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.,
Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., ET AL.,
Defendants-Appellees,

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

On Appeal from the United States District Court for the District of Utah, No. 4:22-CV-00059 (Hon. David Nuffer)

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, AND UTE MOUNTAIN UTE TRIBE RESPONSE BRIEF

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

GLOSSARY

APA	Administrative Procedure Act
Bears Ears	Bears Ears National Monument
Biden Bears Ears Proclamation	Proclamation No. 10285, 86 Fed. Reg. 57321 (Oct. 15, 2021)
BLM	Bureau of Land Management
County Plaintiffs	Garfield County and Kane County, Utah
FLMPA	Federal Land Management and Policy Act
Forest Service	U. S. Forest Service
Garfield Plaintiffs	Garfield County, Kane County, and State of Utah
Individual Plaintiffs	Zebediah Dalton, Kyle Kimmerle, Suzette Morris, and the BlueRibbon Coalition
Interior	U.S. Department of the Interior
Obama Proclamation	Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017)
Plaintiffs	Garfield Plaintiffs and Individual Plaintiffs, combined

SUWA Intervenors	National Parks Conservation Association, The Wilderness Society, Grand Canyon Trust, Great Old Broads for Wilderness, Western Watersheds Project, WildEarth Guardians, Sierra Club, Center for Biological Diversity, Southern Utah Wilderness Alliance, and Natural Resources Defense Council
Tribal Nations	Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, and Pueblo of Zuni
Trump Proclamation	Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 8, 2017)
U. S. Brief	Federal Defs.' Consol. Answering Brief, ECF No. 11053660

I. Introduction

Efforts to protect the Bears Ears region have taken place for over a century. Indeed, the Congress that enacted the Antiquities Act in 1906 identified specific places within the Bears Ears region that need protection. It was not until the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni came together in 2010 to advocate for its protection that the Bears Ears National Monument became a reality. Each of the five Tribal Nations[1] have cultural, religious, and historic connections to the Bears Ears region. Whether those ties are to the sacred towering spires in the Valley of the Gods, the ancient migration routes throughout the region, the ceremonial sites that are still utilized to this day, or the many historic and cultural items that have been left behind by their ancestors, Bears Ears is a traditional and historic homeland for each of the Tribal Nations. As documented extensively in President Biden's 14-page

[1] While there were five Tribal Nations that came together to advocate for the creation of Bears Ears National Monument, only four of those five have intervened in this matter. Thus, any reference to "Tribal Nations" hereinafter will be a reference to the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, and Pueblo of Zuni unless noted otherwise.

Bears Ears Proclamation, the Tribal Nations' historic and cultural connections run throughout Bears Ears, necessitating the protection of the entire region.

Plaintiffs want to undo this historic endeavor. Fatally, though, Plaintiffs have failed to establish that the Proclamations have caused injury to any of their legally protected interests, or that the relief they seek will remedy any alleged harms. And all Plaintiffs fail to establish injury to the extent they allege harm to individuals or entities other than themselves. Thus, Plaintiffs have failed to establish Article III standing to maintain this action.

Should Plaintiffs overcome that threshold issue, they have also failed to establish that the President's discretionary decision is reviewable. Longstanding Supreme Court precedent has upheld the President's broad discretion to create national monuments, and the circuit courts have only reviewed the creation of national monuments in circumstances that do not exist here. The Antiquities Act exudes deference to create national monuments in nearly every clause, and President Biden's Proclamations establishing Bears Ears and Grand Staircase Escalante National Monuments may be the most detailed proclamations by any president. The

Proclamations comport with the statutory text, and Plaintiffs' searching inquiry would be inconsistent with the broad deference accorded to the President by Congress.

Finally, Plaintiffs' Administrative Procedure Act ("APA") claims are fundamentally flawed. The Bureau of Land Management ("BLM") interim guidance memoranda ("Memoranda") were not adopted as the result of any final agency decision making process, were not issued pursuant to the conditions outlined in the Proclamations, and have not caused Plaintiffs any concrete injury. As such, their APA claims fail.

Therefore, the Tribal Nations respectfully request that the Court affirm the district court's judgment.

II. Jurisdictional Statement

Garfield County, Kane County, and the State of Utah ("the Garfield Plaintiffs"), and Zebediah Dalton, Kyle Kimmerle, Suzette Morris, and the BlueRibbon Coalition (the "Individual Plaintiffs") (both sets of plaintiffs together will collectively be referred to as "Plaintiffs") filed suit in the District of Utah, alleging claims based on the Antiquities Act and the APA, invoking the court's jurisdiction under 28 U.S.C. § 1331. The district court lacked jurisdiction and properly dismissed all claims on August 11, 2023.

The Garfield Plaintiffs appealed on August 14, 2023, and the Individual Plaintiffs appealed on August 16, 2023. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. Statement of the Issues

1. Whether Plaintiffs have established Article III standing to challenge the Biden Proclamations where Plaintiffs have not shown that they have legally protected interests in the matter, or that the Proclamations have caused them any harm that would be redressable by the relief sought.

2. Whether President Biden's extensively detailed Proclamations, issued pursuant to the President's broad discretion to create national monuments under the Antiquities Act, is reviewable.

3. Whether this Court has jurisdiction over Plaintiffs' APA claims challenging Memoranda where the Memoranda are not the consummation of the agency's decision making process, do not carry legal consequences, do not meet the conditions precedent to be monument management plans, and have not caused Plaintiffs any concrete injury.

IV. Pertinent Statutes

The relevant statutory provisions are reproduced in the addendum to this brief.

V. Statement of the Case

A. Importance of Bears Ears to the Tribal Nations

Bears Ears has been the Tribal Nations' homeland since time immemorial and remains sacred today. Proclamation No. 10285, 86 Fed. Reg. 57321, 57321 (Oct. 15, 2021) ("Biden Bears Ears Proclamation"). Indeed, the importance of the Bears Ears region to the Tribal Nations and their members cannot be overstated. The opening sentences of President Obama's Proclamation initially establishing the Bears Ears National Monument ("Bears Ears") describe an ancient and unique landscape with no parallel:

> Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe, or "Bears Ears."

Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Jan. 5, 2017) ("Obama Proclamation").

The Tribal Nations' connection to the Bears Ears region is detailed in both the Biden and Obama Proclamations. The Biden Proclamation describes a "unique density of significant cultural, historical, and archaeological artifacts spanning thousands of years[.]" Biden Bears Ears Proclamation at 57321. This includes "ancient cliff dwellings, large villages, granaries, kivas,

towers, ceremonial sites, [and] prehistoric steps cut into cliff faces[.]" *Id.* For example, Grand Gulch—which the Plaintiffs maintain is not worthy of protection, Joint App. Vol. II at 391 (listing locations eligible for protection according to Plaintiffs, excluding Grand Gulch)—is "replete with thousands of cliff dwellings and rock writing sites," and it "likely contains the highest concentration of Ancestral Pueblo sites on the Colorado Plateau." Biden Bears Ears Proclamation at 57329. Grand Gulch is so important that the Grand Gulch Archaeological District was placed on the National Register of Historic Places in 1982. Grand Gulch Instant Study Area Complex, Bureau of Land Management, https://www.blm.gov/site-page/programs-national-conservation-lands-utah-grand-gultch-isa-complex; *Buhendwa v. Reg'l Transp. Dist.*, 82 F. Supp. 3d 1259, 1262 n.1 (D. Colo. 2015) (court may take judicial notice of contents on agency's website).

