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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, a Utah political subdivision; KANE COUNTY, UTAH, a Utah political subdivision; and THE STATE OF UTAH, by and through its Governor, SPENCER J. COX, and its Attorney General, SEAN D. REYES, *Plaintiffs*, ZEBEDIAH GEORGE DALTON; BLUERIBBON COALITION; KYLE KIMMERLE; and SUZETTE RANEA MORRIS, *Consolidated Plaintiffs*, *v.* JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; DEBRA A. HAALAND, in her official capacity as Secretary of Interior; DEPARTMENT OF THE INTERIOR; TRACY STONE-MANNING, in her official capacity as Director of the Bureau of Land Management; BUREAU OF LAND MANAGEMENT; THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; DEPARTMENT OF AGRICULTURE; RANDY MOORE, in his official capacity as Chief of the United States Forest Service; and UNITED STATES FOREST SERVICE, *Defendants*, HOPI TRIBE; NAVAJO NATION; PUEBLO OF ZUNI; and UTE MOUNTAIN UTE TRIBE, *Intervenor Defendants*.	**INDIVIDUAL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Lead Case No. 4:22cv00059 DN-PK Member Case No. 4:22cv00060 DN District Judge David Nuffer Magistrate Judge Paul Kohler

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Pursuant to Rule 56 of both the Federal Rules of Civil Procedure and the Local Rules of Civil Practice, Individual Plaintiffs move for summary judgment in this matter.

INTRODUCTION

"The Antiquities Act originated as a response to widespread defacement of Pueblo ruins in the American Southwest."[1] To that end, the Act gives the President the authority to designate as monuments "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," and to set aside those federal lands that constitute the "smallest area compatible with the proper care and management of the objects to be protected."[2]

Invoking his powers under the Antiquities Act, President Biden recently set aside over *three million acres* of land in Southeastern Utah—roughly the size of Connecticut—as part of two monuments: Grand Staircase-Escalante and Bears Ears. He did so on the unprecedented rationale that entire landscapes—one 1.87 million acres (about the size of Delaware), the other 1.36 million acres (Rhode Island plus Guam)—constituted "objects of historic or scientific interest" under the Act.[3] So too a selection of standalone "areas," ecosystems, habitats, and even species of animals.[4]

President Biden's Proclamations are unlawful. A landscape or an area is not an "object situated on land." It *is* the land. So too amorphous concepts like ecosystems or habitats, which are not discrete "objects" in any sense of the term. And while animals like owls and sheep may be tangible things, they are not *affixed* to federal land, as the Act requires. Put together, the

[1] *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

[2] 54 U.S.C. § 320301(a)-(b).

[3] 86 Fed. Reg. 57335, 57345 (Oct. 8, 2021); 86 Fed. Reg. 57321, 57332 (Oct. 8, 2021).

[4] *See, e.g.*, 86 Fed. Reg. at 57338 (maintaining that the Grand Staircase-Escalante landscape is broken up into "distinct and unique areas, which are themselves objects qualifying for protection").

Proclamations depend for their existence and scope on expanding the range of protectible "objects" beyond what the Act's plain text may bear.

Indeed, if the President were free to deem these things "objects," then the Antiquities Act would have no limits at all. There is not a single inch of federal land that is not part of some landscape or area (or for that matter, ecosystem or habitat). On the President's view, all federal land will become fodder for a possible monument under the Act; the only restraint would be the President's own discretion, which is no restraint at all. And a statute originally tailored to give the President the ability to "create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times,"[5] would be forever transformed into a "power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."[6]

Rather than bless the President's attempt to raze the Antiquities Act's limits, this Court should set the Proclamations aside. By their terms, the Proclamations draw their borders—in whole and in part—around things that are not "objects" as a matter of law. And that legal defect is fatal. The Proclamations do not say what lands are set aside for what "objects," instead setting aside three-million-plus acres to protect one undifferentiated mass. But the "smallest area compatible" for protecting one lump sum of things is necessarily larger than the "smallest area" needed to protect a materially smaller subset of those things. As a result, is impossible to conclude the Monuments comply with the Act's "smallest area" requirement—regardless of whether there also happen to be valid "objects" scattered across the Monuments' country-sized expanse.

What's more, because the Proclamations do not state what lands are set aside for what

[5] H.R. Rep. No. 59-2224, at 1 (1906).

[6] *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

"objects," this Court has no means of salvaging portions of the Monuments, or drawing smaller ones that are more consistent with the Act. The only available remedy is for the Court to set them aside. President Biden would then be free to designate new monuments that do not transgress the Act's basic limits, should he so choose.

The President's unlawful Proclamations are not an abstract theoretical issue, as Plaintiffs' experiences demonstrate. Plaintiffs' families have lived here for generations. Many helped found the communities that are now within Grand Staircase-Escalante and Bears Ears. And even though the Plaintiffs come from different backgrounds—as outdoorsmen, miners, ranchers, and Native Americans—the Proclamations pose a common threat to each.[7]

The Chief Justice recently recognized the need for courts to begin policing presidential abuses of the Antiquities Act.[8] This is the case to start. Both of the Proclamations rest on an extreme reading of the Act that—if sanctioned—would render it boundless. This Court should reject that reading and enforce the Act's terms.

RELIEF REQUESTED

Plaintiffs request summary judgment on their claims that the Proclamations violate the Antiquities Act, and that the federal agency actions implementing the Proclamations therefore

[7] *E.g.*, Griffin Decl. ¶ 15 (Simone Griffin: "The regulations and restrictions that have come with the monument designation have gutted our economy. … [T]he Monument risks destroying what it means to live here in Escalante."); Am. Compl. ¶ 147 (Kyle Kimmerle: "If allowed to stand in its current form, I fear the Monument will soon fundamentally destroy our region and its traditional way of life."); Dalton Decl. ¶ 18 (Zeb Dalton: "If allowed to stand, the Monument and its accompanying regulations pose an existential threat to our ranch and our livelihood."); Am. Compl. ¶ 146 (Suzette Morris: "Whatever the intent behind the Monument, it will be disastrous for our community if it's allowed to stand. We don't need it, and in fact we may not be able to survive it."). References herein to declarants' original declarations will be made to their "Decl.," while references to their supplemental declarations will be made to their "Supp. Decl."

[8] *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

contravene the Administrative Procedure Act. Plaintiffs seek a declaratory judgment holding the Proclamations unlawful, an injunction barring their implementation, and any other relief this Court finds appropriate.[9]

BACKGROUND

A. The Antiquities Act of 1906

The Antiquities Act was originally developed to address a gap in federal law: At the turn of the twentieth century, hordes of people were pilfering the American Southwest of its historical and cultural artifacts, but there was effectively no federal statute on the books to stop them.[10]

To combat this, the Act gave the President the power to proclaim certain items "national monuments," and then reserve portions of federal land for their protection. The Act's text today is materially the same as it was when the law first passed.[11] And now, as then, the Antiquities Act has two main sections that work in tandem, and that read as follows:

> **(a) Presidential declaration.—**The President may, 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 on land owned or controlled by the Federal Government to be national monuments.
>
> **(b) Reservation of land.—**The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[12]

The Antiquities Act has also always included its own punishment provision (now listed at 18 U.S.C. § 1866(b)) that criminalizes the unlawful alteration of any monument:

> **Appropriation of, injury to, or destruction of historic or prehistoric ruin or monument or object of antiquity.—**A person that appropriates, excavates, injures, or destroys any historic or

[9] Am. Compl. at 66.

[10] *See also infra* Part I.A.3 (detailing history of the Act).

[11] *Compare* 54 U.S.C. § 320301, *with* Pub. L. No. 59-209, 34 Stat. 225 (1906).

[12] 54 U.S.C. § 320301.

> prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated, shall be imprisoned not more than 90 days, fined under this title, or both.

Unlike with other conservation laws, national monument designations under the Antiquities Act are done by presidential proclamation alone. There is no required public process; no necessary congressional approval; nor any internal procedural requirements.

The "creation of a national monument is of no small consequence."[13] Monument designations trigger an onerous regime of federal regulation—restrictions that flow from the proclamations themselves as well as the implementing regulations that follow.[14] Notably, where, as here, the proclamation labels the monument the "dominant reservation" on the land, it displaces other policies—such as the flexible "multiple use" mandate that governs much other public land management—and drives how federal agencies manage monument lands on a day-to-day basis.[15]

B. The Grand Staircase-Escalante and Bears Ears Monuments

The Grand Staircase-Escalante and Bears Ears National Monuments together cover more than three million acres of land in Southeastern Utah. Each Monument is itself over one million

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[13] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari).

[14] *See, e.g.*, Carol H. Vincent, Cong. Rsch. Serv., R41330, *National Monuments and the Antiquities Act* 8–10 (2021) (describing effects on land use).

