Nos. 23-4106 & 23-4107

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH, ET AL.,
Plaintiffs-Appellants,

ZEBEDIAH GEORGE DALTON, ET AL.,
Consolidated Plaintiffs-Appellants,
v.
JOSEPH R. BIDEN, JR., ET AL.,
Defendants-Appellees,

HOPI TRIBE, ET AL.,
Defendant Intervenors-Appellees,

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,
Defendant Intervenors-Appellees

On Appeal from the United States District Court for the District of Utah,
Nos. 4:22-cv-0059 and 4:22-cv-0060 (Hon. David Nuffer)

RESPONSE BRIEF OF SUWA INTERVENORS-APPELLEES

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Oral Argument Requested

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PRIOR OR RELATED APPEALS

This appeal consolidates two related cases, *Garfield County et al. v. Biden et al.*, No. 23-4106 (10th Cir.) and *Dalton et al. v. Biden et al.*, No. 23-4107 (10th Cir.).

INTRODUCTION

Plaintiffs seek to use these appeals to advance their preferred interpretation of the Antiquities Act, but their merits arguments are premature. The district court did not address those arguments, or—for that matter—even conclude that any Plaintiff had standing to raise them. Instead, the district court held only that sovereign immunity barred it from reviewing the presidential proclamations restoring Grand Staircase-Escalante and Bears Ears National Monuments, and that the Administrative Procedure Act did not provide an alternative basis for review.

It is a fundamental principle of separation of powers that courts must resolve all questions of subject-matter jurisdiction before reaching the merits. Here, that means the merits of Plaintiffs' claims cannot be considered unless and until this Court reverses the district court's reviewability analysis *and* a court resolves all remaining jurisdictional issues in Plaintiffs' favor—including by finding that Plaintiffs have met their burden to demonstrate Article III standing. But Plaintiffs' opening briefs ignored the unresolved questions about their standing. And it is this Court's normal practice to remand such issues not ruled on by the district court in the first instance.

Moreover, because Federal Defendants have sought affirmance only on threshold grounds of reviewability and standing, this Court lacks the benefit of both a reasoned district court decision and full adversarial briefing on whether

Plaintiffs failed to allege a claim on which relief can be granted. Given Plaintiffs' sweeping reinterpretation of the Antiquities Act, this Court should be particularly reluctant to address the merits on appeal without the district court's initial take or full briefing from the parties. That is especially so where, as here, the district court on remand could find pleading deficiencies or other defects with Plaintiffs' amended complaints that would eliminate the need to resolve Plaintiffs' bold claims at all.

Rather than reaching multiple issues that the district court did not address, if this Court does not affirm the judgment on reviewability grounds, it should follow its normal practice and remand so that the district court may resolve any remaining jurisdictional questions and, if necessary, the sufficiency of Plaintiffs' allegations in the first instance. SUWA Intervenors focus their brief on that point. Additionally, to set out the relevant legal and factual context, this brief begins by supplementing Federal Defendants' corrections to Plaintiffs' skewed statements of the case and their mischaracterizations of the scope of the President's Antiquities Act authority.

STATEMENT OF ISSUES

Whether, if this Court disagrees with the reviewability bases for the judgment below, it should follow its normal practice and remand for the district

court to address the remaining arguments in the motions to dismiss in the first instance?

STATEMENT OF THE CASE

For more than a century, with approval from Congress and the courts, presidents have used the Antiquities Act to protect some of the country's most iconic resources located on federal public lands. From cliff dwellings and rock art to dinosaur fossils to the geologic evidence of eons of erosion and sedimentation, the historic and scientific resources protected within national monuments have helped Americans better understand geological and human history. Grand Staircase-Escalante and Bears Ears National Monuments in Utah follow in this tradition.

Federal Defendants' brief has set out a summary of the Antiquities Act's history, context, and execution over time. SUWA Intervenors incorporate portions of that brief by reference below and offer some additional detail on how national monuments, including Grand Staircase-Escalante and Bears Ears, contribute to the advancement of science, and how Congress has repeatedly preserved and enhanced national monument protections—including in Grand Staircase-Escalante, in particular.

I. Legal Background

A. The Antiquities Act's Legislative History and Enactment

Enacted in 1906, the Antiquities Act authorizes the President to protect federal lands for the advancement of public knowledge and to educate and inspire current and future generations. As the Antiquities Act's co-author, archaeologist Edgar Lee Hewett, observed, many parts of the southwestern United States, including what is now protected within Bears Ears National Monument, were "sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks." H.R. Rep. No. 59-2224, at 3 (1906); *see also id.* at 5 (describing "[t]he Bluff district" in Utah as deserving of protection). The legislative process was slow, however, and "serious scientific losses often occurred" before Congress could act. Ronald F. Lee, Nat'l Park Serv., *The Story of the Antiquities Act* 52 (1970).

