ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5008 (consolidated with Nos. 20-5009, 20-5010, 20-5011, 22-5019, 22-5020, 22-5021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FOREST RESOURCE COUNCIL,
Plaintiff/Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants/Appellants,

and

SODA MOUNTAIN WILDERNESS COUNCIL, et al.,
Intervenor-Defendants/Appellants.

Appeals from the United States District Court
for the District of Columbia, Nos. 1:17-cv-00280-RJL, 1:17-cv-00441-RJL, 1:15-cv-01419-RJL, 1:16-cv-01599-RJL, 1:16-cv-01602-RJL
Honorable Richard J. Leon, District Judge

PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE'S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except as stated below, all parties, intervenors, and amici appearing in this Court are listed in Plaintiffs-Appellees' Principal Brief. That brief lists neither the Natural Resources Defense Council, Inc., granted leave to file a brief as amicus curiae, nor Amici Pacific Legal Foundation or the Cato Institute, which have moved for leave to appear as amici curiae.

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, certifies that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Pacific Legal Foundation is a legal nonprofit dedicated to defending people's liberties when threatened by government overreach and abuse.

The Cato Institute is a nonprofit entity under § 501(c)(3) of the Internal Revenue Code. Cato is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to Cato's participation.

B. Rulings Under Review

References to the rulings under review appear in Plaintiffs-Appellees' Principal Brief.

C. Related Cases

References to related cases appear in Plaintiffs-Appellees' Principal Brief.

DATED: August 30, 2022.

Respectfully submitted,

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PLF – Pacific Legal Foundation

AMICI CURIAE'S IDENTITY AND INTEREST[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest. PLF defends Americans' liberties when threatened by government overreach and is the most experienced public-interest legal nonprofit, both as lead counsel and amicus curiae, in cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

PLF also represents clients in cases involving the Antiquities Act of 1906, 54 U.S.C. § 320301, *et seq*., the partial subject matter of these consolidated appeals. *See, e.g., Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019).

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[1] This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amici or their counsel, contributed money intended to fund this brief's preparation or submission.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

These consolidated cases address the President's authority to unilaterally expand the Cascade-Siskiyou National Monument, through the Antiquities Act, into lands governed by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act). 43 U.S.C. § 2601, *et seq*. Amici submit this brief because Presidential Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017), expanding the Monument onto O&C land, and the availability of judicial review of that Proclamation raise core separation of powers issues related to the proper sphere of each co-equal branch's power under the Constitution.

INTRODUCTION

This amicus brief addresses two issues within these consolidated appeals: (1) Whether the President exceeded his delegated authority under the Antiquities Act by reserving land governed by the O&C Act from sustained-yield timber production, *see* AFRC Br. 3; and (2) Whether the district court had jurisdiction to decide that issue. *See id*. at 54.

These issues raise a fundamental and reoccurring question under the Constitution: "Who decides?" *NFIB v. DOL*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). Under the Constitution's Separation of Powers, does the President have the power to override a congressionally prescribed law with the flick of a pen? And under the Constitution's Separation of Powers, does the President have the power—unreviewable by the judiciary—to issue presidential orders that go beyond his delegated authority and alter rather than enforce the law?

When the American people ratified the Constitution, they answered no to both questions. They delegated some of their power—as described and delimited in the Constitution's text—to each federal branch, respectively. *See* James Wilson, State House Yard Speech (Oct. 6, 1787), *reprinted in* 1 *Collected Works of James Wilson* 171, 172 (Kermit L. Hall

& Mark David Hall eds., Liberty Fund 2011) (The federal government's power is "collected, not from tacit implication, but from the positive grant expressed in the instrument of union."). In other words, "the legislative, executive and judicial departments are each formed in a separate and independent manner; and [] the ultimate basis of each is the constitution only, within which the limits of which each department can alone justify any act of authority." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

As relevant here, the people vested Congress—and Congress alone—with the power to make all rules and regulations regarding public lands. U.S. Const. art. IV, § 3, cl. 2. Those rules and regulations must go through the democratic process outlined by Article I of the Constitution before becoming law. *See generally* U.S. Const. art. I. By contrast, Article II vests the Executive Branch with the power to enforce those laws if properly enacted. *See generally* U.S. Const. art. II. And the people vested the judiciary with the judicial power to declare when the other two branches venture outside their constitutional lanes. *See generally* U.S. Const. art. III.