[15] *See, e.g.*, 43 U.S.C. § 1732(a) (providing BLM "shall manage the public lands under principles of multiple use and sustained yield … except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law"); *see also* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 514-19 (2003) (describing regulatory effects of national monument designation); Bureau of Land Management, *Grand Staircase-Escalante National Monument: Analysis of the Management Situation* 3-1 (Aug. 2022) (explaining "BLM is required to manage [the monument] in a manner that protects [its] values" and "any discretionary uses in [monument lands] that are not consistent with the protection of its objects and values cannot be permitted"); Bureau of Land Management, *Bears Ears National Monument: Analysis of the Management Situation* 3-3 (Sept. 2022) (same for Bears Ears).

acres. And each Monument was remarkably controversial when created—so much so that President Clinton announced Grand Staircase-Escalante from down in Arizona,[16] and President Obama established Bears Ears only days before he left office.[17]

In an effort to shore up support from out-of-state environmentalists ahead of a presidential election, President Clinton created the Grand Staircase-Escalante National Monument in September 1996.[18] The original monument stretched across 1.7 million acres in Kane and Garfield Counties. And with it came a legion of regulations and changes that would impact the region for decades. As Simone Griffin—Policy Director for the BlueRibbon Coalition, and a lifelong resident of the area—witnessed firsthand, the monument designation gutted their "stable, year-round economy made up of logging, drilling, and mining, as well as ranching and farming," and warped it into a seasonal, tourism-driven one that could sustain surrounding towns for only a fraction of the year.[19] As one telling example, the size of the graduating class at Simone's local high school has plummeted by about 80%.[20]

The story of Bears Ears is similar. As with Grand Staircase-Escalante, the creation of Bears Ears pretermitted an ongoing and robust debate among members of Congress, state officeholders, and local stakeholders regarding how to best protect these lands and balance competing interests.[21] And as with Grand Staircase-Escalante, the monument designation promised new restrictions that

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[16] *See Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1181 (D. Utah 2004),

[17] *See* 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016); *see also* James R. Rasband, *Stroke of the Pen, Law of the Land?*, 63 Rocky Mtn. Min. L. Inst. 21-1, 21-2-21-3 (2017) (noting backlash).

[18] *See Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d at 1181-82 (discussing background and desire to shutter local coal mine); *see also* Am. Compl. ¶¶ 54-55.

[19] Am. Compl. ¶¶ 88-89; *see also, e.g.*, William J. Clinton, *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona* (Sept. 18, 1996) ("[W]e can't have mines everywhere").

[20] Am. Compl. ¶ 90.

[21] *Id.* ¶¶ 65-68.

would markedly affect existing ways of life.[22]

The opposition to Grand Staircase-Escalante endured, and the response to Bears Ears was severe. In response, President Trump reexamined the monuments at the start of his administration. And in December 2017, he materially changed both.

President Trump reduced the size of Grand Staircase-Escalante by 860,000 or so acres, and Bears Ears by about 1.2 million.[23] For both monuments, President Trump found that many of the "objects" identified in each proclamation did not merit protection under the Antiquities Act; that other federal laws were better suited to manage the lands at issue; and that in all events, the boundaries of the monuments were far larger than necessary.[24] Further, President Trump's proclamations modifying the monuments removed earlier restrictions that affected land use.[25]

C. President Biden's Proclamations

In his first year in office, President Biden again reversed course, reinstating and expanding Grand Staircase-Escalante and Bears Ears.[26] Under his proclamations (together, herein, the "Proclamations"), President Biden set aside 1.87 million acres for Grand Staircase-Escalante (an expanse larger than Delaware), and 1.36 million acres for Bears Ears (Rhode Island plus Guam).[27]

President Biden justified each Monument on the ground that its entire landscape was *itself*

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[22] *See, e.g.*, 82 Fed. Reg. at 1143-45 (listing within proclamation new limits regarding off-road vehicle use, mining and geothermal leasing, and grazing).

[23] 82 Fed. Reg. 58089, 58093 (Dec. 4, 2017); 82 Fed. Reg. 58081, 58085 (Dec. 4, 2017).

[24] 82 Fed. Reg. at 58090-91 (Grand Staircase-Escalante); 82 Fed. Reg. at 58081-82 (Bears Ears).

[25] 82 Fed. Reg. at 58093-94 (altering regulations concerning mining, off-road vehicle use, and grazing within Grand Staircase-Escalante); 82 Fed. Reg. at 58085-86 (same as to activities within Bears Ears).

[26] 86 Fed. Reg. 57335; 86 Fed. Reg. 57321.

[27] 86 Fed. Reg. at 57345; 86 Fed. Reg. at 57332.

an "object of historic and scientific interest" under the Act.[28] That is unprecedented. No President has ever claimed that a landscape constitutes an "object situated on land," let alone attempt to reserve millions of acres on that basis. The Proclamations also list a range of constitutive "objects" that are scattered across each landscape. Some of them hew closer to what one might expect in connection with an *Antiquities* Act.[29] But a significant measure do not.

Namely, both Proclamations state that each landscape is broken into "distinct and unique areas, which are themselves objects qualifying for protection."[30] The landscapes also contain an indeterminate number of "ecosystems" and "habitats," which the President claims are "objects of historic or scientific interest that are situated on federal land."[31] Furthermore, the Proclamations identify a variety of animals as "objects situated on land"—such as bees, owls, sheep, and more.[32]

The Proclamations establish two national monuments that are together roughly the size of Connecticut. Both Proclamations assert that the landscape alone justifies each monument *in full*; they further assert that individual "objects" scattered across each landscape (including the individual "areas" that make them up) justifies the same.[33]

The Proclamations also reinstate the Clinton- and Obama-era regulatory regimes for each

[28] 86 Fed. Reg. at 57336; 86 Fed. Reg. at 57322.

[29] *See, e.g.*, 86 Fed. Reg. at 57341 ("Ancestral Pueblo sites").

[30] 86 Fed. Reg. at 57338 (Grand Staircase-Escalante); 86 Fed. Reg. at 57324 (same for Bears Ears).

[31] *See, e.g.*, 86 Fed. Reg. at 57323 (collection of "intact ecosystems").

[32] *See, e.g.*, 86 Fed. Reg. at 57337.

[33] *See id.* at 57345 ("As a result of the distribution of the objects across the Grand Staircase-Escalante landscape, and additionally and independently, because the landscape itself is an object in need of protection, the boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the [above] objects"); 86 Fed. Reg. at 57331 (same for Bears Ears).

Monument.[34] The Proclamations further add sets of new policies for each Monument. For instance, both Proclamations direct agencies to retire livestock grazing permits and leases that are relinquished to the Government.[35] And for Bears Ears—in line with the Proclamation's decision to protect the entire landscape as an "object"—President Biden dropped a prior policy ensuring "access by members of Indian tribes for traditional cultural and customary uses."[36]

Last, on top of the restrictions imposed by the Proclamations themselves, the BLM Director—at President Biden's direction—has issued an interim management plan for each Monument.[37] Among other things, the plans impose their own set of rules for activities on monument land, and incorporate other policies, such as the BLM Manual and past management plans.[38] The plans "provide[] specific direction" to the agency, and constitute binding directives until replaced by full monument management plans (which are expected in 2024).[39]

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs represent a cross-section of Utah. Each Plaintiff has been harmed by one or both

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[34] 86 Fed. Reg. at 57344-46 (Grand Staircase-Escalante); 86 Fed. Reg. at 57331-33 (Bears Ears).

[35] 86 Fed. Reg. at 57346 (Grand Staircase-Escalante); 86 Fed. Reg. at 57332 (Bears Ears).

[36] *Compare* 82 Fed. Reg. at 1145.

[37] Memorandum from Director, Bureau of Land Management to Utah State Director, Bureau of Land Management, *Interim Management of the Grand Staircase-Escalante National Monument* (Dec. 16, 2021) [hereinafter, "Grand Staircase-Escalante Interim Plan"], https://www.blm.gov/sites/default/files/docs/2021-12/GSENM_Interim_Guidance_12-16-21_Final508_0.pdf; Memorandum from Director, Bureau of Land Management to BLM Utah State Director, *Interim Management of the Bears Ears National Monument* (Dec. 16, 2021) [hereinafter, "Bears Ears Interim Plan"], https://www.blm.gov/sites/default/files/docs/2021-12/BENM%20Interim%20Guidance%2012-16-21_Final508.pdf.

[38] *See, e.g.*, Grand Staircase-Escalante Interim Plan, at 4 ("In summary, for discretionary decisions before new monument management plans are adopted, the BLM may allow activities only if it determines that: (1) the decision conforms to the applicable 2020 resource management plan; and (2) the decision is consistent with the protection of monument objects."); Bears Ears Interim Plan, at 3 ("[W]ithin Bears Ears National Monument, typical multiple use management is superseded by the direction in Proclamation 10285 to protect monument objects.").

[39] *See, e.g.*, Grand Staircase-Escalante Interim Plan, at 1-2.

Proclamations. Each will be harmed further if they are permitted to stand.

The BlueRibbon Coalition is a 501(c)(3) nonprofit that has worked to protect access to public lands since 1987.[40] Many of its members have lived in Utah their entire lives, or have come to love the State as an adopted home.[41] The Proclamations pose a direct threat to BlueRibbon due to their restrictions on activities like off-road vehicle use.[42] With the Proclamations come closed trails, restricted campgrounds, and shuttered areas.[43] As such, BlueRibbon's members have thus been forced to curtail events, miss out on traditions, and refrain from accessing lands that have deep religious and cultural significance to them.[44] Moreover, BlueRibbon's members (and others) have been deterred from accessing lands they used to freely enjoy, because of the specter of legal liability created by the Proclamations and the Act's enforcement provision.[45]

These restrictions also harm BlueRibbon itself as an organization: BlueRibbon has had to spend tens of thousands of dollars in response to the Proclamations[46]; has had to shift resources away from core programs toward efforts to counteract the effects of and educate members about the monuments[47]; and has had existing initiatives undermined by the Proclamations' new limitations.[48]

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[40] Burr Decl. ¶ 8.

[41] *See id.* ¶ 9.

[42] *E.g.*, *id.* ¶ 28.

[43] *E.g.*, *id.* ¶ 30 (noting Kitchen Corral, Inchworm Arch Road, Park Wash, and Deer Springs Wash); Griffin Decl. ¶ 13 (Little Desert OHV area).

[44] *E.g.*, Wright Decl. ¶ 12 (describing denials of special recreation permits for annual event); *see also* Griffin Decl. ¶ 12 (discussing effects of closures and regulations); Johansen Decl. ¶ 5 (same); Shumway Decl. ¶ 4 (same).