Congress therefore decided to authorize the President to create protective reservations on federal lands. When doing so, Congress considered, but rejected, proposals that would have focused narrowly on human-made archaeological resources. *See* Fed. Defs.' Br. 11-15. It instead enacted a broader approach that gave the President the authority to declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" as national monuments. Antiquities Act, Pub. L. No. 59-209, § 2, 34 Stat. 225, 225 (1906); *see*

also Lee, *supra*, at 74 (explaining that the phrase "objects of historic or scientific interest" likely came from earlier bills focused on natural resource protection). And given the variety of objects that could merit protection, Congress rejected numerical size caps associated with earlier, archaeologically focused draft bills. *See* Fed. Defs.' Br. 12-14. Instead, Congress authorized the President to reserve federal lands "as a part of the national monuments," and directed that such reservations be "confined to the smallest area compatible with the proper care and management of the objects to be protected." Antiquities Act § 2, 34 Stat. at 225; *see also* Lee, *supra*, at 75 (calling the smallest area requirement a "flexible provision" that "permitted the President to establish larger areas if justifiable").

B. Presidential Applications of the Act

From the Antiquities Act's earliest days, presidents have exercised their statutory authority to protect archaeological sites and structures, paleontological resources, land formations, habitats, wildlife, and landscapes. *See* Fed. Defs.' Br. 18-20. These monuments have ranged from a few acres to millions, depending on the nature of the objects to be protected.

Presidents have found reservations of thousands or millions of acres to be necessary, for example, where the objects of scientific interest are themselves very large. Just two years after signing the Antiquities Act into law, President Theodore

Roosevelt reserved more than 800,000 acres[1] for the Grand Canyon National Monument, finding it to be "the greatest eroded canyon in the United States" and thus "an object of unusual scientific interest." Proclamation No. 794, 35 Stat. 2175, 2175 (1908). As the Supreme Court has explained approvingly, the monument "affords an unexampled field for geologic study." *Cameron v. United States*, 252 U.S. 450, 456 (1920).[2]

A monument need not protect just a single object. Assemblages of smaller objects concentrated in an area could provide significant scientific insights. These could be fossils from once-living plants and animals, such as the "mineralized remains of Mesozoic forests" in Petrified Forest National Monument in Arizona.

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[1] *See* 1 *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909*, at 43 (1910), *available at* https://babel.hathitrust.org/cgi/pt?id=hvd.32044090132077.

[2] Congress later redesignated the Grand Canyon as a national park. *See* Pub. L. No. 65-277, 40 Stat. 1175 (1919). Congress has, from time to time, redesignated national monuments as national parks to boost tourism and publicize the availability of developed visitor access. *See id.* § 2 (authorizing the Park Service to award "concessions for hotels, camps, transportation, and other privileges"); 1909 Dep't Interior Rep., *supra*, at 41 (recommending that Congress redesignate Grand Canyon as a national park to "authorize the granting of concessions . . . which its growing importance requires"). *See generally* Garett R. Rose, *"Reservations of Like Character"—the Origins and Benefits of the National Park System's Classification Hierarchy*, 121 Penn St. L. Rev. 355, 373 (2016) ("[O]ne of the chief reasons local boosters and congressmen advocate for 'elevating' a monument to park status is because of the belief that the national park moniker will bring more visitors and more revenue . . . .").

Proclamation No. 697, 34 Stat. 3266, 3266 (1906) (reserving 60,776 acres).[3] Or they could be collections of plants and animals such as the "extensive growth" of "primeval" redwood trees in Muir Woods National Monument in California, Proclamation No. 793, 35 Stat. 217, 217 (1908), or the "summer range and breeding grounds of the Olympic Elk" around Mount Olympus in Washington, Proclamation No. 869, 35 Stat. 2247,2247 (1909) (reserving 608,000 acres).

Presidents have also proclaimed collections of plants, animals, and landforms in combination—i.e., habitats and landscapes—to be national monuments. President Coolidge's creation of Glacier Bay National Monument in Alaska exemplifies how living, nonliving, and fossilized objects are of scientific interest when viewed together. He reserved 1,820 square miles (1,164,800 acres) based on the "unique opportunity for the scientific study of glacier behavior," comparing new "development of flora and fauna" in areas where glaciers recently retreated with the "relics of ancient interglacial forests." Proclamation No. 1733, 43 Stat. 1988 (1925); *see Alaska v. United States*, 545 U.S. 75, 102-03 (2005) (noting an "essential purpose of monuments … is to conserve … wild life," such as

[3] Unless otherwise noted, all monument reservation sizes are from Nat'l Park Serv., National Monument Facts & Figures, https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last updated Oct. 30, 2023).

"the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem" (cleaned up)).

Four of Utah's "Mighty Five" national parks—Zion, Arches, Bryce Canyon, and Capitol Reef—were originally designated under the Antiquities Act as landscape-protecting monuments.[4] As President Wilson summarized in his 1909 proclamation expanding Zion, landforms like canyons promote scientific study because they "plainly record[] the geological events of past ages." Proclamation No. 1435, 40 Stat. 1760, 1760 (1918) (also recognizing as objects of scientific interest "craters of extinct volcanoes, fossiliferous deposits of unusual nature, and . . . strata . . . believed to be the best representatives in the world of a rare type of sedimentation").

