadings must contain plausible factual allegations identifying an aspect of the designation that exceeds the President's statutory authority. *Mountain States*, 306 F.3d at 1133.

Mass. Lobstermen's Assn., 945 F.3d at 540.

The D.C. Circuit Court devised the framework in *Mountain States Legal Found. v. Bush*, 306 F.3d at 1132. In that case, plaintiffs challenged six monument proclamations and argued that factfinding was required to ascertain whether the President had acted within the scope of statutory authority and to review the basis on which the President acted. *Id*. at 1134. In particular, plaintiffs asserted that the proclamations violated the Antiquities Act because it was intended by Congress only to "preserve rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts * * *." *Id*. at 1134.

The D.C. Circuit Court began by addressing open questions about the availability and scope of judicial review for claims alleging a violation of the Antiquities Act. *Id*. at 1135. It noted that the Supreme Court had suggested that "discretionary Presidential decisionmaking" was not subject to so-called "abuse of discretion" review because of "separation of powers concerns." *Id*. (*citing United States v. George Bush & Co.*, 310 U.S. 371, 376-77 (1940); *Dalton v. Specter*, 511 U.S. 462, 476 (1994)). In *Dalton*, the Supreme Court concluded that review "was not available when the statute commits the decision to the discretion of the President." 511 U.S. at 574.

The D.C. Circuit Court noted that a "somewhat different case is presented * * * where the authorizing statute or another statute places discernible limits on the

President's discretion." *Mountain States,* 306 F.3d at 1136 (*citing Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)). Relying on *Reich*, the D.C. Circuit Court suggested that a limited form of review of Presidential proclamations may be appropriate to "ensure that the President has not exceeded his statutory authority." *Id*.

It then conducted a facial review of the six proclamations being challenged and easily rejected the argument that the President had designated ineligible objects. "That argument fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." *Mountain States,* 306 F.3d at 1137 (*citing Cameron*, 252 U.S. at 450).

As to Appellants' remaining claims and their request that the judiciary undertake a more searching *ultra vires* review and factual investigation, the D.C. Circuit Court declined to take up that issue. The plaintiff had not, it found, included any detailed factual allegations to support its claim that the President acted outside Presidential authority, and instead only put forward mere legal conclusions. *Id*. at 1137. The D.C. Circuit Court held that the plaintiff "presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority." *Id*.

In a companion case, *Tulare County*, 306 F.3d at 1138, the D.C. Circuit Court likewise reviewed the plaintiff's allegations and again found them to be inadequate. "This is particularly so as [plaintiff's] claim that the Proclamation covers too much land is dependent on the proposition that parts of the Monument lack scientific or historic value, an issue to which Tulare County made no factual allegations." *Id*. at 1142.

The D.C. Circuit Court did the same in dismissing the complaint in *Mass. Lobstermen's Ass'n*. There, as in the two earlier companion cases, it engaged in limited facial review of the proclamation regarding purely legal issues, including whether the Antiquities Act reaches submerged federal lands offshore, whether the Exclusive Economic Zone offshore is "controlled" by the federal government, and whether the President's authority was constrained by other federal laws. 945 F.3d at 462-65.

As to the claims requiring factual review – *i.e.*, that the monument is not the "smallest area compatible" with the "proper care and management" of the objects to be protected – the D.C. Circuit Court again found the allegations in the plaintiffs' complaint to be insufficient, because it contained "no factual allegations identifying

a portion of the Monument that lacks the natural resources and ecosystems the President sought to protect." *Id*. at 544.[6]

The Supreme Court denied the plaintiffs' petition for certiorari. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979 (2021). Appellants here place great weight on a separate "statement" the Chief Justice filed along with the denial. *See*, *e.g.*, Garfield Br. at 3. But the Chief Justice concurred in the denial of certiorari (as did all the other Justices) and noted the D.C. Circuit Court's holding "that petitioners did not plead sufficient facts to assess their claim that the Monument" is inconsistent with the "smallest area compatible" provision in the Antiquities Act. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. at 981. Thus, the Chief Justice endorsed, or at least did not question, the framework for judicial review the D.C. Circuit Court had earlier established.