[45] *See, e.g.*, Am. Compl. ¶ 123.

[46] Burr Decl. ¶ 31

[47] *Id.*

[48] *Id.* ¶ 30

Kyle Kimmerle is a miner in Moab, Utah.[49] Mining has been in Kyle's family for generations, and he now runs a small mining operation with his dad.[50] The Bears Ears Proclamation, in particular, has prevented Kyle from moving forward on a number of his claims.[51] Among other things, as a result of the Bears Ears Proclamation, Kyle now must subject his mining claims to a new and costly validity exam process that risks having his existing claims declared invalid.[52] This new regulation has already cost him millions of dollars in lost profits.[53] Moreover, the regulatory climate surrounding Bears Ears has caused Kyle's mining claims to plummet in value, and has precluded him from being able to find any buyers.[54] As important, the Proclamation's restrictions on mining have separated Kyle from his heritage and family tradition.[55] And as with the other plaintiffs, Kyle too has watched how the Proclamation is harming his community and preventing small businesses like his from making a profit.[56]

Zeb Dalton is a rancher in Blanding, Utah.[57] His family has been ranching in San Juan County for 130 years.[58] Given the amount of Western land the Federal Government owns, ranching is already a heavily regulated business.[59] For instance, it took Zeb nearly *twenty years* to get federal approval for an ordinary repair of a fence on his ranch.[60] The Bears Ears

[49] Kimmerle Decl. ¶¶ 2-3.
[50] *Id.* ¶ 3.
[51] *Id.* ¶ 15.
[52] *Id.* ¶¶ 12-16.
[53] *Id.* ¶ 16; *see also id.* ¶¶ 17-19 (detailing other costs).
[54] Kimmerle Supp. Decl. ¶ 4.
[55] Kimmerle Decl. ¶¶ 7-8.
[56] *Id.* ¶¶ 20-21.
[57] Dalton Decl. ¶ 2.
[58] *Id.* ¶ 3.
[59] *Id.* ¶ 20.
[60] *Id.* ¶ 12.

Proclamation poses an existential threat to Zeb's business, and has already caused him to have to part with cattle and lose out on real profits.[61] Among other things, the Proclamation subjects all range improvements done on federal land to an even greater and more costly layer of regulation.[62] As with Kyle, the threat to Zeb is also more fundamental: Ranching is integral to Zeb's identity.[63] The Proclamation is jeopardizing Zeb's ability to follow in his family's footsteps, and pass down his ranch to his kids.[64]

Suzette Morris is a member of the Ute Mountain Ute Tribe who lives in White Mesa, Utah.[65] Suzette's family has been with these lands for generations, and they are sacred to her and her family.[66] But the Bears Ears Proclamation risks severing her connection to these sacred areas.[67] In particular, Suzette's religious and familial traditions turn on being able to readily access lands within Bears Ears, and remove from them certain resources (herbs, woods, berries, and the like).[68] But given that the Proclamation brands the entire Bears Ears landscape an "object," federal law now impedes such activities.[69] Further, given the influx of tourists that have followed the Monument, Suzette is watching the steady degradation of these lands from federal mismanagement.[70] So long as the Proclamation remains in effect, it is harming Suzette's traditional way of life.[71]

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[61] *E.g.*, *id.* ¶ 17.
[62] *Id.* ¶¶ 18-19; *see also* Dalton Supp. Decl. ¶ 4.
[63] Dalton Decl. ¶¶ 19-20.
[64] *Id.*
[65] Morris Decl. ¶¶ 1-2.
[66] *Id.* ¶ 3.
[67] *E.g.*, *id.* ¶ 5.
[68] *Id.* ¶ 7.
[69] *Id.* ¶ 8; *see also* Morris Supp. Decl. ¶ 6.
[70] Morris Decl. ¶ 9.
[71] *Id.* ¶¶ 10-11.

In light of the above, Plaintiffs filed this lawsuit in August 2022. The Court consolidated this case with a related suit filed by the State of Utah and certain counties. Meanwhile, a number of parties moved to intervene on behalf of the Government. This Court granted the motion to intervene for a number of tribes (the Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe). The other motions to intervene remain pending. The Federal Defendants and the Intervenor-Defendants each moved to dismiss this action on March 2, 2023.

SUMMARY OF ARGUMENT

This case presents two starkly competing views of the Antiquities Act. On the Government's telling, what constitutes an "object of historic or scientific interest" is whatever the President says, and the Act thus bestows on him the effective power to convert any and all federal land into a national monument. That is not an exaggeration: It is precisely what the Government recently told the D.C. Circuit in a similar case, saying the Act empowered the President to set aside all *three billion* acres of the Exclusive Economic Zone in the Atlantic Ocean as a single monument so long as he declared that he believed those three billion acres contained just one ecosystem.[72]

The Government is wrong. The Antiquities Act operates like every other statute. Its text, structure, and history impose enforceable limits on the President's authority. As relevant here, the Act only empowers the President to declare national monuments to protect certain enumerated items; in particular, historically or scientifically significant "objects situated on land." Because the Proclamations seek to safeguard things that are not such "objects"—and thus violate the Act's terms—this Court should set them aside.

STANDARD OF REVIEW

"Summary judgment is appropriate when 'the movant shows that there is no genuine

[72] Oral Argument at 21:22-22:42, *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019) (No.18-5353).

dispute as to any material fact and the movant is entitled to judgment as a matter of law.'"[73] "A 'dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[74] And "[w]hen applying the summary judgment standard, the court must 'view the evidence and make all reasonable inferences in the light most favorable to the nonmoving party.'"[75]

ARGUMENT

I. THE PROCLAMATIONS CONTRAVENE THE ANTIQUITIES ACT.

Congress passed the Antiquities Act for a simple purpose: To give the President the tailored ability "to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."[76] This case turns on whether Congress failed at that modest aim in spectacular fashion, and stumbled into vesting the President with the plenary power to set aside all federal land as a national monument. It did not.

Rather, the Antiquities Act imposes careful and deliberate limits on presidential power, consistent with its original focus. The Proclamations are irreconcilable with those limits—indeed, with the notion of having limits at all. They purport to set aside over three million acres in Utah on the ground that landscapes, geographic areas, ecosystems, habitats, and animals (among other things) all constitute "objects of historic or scientific interest that are situated on [federal] land."[77] If those justifications are allowed to stand, then the Antiquities Act is truly without bound. There is not a single inch of federal land that does not include those "objects."

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[73] *Markowski v. Brigham Young Univ.*, 575 F. Supp. 3d 1377, 1379 (D. Utah 2022) (quoting Fed. R. Civ. P. 56(a)).

[74] *Vox Mktg. Grp. v. Prodigy Promos*, 556 F. Supp. 3d 1280, 1284 (D. Utah 2021).

[75] *Markowski*, 575 F. Supp. 3d at 1379-80 (quoting *N. Nat. Gas Co. v. Nash Oil & Gas, Inc.*, 526 F.3d 626, 629 (10th Cir. 2008)).

[76] H.R. Rep. No. 59-2224, at 1.

[77] 54 U.S.C. § 320301(a).

The Proclamations contravene the Antiquities Act. As a matter of law, a landscape is not an "object situated on land." Nor is an area, ecosystem, or owl. The Act empowers the President to set aside federal land to protect certain enumerated items; he may not reserve whatever land he wants for whatever reason—a claim of power that would convert the Act into a blank presidential check. Because the Proclamations rest on basic legal errors, the Court should set them aside.

A. The Antiquities Act Confers a Limited Power.

Once more, in relevant part, the Antiquities Act reads as follows:

> **Presidential declaration.—**The President may, 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 on land owned or controlled by the Federal Government to be national monuments.[78]

This case concerns only the third set of items above—neither landmarks nor structures, but "*other objects* of historic or scientific interest that are *situated on land* owned or controlled by the Federal Government."[79] Both Proclamations are exclusively justified as necessary to protect "objects."

Properly understood, the Antiquities Act supplies the President with an important but nonetheless circumscribed power. Text, structure, and history make plain that an "object[] of historic or scientific interest that [is] situated on [federal] land" is a discrete, material thing that can be visibly identified and is affixed to federal land. It is not an open-ended concept with content determined by the President's say-so.

1. Text. Five parts of the Act's text support a confined reading of "object."

First, the word "object" itself imposes certain constraints. The Act does not define "object," so the word has its ordinary meaning at the time of enactment.[80] And contemporary

[78] 54 U.S.C. § 320301(a).

[79] *Id.* (emphases added).

[80] *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021).

dictionaries made clear that an "object" was *not* an open-ended concept or idea—it meant a discrete, material thing.[81]

Second, the word "object" is delimited by the word "other." The Act states the President may designate as monuments "historic landmarks, historic and prehistoric structures, and *other* objects of historic or scientific interest."[82] In using the word "other," Congress made clear that "objects of historic or scientific interest" should be read in relation to "historic landmarks" and "historic and prehistoric structures."[83] That is, the use of "other" means an "object of historic or scientific interest" must be akin to an "historic landmark" or "historic or prehistoric structure."[84]

This list also makes clear that, while an "object" must be *akin* to an historical landmark or structure, it should not *subsume* those items. Here, the Supreme Court's approach to the Federal Arbitration Act—a different statute with a similar structure—is helpful. The FAA does not apply to "contracts of employment of seamen, railroad employees, or any *other* class of workers engaged in foreign or interstate commerce."[85] As the Court explained, "the phrase 'class of workers engaged in … commerce' should be 'controlled and defined by reference' to the specific classes

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[81] *See, e.g.*, Webster's New International Dictionary, at 1482 (1909) ("That which is put, or which may be regarded as put, in the way of some of the senses; something visible or tangible"); 10 Oxford English Dictionary, at 14 (1909) ("Something placed before the eyes, or presented to the sight or other sense; an individual thing seen or perceived, or that may be seen or perceived; a material thing"); Webster's International Dictionary, at 990 (1893) (listing as examples: "he observed an *object* in the distance; all the *objects* in sight; he touched a strange *object* in the dark"); *see also Yates v. United States*, 574 U.S. 528, 537 (2015) (defining "tangible object" as "a discrete thing that possesses physical form") (internal markings omitted).