The Constitution divided the government's powers this way not merely—or even primarily—to resolve inter-branch conflicts or to ensure efficient government. It was to preserve people's freedom to determine how they would exercise their rights and liberties without arbitrary government interference. Indeed, the "doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Above all, to preserve life, liberty, and the pursuit of happiness—*to protect individual freedom*—it was necessary to divide governmental powers because, the Framers knew, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many," would lead to "tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961).

SUMMARY OF ARGUMENT

1. Under these first principles, Proclamation 9564 is ultra vires and violates the Separation of Powers. The President is not a king. He oversees the Executive Branch and "take[s] care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But he does not have the

unfettered power to use old laws to work around clear congressional directives in later enacted statutes to instill his preferred policies—policies that have not gone through the democratic gauntlet outlined in the Constitution.

Yet the President has done just that by issuing Proclamation 9564 under the Antiquities Act. The Proclamation expands the Cascade-Siskiyou National Monument by nearly 40,000 acres into lands Congress has expressly set aside for specific uses under the O&C Act, which was passed decades after the Antiquities Act. The O&C Act designated 2.4 million acres of forest in Western Oregon as "timberlands[] and power-site lands valuable for timber," allowing the sale, cutting, and removal of the timber on the lands to create a permanent source of timber, regulate stream flow, protect watersheds, contribute to economic stability, and provide recreational facilities. *See* 43 U.S.C. § 2601. Congress also mandated in the Act that fifty percent of the revenue generated from timber harvesting on O&C lands go to local counties to fund public services such as schools. *See id.* § 2605.

The President directly contradicted Congress's clear directives by withdrawing these lands through the Antiquities Act. In doing so, he has

gone beyond his delegated authority and altered the law outside the procedures outlined in the Constitution.

2. The district court correctly found this case is justiciable when it declared Proclamation 9564 exceeded the President's authority under the Antiquities Act. AFRC Br. 54. Under Article III of the Constitution, it is the federal judiciary's duty to confront questions involving the Constitution's government-structuring provisions. Put another way, it is the solemn responsibility of the Judicial Branch "to say what the law is" under the Constitution's Separation of Powers. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (finding courts must ensure that presidential proclamations comply with constitutional principles and do not exceed the President's statutory authority under the Antiquities Act).

This Court must affirm the district court and exercise its duty to provide a check on the President's executive lawmaking under the Antiquities Act. In recent years, the President has declared vast areas of land and ocean as "antiquities" to instill his preferred policies—policies

not passed through the Constitution's prescribed procedures. Proclamation 9564 is another expansion of the President's power grab under the Act and must be checked.

* * * * *

The district court preserved these bedrock first principles by granting Plaintiffs-Appellees' motions for summary judgment and denying the Defendants-Appellants' motions for summary judgment. This Court should affirm.

ARGUMENT

I. Proclamation 9564 is Ultra Vires and Violates the Separation of Powers.

A. The Constitution's Separation of Powers requires the President to stay within congressional delegations.

Under the Constitution's Property Clause, Congress, not the Executive Branch, is vested with the power to make laws regulating federal lands. *See* U.S. Const. art. IV, § 3, cl 2. Like any other law, laws passed under the Property Clause must go through the Constitution's procedures outlined in Article I. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring) ("Article I requires . . . every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be

presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . .") (cleaned up).

The reason is simple and fundamental: The Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). Excessive lawmaking was "one of the diseases to which our governments are most liable. To address that tendency, the framers went to great lengths to make lawmaking difficult." *Id.* (cleaned up). And if Congress could delegate its lawmaking power to the Executive Branch, the "vesting clauses" and the "entire structure of the Constitution would make no sense." *Id.* at 2134–35 (cleaned up).

Executive Branch officials—including the President—thus can only act through a valid delegation from Congress prescribing the law's execution. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 420–21 (1935). And actions by the Executive Branch—including the President—exceeding congressional delegations are lawmaking, are ultra vires, and violate the Constitution's Separation of Powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

B. Proclamation 9564 conflicts with the O&C Act's clear directives.

The expansion of the Cascade-Siskiyou National Monument violates the separation of powers because Congress did not delegate the President the power to override later-enacted laws under the Antiquities Act. Yet Proclamation 9564 does just that by overriding a clear direction from Congress as expressed in the O&C Act.