As described in the Biden Proclamation, numerous kivas are located throughout Bears Ears. Kivas are circular underground structures entered by a ladder from the roof down to the center of the kiva floor and are important for religious, cultural, and historic purposes. NPS Museum Collections of Chaco Culture, National Park Service, https://www.nps.gov/museum/exhibits/chcu/slideshow/kivas/kivasint

ro.html. Certain Kivas are specifically mentioned in the Proclamation. Within Kane Gulch, a tributary to Grand Gulch, for example, there is "a well-preserved Perfect Kiva." Biden Bears Ears Proclamation at 57329.[2] While the kivas identified in the Proclamation are historic, some are used for religious ceremonies still conducted today by the Hopi and Zuni people. NPS Museum Collections of Chaco Culture, National Park Service, https://www.nps.gov/museum/exhibits/chcu/slideshow/kivas/kivasintro.html (noting "Kiva" is a Hopi word). During ceremonies today, the ritual emergence of participants from the kiva into the plaza above represents the original emergence by Puebloan groups from the underworld into the current world." *Id.*; Mesa Verde National Park cultural resource photo gallery, National Park Service, https://www.nps.gov/meve/learn/education/artifactgallery_kiva.htm ("Much like the biblical story of Noah's Ark, Hopis believe that the world before this one was destroyed, but a few chosen people were saved. Climbing a ladder up out of the smoky kiva and through the roof into the courtyard after ceremonies may have served

[2] *See also* Grand Gulch Map, Bureau of Land Management, https://www.blm.gov/sites/blm.gov/files/uploads/BLMUtahGrandGulch.pdf (map of Grand Gulch, with Perfect Kiva identified).

as a powerful reminder of their movement from the world before."). As one court noted, the "kivas are the focal point of all religious activity in the Hopi Villages[.]" *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 894 (D. Ariz. 2006), *aff'd in part, rev'd in part and remanded,* 479 F.3d 1024 (9th Cir. 2007), *and aff'd on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

President Biden also identified "a prehistoric road system that connected the people of Bears Ears to each other and possibly beyond." Biden Bears Ears Proclamation at 57321. The "Chacoan roads as well as the handholds and steps carved into cliff faces" within Bears Ears were part of the region's "migration system and are integral to the story of the Bears Ears landscape." *Id.* at 57327. The sites in the region may also provide "evidence of some of the furthest north migration of Pueblo in the Mesa Verde region." *Id.* at 57324. These roads link together "remains of single family dwellings, granaries, kivas, towers, and large villages" and reveal "a complex cultural history." Obama Proclamation at 1139.

Specifically, the ancient roads are tied to the Hopi and Zuni, who are well known for their migration throughout the Bears Ears region. *Nat. Arch and Bridge Soc'y v. Alston*, 209 F. Supp. 2d 1207, 1211 (D. Utah 2002) (discussing Hopi migration through San Juan County); *see Navajo Nation*, 479

F.3d at 1041 (discussing the migrations). The Hopi and Zuni maintain traditional and historic stories, passed down from clan to clan, about their migration that are integrally related to their culture and religion. *Zuni Tribe of New Mexico v. U.S.*, 12 Cl. Ct. 607, 616 (Cl. Ct. 1987) ("The ancient ties of Zuni people to their land is presently manifest in the tribal oral tradition about Zuni origin and migration and in the physical artifacts representing the archaeological history of Zuni culture."); *Canyon Farmers*, National Parks Service History eLibrary, http://npshistory.com/publications/nava/index.htm (describing the sacred migration paths of Hopi clans). These migrations show how the entire landscape of Bears Ears is integrally related to the history of the Hopi and Zuni, as President Biden recognized.

The Ute Mountain Ute also have profound historical connections to Bears Ears. The White Mesa community, just south of Blanding, Utah, is partially within and on the border of the Bears Ears National Monument. Utah Division of Indian Affairs, *Ute Mountain Ute Reservation Map*, https://indian.utah.gov/ute-mountain-ute/; *see also infra* at 15, Joint App. Vol. III at 621 (The Region to the Native Eye Map). "According to Ute tradition, the people of White Mesa came to the Four Corners area after the creation of the world." *Id.* The "people of White Mesa descend from a band

of Southern Utes, the Weenuche." *Id.* Oral history from the Ute "describe[s] the historic presence of bison, antelope, and abundant bighorn sheep, which are also depicted in ancient rock art." Obama Proclamation at 1142. Much of this rock art was "left by the Ute[.]" *Id.* at 1139. The Obama Proclamation, which was referenced heavily and incorporated by the Biden Proclamation, documented the many "ceremonial sites" within Bears Ears, and the Bear Dance is among them. *See* Biden Bears Ears Proclamation at 57321; Obama Proclamation at 1139. The Bear Dance, one of the "most ancient and important Ute ceremonies," was historically conducted within the Bears Ears region, and continues there to this day. Lynda D. McNeil, *Ute Indian Bear Dance: Related Myths and Bear Glyphs*, 25 Am. Indian Rock Art Ass'n (AIRA) 133, 134 (1999) (describing importance of Bear Dance); *Photos: Utah Lt. Gov. Henderson Visits Towaoc Before Bear Dance*, The Journal, Sept. 2, 2022, 8:58 PM, https://www.the-journal.com/articles/photos-utah-lt-gov-visits-towaoc-before-bear-dance/; *Ute Mountain Ute Tribe Visit and White Mesa Bear Dance*, September 2, 2022, Office of the Lieutenant Governor, https://officeofthelieutenantgovernor.pic-time.com/-utemountainutevisitandwhitemesabeardance9222/gallery. Reflecting "restoration," the Bear Dance usually takes place in the spring and is led by female dancers

choosing their dance partners. McNiel, *supra,* at 135.

From the sacred towering spires in the Valley of the Gods, revered as ancient Navajo warriors frozen in stone, to the historic White Canyon region, known as "*Nahoniti'ino*" (hiding place), the lands protected by the Monument also hold special cultural and historic significance for the Diné (the "Navajo" people). Obama Proclamation at 1140. For instance, the historic *Nahoniti'ino* was a place of refuge in the summer of 1864, where many Navajos hid to escape the Long Walk and forced removal to Bosque Redondo. *Id.*; *see Meyers By and Through Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544, 1551 n.1 (D. Utah 1995) (describing how many of the Navajo people were able to escape the harrowing, forced "Long Walk" of the Navajos by hiding in mountains and canyons of San Juan County).

Bears Ears is the birthplace of Navajo leaders, including Headman *K'aayélii* (who was born near the twin Bears Ears buttes), whose band used the canyons of the Monument to elude capture from the U.S. army. Obama Proclamation at 1140. Bears Ears is also home to Navajo Chief Manuelito (born in the Headwaters Region of Bears Ears), *id.*, a central figure in Navajo resistance against the Long Walk and signatory to the Treaty of 1868. Until recently, the Navajo people continued to reside within the Monument's

boundaries in traditional hogans. *Id*. Today, Navajo people make extensive use of the Monument lands, where they camp, hunt for wild game, and forage for native plants as they have done since time immemorial. Navajo medicine men and women continue to harvest soils and medicinal plants within Bears Ears, exemplifying the Monument's inextricable ties to Navajo ceremonial practices, including songs, prayers, and healing ceremonies. Biden Bears Ears Proclamation at 57323; Obama Proclamation at 1140.

As illustrated by just this small set of examples, the importance of Bears Ears to the Tribal Nations "continues to this day." Obama Proclamation at 1140. The Tribal Nations' members still "come here for ceremonies and to visit sacred sites." *Id.* Many places within Bears Ears are tied to traditional and historic "stories of creation, danger, protection, and healing." *Id.* And members still hunt, fish, gather, cut wood, and collect medicinal and ceremonial plants, herbs, and materials within Bears Ears. *Id.*

While there are many historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are identified in the Biden Bears Ears Proclamation, it is inappropriate to specifically identify many sacred places. Given the history of this country, and more specifically, the criminalization of Native people, culture, and

practices, Native people are understandably reluctant about providing traditional knowledge to outsiders. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999) ("In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land."). President Biden recognized as much, noting that many of the objects are "sacred to Tribal Nations, are sensitive, rare, or vulnerable to vandalism and theft, or are dangerous to visit and, therefore, revealing their specific names and locations could pose a danger to the objects or the public." Biden Bears Ears Proclamation at 57322.

Still, within each of the regions of Bears Ears, President Biden identified important objects of great historic and cultural significance to the Tribal Nations. Whether it is the Bears Ears Buttes, Indian Creek, Beef Basin, Blue Mountains, Cottonwood Canyon, Elk Ridge, Cedar Mesa, or Grand Gulch region, President Biden specifically identified objects of historic and scientific interest to the Tribal Nations. *Id.* at 57323-30 (identifying objects within each geographic subregion that hold cultural and historical significance to Tribal Nations). These places "facilitate the practice of traditions, and serve as a mnemonic device that elders use to teach younger generations where they came from, who they are, and how to live." *Id.* at

57323.