[82] 54 U.S.C. § 320301(a) (emphasis added).

[83] *See Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020).

[84] *See United States v. Hendrickson*, 949 F.3d 95, 99 n.5 (3d Cir. 2020) ("The word 'other' usually indicates that the term that follows it is 'of the same kind as the item or person already mentioned.'").

[85] 9 U.S.C. § 1 (emphasis added).

of 'seamen' and 'railroad employees' that precede it."[86] The alternative—reading the third category as picking up all employment contracts—would write the terms "seamen" and "railroad employees" out of the statute altogether.[87] So too here. If "object" reduces to whatever the President deems worthy of protection, then "landmark" and "structure" are pointless surplus—there is no landmark or structure that would not also constitute an "object" under this reading. But courts should avoid "ascribing to one word a meaning so broad that it assumes the same meaning as another statutory term."[88]

Third, "object" is modified by the phrase "situated on land owned or controlled by the Federal Government." As Secretary of the Interior Ickes once observed, the use of "situated" shows that the Act only covers those "objects which are immobile and permanently affixed to the land."[89] Indeed, contemporary dictionaries confirm Secretary Ickes's understanding of the word's ordinary meaning.[90] An amorphous concept or a living creature is not *affixed* to anything; only a discrete, material, stationary thing can be "situated on" federal land.

Fourth, "object" is further modified by the word "monument." The Act specifies that the President may declare "objects of historic or scientific interest … to be national monuments."[91] A "monument," though, is a "building, pillar, stone, or the like, erected to preserve the remembrance

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[86] *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1790 (2022).

[87] *Id.*

[88] *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (internal quotation marks omitted).

[89] Letter from Harold L. Ickes, Sec. of the Interior, to Hon. Rene L. DeRoun, Chairman, House Committee on Public Lands (Apr. 12, 1938), *reproduced in* Report of the Committee on the Public Lands No. 2691 (June 10, 1938).

[90] *See, e.g.*, Webster's New International Dictionary, *supra*, at 1965 ("permanently fixed; located; as, a town *situated* on a hill").

[91] 54 U.S.C. § 320301(a).

of a person, event, action, etc." or "to indicate a limit or to mark a boundary."[92] Here too, it only makes sense for an "object" to be a discrete, material, stationary thing. Something indeterminate or on-the-move cannot be a "monument."

Fifth, the Act's title corroborates a tailored reading of "object."[93] The statute is the *Antiquities* Act—or in its longer original form: "An Act For the preservation of American *antiquities*."[94] And when the Act was passed, an "antiquity" was "defined as a 'relic or monument of ancient times.'"[95]

The Antiquities Act's text thus makes plain that the phrase "object[] of historic or scientific interest that [is] situated on [federal] land" has independent meaning. In light of the above, an "object" under the Act must at minimum be (i) a discrete, material thing, (ii) akin to an historic landmark or structure, that is (iii) affixed upon federal land.

2. Structure. The structure of the Act confirms this meaning of "object."

The Antiquities Act has two main parts that work together: one that allows the President to designate national monuments, and another that allows him to reserve federal lands for their protection. The latter provision is explicit that any reservation of federal land "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[96] So when President Coolidge declared Fort Wood a monument, for instance, he

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[92] Webster's New International Dictionary (1913); *see also* Black's Law Dictionary 791 (2d ed. 1910) (listing as examples "posts, pillars, stone markers, cairns" as well as "fixed natural objects, blazed trees, and even a watercourse").

[93] *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of section are tools available for the resolution of a doubt about the meaning of a statute." (quotation marks omitted)).

[94] Pub. L. No. 59-209, 34 Stat. 225 (emphasis added).

[95] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari) (quoting Webster's International Dictionary of the English Language 66 (1902)); *see also* Webster's New International Dictionary (1913) (listing "coin" or "statue" as examples).

[96] 54 U.S.C. § 320301(b).

reserved the surrounding 2.5 acres for that structure's protection.[97]

This "smallest area compatible" requirement makes sense only if an "object" is a discrete, material, and stationary thing. If the word "object" includes "an imprecisely demarcated concept [like] an ecosystem," then the "smallest area compatible" provision is practically meaningless.[98] If the contours of an "object" are not independently discernible, they will inevitably turn on whatever the President says; and the "smallest area compatible" for protecting that indeterminate "object" will necessarily *also* be whatever the President says. This critical statutory limit would then be no limit at all. But it does not make sense to read the text in such a self-defeating way.

The Act's punishment provision points in the same direction. Since its inception, the Act has included a criminal prohibition on appropriating, excavating, injuring, or destroying any portion of a "monument" (including any "object of antiquity").[99] People have fair notice about what this means only when the "objects" can be readily discerned and quantified. They do not have fair notice when a "monument" is open-ended concept or idea; for instance, a three-billion-plus-acre expanse drawn around a general ecosystem running along the Atlantic Coast.[100]

3. History. The Act's history reflects its narrow scope. The Act "originated as a response to widespread defacement of Pueblo ruins in the American Southwest,"[101] and Congress passed a law consistent with that focus.[102] The Act was never designed to empower the President to shield whatever he deemed worthy of protection.

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[97] *See* Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924).

[98] *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[99] *See* 16 U.S.C. § 433 (original); 18 U.S.C. § 1866(b) (current).

[100] *See* Oral Argument at 21:22-22:42, *Mass. Lobstermen's*, 945 F.3d 535 (No.18-5353).

[101] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari).

[102] *Id.*

Starting in the late nineteenth century, Americans became increasingly interested in the ruins and other archeological treasures that interspersed the Western United States.[103] But with interest came exploitation: With little regard for conservation, people tore through historic sites in hopes of finding objects of antiquity they could flip for a profit.[104] And at the time, federal law stood no barrier.[105]

The Antiquities Act emerged from an effort by archeologists to fill that legal void.[106] Under banners like the Committee on the Protection and Preservation of Objects of Archeological Interest, the archeologists proposed draft legislation that (unsurprisingly) sought to protect and preserve objects of archeological interest.[107] These proposals differed at the margins, but shared two common features: One, a clear desire to specify the precise items that could be protected under any sort of Antiquities Act; and two, a commitment that the Act would empower the President to reserve only strictly limited tracts of federal land.[108]

These considerations are perhaps best underscored by looking at the proposals Congress unambiguously *rejected*. Namely, the Department of Interior had pushed bills that would give the President the unrestrained authority to set aside whatever public land he wanted for virtually any reason.[109] But Congress—led by members from Western States who wielded essential votes, and

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[103] *See, e.g.*, Ronald F. Lee, *The Antiquities Act of 1906* 21-28 (1970).

[104] *Id.* at 32.

[105] *See, e.g.*, Benjamin Hayes, Cong. Rsch. Serv., R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress* 2-3 (2019) ("During this period, federal law did not provide general protection against the excavation or destruction of historic sites located on public lands"); *see also* Lee, *supra*, at 29 ("There was no system of protection and no permit was needed to dig.").

[106] *See* Am. Compl. ¶¶ 39-41 (detailing background).

[107] Lee, *supra*, at 47.

[108] *See* Am. Compl. ¶ 42 nn.1-2 (listing proposals and draft text).

[109] *E.g.*, H.R. 11021, 56th Cong. (1900) (allowing President to set aside lands to protect "scenic beauty," "natural wonders," and other "curiosities").

who would only support a law that narrowly limited any federal antiquity power—refused.[110] Rather than pass an open-ended statute, Congress enacted a narrow one that carefully enumerated *what* items could be protected, coupled with a separate limit on *how* they could be protected.

Indeed, eventually, Dr. Edgar Lee Hewett took the lead on what would become the Antiquities Act of 1906.[111] Hewett was a logical choice. He had personally taken Congressman John Lacey— influential Chairman of the House Public Lands Committee—around the Southwest to show him the "pueblos and cliff dwellings" that any "archaeological legislation" would cover.[112] And he worked closely with Congress to prepare (among other things) a memorandum that catalogued "the historic and prehistoric ruins of Arizona, New Mexico, Colorado, and Utah" that would fall within the ambit of any law.[113]

Near the end of 1905, Hewett submitted his draft legislation to Congress—which Congress passed without any material changes—with text that is substantially similar to that of today's Antiquities Act. President Roosevelt signed the bill into law in 1906.

Everyone understood what Hewett's bill did. As the House Report put it: "The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."[114] Or in the words of the Senate Report: The bill is "carefully drawn" to protect "the historic and prehistoric ruins and monuments on the public lands of the United States [that] are rapidly being destroyed."[115] As Congressman Lacey himself reiterated: The Act "is meant to cover the cave dwellers and cliff

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[110] Lee, *supra*, at 53-55; *see also* Am. Compl. ¶ 43 (collecting quotes).
[111] Am. Compl. ¶¶ 44-45.
[112] Lee, *supra*, at 69.
[113] H.R. Rep. No. 58-3704, at 2 (1905).
[114] H.R. Rep. No. 59-2224, at 1.
[115] S. Rep. No. 59-3798, at 1 (1906).

dwellers" and its "object … is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst [other legislation] reserves the forests and the water courses."[116] The Act would not affect "very much [land]" because the "bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved."[117]

There was no contemporary suggestion—*none*—from any legislator, scholar, or commentator that the Antiquities Act empowered the President to declare millions of acres of federal land a national monument, let alone do so in the name of protecting indeterminate items like landscapes, ecosystems, and habitats. By contrast, there is a consensus across bench and academy that Congress's original intent was the opposite.[118]

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[116] 40 Cong. Rec. 7888 (1906).