The Antiquities Act's authorization for presidents to reserve federal land "as a part of" national monuments, 54 U.S.C. § 320301(b), made *in situ* preservation

[4] Between these four monuments, no fewer than seven presidents over six decades reserved monument lands in Utah for landscape protection and geological study. *See* Proclamation No. 877, 36 Stat. 2498 (1909) (Zion); Proclamation No. 2221, 50 Stat. 1809 (1937) (creating "Zion II" National Monument); Proclamation No. 1664, 43 Stat. 1914 (1923) (Bryce Canyon); Proclamation No. 1875, 46 Stat. 2988 (1929) (Arches); Proclamation No. 2312, 53 Stat. 2504 (1938) (expanding Arches); Proclamation No. 3887, 83 Stat. 920 (1969) (same); Proclamation No. 2246, 50 Stat. 1856 (1937) (Capitol Reef); Proclamation No. 3249, 72 Stat. c48 (1958) (expanding Capitol Reef), Proclamation No. 3888, 83 Stat. 922 (1969) (same). Congress later redesignated each of these monuments as national parks. *See* Nat'l Park Serv., National Monument Facts & Figures, *supra*.

of such varied objects as these possible. Congress recognized that certain objects could be of interest on their own, but their geographic location, concentration, and relationship to one another and to the surrounding landscape could convey further historically or scientifically meaningful information. *See* H.R. Rep. No. 59-2224, at 3 (observing that archaeological resources are "of comparatively little value when scattered about in museums or private collections").

C. Subsequent Legislative Actions

Congress has affirmed time and again that national monuments play an integral role in the advancement of historical and scientific knowledge by protecting natural and manmade resources. A decade after the Antiquities Act's passage, Congress acknowledged the breadth of scientifically valuable public resources that national monuments may protect by directing the newly created National Park Service to manage the monuments under its jurisdiction for the purpose of conserving the "scenery and the natural and historic objects and the wild life therein." National Park Service Organic Act, Pub. L. No. 64-235, § 1, 39 Stat. 535, 535 (1916) (codified as amended at 54 U.S.C. § 100101(a)). Similarly, in the 2009 Omnibus Public Land Management Act, Congress incorporated all national monuments managed by the Bureau of Land Management—including Grand Staircase-Escalante, whose borders Congress simultaneously fine-tuned, *see infra* at pp. 18-19—into the newly established National Landscape Conservation

System, the purpose of which is to protect "nationally significant landscapes that have outstanding cultural, ecological, and scientific values." Pub. L. No. 111-11, § 2002, 123 Stat. 991, 1095 (codified at 16 U.S.C. § 7202(a), (b)(1)(A)). Congress has also created its own national monuments to protect landscapes, ecosystems, and wildlife.[5]

Over more than a century, Congress and the President have engaged in a robust dialogue under the Antiquities Act. As Federal Defendants note, Congress has acted in response to some uses of the Act by limiting the President's authority in specific situations (i.e., limiting new monument designations in Wyoming and Alaska), or by abolishing, shrinking, or otherwise altering the particular monument designation at issue. *See* Fed. Defs.' Br. 74-76 (listing examples). In other instances, Congress has agreed with the President's monument reservations and enacted legislation to expand their boundaries or provide funding for additional protections. *See* Fed. Defs.' Br. 76-77 (listing examples). Throughout, Congress

[5] *See, e.g.*, Pub. L. No. 90-606, 82 Stat. 1188, 1188 (1968) (directing the establishment of Biscayne National Monument in Florida to protect a "rare combination of terrestrial, marine, and amphibious life"); Pub. L. No. 70-1021, § 1, 45 Stat. 1553, 1553-54 (1929) & Pub. L. No. 90-468, § 1, 82 Stat. 663, 663 (1968) (directing the acquisition and establishment of Badlands National Monument in South Dakota and expanding its boundaries to include "lands of outstanding scenic and scientific character"). Although these statutes are not themselves actions under the Antiquities Act, they demonstrate Congress's longstanding view that "national monuments" may protect natural resources and landscapes of scientific interest, including large ones.

has chosen not to disturb the President's core Antiquities Act authority. In fact, when Congress overhauled and consolidated the existing patchwork of public land laws in 1976, it purposefully left the President's Antiquities Act power untouched. *See* Fed. Defs.' Br. 77-79; Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, §§ 204(a)-(d), 704(a), 90 Stat. 2743, 2751-53, 2792 (codified in part at 43 U.S.C. § 1714(a)) (repealing most other executive land reservation statutes); *Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1198 n.16 (D. Utah 2004) (discussing legislative history).