When assessing whether Congress intended to delegate power to the Executive, statutes "cannot be construed in a vacuum." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Courts must instead read those laws in context with other statutes. For example, when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions[,]" courts must give that scheme effect. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)). It is a "well established canon of statutory interpretation" that specific provisions govern more general provisions. *Id.* at 645.

The Antiquities Act allows the President to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301. Although the Antiquities Act gives the President significant authority to execute laws over federal lands, other statutes ultimately limit this authority. *See Mountain States Legal Found.*, 306 F.3d at 1136 (citing *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996)).

Congress provided a limitation in the O&C Act by mandating that O&C land "shall be managed . . . for the purpose of providing a permanent source of timber supply." 43 U.S.C. § 2601. And courts have consistently agreed with the text that using land for timber harvesting is an unambiguous requirement. The Ninth Circuit, for example, has observed that the lands subject to the O&C Act "were to be managed as part of a 'sustained yield timber program' for the benefit of dependent communities." *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1364 (9th Cir. 1976). The paramount importance of timber harvesting is also reflected in the Ninth Circuit's holding that: "Nowhere does the

legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990).

This Court has also emphasized the O&C Act's focus on timber harvesting. In *Swanson Grp. Mfg. LLC v. Jewell*, in which timber sales from O&C Act lands were at issue, this Court held "[t]he O & C Act requires that . . . ['the annual sustained yield capacity . . . shall be sold annually, or so much thereof as can be sold at reasonable prices on the normal market.'" 790 F.3d 235, 239 (D.C. Cir. 2015) (quoting 43 U.S.C. § 1181a). To be sure, *Swanson* did not address a proposed alteration of the O&C Act by the President, but it shows the fixed meaning of the statute and the importance of timber production to its statutory scheme. *See id.*

The O&C Act's purpose supports the text's clear command that the Act provides a sustained timber yield, with all other uses secondary. *See O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987); *Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979). The purposes of the

Cascade-Siskiyou National Monument and the O&C lands are also mutually exclusive. Proclamation 7318, which first established the Monument, directly addressed timber harvesting by prohibiting it. "No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber[.]" Proclamation 7318, Establishment of the Cascade-Siskiyou National Monument, 65 Fed. Reg. 37,249, 37,250 (June 9, 2000). The Proclamation also mandated tree removal "from within the monument area may take place only if clearly needed for ecological restoration and maintenance or public safety." *Id.*

In this way, the Cascade-Siskiyou National Monument's dominant purpose is conservation, so it made trees only removable for certain limited purposes. *See id.* Yet Proclamation 9564 expands the Monument onto O&C lands—which Congress had explicitly set aside for timber harvesting.

The President's Cascade-Siskiyou National Monument expansion through Proclamation 9564 is thus incompatible with Congress's will, expressed through the O&C Act. As the district court observed, "[p]ut simply, there is no way to manage land for sustained yield timber

production, while simultaneously deeming the land unsuited for timber production and exempt from any calculation of the land's sustained yield of timber." AFRC Br. 21.[2]

In short, the O&C Act's specific requirements cannot bend to the President's unconstitutional usurpation of power to instill his preferred policy under the Antiquities Act. The President may not amend a congressionally prescribed law by exceeding his delegated authority. If the O&C Act is to yield to the President's preferred policy, it is Congress's job to change the law through the Constitution's required procedures. Any other interpretation of the Antiquities Act untethers the President from his executive function under the Constitution.

[2] This is how the Antiquities and O&C Acts have been interpreted throughout history. *See* DOI Solicitor's Opinion M. 30506 (Mar. 9, 1940) ("It is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress."); *see also* Lawson Fite, *The Missing Piece: Presidential Action on Monuments Highlights Congressional Abdication of Responsibility*, 49 No. 4 ABA Trends 4, 7 (2018).

