

No. 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.

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

**BRIEF OF *AMICI CURIAE* GRAND STAIRCASE ESCALANTE
PARTNERS, SOCIETY OF VERTEBRATE PALEONTOLOGY,
AND CONSERVATION LANDS FOUNDATION IN SUPPORT OF
DEFENDANT INTERVENORS-APPELLEES**

Raymond Scott Berry
GRAND STAIRCASE ESCALANTE PARTNERS
P.O. Box 9491
Salt Lake City, UT 84109
(801) 556-8515
rsberrysl@gmail.com

Gary S. Guzy
John Mizerak
Scott Shelton
Timothy Duncheon
Daniel J. Nathan
COVINGTON & BURLING LLP
850 Tenth St. NW
Washington, D.C. 20001
(202) 662-6000
gguzy@cov.com
Counsel for Amici Curiae

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PRIOR OR RELATED APPEALS

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

INTEREST OF AMICI CURIAE¹

Amici Grand Staircase-Escalante Partners (“GSEP”), the Society of Vertebrate Paleontology (“SVP”), and the Conservation Lands Foundation (“CLF,” and collectively, “GSEP *Amici*”) are three organizations founded to protect and preserve the sensitive resources contained within Grand Staircase-Escalante National Monument (“Grand Staircase”), and in the case of GSEP and CLF, to protect Grand Staircase’s very existence. GSEP bears the Monument’s name and exists to protect the Monument and build relationships with scientific, historical, and Indigenous communities. SVP and its members were among the original advocates for the Monument’s creation. They have conducted, and continue to conduct, extensive paleontological fieldwork within Grand Staircase—one of the world’s richest sources of unique and valuable paleontological resources. Over 100 SVP members have either engaged in long-term research at Grand Staircase or made short-term

¹ All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, contributed any money intended to fund the preparation or submission of this brief. This brief is timely because it is being filed “no later than 7 days after the principal brief[s] of the part[ies] being supported”—Tribal Nation Intervenors and SUWA Intervenors—were filed. Fed. R. App. P. 29(a)(6).

research field trips or site visits, with more than thirty currently conducting paleontological work within the Monument.

GSEP provides extensive educational resources and programming within Grand Staircase, including administering one of the largest backcountry restoration projects in the nation, developing an extensive science and monitoring plan for the Monument, and supporting the restoration of damaged historic, scientific, and cultural sites. GSEP's staff, volunteers, and hosted workers have contributed tens of thousands of hours to supporting and restoring the Monument's resources and educating the public about the Monument.

SVP and its members advocated for the creation of, and conduct extensive paleontological fieldwork within, Bears Ears National Monument ("Bears Ears"). They have profound expertise in both Monuments' geological, archaeological, and paleontological resources. Twenty-one SVP members currently work in Bears Ears, and dozens more have visited the Monument in recent years. CLF actively organized and provided resources to support tribal and community efforts to create Bears Ears. It continues to support ongoing visitor engagement and education at the Monument.

GSEP *Amici* have been litigating issues relating to the Antiquities Act and the Monuments since 2017, when President Trump purported to reduce Grand Staircase to less than half its previous size and Bears Ears to around one seventh of its previous size. GSEP *Amici* believe that President Biden’s October 8, 2021 Proclamations designating the boundaries for Grand Staircase and Bears Ears (collectively, the “Monuments”) are critical for the proper care and management of the resources therein and lawful under the Antiquities Act as it has been interpreted for over a century.

INTRODUCTION

Breathtaking stretches of federal land, Grand Staircase and Bears Ears boast thousands of irreplaceable geological, archeological, and paleontological resources unlike those found anywhere else on Earth. *See generally* Grand Staircase-Escalante National Monument, Proclamation 10286, 86 Fed. Reg. 57,335 (Oct. 8, 2021) (“Grand Staircase Proclamation”); Bears Ears National Monument, Proclamation 10285, 86 Fed. Reg. 57,231 (Oct. 8, 2021) (“Bears Ears Proclamation,” and collectively, the “Proclamations”). They collectively constitute a vital part of our shared national heritage. GSEP *Amici* and their members have long treasured the Monuments’ resources. Their members work, conduct scientific research, recreate, and find aesthetic and spiritual fulfillment within these Monuments, alongside millions of others who likewise cherish Grand Staircase and Bears Ears. The Monuments feature everything from prehistoric cave paintings to vast dinosaur boneyards, unique geological formations to miles-long trails snaking their way through the earliest years of our nation’s history. Study of these resources has led to numerous fundamental scientific discoveries that have enhanced humanity’s understanding of the fossil record,

archaeology, human settlement, and species ecology. In the two decades that followed the establishment of Grand Staircase, Congress, recognizing the Monument's valuable and sensitive resources, passed multiple pieces of legislation expanding and codifying its boundaries. President Biden's Proclamations protecting these resources thus comport with the Antiquities Act's text, history, and purpose.