In contrast to Congress's active involvement in monument management, judicial intervention has been limited. Challenges to monument designations have been relatively rare, and, while courts to date have uniformly exercised their jurisdiction to review such challenges, no court has ever invalidated a monument. In early litigation concerning the Grand Canyon and Jackson Hole designations, the courts upheld the President's authority to designate those monuments.[6] The Supreme Court has also approved of monument designations—Devil's Hole, Glacier Bay, and Channel Islands—that protected natural resources, including a

[6] *See Cameron*, 252 U.S. at 455-56 (agreeing that the Grand Canyon is an object of scientific interest); *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945) (accepting government's testimony that Jackson Hole contained "a biological field for research of wild life in its particular habitat within the area").

scientifically significant rare fish and its unusual habitat, as well as other wildlife.[7] And all other courts to date have reviewed and rejected challenges to monuments that protect plants, wildlife, land, and ecosystems—including a previous unsuccessful challenge to Grand Staircase-Escalante itself.[8]

II. Factual Background

The two national monuments at issue in these cases—Grand Staircase-Escalante and Bears Ears, first established in 1996 and 2016, respectively—follow

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[7] *See Cappaert v. United States*, 426 U.S. 128, 141-42 (1976) (upholding injunction limiting landowner's water use that would affect pool in Devil's Hole National Monument when "the pool . . . and its rare [fish] inhabitants are 'objects of historic or scientific interest'"); *Alaska*, 545 U.S. at 109 (concluding federal government retained title to submerged land in Glacier Bay National Monument pursuant to statutory provision that withheld transfer of any land reserved "for the protection of wildlife"); *United States v. California*, 436 U.S. 32, 36 (1978) (stating there was "no serious question" that the President "had power . . . to reserve the submerged lands and waters" of Channel Islands National Monument).

[8] *See Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 541-44 (D.C. Cir. 2019) (concluding Northeast Canyons & Seamounts Marine National Monument could protect both underwater canyons and the surrounding ecosystems); *Tulare County v. Bush*, 306 F.3d 1138, 1140-42 (D.C. Cir. 2002) (upholding monument protecting "groves of giant sequoias, the world's largest trees, and their surrounding ecosystem"); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (rejecting challenges to six monument proclamations); *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1186, 1200 (dismissing challenge to Grand Staircase National Monument), *appeal dismissed*, 455 F.3d 1094, 1101 (10th Cir. 2006) (finding plaintiffs who appealed lacked standing); *Anaconda Copper Co. v. Andrus*, No. A79-161, 1980 U.S. Dist. LEXIS 17861, at *7-8 (D. Alaska July 1, 1980) (upholding three monuments in Alaska that protected objects including "geological formations," island resources that "reflect the cultural history of the Tlingit" people, and unique animal species).

in this century-long tradition of interbranch agreement about the Antiquities Act's role in promoting historical and scientific knowledge. They protect distinctive natural resources and landforms and irreplaceable cultural, archaeological, and paleontological sites.

A. Bears Ears National Monument

As the Tribal Nation Intervenors describe, Bears Ears has been home to Native American communities "since time immemorial." Tribal Nations' Br. Statement of the Case A; *accord* Proclamation No. 10,825, 86 Fed. Reg. 57,321, 57,321 (Oct. 8, 2021). Their stories are interwoven into the landscape in the form of mud brick granaries and dwellings, rock art, tools, projectile points, pottery, and other cultural sites. There is perhaps no worthier example of a national monument than Bears Ears. In fact, the density of cultural and archaeological sites in the Bears Ears region "was an impetus for the passage of the Antiquities Act" itself. Proclamation No. 10,825, 86 Fed. Reg. at 57,321; *see also* Fed. Defs.' Br. 30 n.24 (citing Hewett memorandum).

Federal Defendants' and Tribal Nation Intervenors' briefs eloquently describe some of the innumerable objects of historic and scientific interest protected here. *See* Fed. Defs.' Br. 23-25, 27-29; Tribal Nations' Br. Statement of the Case A. These objects draw much of their meaning from the context and landscape in which they are embedded. The concentration and locations of cultural

objects have contributed to understanding how people in the region have interacted with one another and with the surrounding environment—including by hunting, introducing plants for cultivation, and domesticating animals—for more than a thousand years. *See* Proclamation No. 10,825, 86 Fed. Reg. at 57,327-29. Systems of steps carved into cliff-faces offer insight into the trading patterns, economy, and social organization of Ancestral Pueblo communities. *Id.* at 57,321, 57,327. Rock art panels throughout the monument—some of which contain overlapping writing from multiple historic periods—provide insights into the daily lives and rituals of the people who created them. *See id.* at 57,324, 57,326-27, 57,328-29. Dispersed throughout the monument are structures including family homes, granaries, towers, ceremonial sites, and kivas from Archaic, Ancestral Pueblo, and Basketmaker cultures—including sites containing multiple structures that show how communities organized their villages. *Id.* at 57,325. Overall, the monument reflects 13,000 years of human occupation. *Id.* at 57,328.

Bears Ears also features "exposed geologic formations" well suited for paleontological and biological research. *See id.* at 57,323. Paleontologists have found taxa of dinosaurs and extinct reptiles whose range is exclusive to Bears Ears or whose discovery in Bears Ears significantly extended that species' known range. *Id.* The range of fossils found here—freshwater sharks, giant amphibians, ferns the size of trees, and unique taxa of mammal-like reptiles—reflect changes to the

Bears Ears landscape over millions of years, from a tropical sea to scorching heat to the current desert climate. *See id.* at 57,328; Proclamation No. 9558, 82 Fed. Reg. 1139, 1140-41 (Dec. 28, 2016). Living plants and wildlife in Bears Ears have also attracted scientific interest, including multiple endangered and threatened species, and one species—the *Eucosma navajoensis* moth—that has been found nowhere else in the world. *See* Proclamation No. 10,825, 86 Fed. Reg. at 57,328.