[117] *Id.*; *see also id.* (explaining that Antiquities Act is different from national park legislation).

[118] *See, e.g.*, *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari) ("Because there was scarcely an ancient dwelling site in the area that had not been vandalized by pottery diggers for personal gain, the Act provided a mechanism for the preservation of prehistoric antiquities in the United States." (quotation marks omitted)); *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1178 ("The original purpose of the proposed Act was to protect objects of antiquity."); *Utah Ass'n of Cntys.*, 1999 U.S. Dist. LEXIS 15852, at *10 (Congress "intended to limit the creation of national monuments to small land areas surrounding specific objects."); Squillace, *supra*, at 477-78 ("There seems little doubt that the impetus for the law that would eventually become the Antiquities Act was the desire of archaeologists to protect aboriginal objects and artifacts."); Justin J. Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics*, 19 J. Land Res. & Env't L. 55, 77 (1999) (the Act was intended to cover "aboriginal antiquities situated on federal lands"); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. Colo. L. Rev. 483, 501 (1999) ("[T]he Antiquities Act, as initially enacted, was intended to allow the President to make only small withdrawals of public lands in order to protect prehistoric ruins and Indian artifacts."); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Res. J. 279, 301-02 (1982) ("Congress did not have in mind authorizing withdrawals of vast areas for designation as national monuments when it passed the Antiquities Act."); Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 450 (1981) ("Congress nevertheless intended to limit the creation of national monuments to small reservations surrounding specific 'objects.'").

Text, structure, and history all make plain that when Congress gave the President the power to declare "objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments," it conferred upon him a limited grant of authority.[119] An "object" is not in the eye of the beholder; it is not a boundless concept. Rather, an "object" is, at minimum, (i) a discrete, material thing, (ii) akin to an historic landmark or structure, that is ultimately (iii) affixed upon federal land. The Antiquities Act's terms bar a President from predicating a monument on any "object" that lacks these features.

B. The Proclamations Exceed the Antiquities Act's Limits as a Matter of Law.

The Proclamations are based—in whole and in part—on protecting things that are not "objects" at all: Among them, landscapes, areas, ecosystems, habitats, and animals. As a matter of law, none of these items have the necessary traits of an "object." And if adopted, this understanding of the word "object" would confer extraordinary power on the President to unilaterally convert all federal lands into national monuments.

1. Land. The Proclamations rest foremost on the premise that federal land may itself constitute an "object situated on land" under the Act. The Grand Staircase-Escalante Proclamation sets aside 1.87 million acres of land on the rationale that the entire Grand Staircase-Escalante landscape is *itself* an "object."[120] The Bears Ears Proclamation reserves 1.36 million acres on the same basis.[121] Moreover, both Proclamations declare that each landscape is composed of constitutive "areas" (*i.e.*, smaller landscapes) that are also "objects."[122]

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[119] 54 U.S.C. § 320301(a).

[120] 86 Fed. Reg. 57335, 57336 (Oct. 8, 2021); *see also id.* at 57345 (stating landscape alone "independently" justifies the full monument).

[121] 86 Fed. Reg. 57321, 57322 (Oct. 8, 2021); *see also id.* at 57331 (same).

[122] 86 Fed. Reg. at 57338 ("Within the whole are distinct and unique areas, which are themselves objects qualifying for protection."); 86 Fed. Reg. at 57324 (same).

The Proclamations are unprecedented. No President has ever claimed a landscape is itself an "object." For good reason. The "land as object" theory that animates the Proclamations cannot be squared with the Act's text, structure, or history.

First, the text. An entire landscape—or a smaller "area" within it—is not an "object" that is "situated on land." It *is* the land. An "object" placed *on* a shelf is not *the* shelf. An "object" set *on* a table is not *the* table. And an "object" situated *on* land is not *the* land. That is no doubt why the Proclamations omit the Act's "situated on land" language when discussing these "objects."

Nor is an individual landscape an "object" in any ordinary sense of the word. A landscape is not a discrete, material thing. And it is certainly not akin to a landmark or structure. All told, the Government's "land as object" theory effectively reduces the Act's text to this:

> **(a) Presidential declaration.—**The President may, 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 on~~ land owned or controlled by the Federal Government to be national monuments.

The Government's position thus does not merely render a stray word or two superfluous; it vitiates the very essence of the provision. That is not permissible.[123]

Second, the structure. The second half of the Act, as noted, requires that any monument "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[124] But if the land itself can be the object, then this requirement is meaningless. If the area and the object are the same thing, then the area will *necessarily* be the "smallest area compatible" with protecting that object—even if it is ultimately the size of Connecticut, or even Montana.

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[123] *See, e.g.*, *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 744 (10th Cir. 2020) (rejecting interpretation that would render "meaningless" critical statutory language).

[124] 54 U.S.C. § 320301(b).

This Court should not adopt an interpretation of the Act that effectively excises one of its two core provisions. The "smallest area compatible" requirement was an indispensable piece of the original Antiquities Act—without which the Act would never have garnered enough votes from Western States for it to pass Congress.[125] And by design, the provision imposes a clear restraint on presidential power.[126] But under the "land as object" theory, presidents can circumvent this requirement by simply including the entire landmass of the desired monument within the monument's list of "objects." That cannot be right.[127]

Third, the Act's history likewise militates against the notion that a landscape or "area" can constitute an "object." As discussed further below, the practical consequence of the Proclamations is that any President has unfettered discretion to set aside any and all federal land as a monument—after all, every inch of federal land is part of a landscape or "area." But that is the *opposite* of what Congress intended. Again, as the House Report put it: "The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."[128]

The point is not that that phrase "object of historic or scientific interest" *only* means archeological relics or some other specialized term narrower than the plain words Congress used. Rather, the point is that for the Government to be right, Congress must have passed a law that brought about the *very thing* that it sought to avoid, and the *very thing* that it specifically rejected

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[125] *See, e.g.*, Frank Norris, *The Antiquities Act and the Acreage Debate*, 23 George Wright Forum 6, 8 (2006).

[126] *Mass. Lobstermen's*, 141 S. Ct. at 980-81 (Roberts, C.J., statement respecting the denial of certiorari).

[127] *See Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1905 (2022) ("We must hesitate to adopt an interpretation that would eviscerate such significant aspects of the statutory text.").

[128] H.R. Rep. No. 59-2224, at 1; *see also, e.g.*, *Utah Ass'n of Cntys. v. Clinton*, Nos. 97-cv-479, 97-cv-492, 97-cv-863, 1999 U.S. Dist. LEXIS 15852, at *10 (D. Utah Aug. 12, 1999).

years prior. Congress debated the Antiquities Act for nearly a decade, and took pains to tailor the statute to ensure that the President's authority—while sufficient to achieve Congress's goals—would still be bounded. Yet on the Government's telling, Congress accidentally wrote the President a blank check all the same. That is not plausible.[129]

The Government's "land as object" theory thus fails. Each aspect of the Act confirms what common sense dictates: The land is not an "object situated on land."

2. Other "Objects." The other "objects" underlying the Proclamations fare no better. As a pure legal matter, none has the traits of an "object" under the Act: None is (i) a discrete, material thing, (ii) akin to an historic landmark or structure, that is (iii) affixed upon federal land.

Ecosystems. Both Monuments identify sprawling "ecosystems" as "objects."[130] But an ecosystem is a quintessential "imprecisely demarcated concept."[131] It is not a discrete, material thing; it is not akin to an historic landmark or structure; and it is not affixed to anything. An ecosystem also fits poorly with the Act's "smallest area" requirement because it has no discernible bounds—again, the Government has claimed elsewhere the President may reserve all *three billion* acres along the Atlantic Ocean as a monument if he discerns an ecosystem. That is untenable.

Habitats. Both Proclamations list multiple "habitats" as "objects."[132] But a habitat is just "[t]he location where" an "animal lives and its surroundings."[133] It is no different than the land

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[129] *See, e.g.*, *United States v. Hayes*, 555 U.S. 415, 427 (2009) (rejecting reading that would "frustrate Congress' manifest purpose" in passing statute).

[130] *See, e.g.*, 86 Fed. Reg. at 57340-41 (Grand Staircase-Escalante); 86 Fed. Reg. at 57323 (Bears Ears).

[131] *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[132] *See, e.g.*, 86 Fed. Reg. at 57341 (Grand Staircase-Escalante); 86 Fed. Reg. at 57323 (Bears Ears).

[133] U.S. Fish & Wildlife Service, *Habitat Conservation Planning Handbook* G-14 (Dec. 21, 2016); *see also, e.g.*, Charles Schwarz et al., USDA Forest Service, *Wildland Planning Glossary*

and—no more than a landscape or area—cannot be an "object situated on land." Moreover, as with ecosystems, habitats have no discernible bounds, and thus fit poorly within the Act's design.

Animals. Both Proclamations are replete with animal species listed as "objects."[134] But an animal is not an "object situated on land"—most obviously because living creatures are not *affixed* to federal land. Likewise, while a living animal may be a discrete, material thing, it is nothing like the sorts of "historic landmarks" or "structures" that can be "declare[d] by public proclamation . . . to be national monuments." It makes no sense to say that bees or falcons can be deemed "national monuments" akin to inanimate cave dwellings. That is no doubt why even the Department of Justice used to maintain that animal species are not "objects" under the Act.[135]

Accordingly, as a matter of law, ecosystems, habitats, and animals—like landscapes and areas—simply fall beyond the ambit of the Act.