Bears Ears and the sacred places found throughout it continue to serve integral roles in the development and practice of Indigenous ceremony and culture. From dances and ceremonies held on these sacred lands, to the gathering of traditional foods and medicines, Bears Ears remains an essential landscape that members of Tribal Nations regularly visit to practice their spirituality and connect with their history. *Id.* A region more worthy of protection under the Antiquities Act is hard to imagine.

For context and to show how the Tribal Nations are connected to this place, below is a representational map of the Bears Ears region to the Native eye. Joint App. Vol. III at 621.

B. The Antiquities Act was a Compromise

Efforts to protect places like Bears Ears, replete with these cultural and religious sites, gave rise to the Antiquities Act more than a century ago.[3] As

[3] Native people have not always been enamored with the Antiquities Act. *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves*

the Federal Defendants conveyed, the Antiquities Act was a compromise between the Department of Interior ("Interior") and Western interests. Federal Defs.' Consolidated Answering Br. at 11-15, ECF No. 11053660 ("U.S. Brief"). Interior wanted broad discretion to reserve sufficient areas to protect objects of scientific importance, while Western interests wanted the government to have more limited authority to protect historic objects, with limits on how much land could be reserved. The final version that was adopted shows the compromise between these positions. *Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004) (noting the contrasting positions).

The legislative proposals that were introduced in the years prior to the passage of the Antiquities Act bear this out. For years leading up to the Act's passage, Interior's General Land Office lobbied Congress to enact legislation granting the President a distinct power "to set apart, as national parks, tracts

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Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 42-43 (1992) (discussing how the Antiquities Act essentially defined Native American remains as "archeological resources," thereby converting them into "federal property" that could be disinterred pursuant to permit). But the Biden Proclamation here properly recognizes the role of the Tribal Nations in managing the Bears Ears region. *See* Biden Bears Ears Proclamation at 57322.

of public land which . . . it is desirable to protect and utilize in the interest of the public." Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 117 (1902); *see also* Ronald F. Lee, *The Antiquities Act of 1906* 53 (1970). Interior's early efforts at proposing such legislation included key language that was later incorporated into the Antiquities Act.

The original draft bill leading to the Antiquities Act would have authorized the President to designate "any natural formation of scientific or scenic value or interest, or natural wonder or curiosity together with such additional area of land surrounding or adjoining the same[.]" Lee, *supra* at 48. A modified version of this bill was introduced by Rep. Jonathan P. Dolliver on February 5, 1900. *Id.* at 50. In response to these and related bills, then-Commissioner of the General Land Office, Binger Hermann, emphasized "the need for legislation which shall authorize the setting apart of tracts of public land as National Parks, in the interest of science and for the preservation of scenic beauties and natural wonders and curiosities, by Executive Proclamation, in the same manner as forest reservations are created." *Id.* at 52. Later, Interior's Land Office proposed a replacement bill, which Representative John F. Lacey introduced on April 26, 1900, titled "A Bill to

establish and administer national parks, and for other purposes." *Id.* at 53. This bill put "greater emphasis on scenic and natural areas[.]" *Id.* It would have authorized reservations of "public land . . . for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest[.]" *Id.* Though these early-1900s bills were initially met with "a cool response," *id.* at 55, they set the stage for the Antiquities Act's ultimate authorization to protect objects of "historic or scientific interest." 54 U.S.C. § 320301(a).

Congress also initially rejected early legislation targeting discrete, enumerated antiquities and landmarks that did not protect scientific interests. For example, legislation championed by Senator Henry Cabot Lodge focused on protecting "ruins," with strict regulation of "excavations" and other similar activities. Lee, *supra* at 59-61. Similarly, legislation supported by the Smithsonian Institute would have protected specific, clearly defined structures and landmarks, including "mounds, pyramids, cemeteries, graves, tombs," and several other enumerated objects, with no protection for historical, scenic, or scientific resources on public lands. *Id.* at 61-2. There were a number of failed proposals that would have limited protection to human-made artifacts, with no protection for natural objects. H.R. 8195, 56th Cong.

(1900) (proposing protections only for "any aboriginal antiquity or prehistoric ruin on [] public lands"); H.R. 9245, 56th Cong. (1900) (proposing protections only for "ruins of temples, houses, or other structures built by the former inhabitants of the country"); H.R. 10451, 56th Cong. (1900) ("proposing protections only for "monuments, cliff dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric, primitive, or aboriginal man"); H.R. 13349, 58th Cong. (1904) (proposing protections only for "historic and prehistoric ruins, monuments, archaeological objects and other antiquities, and the work of American aborigines"); S. 5603, 58th Cong. (1904) (same); S. 4127, 58th Cong. (1904) (providing protections only for "aboriginal monuments, ruins, or other antiquities"). Some of those proposals withheld authority to protect objects altogether. H.R. 8195, 56th Cong. (1900); S. 5603, 58th Cong. (1904).

Other failed proposals would have capped the number of acres that could be protected, removing any discretion from the President in that regard. H.R. 9245, 56th Cong. (1990) (proposing a limit of 320 acres to protect any one historic ruin); H.R. 10451, 56th Cong. (1900) (also proposing a 320-acre limit); H.R. 11021, 56th Cong. (1900) (proposing a 640-acre limit); H.R. 13478, 58th Cong. (1904) (same; identical to H.R. 11021 proposed four years earlier). But

these bills also failed to garner sufficient support, and Congress declined to pass them into law. Lee, *supra* at 63-7. In an influential memorandum that he submitted to the House Committee on Public Lands, Professor Hewett noted the need to enact "legislation to the end that these *regions* may be" protected. H.R. Rep. No. 59-2224 at 2-3 (1906) (emphasis added). "Unquestionably," Hewett went on, "some of these *regions* are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks[,]" rather than being "temporarily withdrawn." *Id.* at 3 (emphasis added).

What finally became the Antiquities Act was a bill that "reconciled the conflicting interests that had plagued antiquities legislation for six years," incorporating language from the Lodge bill (which had been limited to historic and prehistoric antiquities and made no provision for protecting natural areas) and the early Interior bills (which encompassed broad "scientific" interests and discretion for protecting necessary lands). Lee, *supra* at 71, 74. The legislative history thus shows that the Antiquities Act was a compromise that protected both historic and scientific objects and provided the President with the discretion to reserve the land necessary to protect them. 54 U.S.C. § 320301(a).

Congress later affirmed its understanding of the broad scope of protection. When Congress amended the Antiquities Act in 1950, it noted that the Act was designed to protect "natural phenomena" as well as areas of "historic importance." S. Rep. No. 1938, at 2 (1950). And in 1976 when Congress enacted the Federal Land Management and Policy Act ("FLPMA"), which repealed or amended numerous federal land laws, it could have again taken that opportunity to amend the Act. But instead, Congress "did not curtail or restrict the exercise of presidential authority." *Anaconda Copper Co. v. Andrus*, No. A79-161, 1980 BL 175, *3 (D. Alaska, July 1, 1980). Had Congress been concerned about the Supreme Court's interpretation of the Antiquities Act in upholding the monument designation of the Grand Canyon, *see Cameron v. United States*, 252 U.S. 450 (1920), or a lower court's decision upholding the Jackson Hole National Monument, *see Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945), it could have amended the Act to cabin the President's discretion in either 1950 or 1976—but it chose not to, instead leaving the President's discretion intact. 54 U.S.C. § 320301(d).

As evidenced by the varied language of the draft bills it considered, Congress knew how to limit which objects could be protected and how to

limit the amount of land reserved. The final version of the Act, however, was a compromise that authorized the President to broadly protect objects of historic or scientific interest and reserve the land necessary to do so.

C. History of Bears Ears National Monument

The protection of Bears Ears itself is closely linked with the history of the Antiquities Act. In the House Report for the Antiquities Act, Congress identified the Bluff District in San Juan County, Utah as containing "numerous ruins[.]" H.R. Rep. No. 59-2224, at 5 (1906). The "important relics of ancient 'basket makers'" were noted to be numerous along "Montezuma Creek, Recapture Creek, Cottonwood Creek, Butler Wash, Comb Wash, and Grand Gulch." *Id.* "As early as 1904, advocates for protection of cultural landscapes . . . identified the Bears Ears region as one of seven areas in need of immediate protection." Biden Bears Ears Proclamation at 57321. Under the Plaintiffs' cramped view of the Antiquities Act, items and places specifically identified by Congress that passed the Act would be ineligible for protection. Joint App. Vol. II at 391 (listing places to be protected, excluding Grand Gulch).