Calls for protecting Bears Ears dating back to 1904 remained unfulfilled for over a century, "until the Hopi Tribe, Navajo Nation, Ute Indian Tribe of the Uintah and Ouray Reservation, Ute Mountain Ute Tribe, and Pueblo of Zuni united in a common vision to protect these sacred lands and requested permanent protection" as a national monument. *Id*. at 57,321; *see* Proclamation No. 9558, 82 Fed. Reg. at 1139. The protection of Bears Ears in 2016 brought the promise of the Antiquities Act full circle.

B. Grand Staircase-Escalante National Monument

Often called the "Science Monument,[9]" Grand Staircase-Escalante National Monument is "one of the world's great paleontological laboratories." Proclamation No. 10,286, 86 Fed. Reg. 57,335, 57,337 (Oct. 8, 2021). The monument's varied geology has long been the focus of scientific study, both for the geological

[9] Bureau of Land Mgmt., *National Conservation Lands: Science & Research*, https://www.blm.gov/programs/national-conservation-lands/utah/grand-staircase-escalante-national-monument/science-research (last accessed Jan. 9, 2024).

formations themselves and for the great biological diversity—past and present—this landscape supports.

Nineteenth-century geologist Clarence Dutton first coined the name "Grand Staircase" for the series of multi-colored cliffs rising, in stairstep fashion, to the rim of Bryce Canyon. Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,223 (Sept. 18, 1996). Each one of these elevation changes creates its own habitat sustaining different species. *See* Proclamation No. 10,286, 86 Fed. Reg. at 57,337. Scientists have made numerous biological discoveries within the monument, including the identification of more than 600 species of bees, "some of which likely exist nowhere else on Earth." *Id.* at 57,336.

In part because the monument's stratified geological formations expose fossils that would otherwise be deep underground, paleontologists have made many significant fossil discoveries in Grand Staircase-Escalante. *See id.* at 57,337, 57,340. To date, scientists have found fifteen previously unknown species of dinosaurs in the monument, including several horned dinosaurs, a new raptor, and a new tyrannosaurid. *Id.* at 57,340. One site preserves four tyrannosaurs of different ages in close proximity; their discovery suggests that the famously fearsome dinosaurs may have hunted socially and engaged in extended parental care. *Id.*

In addition to dinosaurs, the monument contains some of the earliest evidence of mammals in the fossil record, and it is the only known place in the

Western Hemisphere with evidence of mammals from the Cenomanian through Santonian ages (100.5 to 83.6 million years ago). *Id.* Despite its current high desert environment, parts of the monument were once submerged by a vast inland sea and contain evidence of marine life, including marine reptiles, oyster beds, fish, and shark teeth. *Id.* at 57,340-41, 57,343. The Kaiparowits Plateau is a world-class paleontological hotspot with thousands of known sites, but other areas in the monument have yielded dozens of productive dig sites, too. *Id.* at 57,338, 57,340-41. Fossils found in the monument are unusually detailed with traces of soft tissue; impressions of skin, beaks, and claws; or near-complete skeletons. *See id.* at 57,340-42.

The monument is also rich with human history. Nine different Native American tribes have ties to the area and continue to use it today. *Id.* at 57,337. Etched on canyon walls are Fremont, Ancestral Pueblo, and Southern Paiute rock art. *Id.* at 57,338-39. One particularly remarkable pictograph artistically depicts the fossilized dinosaur tracks visible nearby. *Id.* at 57,343. Other areas contain Fremont and Ancestral Pueblo cultural sites, structures, and writings. *See id.* at 57,341-43. The monument also preserves more recent history such as Hole-in-the-Rock Road, which follows the route used by Latter-day Saint pioneers when crossing southern Utah via wagon train. *Id.* at 57,339.

Since Grand Staircase-Escalante's creation more than a quarter century ago, Congress has repeatedly demonstrated its approval by enacting legislation to secure the monument's integrity and enhance the care and management of its resources.

On two occasions, Congress appropriated funding to protect the monument from competing land uses that could have jeopardized the protection of the monument's historic and scientific resources. In 1998, Congress ratified a land exchange, acquiring all of Utah's inholdings within the monument's boundaries, and giving Utah comparable federal lands outside the monument and a $50 million payment. Utah Schools & Land Exchange Act of 1998, Pub. L. No. 105-335, §§ 3, 7, 112 Stat. 3139, 3141-42. In ratifying the agreement, Congress explained that it would "resolve many longstanding environmental conflicts" and prevent the "[d]evelopment of surface and mineral resources" that "could be incompatible with the preservation of the[] scientific and historic resources for which the Monument was established." *Id.* §§ 2(3), 2(14), 112 Stat. at 3139, 3141. The following year, Congress appropriated a further $19.5 million to buy back preexisting coal leases "within the Grand Staircase-Escalante National Monument." Consolidated Appropriations Act, Pub. L. No. 106-113, app. C, tit. VI, § 601, 113 Stat. 1501, 1501A-215 (1999).