3. Consequences. The practical "fallout" from the Government's position "underscores the implausibility of [its] interpretation."[136] If the concepts and items underlying the Proclamations all constitute "objects," then the Act would empower the President to convert whatever federal land he wants into a monument. That is not plausible for at least three reasons.

First, that boundless reading would effectively annul a multitude of other laws. Congress has enacted numerous detailed statutory frameworks for how the President "may preserve portions of land and sea."[137] But the Government's interpretation of the Act would empower the President

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91 (1976) (defining "[h]abitat" as the "natural environment" or "locality where the organism may generally be found").

[134] *See, e.g.*, 86 Fed. Reg. at 57339 (chuckwalla), 57342 (bees), 57342 (falcons); 86 Fed. Reg. at 57324 (sheep), 57328 (moths).

[135] *See United States v. California*, 436 U.S. 32, 34 n.5 (1978).

[136] *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).

[137] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari).

to sidestep those regimes via unilateral proclamation. That violates one of the "rudimentary principles of construction that the specific governs the general, and that, where text permits, statutes dealing with similar subjects should be interpreted harmoniously."[138]

Consider just a handful of the laws that the Government seeks to override:

- *Wilderness Act* (16 U.S.C. § 1131 *et seq.*). "The Wilderness Act … was intended to preserve the undeveloped character of designated areas."[139] The Act gives the Executive the authority to temporarily set aside lands as "Wilderness Study Areas" and, after detailed procedures, gives the President the ability to *recommend* to Congress whether those lands should be designated as wilderness (a label that triggers a host of land use restrictions). Notably, the Act reserves for *Congress* the power to designate an area as "wilderness." And *unlike* the Antiquities Act, the Wilderness Act is expressly designed to reach any "areas" that are over 5,000 acres and have "ecological, geological, or other features of scientific, educational, scenic, or historical value."[140]

- *Federal Land Policy and Management Act* (43 U.S.C. § 1701 *et seq.*). The FLPMA "established a policy in favor of retaining public lands for multiple use management," which involves "striking a balance" among a number of statutory interests (including recreation, timber, and mining).[141] The FLPMA gives the Interior Secretary the power to "make, modify, extend, or revoke withdrawals but only in accordance with" the Act's extensive procedural requirements.[142] For instance, FLPMA withdrawals in excess of 5,000 acres may be made only for twenty years at a time.[143] And FLPMA withdrawals are subject to, among other things, full compliance with the National Environmental Policy Act (NEPA).[144]

- *National Park Service Act* (54 U.S.C. § 100101 *et seq.*). The NPSA provides that while the Executive is responsible for *managing* National Parks, those parks "may be established only by an Act of Congress."[145] As with the Wilderness Act, Congress reserved for *itself* the decision-making role when it came to a conservation statute with the potential to cover wide swaths of federal land. Moreover, the NPSA shows that when Congress wants to broadly protect "scenery, natural and historic objects, and wild

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[138] *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[139] *Utah Ass'n of Cntys.*, 1999 U.S. Dist. LEXIS 15852, at *14.

[140] 16 U.S.C. § 1131(c).

[141] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004).

[142] 43 U.S.C. § 1714(a).

[143] *Id.* § 1714(c)(1).

[144] *See* 43 C.F.R. § 2310.3-2(b)(3).

[145] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari).

life," it knows how to do so, and to do so clearly.[146]

- *National Marine Sanctuaries Act* (16 U.S.C. § 1431 *et seq.*). "Under the National Marine Sanctuaries Act … the Secretary of Commerce can designate an area of the marine environment as a marine sanctuary, but only after satisfying rigorous consultation requirements and issuing findings on 12 statutory criteria." [147] Nevertheless, over the last two decades, Presidents have used the Antiquities Act to sidestep the Marine Sanctuaries Act's extensive procedural hurdles, and have created massive marine monuments by way of simple and unilateral proclamations.[148]

Other examples abound.[149] Of course, the point is not that laws cannot overlap at all, or even in significant ways. The point is that the Government's capacious reading of the Antiquities Act renders a legion of other statutory schemes *nonsensical*—a reality that strongly cuts against their position. It is not sensible that the U.S. Code would contain detailed schemes like the Wilderness Act or the National Marine Sanctuaries Act that the President can avoid at will whenever he chooses—particularly when his aim of protecting public lands or waters is the *same* purpose for which those schemes exist. And it strains credulity to think Congress would deliberately keep for *itself* the power to create national parks in the National Park Services Act, while obliquely giving the President the ability to do the same thing all by himself. Giving the word "object" its ordinary meaning would avoid all these tensions.

Second, basic federalism principles require that Congress speak clearly if it wishes to give

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[146] 54 U.S.C. § 100101(a).

[147] *Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari).

[148] *Id.*

[149] *See, e.g.*, Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa *et seq.*; National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*; Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*; Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*; Federal Cave Resources Protection Act of 1988, 16 U.S.C. § 4301 *et seq.*; Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; National Forest Management Act, 16 U.S.C. § 1600 *et seq.*; National Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*; Native American Graves Protection and Repatriation Act of 1976, 25 U.S.C. § 3001 *et seq.*; Paleontological Resources Preservation Act, 16 U.S.C. § 470aaa *et seq.*

the President unfettered authority to set aside much of a State as a national monument. The Federal Government owns roughly half of the land in the American West. For States like Utah—where the Government owns over 60% of the State's land—issues involving federal land management are intertwined with the State's ability to function. It is not surprising, then, that when Congress has addressed matters of federal land ownership in the West, it has spoken clearly by way of finely reticulated schemes like the Federal Land Policy and Management or National Park Service Acts.

According to the Government, however, the Antiquities Act's sparse text empowers the President to unilaterally designate most of Utah as a national monument right now. In its view, so long as the President deems those "landscapes" or "areas" to be "objects" worthy of protection, he may convert all 33 million acres of federal land in the State into a monument—and the federal courts would be powerless to stop him.

If nothing else, that is a remarkable ability to alter the balance of power between the federal government and the Western States. But the Supreme Court has repeatedly made clear that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[150] The Act's 181 words do not clear that bar.

Third, separation of powers canons like the major questions and non-delegation doctrines similarly foreclose the Government's open-ended view of the Act. The former is implicated when a governmental action resolves a matter of great "political significance,"[151] or upends the traditional "balance between federal and state power."[152] The Government's sweeping interpretation of the Act—claiming the unilateral power to convert millions of acres of land into a

[150] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).
[151] *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022).
[152] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

national monument and thus sharply curtail all productive uses of it—squarely implicates the major questions doctrine.

The President thus must point to "clear congressional authorization" for his authority to establish such large expanses as monuments.[153] A "plausible textual basis" is not enough.[154] So even if the Government's reading of "object" were "colorable"—which it is not—that would be insufficient.[155] Only a *clear statement* will suffice.[156] And whatever the Antiquities Act provides, it assuredly does not provide *that*.

Relatedly, constitutional avoidance principles caution against an open-ended reading of the Act because, if the Government is correct, then the statute raises serious non-delegations concerns. If the phrase "object of historic or scientific interest" means essentially "whatever the President proclaims," then the Act has no intelligible principle to shape the President's discretion. A federal law that read—"The President may set aside as a national monument any federal land he sees fit"—would be unconstitutional. But that is *exactly what* the Government interprets the Act to say.

* * *

The Government's conception of an "object" interprets the Act as giving the President total power to reserve any and all federal lands. Text, structure, history, and canons of construction all confirm that such a view is as wrong as it sounds.

C. The Defendants' Justifications Lack Merit.

The Defendants do not—because they cannot—ground their defense of the Proclamations in the original public meaning of the Antiquities Act. Rather, consistent with past litigation,

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[153] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).
[154] *Id.*
[155] *Id.*
[156] *Id.*

Defendants mostly contend that precedent and practice have come to bless their capacious expansion of the law. Defendants are wrong on both scores.

1. Binding Precedent. As the Chief Justice recently noted, the Supreme Court has never addressed—let alone sanctioned—a million-plus-acre monument like Grand Staircase-Escalante or Bears Ears.[157] Indeed, the Court has definitively spoken to the scope of the term "object" just twice, yielding approximately three lines of independent analysis. Those few lines cannot salvage the Proclamations.

The Court first engaged with the Antiquities Act in *Cameron v. United States*, 252 U.S. 450 (1920). That case involved a challenge by Ralph Cameron (and others) to the Government's attempt to stop him from using a mining claim within the Grand Canyon National Monument.[158] The case primarily concerned unrelated issues regarding the Interior Secretary's decision to render the claim invalid.[159] But Cameron also challenged whether President Roosevelt had the power to create the Monument in the first place.[160] The Court summarily rejected Cameron's argument: "[The Grand Canyon] is the greatest eroded canyon in the United States, if not 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."[161]

This makes sense. The phrase "objects of historic or scientific interest that are situated on [federal] land" fairly includes natural formations, as long as those formations are discrete and

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[157] *See Mass. Lobstermen's*, 141 S. Ct. at 981 ("We have never considered how a monument of these proportions—3.2 million acres of submerged land—can be justified under the Antiquities Act.").

[158] 252 U.S. at 454-55.

[159] *Id.*

[160] *Id.* at 455.

[161] *Id.* at 455-56.

quantifiable, and akin to a historic structure or landmark. Canyons—and especially the Grand Canyon—may fall comfortably within that language, even if they are large. Best read, *Cameron* simply confirms that the Act's reference to "objects" is not necessarily limited to archeological sites and historic relics. But that is a far cry from saying that the word "object" has no limit at all, and can be stretched beyond all meaning to include amorphous concepts and indeterminate ideas.