While there was a long history seeking to protect Bears Ears, the movement gained its full strength when the five Tribal Nations came

together in 2010. It was when the Tribal Nations "united in a common vision to protect these sacred lands and requested permanent protection from President Obama that Bears Ears National Monument became a reality." Biden Bears Ears Proclamation at 57321. In 2017, however, President Trump signed a Proclamation purporting to revoke the Bears Ears National Monument. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017) ("Trump Proclamation"). On October 8, 2021, President Biden issued his Proclamation, establishing a Bears Ears that included all lands protected by the Obama Monument, as well as additional lands that President Trump had protected. Biden Bears Ears Proclamation at 57321. The Biden Proclamation restored protections for numerous cultural, religious, and scientific objects and sites throughout the Bears Ears region, listing many of these features by name and identifying their significance with detail and specificity. *See id.*

In recognition of the historical and traditional "knowledge of Tribal Nations about these lands and objects," Biden Bears Ears Proclamation at 57332, President Obama created a Bears Ears Commission consisting of elected representatives from each of the Tribal Nations to provide guidance and recommendations in the management of Bears Ears. Obama Proclamation at 1144. President Biden's Proclamation reestablished the

Commission, recognizing that it would ensure management decisions affecting the Monument reflect the essential knowledge of Tribal Nations. Biden Bears Ears Proclamation at 57332. By incorporating the Obama Proclamation's provisions on the Commission, *id.*, the Biden Proclamation ensures that traditional knowledge and expertise will be centered in the management of the region and that the Tribal Nations will have a key role in developing management plans. Obama Proclamation at 1144.

D. Procedural History

Garfield Plaintiffs filed this action on August 24, 2022, challenging President Biden's Proclamations on both Bears Ears and Grand Staircase-Escalante National Monuments. *See* Joint App. Vol. I at 51 (Garfield Pls. Compl.). Individual Plaintiffs filed a similar suit the following day. The cases were consolidated. *See* Joint App. Vol. I at 4 (consolidated docket sheet). Both sets of Plaintiffs sought declaratory and injunctive relief to facially challenge the Biden Proclamations, arguing that the President had designated ineligible objects and reserved more land than was authorized under the Antiquities Act. *See* Joint App. Vol. I at 51-134 (Garfield Pls. Compl.); *id.* at 135-201 (Indiv. Pls. Am. Compl.). The Plaintiffs also challenged interim guidance memoranda that BLM had issued. *See* Joint App. Vol. I at 198-99 (Indiv. Pls. Am. Compl.,

Count II); Joint App. Vol. II at 406-07 (Garfield Pls. Am. Compl., Count III).

The Tribal Nations moved to intervene as defendants, Joint App. Vol. I at 27 (Docket sheet, ECF No. 26), and the district court granted their motion, *id.* at 30 (Docket sheet, ECF No. 52). The district court also permitted intervention by a coalition of conservation organizations (the "SUWA Intervenors"), while denying other organizations' intervention motions on the ground that they were adequately represented by the other intervenors. *Id.* at 40-41 (Docket sheet, ECF No. 122).

After the Federal Defendants filed a motion to dismiss, both sets of Plaintiffs filed amended complaints. *See id.* at 35-36 (Docket sheet, ECF Nos. 78, 90, 91). The Federal Defendants, Tribal Nations, and SUWA Intervenors then moved to dismiss the amended complaints for lack of jurisdiction and failure to state a claim. *Id.* at 39, 43-44 (Docket sheet, ECF Nos. 113, 114, 141). Collectively, the Defendants argued that the creation of a monument pursuant to the Antiquities Act is not judicially reviewable; that Plaintiffs lack standing; that Plaintiffs failed to state a claim for violation of the Antiquities Act; and that there was no final agency action pursuant to the Administrative Procedure Act ("APA"). *See* Joint App. Vol. II at 412 (Federal Defs.' Mot.); Joint App. Vol. III at 626 (Tribal Nations' Mot.); Joint App. Vol.

III at 677 (SUWA Intervenors' Mot.).

The district court granted the motions to dismiss on August 11, 2023. Joint App. Vol. IV at 965-92 (Mem. Decision and Order). The court concluded that the Proclamations are not judicially reviewable because they are statutory challenges for which there is no waiver of sovereign immunity, and the *ultra vires* exception to sovereign immunity does not apply given the discretionary nature of the Antiquities Act. *Id.* at 977, 983. The court also concluded that the BLM interim guidance memoranda do not constitute final agency action for purposes of the APA, and that the Individual Plaintiffs lacked standing as to their alleged permit denials. *See id.* at 990. The court therefore dismissed all claims for lack of jurisdiction. Having done so, the court did not reach the defendants' other arguments that the plaintiffs lacked standing more broadly, or their Rule 12(b)(6) arguments that the Plaintiffs had failed to state a claim.

This appeal followed.

VI. Standard of Review

This Court reviews *de novo* a district court's dismissal of a complaint for lack of jurisdiction. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017). The burden of establishing subject-matter jurisdiction is on the

party asserting jurisdiction. *Id.*

VII. Summary of Argument

Defendants argued in the district court that the Plaintiffs lacked Article III standing to maintain their claims. The district court did not rule on that issue. The district court only considered, and rejected, Individual Plaintiffs' standing to raise an APA challenge based on an alleged permit denial. This Court can affirm dismissal of all Plaintiffs' claims for lack of Article III standing and failure to establish jurisdiction.

With regard to the Garfield and Kane County, ("County Plaintiffs"), Bears Ears is not located within their jurisdictional boundaries. As a result, County Plaintiffs fail to establish injury from Bears Ears. And all Plaintiffs fail to establish injury to the extent they allege harm to individuals or entities other than themselves. Critically, all Plaintiffs have failed to establish that the Proclamations have caused injury to any of their legally protected interests, or that the relief they seek will remedy any alleged harms. Plaintiffs have therefore failed to establish Article III standing to maintain this action.

Plaintiffs' claims are unreviewable for another reason. Longstanding Supreme Court precedent has upheld the President's broad discretion to create national monuments. The Antiquities Act exudes deference to create

national monuments in nearly every clause, and President Biden's Proclamations establishing Bears Ears and Grand Staircase Escalante National Monuments easily comport with the statute. As a result, the district court's conclusion that the President did not exceed his authority under the Antiquities Act should be affirmed.

Finally, Plaintiffs' APA claims fail as well. They are challenging BLM interim guidance Memoranda as monument management plans, even though the Memoranda were not issued pursuant to the conditions outlined in the Proclamations, nor were they adopted as the result of any final agency decisionmaking process. Plaintiffs have also not claimed to have suffered any concrete and particularized injury from the Memoranda, and thus they lack Article III standing.

For these reasons, the Tribal Nations respectfully request that the district court's judgment be affirmed.

VIII. Argument

A. Plaintiffs fail to establish Article III standing to challenge the Biden Proclamations

Serious questions about Plaintiffs' Article III standing were raised in the district court, and Plaintiffs effectively ignore those threshold questions.

This Court reviews purely legal issues such as standing *de novo*, *Safe Streets Alliance*, 859 F.3d at 878, and may affirm the district court's decision dismissing Plaintiffs' complaint for lack of jurisdiction on the basis that Plaintiffs lack standing. *See McKenzie v. U.S. Citizenship & Immigr. Servs., Dist. Dir.*, 761 F.3d 1149, 1155 (10th Cir. 2014) (jurisdictional arguments "can be raised at any time."); *Utah Ass'n of Cntys v. Bush*, 455 F.3d 1094, 1100 (10th Cir. 2006).

The Tribal Nations bring facial challenges to Plaintiffs' standing, where factual allegations in the complaint are accepted as true. *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010); *Anderson v. Suiters*, 499 F.3d 1228, 1232 (10th Cir. 2007) (citation omitted). Plaintiffs fail to meet their burden to plead allegations which, if accepted as true, would establish the three standing elements: injury, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *State of Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998); *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) (plaintiffs have the burden to establish standing).