Congress also adjusted Grand Staircase-Escalante's boundaries on two other occasions. In 1998, shortly after ratifying the land exchange with Utah, Congress made other small adjustments to the monument's boundaries, adding certain federal lands while removing others. *See* Automobile National Heritage Area Act, Pub. L. No. 105-355, § 201, 112 Stat. 3247, 3252-53 (1998). And in 2009, as part of the Omnibus Public Land Management Act, *see supra* pp.9-10, Congress removed roughly 25 acres from the monument to exclude an existing ranch. Omnibus Public Land Management Act, § 2604, 123 Stat. at 1119. As noted above, some monument opponents pursued judicial (rather than congressional) changes to the monument, but the District of Utah dismissed their claims, *see Utah Ass'n of Cntys*, 316 F. Supp. 2d at 1200, and this Court dismissed the appeal because the sole remaining appellant lacked Article III standing, *Utah Ass'n of Cntys. v. Bush*, 455 F.3d 1094, 1100-01 (10th Cir. 2006).

In sum, Congress resolved disputes and "increased the monument's reservation by more than 180,000 acres." Proclamation No. 10,286, 86 Fed. Reg. at 57,335. Congress's active management of Grand Staircase-Escalante has, in its words, ensured the integrity of "some of the most renowned conservation land units in the United States." Utah Schools & Land Exchange Act, § 2(14), 112 Stat. at 3141.

SUMMARY OF ARGUMENT

The district court dismissed the complaints on two jurisdictional grounds: sovereign immunity and lack of a final agency action. 4-JA 976–90[10]; *see Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 976 (10th Cir. 2001) (sovereign immunity is jurisdictional); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (final agency action is jurisdictional). With the exception of rejecting a single standing theory, the district court "did not reach any" of the other arguments the Federal Defendants and Intervenors raised in support of dismissal, including other jurisdictional arguments under Federal Rule of Civil Procedure 12(b)(1) and merits arguments under Rule 12(b)(6). Fed. Defs.' Br. at 34; 4-JA-990–92.

On appeal, Plaintiffs strenuously attack the merits of Grand Staircase-Escalante and Bears Ears, ignoring the steps this Court would need to take before it considers these merits questions. It is a "fundamental principle[] of separation of powers" that courts ensure themselves of subject-matter jurisdiction before reaching the merits of any legal argument. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Neither this Court nor any other can consider the sufficiency of Plaintiffs' legal claims unless and until it finds that the United States

[10] Citations to the Joint Appendix use the following convention: [Volume number]-JA-[Page number(s)].

is not immune from suit *and* that the Plaintiffs have met their burden to establish Article III standing. Even then, it is this Court's normal practice to remand issues not ruled on by the district court in the first instance. *Wyo-Ben Inc. v. Haaland*, 63 F.4th 857, 880 (10th Cir. 2023) (citing, e.g., *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013)). That practice is particularly pertinent given that resolving Plaintiffs' sweeping statutory interpretation arguments may still be unnecessary: in the district court, Federal Defendants' and Intervenors' motions identified specific Rule 12(b)(6) pleading deficiencies with Plaintiffs' amended complaints that could provide sufficient bases for dismissal without resolving Plaintiffs' reinterpretations of the Antiquities Act. 2-JA-472–76 (Federal Defendants' motion); 3-JA-673–74 (Tribal Nation Intervenors' motion); 3-JA-678–79 (SUWA Intervenors' motion).

Rather than reaching multiple issues that the district court did not address, if this Court concludes that the district court erred in its reviewability analysis, the Court should follow its normal practice and remand the remaining issues—including all Rule 12(b)(6) questions—to the district court.

ARGUMENT

I. Plaintiffs' standing must be resolved before any court can consider whether Plaintiffs have alleged valid claims

No court has jurisdiction to consider Plaintiffs' reinterpretation of the Antiquities Act unless and until Plaintiffs meet their burden of establishing Article III standing. In the district court, Federal Defendants and the Tribal Nation

Intervenors raised facial and factual challenges to Plaintiffs' standing to sue. 2-JA-442–72; 3-JA-646–54. The district court did not resolve most of those challenges; it concluded only that a single Dalton Plaintiff (the Blue Ribbon Coalition) lacked standing to pursue a single claim pertaining to the alleged denial of permits. 4-JA-990–92. The Dalton Plaintiffs did not contest that aspect of the district court's ruling in their opening brief. And neither one of Plaintiffs' opening briefs directly argued that they have Article III standing to pursue their other claims.

Yet, by devoting large portions of their appeal briefs to their preferred interpretation of the Antiquities Act, Plaintiffs seemingly ask this Court to violate the requirement that courts ensure themselves of subject-matter jurisdiction before reaching the merits of any claim. *Steel Co.*, 523 U.S. at 94. This requirement is "inflexible and without exception" because it goes to the Court's very "power to declare the law." *Id.* at 94-95 (first quoting *Mansfield, C. & LM Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884), then quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). Plaintiffs' rush to put their merits grievances before this Court ignores the tenet that federal courts may exercise judicial power only "in the last resort, and as a necessity." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)), *overruled on other grounds*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Of the subject-matter jurisdiction doctrines, standing is particularly important because it "prevents courts from expanding their power so as to bring under their jurisdiction ill defined controversies." *United States v. Muhtorov*, 20 F.4th 558, 612 (10th Cir. 2021) (cleaned up); *see infra* p.28 (describing the amorphous nature of Plaintiffs' alleged disagreements with the President's exercises of discretion). And as this Court explained the last time it heard a challenge to Grand Staircase-Escalante, the "proper evaluation of standing is particularly important" where, "as here, a plaintiff challenges an action of the President," given the separation-of-powers considerations involved. *Utah Ass'n of Cntys.*, 455 F.3d at 1099; *see also Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) ("Because Plaintiffs have invoked Article III jurisdiction to challenge the conduct of the executive branch of government, the necessity of a case or controversy is of particular import.").