C. If Proclamation 9564 is lawful, there is no limiting principle on the President's power under the Antiquities Act.

No precedent in this Circuit directly addresses the interaction between the Antiquities Act and the O&C Act. The district court's narrow holding that the President exceeded his statutory delegation thus allows the Court to uphold the O&C Act's clear directives and appropriately limit the President's authority under the Antiquities Act. It can do so by "employing a narrowing construction to avoid separation of powers concerns and fulfill the purpose of the Property Clause." *The Missing Piece*, 49 No. 4 ABA Trends at 7.

The Supreme Court has recently held that "both separation of powers principles and a practical understanding of legislative intent" should make courts "reluctant to read into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up). There must be "something more than a merely plausible textual basis"—there must be a "clear congressional authorization" before courts presume a broad congressional delegation. *Id.*

And courts should be skeptical when the Executive Branch attempts to "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (rejecting an executive agency's claim of "jurisdiction to regulate an industry constituting a significant portion of the American economy" absent explicit congressional authorization).

This principle applies here. The Constitution gives Congress the power to manage federal lands under the Property Clause. *See* U.S. Const. art. IV, § 3, cl 2. Congress delegated some authority to the President to establish national monuments through the Antiquities Act. *See* 54 U.S.C. §§ 320301–320303. And while Congress's delegation of authority under the Antiquities Act is broad, ambiguously so, there must be a clear limit to the power delegated to the President. Indeed, congressional delegations of power to the President must have some "boundaries" to prevent him from seizing the powers reserved for Congress. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 426 (1944); *see also Mistretta v.*

United States, 488 U.S. 361, 379 (1989); *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

If this Court allows the President's unilateral expansion of the Cascade-Siskiyou National Monument, it will set a precedent giving the President boundless power under the Antiquities Act. It will provide no limiting principle on future expansions of national monuments onto land reserved for other purposes by Congress. And it will effectively give the President unlimited authority to regulate federal land how he sees fit, regardless of any uses already designated for the land by statute.

The limitation adopted by the district court—that the President cannot unilaterally expand a national monument onto lands reserved for another purpose by Congress—avoids the constitutional problem that will arise if the President has the unlimited authority to alter later enacted laws. But if the Court interprets the Antiquities Act to create such a sweeping delegation of power to the President to manage federal land under the Property Clause, it will represent an improper delegation of power. *See, e.g.*, *Yakus*, 321 U.S. at 426. Indeed, if lawful, Congress will effectively have delegated its power to legislate federal land use under the Property Clause to the President—creating a "delegation running

riot." *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552–53 (1935) (Cardozo, J., concurring).

In sum, courts should not interpret the Antiquities Act to allow the President to wield Congress's Property Clause power whenever he pleases. Instead, it should be read with a clear limiting principle—the President acts ultra vires when he seeks to expand a national monument onto lands already reserved for another purpose by Congress. Under the Constitution, the people delegated Congress the power to manage federal lands. U.S. Const. art. IV, § 3, cl 2. No interpretation of the Antiquities Act should allow a congressional delegation of legislative authority to the President obliterating that constitutional mandate.

II. This Court Has Jurisdiction to Determine Whether the President Has Acted Outside of His Delegated Powers.

A. Article III courts have a judicial duty to determine when the President has exceeded his power under Federal Law and the Constitution.

The district court correctly found that the federal courts have jurisdiction to determine when the President has exceeded his statutory and constitutional authority under the Antiquities Act. AFRC Br. 54–57. That ruling is not extraordinary—it is required by the Constitution's

mandate that the federal courts provide a vital check on the political branches' excesses of power.

The Framers envisioned that the judiciary—not the Executive Branch—would determine laws' meaning. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 125 (2015) ("The Framers expected Article III judges to engage . . . by applying the law as a 'check' on the excesses of both the Legislative and Executive Branches.") (Thomas, J., concurring). Federal judges are thus constitutionally charged with the duty to exercise independent judgment under Article III of the Constitution. *See* The Federalist No. 78 (Alexander Hamilton) (The judicial duty entails the "interpretation of the laws," which is the "proper and peculiar province of the courts.").