Standing is not something dispensed in gross, but rather must be established with respect to each claim a plaintiff raises and for each form of

relief requested. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Plaintiffs raised claims against the Biden Bears Ears and Grand Staircase National Monument Proclamations. Joint App. Vol. I at 195-200 (Indiv. Pls. Am. Compl. at pp.'s 61-66); Joint App. Vol. II. at 404-08 (Garfield Pls. Am. Compl. at 90-94). Thus, to establish jurisdiction, Plaintiffs must have alleged facts in their complaints as to both Proclamations sufficient to satisfy their burden for Article III standing to challenge each of the Proclamations. However, Garfield and Kane County Plaintiffs ("County Plaintiffs") fail to establish injury from Bears Ears, as it is not within their jurisdictional boundaries at all, and they do not allege that Bears Ears has actually caused them any harm. As a result, County Plaintiffs cannot maintain their action against the Biden Bears Ears Proclamation. And all Plaintiffs fail to establish injury to the extent they allege harm to individuals or entities other than themselves.

Standing is not measured by the "intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy . . . [n]or is the perceived importance of the asserted right a substitute for constitutional standing." *State of Utah*, 137 F.3d at 1202. In their complaints, Plaintiffs raise many grievances about national monuments established under the

Antiquities Act. Each falls short, however, of establishing one or more of the three standing elements, the "irreducible constitutional minimum of standing." *Id. at* 1204; *Lujan*, 504 U.S. at 560.

i. Plaintiffs fail to establish injury to legally protected interests

To constitute injury in fact, a harm must be to a legally protected interest that is "concrete and particularized" and be "actual or imminent[.]" *Lujan*, 504 U.S. at 560. All Plaintiffs fail to meet this standard. First, County Plaintiffs fail to establish injury to any legally protected interests in Bears Ears. Second, all Plaintiffs fall short with general allegations of harm to others rather than harm to themselves.

1. County Plaintiffs fail to establish injury to challenge Bears Ears as it falls beyond their jurisdictional boundaries

Neither Garfield nor Kane County Plaintiffs claimed injury from Bears Ears; instead, they only identified the Biden Grand Staircase Monument as causing them harm. Joint App. Vol. II at 318-19 (Garfield Pls. Am. Compl. at 4-5).[4] As such, they fail to establish injury to challenge the Biden Bears

[4] Federal Defendants make several other arguments for why all Garfield Plaintiffs, including the State of Utah, lack legally protected interests in

Ears Monument.

In the summary of their alleged injuries, County Plaintiffs state that their jurisdictional boundaries overlap with the Biden Grand Staircase-Escalante Monument but make no mention of the Biden Bears Ears Monument. Joint App. Vol II at 318-19 (Garfield Pls. Am. Compl. at 4-5). Bears Ears does not border Garfield or Kane Counties, and there are no allegations that any Bears Ears lands fall within the County Plaintiffs' boundaries. *Bears Ears National Monument Management*, Bureau of Land Management, https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument (noting the Bears Ears National Monument is in San Juan County, Utah); *Buhendwa*, 82 F. Supp. 3d at 1262 n.1 (court may take judicial notice of contents on agency's website). Rather, the alleged harms would be to others—namely, San Juan County, the only county within which Bears Ears is located.

But Kane and Garfield Counties cannot establish a concrete and particularized injury based on alleged harms occurring in San Juan County,

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managing the Monuments. U.S. Brief at 107-11. Tribal Nations' argument here is specific to Garfield and Kane Counties lacking legally protected interests in Bears Ears.

where they have no presence or interests. *Cf. Bd. of Cnty. Comm'rs of Sweetwater Cnty. v. Geringer*, 297 F.3d 1108, 1114-15 (10th Cir. 2002) (Finding plaintiff-county lacked standing to bring breach-of-trust claim against the state of Wyoming where the county was neither a trustee nor a beneficiary). The same defect exists as to their allegations of harm to other entities and interests, such as "state or local governments" or "Utah's small, dirt back roads." Joint App. Vol. II at 366 (Garfield Pls. Am. Compl. at 52, ECF No. 91).

County Plaintiffs do not assert that any of the alleged harms in Bears Ears are "real and immediate," as opposed to "hypothetical" or "conjectural." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). County Plaintiffs may oppose Bears Ears, but that is not enough to establish injury under Article III, which requires harm to a "legally protected interest." *Lujan*, 504 U.S. at 560. County Plaintiffs have no legally protected interests in Bears Ears.

2. Plaintiffs cannot rely on injury to others for purposes of standing

Plaintiffs have alleged harm to many others. But they cannot rely on such allegations to establish injury to themselves. Under "Article III, an injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 594 U.S.

413, 427 (2021) ("Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court.") (emphasis in original); *see also Doe by and through Doe v. Hunter*, 796 F. App'x 532, 537 (10th Cir. 2019) (Article III requires an injury in fact as opposed to a "mere interest in the problem"). Plaintiffs' arguments that the Biden Proclamations are illegal are not sufficient without any particularized injury to them. *Id*. However, Plaintiffs heavily rely on alleging harm to others.

For example, Garfield Plaintiffs alleged that the Biden Monuments prohibit "Native Americans" from engaging in traditional cultural practices. Joint App. Vol. II at 372 (Garfield Pls. Am. Compl. at 58).[5] Even were this accurate, Garfield Plaintiffs did not allege that they as governmental bodies have suffered these injuries; nor did Garfield Plaintiffs assert to have sued *parens patriae* on behalf of any Native American people or communities. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982) (describing *parens patriae* standing). In any event, Garfield Plaintiffs

[5] While they repeatedly assert alleged injuries to "Native Americans," Plaintiffs' examples are limited to just one single reference to one individual tribal member. Joint App. Vol. II at 372 (Garfield Pls. Am. Compl. at 58).

could not claim *parens patriae* standing against Federal Defendants. *Haaland v. Brackeen*, 599 U.S. 255, 294-95 (2023); *State ex rel. Sullivan v. Lujan,* 969 F.2d 877, 883 (10th Cir. 1992). Further, the Tribal Nations are federally recognized tribes that intervened in this matter to represent their own sovereign interests and the interests of their citizens, in opposition to the Garfield Plaintiffs.

Individual Plaintiffs likewise attempt to rely on harm to others in their assertions of injury in fact. The BlueRibbon Coalition identified harms to unspecified local tribes and communities, other business, and industries in the area. Joint App. Vol. I at 160-64 (Indiv. Pls. Am. Compl. at 26-30). But "'the injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972).

And, as the Federal Defendants argue, *see* U.S. Brief at 107-11, Garfield Plaintiffs do not have legally protected interests in the Monument objects that they allege are harmed. *See* Joint App. Vol. II at 352-58 (Garfield Pls.

Am. Compl. at 38-44).[6] Where Plaintiffs do not own or have any control over those objects, or otherwise have a legally protected interest in them, they cannot rely on purported harm to those objects to establish injury. *Id*.

Plaintiffs have thus failed to establish concrete injuries to their interests.

ii. All Plaintiffs fail to establish causation and redressability

Plaintiffs fail to establish causation and redressability. Simply put, the Biden Proclamations did not cause the harms Plaintiffs allege and the relief sought would fail to remedy those alleged harms. "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560-61. And redressability requires that it be "likely" as opposed to "speculative" that the injury will be redressed by a

[6] Here, Garfield Plaintiffs bemoaned harms to ecosystems, but claimed no legally protected interests in any of the objects or values therein. Nor did they cite any authority to support the proposition that they can establish injury based on their purported role as "traditional stewards" of the land. *See* Joint App. Vol. II at 352-53, 356-58, 400 (Garfield Pls. Am. Compl. ¶¶ 174, 176, 186, 191, 353).

favorable decision. *Lujan*, 504 U.S. at 561.

1. Plaintiffs fail to establish that the Proclamations caused their alleged harms

The alleged harms Plaintiffs attribute to the Biden Proclamations would have already been caused by the Clinton, Obama, and Trump Proclamations, and Plaintiffs repeatedly acknowledge as much. *See*, *e.g.*, Joint App. Vol. I at 154-57, 160, 163-64, 194-95 (Indiv. Pls. Am. Compl. at 20-23, 26, 29-30, 60-61); Joint App. Vol. II at 337-40 (Garfield Pls. Am. Compl. at 23-26).