V. This Court should adopt a framework for judicial review that is consistent with that of the D.C. Circuit Court of Appeals.

Appellants' allegations in this case mirror closely the allegations in the trio of cases from the D.C. Circuit establishing the framework for judicial review. In particular, they have brought two *ultra vires* claims, one against each of the Proclamations issued by the President restoring Bears Ears and Grand-Staircase

[6] The D.C. Circuit Court of Appeals ultimately dismissed the complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) and held that the district court possessed subject matter jurisdiction over challenges to Antiquities Act designations under 28 U.S.C. § 1331.

Escalante National Monuments. They allege President Biden "exceeded his statutory authority under the Antiquities Act" and then set forth two central arguments under each of the two claims. Garfield Am. Compl. at 90 para 371; 91 para 378.

First, Appellants argue that the Monuments are not "confined to * * * other objects of historic or scientific interest." Garfield Am. Compl. at 90, para 373. Second, Appellants argue that the Monuments are not "confined to the smallest area compatible with the proper care and management of the objects to the be protected." *Id*. at 90, para 374. The two central claims in this case are virtually identical to the analogous claims in the trio of D.C. cases, and this Court can draw on that same framework for judicial review in resolving this case.

In citing the D.C. Circuit Court decisions, Appellants fail to acknowledge the distinction between facial and factual review and fail to grapple with the nuances of such review where Congress has entrusted the office of the President with significant discretion. *See* Garfield Br. at 22-24. They instead couch *ultra vires* review as a "standard mechanism for challenging executive action beyond statutory authority." *Id*. at 24. They fail to acknowledge that the D.C. Circuit cases limit judicial review to the face of the proclamations for the limited purpose of determining whether the President exercised authority granted to him by Congress. *Id*. at 29-30. And they fail to recognize that *ultra vires* review is limited to only those situations where the officer "was not exercising the powers delegated to him by the sovereign." *Wyoming*

v. United States, 279 F.3d 1214, 1229 (10th Cir. 2002) (*citing United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10 Cir. 2001)). *Ultra vires* review does not extend to challenges to "'an incorrect decision as to law or fact.'" *Id*. (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949)).

Thus, under the framework suggested here, courts can conduct a facial review of a monument proclamation to address allegations that the President designated objects on private or state land that is not "owned or controlled by the federal government."[7] They can also address allegations that the President shrunk or eliminated a national monument, thereby acting in excess of the authority granted to the office by Congress.[8] And they can also consider allegations that the President acted in contravention of other applicable federal law.[9] Each of these examples would be resolved as a matter of law on the face of the proclamation. In each case the court would play a limited role in ensuring that the President acted within the

[7] See, *e.g.*, *United States v. California*, 436 U.S. 32 (1978).

[8] This is the claim still pending before the D.C. District Court in the cases challenging President Trump's proclamations shrinking Bears Ears and Grand-Staircase Escalante National Monuments. *Hopi Tribe, et. al. v. Trump, et. al.*, Consolidated Cases No. 1:17-cv-02590 (D.C. Dist. Ct.).

[9] *See*, *e.g.*, *American Forest Resources Council v. United States*, 77 F.4th 787 (D.C. Cir. 2023); *Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023).

statutory authority provided by Congress in the Antiquities Act and did not act in clear violation of statutory prohibitions.[10]

This limited scope of review properly respects the discretion granted by Congress to the President. Federal courts are especially sensitive to "substitut[ing their] judgment for that of the President, * * * in an arena in which the congressional intent most clearly manifest is * * * to delegate decision-making to the sound discretion of the President." *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1186. Appellants' suggestion that *ultra vires* review is a "standard mechanism" for judicial review, one that allows a court to review the President's interpretation of statutory terms entrusted to his discretion, would upset this delicate balance and disrespect the separation of powers. *Mountain States Legal Found.*, 306 F.3d at 1135.