Plaintiffs had it backward, then, when their opening briefs ignored the unresolved questions around their Article III standing, but devoted considerable space to their sweeping reinterpretation of the Antiquities Act and their position that they have alleged valid claims. Dalton Br. 14-35; Garfield Br. 34-40. The meaning of specific terms in the Antiquities Act is firmly a merits question that can be addressed only if there is subject-matter jurisdiction. *See Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 545 (D.C. Cir. 2019) (dismissal of Antiquities Act

claims after rejecting plaintiffs' statutory interpretation arguments should have been under Rule 12(b)(6), not Rule 12(b)(1)).[11] The Dalton Plaintiffs go so far as to argue that the proclamations are "unlawful *in toto*" and that "[t]his Court should declare as much, thus barring their enforcement." Dalton Br. 13; *see also id.* at 2 (arguing that "the time is well past due for the federal courts to start policing" the President's Antiquities Act authority). But however much Plaintiffs may want to "proceed directly to the merits" of their disagreement with the Executive Branch and "'settle' it for the sake of convenience and efficiency," the Constitution requires that standing be decided first, to "keep[] the Judiciary's power within its proper constitutional sphere." *Schaffer v. Clinton*, 240 F.3d 878, 883 (10th Cir. 2001) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). Without a determination that Plaintiffs have standing, their merits arguments are premature.

On appeal, Federal Defendants and Tribal Nation Intervenors renew their challenges to Plaintiffs' standing. Fed. Defs.' Br. 82-119 (raising facial and factual attacks on standing); Tribal Nations' Br. Argument A (raising facial attacks on standing). This Court may affirm the district court's judgment on that alternative

[11] Other circuits have carefully distinguished between reviewability arguments and merits arguments in similar contexts, with the jurisdictional question of whether Congress placed any relevant limits on the President's authority being distinct from the merits question of whether the President, in fact, violated a limit. *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1330-31 (D.C. Cir. 1996); *Murphy Co. v. Biden*, 65 F.4th 1122, 1130-31 & n.1 (9th Cir. 2023).

ground, but if it does not consider the appeals to be "easily resolved" on that basis—for example, if the standing issue would benefit from additional vetting or the resolution of factual disputes—it should follow its normal course and remand to the district court to consider the issue in the first instance. *Graff v. Aberdeen Enterprizes, II, Inc*., 65 F.4th 500, 525-26 (10th Cir. 2023); *see also Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906-07 (10th Cir. 2012) (remanding disputed jurisdictional facts to the district court).

Ultimately, given Federal Defendants' and the Tribal Nation Intervenors' standing challenges, it may not be necessary for any court to reach the merits questions—or, for that matter, even definitively resolve the reviewability issues—at all. *See Steel Co.*, 523 U.S. at 94; *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (federal courts may choose to decide threshold issues in any order). That is, after all, a primary point of standing doctrine: to keep federal judges from wading into contested policy disputes unless truly necessary. *See Raines*, 521 U.S. at 819-20.

II. The Court should not consider the sufficiency of Plaintiffs' claims without adversarial briefing or a reasoned district court decision

Even if the Court were to resolve the multiple predicate jurisdictional and reviewability questions here in Plaintiffs' favor, it should remand the remaining issues that the district court did not address—including Federal Defendants' and Intervenors' Rule 12(b)(6) challenges to Plaintiffs' amended complaints—to decide

in the first instance. *See In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d 1175, 1182 (10th Cir. 1991) (reversing jurisdictional holding and remanding for district court to resolve the merits (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976))).

"Where an issue has not been ruled on by the court below," this Court "generally favor[s] remand for the district court to examine the issue." *Tabor*, 703 F.3d at 1227; *accord Forth v. Laramie Cnty. Sch. Dist. No. 1*, 85 F.4th 1044, 1070 (10th Cir. 2023); *Graff*, 65 F.4th at 525-26. The Plaintiffs have provided "no reason to deviate from that practice in this case," and this Court should follow its normal practice here. *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005) (citing, *inter alia*, then Tenth Circuit Rule 28.2(C)(2)—now Rule 28.1(A)—and declining to address an issue that was "raised, but not ruled on," below); *Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 653 (10th Cir. 2017) (remanding legal questions not decided by district court).