The Clinton and Obama Proclamations created the Grand Staircase Escalante and Bears Ears National Monuments, respectively, which continued to exist even after the Trump Proclamations. Thus, the corresponding harms that Plaintiffs allege — e.g., preemption of Utah's laws and policies, injury to wildlife, deprivation of economic opportunity, and tax revenues—would all have existed prior to the Biden Proclamations. *See* Joint App. Vol. I at 158-191 (Indiv. Pls. Am. Comp. at 46-57) (economic deprivation); Joint App. Vol. II at 365, 368-371, 371 (Garfield Pls. Am. Comp. at 51, 54, 57) (respectively: tax revenues, preemption, wildlife). The Biden Proclamations simply established Monuments protecting the same lands

already encompassed by the prior Administrations' Proclamations.

Thus, all harms Plaintiffs have alleged would have originated from "third party actions" well before the Biden Proclamations, and Plaintiffs cannot fairly trace their injuries to the Biden Proclamations to establish causation. *Lujan*, 504 U.S. at 560-61.

2. Plaintiffs fail to establish redressability because they do not challenge prior Proclamations

For the same reasons, Plaintiffs fail to establish redressability. Plaintiffs have requested declaratory and injunctive relief to facially invalidate only the Biden Proclamations, not the Clinton, Obama, or Trump Proclamations. Because the prior Administrations' Proclamations will persist, there is no possibility that invalidating the Biden Proclamations would provide redress; instead, the prior Monuments will continue to inflict the regulatory burdens and restrictions Plaintiffs have alleged. Redressability requires that it be "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. Here, the requested relief to invalidate the Biden Monuments alone simply could not redress Plaintiffs' alleged harms.

For example, Garfield Plaintiffs postulate that the appropriate size of

the Bears Ears Monument would be a few thousand acres. Joint App. Vol. II at 395-98 (Garfield Pls. Am. Compl. at 81-84). They provide a list of southwest Monuments they deem "were generously proportioned and may not fully have adhered to the terms of the Act," but were within the realm of propriety, ranging from 360 to 859 acres in size. Joint App. Vol. II at 394 (Garfield Pls. Am. Compl. at 80). A monument within the range Garfield Plaintiffs suggest is much smaller than the smallest of the two prior Bears Ears Monuments. Even the 200,000-acre Trump Bears Ears Monument is characterized by Garfield Plaintiffs as "extremely large," and is exponentially larger than the size deemed by the Garfield Plaintiffs to be "appropriate." Joint App. Vol. II at 339-40 (Garfield Pls. Am. Compl. at 25-26). Clearly, the Obama Bears Ears Monument—nearly identical in area to the Biden Bears Ears Monument—is much larger than Garfield Plaintiffs suggest is appropriate. Joint App. Vol. II at 338, 340 (Garfield Pls. Am. Compl. at 24, 26). Thus, even if the Biden Bears Ears Monument was declared unlawful, Garfield Plaintiffs' alleged injuries would continue.

Individual Plaintiffs likewise argue that the Biden Proclamations are unsalvageable and, therefore, they must be set aside in full. Joint App. Vol. I at 196 (Indiv. Pls. Am. Compl. at 62). The outcome is the same—invalidating

the Biden Proclamations would fail to provide redress, as the alleged regulatory burdens and restrictions would continue by virtue of the prior Administrations' Proclamations.

Plaintiffs have not challenged any of the prior Administrations' Proclamations.[7] Rather, they have only requested declaratory and injunctive relief to invalidate the Biden Proclamations. Joint App. Vol. I at 200 (Indiv. Pls. Am. Compl. at 66); Joint App. Vol. II at 409 (Garfield Pls. Am. Compl. at 95). Thus, granting the relief requested would fail to redress their alleged injuries.

…

On the face of their complaints, Plaintiffs each lack one or more of the three indispensable elements of Article III standing to challenge the Proclamations. Therefore, Plaintiffs fail to establish this Court's jurisdiction, and the district court's dismissal should be affirmed.

B. President Biden Properly Utilized His Discretion to Declare the Monuments

Standing is not the only threshold issue that Plaintiffs fail to meet.

[7] Nor could they, as the statute of limitations to challenge those Proclamations has run. 28 U.S.C. § 2401(a).

Plaintiffs also fail to establish that the President's discretionary decision is reviewable. The reviewability of the creation[8] of national monuments under the Antiquities Act is limited. Other circuits have reviewed such claims under three narrow circumstances: if the claim, on the face of the complaint, plausibly alleges that the presidential action (1) is unconstitutional, (2) is *ultra vires* as independently violating another statute, or (3) is *ultra vires* as exceeding the President's authority under the Antiquities Act. *See, e.g.*, *Am. Forest Res. Council v. United States*, 77 F.4th 787, 798 (D.C. Cir. 2023) (concluding claims were reviewable where plaintiffs argued "that the President's exercise of authority under the Antiquities Act was *ultra vires* because it was inconsistent with an independent statute—the O & C Act"); *Murphy Co. v. Biden*, 65 F.4th 1122, 1130 (9th Cir. 2023) (concluding claims were reviewable where plaintiff alleged constitutional violation or violation of another statute, which court construed as constitutional); *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 539-40 (D.C. Cir. 2019) (concluding

[8] That the Antiquities Act provides discretion to the President to *create* national monuments is clear. *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1140 (D.C. Cir. 2002); *Mountain States Legal Found. v. Bush,* 306 F.3d 1132, 1137 (D.C. Cir. 2002). The discretionary power to create that was delegated through the statute, however, does not include the power to revoke or reduce monuments. 54 U.S.C. § 320301.

claims were reviewable where plaintiffs argued monument exceeded President's statutory authority under the Antiquities Act and was not compatible with the Sanctuaries Act); *but see Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("The instant case, however, presents no occasion for the court to engage in *ultra vires* review of the Proclamations because Mountain States fails to allege any facts sufficient to support its *ultra vires* claim."); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1144 (D.C. Cir. 2002) (affirming dismissal because plaintiff did not "present[] factual allegations that would occasion . . . *ultra vires* review of the Proclamation" (ellipses in original) (citation omitted)).

Here, Plaintiffs do not claim that the President's designation of Bears Ears was unconstitutional or that it violated an independent statute[9]—nor could they. *See, e.g.*, *Murphy Co.*, 65 F.4th at 1131 ("No party challenges President Obama's general authority to expand the Monument under the Antiquities Act. And for good reason . . . ."); *Tulare Cnty.*, 306 F.3d at 1140 ("Tulare County does not contend that the President lacks authority under

[9] As the district court recognized here, "Plaintiffs' amended complaint does not assert that President Biden lacks the authority to withdraw federal land as national monuments." Joint App. Vol. IV at 982.

the Antiquities Act to proclaim national monuments like Giant Sequoia, as the Supreme Court has long upheld such authority."). Plaintiffs simply argue that *ultra vires* review is available because they disagree with the President's discretionary decision. *See* Joint App. Vol II at 90-91 (Garfield Pls. Am. Compl. ¶¶ 371, 378); Joint App. Vol. I at 119 (Indiv. Pls. Compl. at 66). But as the Federal Defendants describe, "Plaintiffs' claims do not meet the stringent standards for application of the *ultra vires* doctrine." U.S. Brief at 62.[10] Instead, Plaintiffs' allegations merely amount to claims that President Biden abused his discretion.

"Although the Supreme Court has never expressly discussed the scope of judicial review under the Antiquities Act," it "has directly addressed the nature of review of discretionary Presidential decisionmaking under other statutes." *Mountain States*, 306 F.3d at 1135. In doing so, the Court "has cautioned that [separation of powers] concerns bar review for abuse of discretion altogether." *Id.*; *see Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("[R]eview is not available when the statute in question commits the decision

[10] The Tribal Nations only address the question that other courts have wrestled with — the application of the *ultra vires* doctrine. The Tribal Nations do not incorporate the Federal Defendants' reviewability arguments.

to the discretion of the President."). Accordingly, the *ultra vires* doctrine is highly cabined when the act being reviewed is discretionary. That is because courts are "sensitive to pleading requirements" where they are asked to "review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented." *Tulare Cnty.*, 306 F.3d at 1141 (citing *Mountain States,* 306 F.3d at 1137).