The Federal defendants would go considerably further than any of the Antiquities Act decisions discussed here in limiting judicial review of Presidential proclamations under the Antiquities Act. They base their claims on sovereign immunity and argue that the *ultra vires* doctrine simply does not apply to statutory

[10] This is also the approach to judicial review adopted by the District of Utah in the case that challenged the original proclamation establishing Grand Staircase-Escalante National Monument. *Utah Ass'n of Cntys.*, 316 F. Supp. 3d at 1172 (challenging Proclamation 6920 (61 Fed. Reg. 50,223 (Sept. 23, 1996) ("beyond such a facial review the court is not permitted to go") (*citing Dalton*, 511 U.S. at 462; *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). In its opinion in this case, the district court did not address the approach to judicial review followed in *Utah Ass'n of Cntys*.

claims against the President. Fed. Answering Br. at 59-60. And they argue that Appellants must establish "a right of action at law, or the invasion of a legal right traditional protected at equity." *Id*. at 61.

This Court need not grapple with the difficult questions raised by the U.S. brief. Instead, it should follow the ample precedent where federal courts have exercised restraint and avoided unnecessary holdings regarding the availability or scope of judicial review of Presidential actions. *See*, *e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) ("we may assume without deciding that plaintiffs' statutory claims are reviewable"); *American Forest Resources Council*, 77 F.4th 787 (D.C. Cir. 2023) ("The United States Supreme Court has not yet decided if a claim that the President acted in excess of his statutory authority is subject to non-statutory review").

This Court can and should avoid those questions for the same reason the D.C. Circuit did in earlier Antiquities Act cases. Appellants' first claim is that the President designated ineligible objects. Garfield Am. Compl. at 90, para 373. That claim must be rejected as a matter of law because the Supreme Court has held that the Antiquities Act authorizes the President to protect a vast array of natural and cultural features found on public lands. *See Cameron*, 252 U.S. at 450; *Cappaert*, 426 U.S. at 128; *Alaska v. United States*, 545 U.S. at 75; *see also Mass Lobstermen's Ass'n*, 945 F.3d at 544; *Mountain States Legal Found.*, 306 F.3d at 1137.

Appellants' second primary claim is that the monuments are not limited to the "smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). The language "referring to the proper care and management" vests broad discretion to the President. Indeed, it is difficult to see how a federal court could review a presidential determination about what kind of "care and management" is "proper" without simply substituting its judgment for that of the President. The texts of the proclamations clearly demonstrate that in setting the boundaries of the two monuments in question, the President carefully considered, in great detail, the large number of objects the proclamation identified and the extensive geographic area many of them covered. This makes it obvious he was acting within the authority Congress delegated to him under the Antiquities Act. *See*, *e.g.*, Proclamation 10,285 at 2 ("the reservation described below is the smallest area compatible with the proper care and management of the objects of historic and scientific interest named in this proclamation and Proclamation 9558").

More specific to this case, however, Appellants have failed to set forth any allegations of fact that would trigger the question of whether judicial review is available. *Mass. Lobstermen's Assn.*, 945 F.3d at 544; *Mountain States Legal Found.*, 306 F.3d at 1137 (plaintiff "presents the court with no occasion to decide the ultimate question of the availability or scope of judicial review"); *Tulare Cty.*, 306 F.3d at 1142 (plaintiff's allegations are a "legal conclusion couched as a factual

allegation"). In this case, Appellants' "smallest area compatible" argument depends wholly upon their argument that the President protected ineligible objects. *See* Garfield Am. Comp. at 77. Appellants suggest that only "a small number of identified items" may "likely qualify" for protection, *id*. at para 321, and then fail to allege any specific allegations regarding proper care and management of the objects actually included in the proclamations. Similarly, they allege generally that a reservation must be limited to a size "from a few acres to a few thousand acres," *id*. at 78 para 328, but these amount to nothing more than incorrect legal conclusions untethered to any specific factual allegations.

CONCLUSION

Based on the allegations in these two amended complaints, a limited facial review of the monument proclamations is sufficient to affirm dismissal. For all the reasons stated above, this is not the case in which a federal court needs to explore the outer boundaries of nonstatutory judicial review of Presidential actions. If this Court determines that Appellants have established standing and that further proceedings are appropriate, it should remand to the District Court.

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/s/ Christopher G. Winter

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I certify that on January 16, 2024, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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