This constitutional principle mandates that courts not "defer to the other branches' resolution" of separation of powers issues. *See NLRB v. Noel Canning*, 573 U.S. 513, 571–72 (2014) (Scalia, J., concurring). And the judiciary's "role is in no way lessened because it might be said that the two political branches are adjusting their own powers between themselves." *Id.* (cleaned up). In the context of executive overreach, the federal courts must look to "the compatibility of [executive] actions with

enabling statutes." *Perez*, 575 U.S. at 1221 (Thomas, J., concurring) (citing *Util. Air Regulatory Grp.*, 573 U.S. at 313–16).

This Court has applied this foundational constitutional principle and reviewed the President's actions in several cases directly dealing with the Antiquities Act and other statutes besides. *See Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d at 540 (D.C. Cir. 2019); *Mountain States*, 306 F.3d 1132; *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); *Reich*, 74 F.3d 1322.

B. This Court must continue to review the President's authority under the Antiquities Act.

There is no reason to depart from the Constitution and this Court's precedents. In fact, it is vital that this Court continues to exercise jurisdiction over the President's actions and provide a limiting principle, as outlined in the district court's holding, to cabin the President's authority under the Antiquities Act.

Presidents rarely gain power through grand usurpations. Presidents usually engage in "creative destruction"—unchecked violations of the law that expand their power over time. *See* Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 8 (2020). This is essentially a "practice-makes-perfect" form of executive lawmaking in which Presidents "claim to have the

authority to change federal law via repeated violations." *Id.* at 9. Through this creative destruction, modern Presidents are thus "Brahma, Vishnu, and Shiva" rolled into one: "creators, preservers, and destroyers" all at once, "switch[ing] between these roles to suit their personal and policy interests." *Id.* at 146. This is partly enabled by "a judicial system that acts as only a partial, fitful check on the executive, and the weakness of the check has consequences for the actions the executive is willing to take." *Id.* at 73.

The Antiquities Act and judicial review of the President's actions provide a perfect example. Under the Antiquities Act, presidents may designate "National Monuments" on certain public lands. 54 U.S.C. § 320301. Congress intended the Act to be a quick way to protect archaeological artifacts from vandalism and looting. *See* Richard H. Seamon, *Dismantling Monuments*, 70 Fla. L. Rev. 553, 561–67 (2018) (discussing the Antiquities Act's legislative purpose). But since at least the 1990s, presidents have slowly swallowed more and more power through the Antiquities Act's implementation with little to no judicial check on their power.

During President Clinton's tenure, for example, the statute's scope broadened from protecting specific "objects" to regulating nebulous "ecosystems."[3] According to the Clinton administration, these unnamed ecosystems were themselves "objects" the President could designate as a "monument." *See Tulare Cnty.*, 306 F.3d at 1142 (explaining the president's reasoning). All told, President Clinton established 19 monuments and expanded three others, totaling 5.9 million acres.[4]

And the expansion of the President's power under the Antiquities Act is not a partisan affair. President George W. Bush expanded on his predecessor's innovation in executive authority by taking ecosystem monuments to new domains. The President's regulatory reach is

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[3] Bruce Babbitt, Secretary, Department of Interior, Address at the Sturm College of Law of the University of Denver, *From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLM*, 3 U. Denv. Water L. Rev. 223, 229 (2000) (describing the evolution of presidential regulation under the Antiquities Act, starting with the designation of "curiosit[ies]" and, during the Clinton administration, expanding to the protection of entire ecosystem). https://core.tdar.org/document/374192/from-grand-staircase-to-grand-canyon-parashant-is-there-a-monumental-future-for-the-blm.

[4] *National Monuments and the Antiquities Act: President Clinton's Designations and Related Issues*, Congressional Research Service 4 (June 28, 2001) https://www.everycrsreport.com/files/20010628_RL30528_51e7ee36b7368d6934398c5f4f14f92bb11a201a.pdf.

textually limited to property on "land" "owned or controlled" by the federal government. 54 U.S.C. § 320301. During the law's first 100 years, courts understood that limitation to mean only those land areas subject to U.S. sovereignty, such as public lands or the land within the territorial seas. *See United States v. California*, 436 U.S. 32, 35–36 (1978) (recognizing that Presidents only designated monuments in areas where the federal government exercised "full dominion and power"). But in 2006, President Bush adopted a broader reading and established the 89-million-acre Northwestern Hawaiian Islands Marine National Monument in the Pacific Ocean.[5] Under President Bush's interpretation of "land" that is "owned or controlled" by the federal government, the President's authority extends to the Oceans' seabed in the "exclusive economic zone"—an area between the territorial sea and 200 miles from the Nation's coast, over which nations exercise concurrent authority that falls far short of sovereign dominion.[6]

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[5] Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), https://www.federalregister.gov/documents/2006/06/26/06-5725/establishment-of-the-northwestern-hawaiian-islands-marine-national-monument.