Congress, as the body that has "complete power" over public lands, can "regulate and protect" that land. *Kleppe v. New Mexico,* 426 U.S. 529, 540-41 (1976) (internal quotation marks omitted). It is "equally true that Congress may delegate this authority as it deems appropriate." *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1191. In nearly every clause, the language of the Antiquities Act "exudes deference" to create monuments. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018). The President "may," in the President's "discretion," declare national monuments; "may" reserve parcels of land; and the Secretary "may" accept the relinquishment of other parcels. 54 U.S.C. § 320301(a), (b), (c). Because the President's discretion to create under the Act is so broad, review of such discretionary actions is necessarily very limited. *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1185-86; *see Tulare Cnty.*, 306 F.3d at 1141; *Mountain States Legal Found.*, 306 F.3d at 1136. The Proclamations here fall "well within" the

statutory delegation to the President. *See Trump*, 138 S. Ct. at 2408.

Plaintiffs cannot overcome more than a century of established case law. Plaintiffs' exact arguments as to how the President purportedly exceeded his delegated authority have been repeatedly rejected by the Supreme Court and other courts. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 141–42 (1976) (rejecting argument that "the President may reserve federal lands only to protect archeologic sites"); *Cameron v. United States*, 252 U.S. 450, 455 (1920) (affirming designation of Grand Canyon as "an object of unusual scientific interest"); *Mountain States Legal Found.*, 306 F.3d at 1137 (rejecting argument that only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, were to be designated"); *Tulare Cnty.*, 306 F.3d at 1141 ("Tulare County's complaint is premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation. No such requirement exists.").

Had Congress agreed with Plaintiffs' views, it certainly could have amended the Antiquities Act in the last 100 years. *Consolidation Coal Co. v. Dir., Off. Of Workers' Comp. Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017) (Courts presume Congress is aware of judicial interpretations); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative

or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]"). But in fact, Congress amended the Antiquities Act twice, *see* Pub. L. No. 113-287, § 3, Dec. 19, 2014, 128 Stat. 3094, 3260 (codified at 54 U.S.C. § 320301(d)); *see also* Grand Teton National Park Act, Pub. L. No. 81-787, 64 Stat. 849 (1950), and chose to maintain the provisions that have long been broadly interpreted by the courts. In amending the Act while choosing to leave these provisions in place, Congress effectively ratified the courts' interpretation. *Lorillard*, 434 U.S. at 580.

The 13- and 14- page Proclamations here are each extensively detailed and comply with the requirements of the Act. The President is not required to "include a certain level of detail in the Proclamation." *Tulare Cnty.*, 306 F.3d at 1141. Rather, the Act only requires the President to, in his discretion, "declare" national monuments. 54 U.S.C. § 320301(a). There is nothing that requires the President to "explain" the declaration "with sufficient detail to enable judicial review." *See Trump*, 138 S. Ct. at 2409. Here, the Proclamations—which thoroughly describe the objects to be protected and the land necessary to protect them—are more than sufficient. *Id*. (concluding 12-page Proclamation was sufficient).

For the reasons explained above, the district court properly concluded it did not have jurisdiction to hear Plaintiffs' claims because the Plaintiffs did not assert that the President lacked authority to act, but merely erred in exercising his discretion. Joint App. Vol. IV at 982 (District Court Memo at 18). Accordingly, the district court did not address the merits of the Plaintiffs' statutory arguments regarding the language of the Act. *Id*. If this Court disagrees with the district court's determination, the appropriate remedy is to remand to the district court to consider Defendants' substantive grounds for dismissal under Rule 12(b)(6), which dealt with the statutory language of the Act. *See* Joint App. Vol. II at 472-76 (Federal Defs.' Mot. to Dismiss); Joint App. Vol. III at 661-75 (Tribal Nations' Mot. to Dismiss); *id.* at 678 (SUWA Intervenors' Mot. to Dismiss, incorporating Tribal Nations' 12(b)(6) argument). Although Plaintiffs attempt to demonstrate their "valid claims," Garfield App. Br. at 34–40, ECF No. 01011093713, those issues are not properly before this Court. *See Stillman v. Teachers Ins. And Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1323 (10th Cir. 2003) (declining to consider on appeal an issue not reached by the district court); *see also Adamsheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 588 (10th Cir. 2016) ("affirming on legal grounds not considered by the trial court is disfavored"

(citing *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2016)). If this Court does not affirm the judgment of dismissal in its entirety, it should remand for the district court to consider the 12(b)(6) motions.

C. Plaintiffs' APA challenges fail as the BLM Memoranda do not constitute final agency action and Plaintiffs lack Article III standing to challenge the Memoranda

The district court correctly concluded that the BLM interim management guidance memoranda ("Memoranda") are not final agency action and are thus not reviewable. Because the Memoranda are not final agency action, Plaintiffs lack statutory standing and fail to establish jurisdiction to challenge them. 5 U.S.C. § 704; *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171 (10th Cir. 2000). Additionally, while the district court did not address whether Plaintiffs have Article III standing to challenge the Memoranda, the district court's dismissal of Plaintiffs' APA claims may be affirmed on that ground because Plaintiffs have not established Article III standing to challenge the Memoranda. *See McKenzie*, 761 F.3d at 1155 (jurisdictional arguments "can be raised at any time."); *Utah Ass'n of Cntys*, 455 F.3d at 1100.

Only Garfield Plaintiffs brief the APA claims, though Individual Plaintiffs adopt Garfield Plaintiffs' argument by reference. Individual

Plaintiffs' App. Br. at 46 n.14. However, Individual Plaintiffs neither contest the district court's determination that they lack standing, nor do they raise their prior challenges to other, unspecified agency actions to implement the Proclamations. *See, e.g.*, Joint App. Vol I. at 199 (Individual Plaintiffs Complaint, allegation 193) (challenging that the Proclamations have led them to "have had federal permits denied" without any further details). Therefore, as the Federal Defendants note, Individual Plaintiffs forfeit these claims. U.S. Brief at 33-34 n.27.

Garfield Plaintiffs' attempt to challenge the Memoranda ultimately fails on two main grounds. First, the Memoranda do not constitute final agency action. By this alone, Plaintiffs fail to establish the Court's jurisdiction to review the Memoranda. *See Farrell-Cooper Mining Co. v. United States Dep't of Interior*, 864 F.3d 1105, 1109 (10th Cir. 2017) ("Pursuant to the APA, we have jurisdiction to review only final agency actions.") (citation omitted). Second, Plaintiffs have not alleged that they have been harmed by the Memoranda in a way that is redressable by a favorable ruling of this Court. Rather, their pleadings trace their harms to the Biden Proclamations or existing laws, not the Memoranda. As such, they also lack Article III standing to challenge the Memoranda.

i. The BLM Interim Guidance Memoranda do not constitute final agency action

Plaintiffs claim that the BLM Memoranda are "monument management plans" and, as such, constitute final agency action challengeable under the APA. However, the Memoranda do not satisfy the criteria for final agency action as monument management plans.

As the Supreme Court described in *Bennett v. Spear*, for an agency action to be final:

> First, the action must mark the "consummation" of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

520 U.S. 154, 177-78 (1997) (internal citations omitted). The Memoranda do not fulfill the processes required by the Proclamations to create binding monument management plans, and Plaintiffs thus fail to satisfy the *Bennett* factors.

1. The Memoranda do not mark the "consummation of the decisionmaking process" necessary to create monument management plans

To constitute consummation of the decisionmaking process, an agency action must mark the completion of a process that will directly affect

the parties. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Agency actions reviewable under the APA fall within the categories of formal or informal rulemaking or adjudication. 5 U.S.C. §§ 553, 554, 556, 557. The District Court found that the Memoranda do not render any decisions, let alone decisions that could mark the completion of a process that affects Plaintiffs. Joint App. Vol. IV at 988-990 (District Court Memo at 23-25). The Memoranda are not rules or adjudications binding on Plaintiffs or any other private or public actors. Rather, they are guidance documents to subordinate BLM officials about how to proceed in creating rules and regulations in the form of the actual management plans.

Garfield Plaintiffs assert that the Memoranda are sufficient to mark the "consummation of the decisionmaking process," even if the actual management plans are yet to come, because they claim the Memoranda are "monument management plans" that "implement detailed and restrictive rules governing the monument reservations" and are "binding today." Garfield App. Br., at 40, 42.[11]

[11] Garfield Plaintiffs also suggest the Memoranda may be challenged because they were issued "in excess of statutory authority." Garfield App. Br. at 40-41. However, even if this were true (and it is not), Plaintiffs would need to

In addition to the reasons provided by the district court and the Federal Defendants, Joint App. Vol. IV at 988-90 (District Court Memo at 23-25); U.S. Brief at 120-27, the Memoranda do not satisfy the consummation of the decisionmaking process, as they did not undergo several processes required by the Biden Proclamations to be monument management plans.