The second (and only other) time the Court directly addressed the meaning of "object" was *Cappaert v. United States*, 426 U.S. 128 (1976). The case arose out of a water rights dispute between a rancher and the Federal Government. The rancher wanted to pump groundwater from an underground basin that also was a water source for "Devil's Hole"—a prehistoric limestone cavern that was the hallmark of the Death Valley National Monument.[162] As above, the case primarily involved issues other than the Antiquities Act (namely, the scope of the implied reservation of water rights doctrine). But Cappaert also raised an Antiquities Act argument, arguing that Devil's Hole's "remarkable underground pool" fell outside the Act's scope.[163] As it had in *Cameron*, the *Cappaert* Court summarily rejected in a couple lines the rancher's fallback claim that the Antiquities Act merely "protect[ed] archeologic sites."[164]

The Court's rejection of Cappaert's challenge to the "40-acre tract of land surrounding Devil's Hole" says nothing about the multi-million-acre monuments here.[165] There is little controversy that a natural pool—much like a backyard pool—can be an "object." It is a (i) discrete, material thing, (ii) akin to a historical structure, that is (iii) affixed to federal land. (The Court has held that "land" under the Act also includes submerged lands—a holding Plaintiffs do not

[162] 426 U.S. at 131-33.
[163] *Id.* at 132.
[164] *Id.* at 142.
[165] *Id.* at 131.

contest.[166]) But as in *Cameron*, the *Cappaert* Court never suggested that "object" was a boundless term, or that it could encompass amorphous concepts.

One other case bears mention. In *Alaska v. United States*, the Court discussed the Antiquities Act in the context of a complex dispute involving title to certain submerged lands in Alaska. In so doing, a portion of the Court's opinion "suggested that an 'ecosystem' … can, under some circumstances, be protected under the Act."[167] But as the Chief Justice has explained, this aside was dicta.[168] Alaska did not press an Antiquities Act argument before the Court.[169] And the Court never actually said that an ecosystem *was* an "object" under the Act; only that it "might conceivably" be one, which, "[i]f true," would bolster one manner of deciding the case.[170]

The Supreme Court has thus never resolved the key issues here. And the same is true for the Tenth Circuit, which has never directly addressed the meaning of "object" under the Antiquities Act. This Court should accordingly apply the statute as written.

2. Non-Binding Precedent. Litigation about the scope of the Antiquities Act is rare—counsel is aware of six federal cases (besides the ones above) that rendered a holding on the meaning of "object." The Government prevailed in those cases, but all are non-binding, of limited persuasive value, and—at the end of the day—wrong.

The D.C. Circuit is the only appellate court to have spoken on this issue, and it has done

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[166] *See California*, 436 U.S. at 36.

[167] *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari) (citing *Alaska v. United States*, 545 U.S. 75, 103 (2005)).

[168] *Id.*

[169] *Alaska*, 545 U.S. at 101.

[170] *Id.* at 103.

so three times.[171] But those cases have limited persuasive value because the litigants did not press the above arguments, and the court thus did not analyze them.

In *Tulare* and *Mountain States*—companion cases decided the same day—the plaintiffs argued the Act was "limited to protecting only archeological sites."[172] The D.C. Circuit rejected that argument as foreclosed by Supreme Court precedent.[173] In so doing, the court also held in a single sentence that "[i]nclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features."[174] And in in *Massachusetts Lobstermen's*, the litigants barely raised an "objects" argument—focusing instead on parts of the Antiquities Act not at issue here. There, the D.C. Circuit quickly rejected the plaintiffs' passing claim that an "ecosystem" could not be an "object" on the ground *Tulare* had already resolved the issue.[175]

In none of these cases, however, did the litigants press the text, structure, and history arguments above—and the D.C. Circuit thus never grappled with them. This Court should therefore assign limited value to that court's sparse, non-binding analysis.

Additionally, three district courts have rendered holdings about the meaning of "object" in decisions that were not reviewed on appeal.[176] The *Andrus* court based its decision on a misguided view of implicit ratification, discussed next. *Infra* Part I.C.3. The two other decisions turned on

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[171] *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019); *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).

[172] *Tulare*, 306 F.3d at 1142; *see also Mountain States*, 306 F.3d at 1137.

[173] *Tulare*, 306 F.3d at 1142; *Mountain States*, 306 F.3d at 1137.

[174] *Tulare*, 306 F.3d at 1142.

[175] 945 F.3d at 544.

[176] *Utah Ass'n of Cntys.*, 316 F. Supp. 2d 1172; *Anaconda Copper Co. v. Andrus*, No. A79-191, 1980 U.S. Dist. LEXIS 17861 (D. Alaska July 1, 1980); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

the same defect: The courts wrongly held that proclamations made under the Act are essentially unreviewable.[177]

Most relevant, *Utah Ass'n of Counties* involved a challenge under the Antiquities Act to President Clinton's version of the Grand Staircase-Escalante Monument. But there, the court did not reach the substance of the suit. Rather, it held that because the Act gives the *President*—as opposed to a federal agency—the power to designate national monuments, judicial review is limited to assessing whether the President claimed he was acting pursuant to the statute's terms.[178] Because "the President in fact *invoked* his powers under the Antiquities Act," the court found itself bound to uphold the proclamation.[179]

That is wrong, as a matter of both law and logic. Most important, the Supreme Court implicitly rejected this argument when it resolved two similar Antiquities Act challenges on the merits.[180] And that implicit rejection is consistent with basic principles of judicial review. As the D.C. Circuit has held as to the Antiquities Act itself, where "the authorizing statute or another statute places discernible limits on the President's discretion," judicial review is available to ensure any action is "consistent with constitutional principles and that the President has not exceeded his statutory authority."[181]

Consider a basic example. The Antiquities Act extends only to land "owned or controlled by the Federal Government."[182] Suppose the President tried to reserve unambiguously private land as part of a monument, on an untenable and aggressive interpretation of what it means for land to

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[177] *Utah Ass'n of Cntys.*, 316 F. Supp. at 1185-86; *Wyoming*, 58 F. Supp. at 894.
[178] 316 F. Supp. 2d at 1185-86.
[179] *Id.* at 1183 (emphasis added).
[180] *Cappaert*, 426 U.S. at 141-42; *Cameron*, 252 U.S. at 455-56.
[181] *Mountain States*, 306 F.3d at 1136.
[182] 54 U.S.C. § 320301(a).

be "controlled by the Federal Government." Nobody would claim such actions are unreviewable simply because the President is purporting to act pursuant to the terms of the Antiquities Act.

The same should hold here. There is no reason why one statutory limit (that the land be federal) would be reviewable while another (that the protected items be "objects of historic or scientific interest") would not. Rather, the federal courts can assess both. Indeed, "[j]udicial review of such claims resembles the sort of statutory interpretation with which courts are familiar."[183] These are the sort of garden variety claims that may be "resolved as a matter of law because they turn on questions of statutory interpretation."[184] And these are the sort of claims where judicial review is necessary to confine the executive to its statutory limits.[185]

In short, statutory limits mean something. They constrain the President, just as they constrain the federal agencies he oversees. Ignoring the law's commands in the face of presidential action would upend the usual constitutional order.

3. Practice. Finally, while it is true Presidents have used the Antiquities Act to create some large monuments, there is no serious argument Congress has ratified the capacious view underlying the Proclamations here. Establishing implicit ratification requires "overwhelming evidence" of congressional acquiescence—that is, direct and explicit "evidence that Congress considered … the *precise* issue presented before the Court."[186] There is none here.

First, Congress has never specifically considered and endorsed the interpretation of the Act underlying the Proclamations. For instance, in 2014, Congress recodified the Antiquities Act without any substantive modifications. But Congress did so as part of a massive, non-substantive

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[183] *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54-55 (D.D.C. 2018).

[184] *Mass. Lobstermen's Ass'n*, 945 F.3d at 540 (quotation marks omitted).

[185] *See, e.g.*, *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1331-32 (D.C. Cir. 1996).

[186] *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (quotation marks omitted).

effort to recodify a multitude of conservation laws that were related to the National Park System.[187] That legislative housekeeping does not represent Congress analyzing the "precise issue" here.[188]

Nor has Congress somehow ratified the Executive's sweeping view in its other interactions with the Antiquities Act. In particular, Congress did not implicitly ratify a boundless reading of the Act when it passed the FLPMA. There, Congress repealed a number of laws relating to federal public lands management, but left the Antiquities Act in place.[189] But that comes well below the towering bar set by the Supreme Court's precedents. Consider, for example, *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341, 1351 (2021). There, the Court unanimously held Congress did not implicitly ratify the consensus view of eight circuit courts when it amended a provision's venue, joinder, and service rules, because the words at issue ("permanent injunction") were part of a *different* section within the *same* provision.[190] If that falls short of what is required for implicit ratification, Congress's decision to pass the FLPMA—a *different* statute that itself repealed or amended *other* laws—does as well.

Likewise, Congress did not acquiesce to an open-ended view of the Antiquities Act when it rejected specific presidential actions taken under it—namely, overturning President Carter's monuments in Alaska (16 U.S.C. § 3213), and requiring congressional approval for monuments in Wyoming (54 U.S.C. § 320301(d)). Where "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments … it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a

[187] H.R. Rep. No. 113-44 (2013) (noting bill makes "no substantive changes to the law").

[188] *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001).

[189] *See* Pub. L. No. 94-579, 90 Stat. 2743, 2792 (1976).

[190] *AMG Cap. Mgmt.*, 141 S. Ct. at 1351.

particular] statutory interpretation."[191] So too here.

In any event, previous monument designations are nowhere near as boundless and inconsistent with the Act as the Proclamations here. Most monuments are under 10,000 acres, with a third under 1,000 acres and about three-quarters under 100,000 acres.[192] The notion of sprawling, country-sized monuments is a mostly modern phenomenon—starting with President Carter in 1978 (two years after the FLPMA passed).[193] In fact, "[s]ince 2006, Presidents have established five marine monuments alone whose total area exceeds that of all other American monuments combined."[194]

And even among the largest monuments, President Biden's break new ground. Never before has a President deemed an *entire landscape* an "object" under the Act—to say nothing of setting aside over *three million acres* of land to protect that supposed "object." And it is of course impossible for Congress to have ratified something novel.