[6] *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (establishing the EEZ),

Not to be outdone, President Obama expanded three of President Bush's marine monuments and created the Northeast Canyons and Seamounts National Monument—which designated millions of acres of the Atlantic Ocean as a national monument and banned commercial fishing within its boundaries. *See Mass. Lobstermen's Ass'n*, 945 F.3d at 538–39.[7]

These two Presidents' Ocean monuments now encompass almost 750 million acres of Ocean seabed. That is nearly ten times the area as the total acreage regulated during the first 100 years of the Antiquities Act.[8] And these monuments have severely limited the people's ability to ply their trade and earn a living within the designations.

Of course, the inherent problem with ecosystem monuments is that there's no limiting principle. This is so because every square inch of the earth contains or is part of an ecosystem—*all* public "lands" or Oceans'

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https://archives.federalregister.gov/issue_slice/1983/3/14/10605-10606.pdf#page=1.

[7] President Obama expanded the Pacific Remote Islands Marine National Monument by 261.3 million acres and the Papahanaumokuakea Marine National Monument by 283.4 million acres.

[8] *National Monuments and the Antiquities Act*, Congressional Research Service R41330 Appendix B (updated July 11, 2022), https://sgp.fas.org/crs/misc/R41330.pdf.

seabed are designable "monuments" under the President's reading of the law.[9] In this way, ecosystem monuments obviate the Antiquity Act's primary constraint on executive authority—that a designation must be limited to the "smallest area compatible" with a monument's preservation. 54 U.S.C. § 320301(b). Yet this limitation becomes meaningless when courts permit the President to merely draw shapes on a map and designate an entire ecosystem as a "national monument."

In essence, these continual transgressions of power through several presidential proclamations—with little to no judicial scrutiny of the President's authority when they happen—have allowed the President to become a constitutional "pickpocket" of Congress's power under the Property Clause. *See* Prakash, *The Living Presidency* 9. It should thus be no surprise that the President is now seeking to expand his power even further by claiming the authority to override clear statutory mandates.

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[9] *See* National Geographic, *Ecosystem*, Resource Library: Encyclopedia ("The whole surface of Earth is a series of connected ecosystems."), https://www.nationalgeographic.org/encyclopedia/ecosystem/print/#:~:text=The%20whole%20surface%20of%20Earth,types%20of%20biomes%2C%20for%20example.

Even so, this expansion of power has started to be noticed. As the Chief Justice observed, the Antiquities Act's limited delegation has not yet been meaningfully delineated by courts, resulting in increasingly absurd interpretations of the Act. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980–81 (2021) (Mem) (noting that past presidents' interpretations of the Antiquities Act strain the bounds of "ordinary English"). As the Chief Justice tacitly acknowledged, the Antiquities Act has morphed into limitless power never envisioned by Congress when it passed the statute over 100 years ago. *See id.* at 981.

This Court should heed these observations, continue to exercise jurisdiction over the President's unlawful exercise of authority under the Antiquities Act, and provide the judicial check the Constitution requires to limit his authority to that delegated by Congress. The Court can do so by affirming the district court's holding that the President cannot override Congress's clear statutory mandates. The Antiquities Act is not, and constitutionally cannot be, a delegation that allows the President to ignore Congress's clear legal directives.

CONCLUSION

For all these reasons, this Court should affirm the district court's judgment granting Plaintiffs-Appellees' motions for summary judgment and denying the Defendants-Appellants' motions for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,936 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This statement is based on the word count function of Microsoft Office Word.

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a 14-point Century Schoolbook, a proportionally spaced font.

s/ Frank D. Garrison
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CERTIFICATE OF SERVICE

I certify that on August 30, 2022, I electronically filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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