First, the Memoranda are internal BLM documents that do not involve the U.S. Forest Service ("Forest Service"). This creates a problem for Plaintiffs to challenge the Bears Ears Memorandum, in particular. That is because, under the Biden Bears Ears Proclamation, the Forest Service and BLM are co-managing agencies. Biden Bears Ears Proclamation at 57331-32. As co-managing agencies, the Proclamation directs that they "jointly prepare and maintain a new management plan for the entire monument." *Id*. The BLM Bears Ears Memorandum was not issued in conjunction with the Forest Service, nor did the Forest Service sign its concurrence or give it a stamp of

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establish that the Memoranda constitute final agency action to bring an APA claim. Only "final agency action for which there is no other adequate remedy in a court" is "subject to judicial review" under the APA. 5 U.S.C. § 704. If an agency action is final, a reviewing court may then "hold unlawful and set aside agency action" that it determines to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C); *see also Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1154 (10th Cir. 2014).

approval in any way — a condition precedent to complete the monument management plan. As the Biden Bears Ears Proclamation requires the Forest Service's participation to create the monument management plan, the BLM Memorandum does not fulfill the procedure necessary to consummate the decisionmaking process.

The Forest Service's co-equal participation with BLM in creating the Bears Ears monument management plan is not the only prerequisite to finalization required by the Proclamations. The Bears Ears Proclamation further provides that the land management plan must be created with the guidance and recommendations of the Bears Ears Commission (consisting of representatives from each of the Tribal Nations). Biden Bears Ears Proclamation at 57332. As the Commission was not involved at all prior to the issuance of the Memoranda, the Memoranda cannot mark the consummation of the decisionmaking process as to Bears Ears.

Along the same lines, both the Bears Ears and Grand Staircase Escalante Proclamations require consultation with other federal land management agencies, Tribes, States, local governments, and the public prior to creating monument management plans. Biden Bears Ears Proclamation at 57332; Proclamation No. 10286, 86 Fed. Reg 57335, 57345

(Oct. 15, 2021) (Biden Grand Staircase-Escalante Proclamation). Again, such consultations did not occur prior to the issuance of the Memoranda, and thus they cannot mark consummation of the decisionmaking process as to either Monument.

2. Plaintiffs fail to demonstrate that the Memoranda generate "direct and immediate legal consequences"

To constitute final agency action, an agency action must itself create direct and immediate legal consequences. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 152 (1967). Plaintiffs have failed to show that the Memoranda generate any direct or immediate legal consequences.

Instead, Garfield Plaintiffs merely offer the blank assertion that the Memoranda are "binding" and "effective" monument management plans followed by a gaping absence of any discrete factual allegations describing what direct and immediate consequences they have experienced. Garfield App. Br., at 40-46. To the contrary, the Memoranda explicitly state that until the new management plans are approved, the existing monument and management plans—i.e., those created pursuant to the Trump Proclamation—"will remain in effect." Memorandum from Director, Bureau of Land Management to BLM Utah State Director, *Interim Management of the*

Bears Ears National Monument at 7 (Dec. 16, 2021) https://www.blm.gov/sites/blm.gov/files/docs/2021-12/BENM%20Interim%20Guidance%2012-16-21_Final508.pdf; Memorandum from Director, Bureau of Land Management to Utah State Director, Bureau of Land Management, *Interim Management of the Grand Staircase-Escalante National Monument* at 7 (Dec. 16, 2021) https://www.blm.gov/sites/blm.gov/files/docs/2021-12/GSENM_Interim_Guidance_12-16-21_Final508_0.pdf.

Concluding that the Memoranda are not monument management plans makes sense under the "pragmatic way" courts determine finality. *Abbott Laby's*, 387 U.S. at 149. After all, the seven- to eight-page Memoranda provide nothing close to the level of substance and detail required to constitute management plans. The prior management plans that the Memoranda acknowledge as remaining in effect, by comparison, provide NEPA alternatives, notes on public involvement, goals and objectives, management decisions, and instructions on plan implementation spanning hundreds of pages. *See Bears Ears National Monument: Record of Decision and Approved Monument Management Plans Indian Creek and Shah Jáa Units*, Bureau of Land Management (Feb. 2020) https://eplanning.blm.gov/public_

projects/lup/94460/20012455/250017011/BLM_ROD_and_Approved_MMPs_for_the_Indian_Creek_and_Shash_Jaa_Units_of_BENM_February2020.pdf; *Record of Decision and Approved Resource Management Plans for the Grand Staircase-Escalante National Monument*, Bureau of Land Management (Feb. 2020) http://npshistory.com/publications/blm/grand-staircase-escalante/rod-armp-gsenm-2020.pdf. Lacking such substance and detail, the Memoranda simply do not have direct and immediate consequences of a monument management plan. Plaintiffs certainly do not articulate how the Memoranda are comparable to the management plans.

And, as previously explained, the Memoranda were not preceded by the significant processes required by the Biden Proclamations to establish monument management plans. *Supra*, at 51 (consummation of a decisionmaking process). The Memoranda thus cannot generate the legal consequences of monument management plans until those processes have taken place. If an agency rule, interpretation, adjudication, or other instrument requires any processes involving other actors in addition to the agency in order to generate any legal consequences, the absence of those others' actions means there are no legal consequences and no final agency action.

Franklin v. Massachusetts is instructive. There, the Supreme Court found that the Secretary of Commerce's submission of the census tabulation report to the President was not final, as it was a non-dispositive action by a subordinate official, it was not promulgated to the public, and it would not affect the public unless the President acted. *Franklin*, 505 U.S. at 796-97. As a result, the court found there were no direct and immediate legal consequences. Similarly, here, even if the Memoranda purported to proclaim any monument management rules or regulations (which they do not), they could not have direct and immediate legal consequences, as they would not have involved the Forest Service, Bears Ears Commission, and other actors' involvement required by the Proclamations to create monument management plans.

ii. Plaintiffs lack Article III standing to challenge the Memoranda

It is a plaintiff's burden to establish Article III standing as to every claim they bring, *Colo. Outfitters Ass'n*, 823 F.3d at 544, and Plaintiffs fail to identify any harm from the Memoranda. The hodgepodge of allegations and declarations to which Garfield Plaintiffs cite in an attempt to assert otherwise do not actually identify the Memoranda as the source of any specific harm.

When Plaintiffs do refer to any specific source of harm, it is the Proclamations that are the source. For example, Garfield Plaintiffs cite to vast swaths of the complaint to assert that "Federal Defendants apply the management plans against them and others—directly and immediately—today." Garfield Pls.' App. Br. at p.46 (citing Joint App. Vol. II at 344-57, 367, 400). None of the allegations, however, even mention the Memoranda, let alone attribute the alleged harms to them. *See* Joint App. Vol. II at 344-57, 367, 400. Instead, they attribute the alleged harms to the Biden and prior Administrations' Proclamations. *See* Joint App. Vol. II at 344-57, 367, 400. Plaintiffs did not challenge the Proclamations under the APA as final agency actions.

Lacking any allegations that the Memoranda have been applied to regulate them and directly cause them harm, Plaintiffs fail to show injury necessary to establish Article III standing.

…

Plaintiffs' arguments that the Memoranda constitute final agency action boils down to unsupportable, conclusory statements that the Memoranda subject them to new rules, regulations, restrictions, and standards. However, as the district court correctly recognized, the

Memoranda simply do not do so. The district court concluded that the Memoranda were directed only to the Utah BLM Director, and that they do not compel any action by Plaintiffs or, for that matter, anyone else. Joint App. Vol. IV at 986-88 (District Court Memo at 21-23). Garfield Plaintiffs do not establish otherwise. Further, Plaintiffs do not make factual allegations—but, rather, only conclusory assertions—that the Memoranda have caused them harm. Thus, they cannot establish Article III standing to challenge the Memoranda.

IX. Conclusion

For the foregoing reasons, the Tribal Nations respectfully request that the Court affirm the district court's dismissals.

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Respectfully submitted,

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