The briefing in these appeals provides a particularly strong reason to hew to that practice. No party has asked this Court to affirm dismissal on the alternative ground that Plaintiffs failed to state claims for relief, as is their prerogative. *See Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1249 (10th Cir. 2010) (parties are "not required to raise alternative arguments" for "affirming the district court's ruling in their favor"). So, as it stands now, the Court is missing several important voices on this issue: the district court's, the Federal Defendants', and the

Intervenors'. Where the Court lacks both the "benefit of vigorous adversarial testing of the issue" and a "reasoned district court decision on the subject," the "superior course of action is to remand so that district court may decide the issues in the first instance." *United States ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729, 763 n.17 (10th Cir. 2019) (cleaned up); *see also United States v. McLinn*, 896 F.3d 1152, 1157 (10th Cir. 2018) (declining to address legal questions that were not fully briefed on appeal or addressed by the district court).

Given the sweeping nature of Plaintiffs' arguments, this Court should be especially reluctant to address the merits without the benefit of a district court's first take or full briefing on appeal. Plaintiffs present a brazen reinterpretation of the Antiquities Act, and they make clear their view that it would apply far beyond the two monument proclamations at issue here. Dalton Br. 25-32; Garfield Br. 35-38; *see also supra* pp. 5-8 (describing other monuments created under the Antiquities Act that protect natural resources). Plaintiffs' challenge to Grand Staircase-Escalante also raises acute separation-of-powers concerns, given that their lawsuits seek judicial invalidation of Congress's own legislative additions to the monument, *see supra* pp. 18-19, which Plaintiffs entirely fail to acknowledge. They also seem to ask for this Court to endorse a sort of Antiquities Act exceptionalism: that courts should scrutinize presidential findings underlying monument designations more rigorously than agency determinations would be

reviewed under the Administrative Procedure Act. *See, e.g.*, Garfield Br. 25-26, 38-39; *see also* Fed. Defs.' Br. 67-68 & n.40.

If the district court addresses all the remaining bases for the motions to dismiss, there may be no need to address Plaintiffs' bold claims at all. Federal Defendants and Intervenors raised other Rule 12(b)(6) pleading deficiencies about the sufficiency of Plaintiffs' factual allegations that may eliminate the need to decide the scope of the President's Antiquities Act authority or whether these proclamations are *ultra vires*. *See, e.g.*, 2-JA-472–76 (Federal Defendants arguing that Plaintiffs failed to identify lands in the monuments that were improperly reserved); 3-JA-673–75; 4-JA-880–82 (Tribal Nation Intervenors arguing that Plaintiffs failed to show there is no set of circumstances in which proclamations could be applied consistently with the law); 3-JA-678–79 (SUWA Intervenors' motion adopting Federal Defendants' arguments). These are alternative narrow bases to dismiss Plaintiffs' claims. And even if not, and the district court proceeds to resolve the Plaintiffs' broad statutory interpretation arguments, the amended complaints are rife with inconsistencies, hair-splitting, and vague value judgments that warrant skepticism and scrutiny. *See, e.g.*, 2-JA-386–87 (using terms like "ubiquitous," "too large," or "nondescript" to exclude objects that otherwise seem to meet their proposed statutory definitions). Remand would help give the important issues in these cases "the full vetting [they] deserve[]," so that "this

court ultimately might be in a position to offer a judgment with the degree of confidence the question merits." *United States v. Suggs*, 998 F.3d 1125, 1141 (10th Cir. 2021).

To the best of SUWA Intervenors' knowledge, all other courts that have resolved similar challenges to national monuments had the benefit of a thorough district court decision and full adversarial appellate briefing.[12] There is no need for this Court to break new ground and become the first to rule on far-reaching claims like Plaintiffs' on appeal in the first instance. Instead, if the Court concludes that the district court's reviewability ruling was flawed, the Court should follow its ordinary course and allow the district court to address—if necessary—the sufficiency of Plaintiffs' claims in the first instance.

CONCLUSION

If this Court does not affirm the judgment on threshold reviewability or jurisdictional grounds, it should remand for the district court to resolve any remaining jurisdictional questions and, if necessary, whether Plaintiffs have alleged any valid claims for relief.

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[12] *See, e.g.*, *Murphy Co.*, 65 F.4th at 1128; *Mass. Lobstermen's Ass'n*, 945 F.3d at 539-40; *Tulare County*, 306 F.3d at 1140.

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STATEMENT REGARDING ORAL ARGUMENT

The SUWA Intervenors believe that oral argument would be useful to the Court due to the significant and complex questions the appeals raise.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response brief contains 6,718 words based on the word-count function on Microsoft Word 365, excluding items exempted by Fed. R. App. P. 32(f). It therefore complies with Fed. R. App. P. 32(a)(7)(B)(i), as modified by the Court's Order dated September 14, 2023. The 14-point Times New Roman type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

January 9, 2024 *s/ Jacqueline Iwata*

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: (1) all required privacy redactions have been made pursuant to Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5; (2) all hard copies filed with the Court are exact copies of this ECF submission; and (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, CrowdStrike Falcon, and according to the program is free of viruses.

January 9, 2024 *s/ Jacqueline Iwata*

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2024, I filed the original version of this brief using the CM/ECF System. Notice of this filing will be sent to all attorneys of record via ECF.

January 9, 2024 *s/ Jacqueline Iwata*