Second, Congress has not ratified the Grand Staircase-Escalante Monument, in particular. The Proclamation suggests Congress has ratified President Biden's version of the Monument because it passed three laws altering the borders of President Clinton's.[195] Putting aside that President Biden's Proclamation involves different and additional "objects," the point is still wrong, for the same reasons Judge Benson gave when he was faced with a materially identical argument

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[191] *AMG Cap. Mgmt.*, 141 S. Ct. at 1351 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (alteration omitted)).

[192] National Park Service, *National Monument Facts and Figures*, www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last visited Mar. 7, 2023).

[193] *See Mass. Lobstermen's*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari) (modernity has betrayed a "trend of ever-expanding antiquities").

[194] *Id.*

[195] 86 Fed. Reg. at 57344 (citing Utah Schools and Lands Exchange Act of 1998; the Automobile National Heritage Area Act of 1998; and the Omnibus Public Land Management Act of 2009).

raised by the Clinton Administration.[196]

None of these laws consider the validity of—much less codify—the Grand Staircase-Escalante Monument. The Utah Schools and Lands Exchange Act effectuated a land swap for state lands within the Monument; the Automobile National Heritage Area Act (which, as its title suggests, mostly concerned other subjects) removed certain towns from the Monument and made a small addition; and the Omnibus Public Land Management Act withdrew about 25 acres from the Monument to be sold. In each instance, "these boundary adjustments could just as logically be seen as an attempt to mitigate one of the many possible severe impacts of the Monument rather than to validate its creation."[197] And because each law has a plausible alternative explanation, none evinces the clear legislative intent required for ratification.

Arguments based in legislative inaction generally "deserve little weight in the interpretive process,"[198] and there is no reason to give them greater weight here. Congress's inability to muster the political will to countermand unlawful executive action does not render that action lawful over time. "[P]ast practice does not, by itself, create power."[199] This case is no exception.

II. THE PROCLAMATIONS MUST BE SET ASIDE IN FULL.

The Proclamations rest on basic legal errors. To be valid, a monument must be the "smallest area compatible" for protecting its covered "objects."[200] But here, both Proclamations are expressly predicated on things—landscapes, areas, ecosystems, habitats, and animals—that are not such "objects" as a matter of law. As a result, both Proclamations should be set aside in full.

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[196] *Utah Ass'n of Cntys.*, 1999 U.S. Dist. LEXIS 15852, at *46-67.

[197] *Id.* at *49 (quotation marks omitted).

[198] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

[199] *Medellín v. Texas*, 552 U.S. 491, 532 (2008).

[200] 54 U.S.C. § 320301(b).

When a federal action is premised on invalid grounds, the traditional remedy is for a court to simply to set that action aside.[201] That traditional remedy is appropriate here. The legal deficiencies detailed above pervade every square inch of the Monuments, and there is no way for this Court to conclude that these fundamental errors were harmless to either one.

The Proclamations offer two justifications for their borders: First, each Monument is "independently" justified on the ground that its underlying "landscape" is itself an "object in need of protection"; second, the "objects" scattered across each landscape *themselves* purportedly add up to three-million-plus-acres-worth of protection.[202] Both rationales depend on a legally incorrect understanding of "objects" under the Act.

The "landscapes alone" rationale fails because, as explained, a "landscape" cannot be an "object." Nor can the "constitutive objects" rationale justify the Monuments. For one thing, separate and apart from the landscapes, the Government relies on the same flawed "land as object" theory to support its second rationale. Namely, the Proclamations state that each landscape is a "nesting doll" of "distinct and unique areas, which are themselves objects qualifying for protection."[203] And those "areas" cover the entirety of both Grand Staircase-Escalante and Bears Ears. So whether by way of one big landscape or multiple smaller ones (*i.e.*, areas), the "land as object" theory undergirds the entirety of the Monuments' three-million-acre expanse.

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[201] *See, e.g.*, *William Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F. 3d 319, 330 (D.C. Cir. 2006) ("When an agency relies on multiple grounds for its decision, some of which are invalid, we may only sustain the decision where one is valid and the agency would clearly have acted on that ground even if the other were unavailable." (quotation mark and alterations omitted)); *see also Zzyym v. Pompeo*, 958 F.3d 1014, 1033–35 (10th Cir. 2020); *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533 (10th Cir. 1993).

[202] *See* 86 Fed. Reg. at 57345 (explaining the Grand Staircase-Escalante borders are a "result of the distribution of the objects across the Grand Staircase-Escalante landscape, and additionally and independently, because the landscape itself is an object in need of protection"); 86 Fed. Reg. at 57331 (same for Bears Ears and its landscape).

[203] 86 Fed. Reg. at 57338 (Grand Staircase-Escalante); 86 Fed. Reg at 57324 (Bears Ears).

The other purported "objects" only worsen—rather than fix—the problem. The Proclamations identify around 100 species that traverse monument lands.[204] Likewise, the Proclamations rely on approximately 20 distinct "habitats," and an indeterminate number of "ecosystems."[205] By their terms, the Proclamations rely on these gap-filling "objects" to justify the Monuments' massive scope, and to capture the vast expanses that exist in between individual ruins, artifacts, and fossils.

The Proclamations' second rationale thus cannot save the Monuments. And because each proffered justification for the Monuments is corrupted by the same basic legal errors concerning what constitutes an "object," neither Proclamation may survive.

Nor is there any judicial mechanism to draw smaller monuments that sever or salvage a subset of the Proclamations. Without any record or indication as to what lands are reserved for what "objects," there is no way for a court to divine what the "smallest area compatible" might be for protecting whatever valid "objects" exist in each Monument. The Court is thus without the means—or authority—to "blue-pencil" the Proclamations to create different-and-lawful ones.[206] Designating lawful monuments is the President's job; and he has not done it.

There is thus only one remedy available here: Set aside the Proclamations in full, and restore the status quo.[207] Because the Proclamations state that their borders are the "smallest area compatible" to protect an undifferentiated mass of improper and proper objects, it is impossible

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[204] *E.g.*, Am. Compl. ¶¶ 294-95, *Garfield Cnty. v. Biden*, No. 22-cv-00059 (D. Utah Jan. 26, 2023).

[205] *E.g.*, 86 Fed. Reg. at 57323 (range of "habitat[s]" for "variety of threatened, endangered, sensitive, endemic, or otherwise rare species of wildlife, fish, and plants"); *id.* (broad collection of "intact ecosystems").

[206] *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 509 (2010).

[207] *See, e.g.*, *Backcountry Hunters & Anglers v. U.S. Forest Serv.*, 612 F. App'x 934, 935 (10th Cir. 2015) (Gorsuch, J.) ("[I]f we were to grant the group the relief it seeks and strike down the 2010 order, the last valid and relevant trail plan … would apply.").

for this Court to independently declare the Monuments' borders are the "smallest area compatible" with protecting whatever valid objects exist within their bounds.[208] After all, the "smallest area" necessary to protect a *collection* of things is invariably bigger than the "smallest area" necessary to protect a *subset* of those things. If a judge drew up the "smallest" budget needed to hire four law clerks, it would of course be a larger amount than what the judge would need to hire two.

At bottom, because there is no way to conclude the Monuments comply with the Act's "smallest area compatible" requirement—and because there is no way to sever or salvage portions of the Monuments—the sole course here is simply to set aside both Proclamations in full. To the extent any "objects" exist within current monument lands—like Grosvenor Arch or Newspaper Rock—the Act requires the President designate new monuments that are tailored to protecting only those "objects." But he must do in a way that respects, rather than vitiates, the Act's bounds.

For the same reasons, the agency actions implementing President Biden's Proclamations fail too. Defendants have engaged in a number of "final" agency actions to carry out the terms of the Proclamations. In particular, BLM has issued two interim management plans—one for Grand Staircase-Escalante, another for Bears Ears—that establish how federal agencies and bureaucrats will regulate activities on monument lands.[209] Until replaced by full management plans sometime next year, these interim plans are "guidance document[s] reflecting a settled agency position and having legal consequences for those subject to [their] regulation."[210] Likewise, Defendants have made a number of final, on-the-ground decisions—such as denying special recreation permits due

[208] *See, e.g.*, *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 880 (9th Cir. 2009) (error harmless only when it "clearly had no bearing on … the substance of [the] decision reached").

[209] *Supra* at 11-12.

[210] *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000).

to the Proclamations[211]—that constitute final agency actions.[212]

When a presidential directive is unlawful, the agency actions implementing that illicit directive are unlawful too.[213] The proper course is to "set aside" those actions as "in excess of statutory … authority" and "otherwise not in accordance with law."[214] This Court should do so.

CONCLUSION

For the reasons given, the Court should grant the motion for summary judgment.

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[211] *See, e.g.*, Am. Compl. ¶ 109.

[212] *See Role Models Am., Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003) (agency action final to the extent that it denies a right).

[213] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952); *see also Franklin v. Massachusetts*, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring in part and concurring in the judgment).

[214] 5 U.S.C. § 706(2)(C), (A).

CERTIFICATE OF SERVICE

I hereby certify that, on March 9, 2023, the foregoing document was served upon all counsel of record through this Court's electronic filing system.

/s/ Brady Brammer
Brady Brammer

Counsel for Individual Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with this Court's Order Granting Motion for Leave to File Brief Exceeding Page Limits, ECF No. 116 (Mar. 9, 2023), as it contains 44 pages.

/s/ Brady Brammer
Brady Brammer

Counsel for Individual Plaintiffs