ARGUMENT

GSEP *Amici* have extensive first-hand experience with the treasure-trove of invaluable objects distributed across Grand Staircase and Bears Ears. The Antiquities Act, passed in 1906 to safeguard "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government," authorizes the President to protect these resources. 54 U.S.C. § 320301(a).

While Plaintiffs-Appellants may as a matter of their own policy preferences disagree with the impetus to protect these resources, that is not a basis for judicial intervention. Plaintiffs-Appellants ask this Court to fashion out of whole cloth a new standard of review that conflicts with a century of case law, well-established presidential and congressional

practice, and the text and structure of the Antiquities Act. *See, e.g.*, Opening Br. Individual Pls. 14–35. This Court should decline those invitations. If this Court disagrees with the district court, it should remand for further proceedings and take the opportunity to clarify that, contrary to the probing standard of review advocated for by the Appellants, any judicial scrutiny of the Proclamations must be highly deferential, in accordance with the broad executive discretion embodied by the Antiquities Act and affirmed over a century of legal precedent and legislative action.

I. The Proclamations Protect Numerous Invaluable Objects Widely Distributed Throughout Monument Lands.

By Plaintiffs-Appellants’ own admission, the Proclamations designated “nearly 200 geological items[] and over 150 archaeological and paleontological items.”² Garfield Br. 35. Courts have long held such

² Whether one accepts Plaintiffs-Appellants’ count as a lower bound or recognizes that the Proclamations—which incorporate by reference earlier Proclamations promulgated by Presidents Clinton and Obama—designate far more geological, archaeological, and paleontological objects, there is no dispute that the Monuments contain hundreds of objects of historic and scientific import meriting protection. *See* Grand Staircase Proclamation at 57,344 (incorporating the resources identified in Establishment of the Grand Staircase-Escalante National Monument, Proclamation 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (“Clinton Proclamation”)); Bears Ears Proclamation at 57,331 (incorporating the resources identified in Establishment of the Bears Ears National Monument, Proclamation 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) (“Obama Proclamation”).

items to fall squarely within the Antiquities Act's purview. *See Cameron v. United States*, 252 U.S. 450, 456 (1920) (recognizing that the Grand Canyon "affords an unexampled field for geologic study"); *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (including "archeologic sites" within the Act's coverage).

The Proclamations also referenced "over 200 plants and animals," as well as "landscapes." Garfield Br. 35. The Supreme Court has indicated that these can qualify as "objects" within the meaning of the Antiquities Act. *See Cappaert*, 426 U.S. at 142 (describing the Devil's Hole pupfish as "objects of historic or scientific interest"); *accord Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (statement of Roberts, C.J.) (acknowledging that the Supreme Court has "suggested that an 'ecosystem' and 'submerged lands' can, under some circumstances, be protected under the Act").

The objects identified in the Proclamations blanket Grand Staircase and Bears Ears, rendering each Monument precisely the type of landmass worthy of protection under the Antiquities Act. The remainder of this section describes some of the geological, archaeological, and paleontological objects of greatest interest to GSEP *Amici*. But this

brief's focus on such objects—which are particularly relevant to *Amici's* organizational purposes—in no way indicates that *Amici* view the other resources identified in the Proclamations as less deserving of preservation under the Act.

A. The Grand Staircase Proclamation Identified Objects Dispersed Throughout 1.87 Million Acres.

Grand Staircase contains “world-class paleontological” resources, including “the oldest marsupial fossils ever identified” and “the most continuous record of Late Cretaceous life.” Grand Staircase Proclamation at 57,335–37. “Dozens of new dinosaur and other large vertebrate taxa . . . , as well as hundreds of species of [non-dinosaur animals], have been found” there. Bureau of Land Mgmt., *Analysis of the Management Situation: Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area* 52 (2018). Museums house around 52,000 specimens collected from the Monument. Bureau of Land Mgmt., *1 Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Proposed Resource Management Plans and Final Environmental Impact Statement* 3-44 (2019). Work at Grand Staircase has informed humanity’s understanding of “how the Earth recovered from its largest extinction” and “how Earth’s ecosystems became ‘modern’

because of the rise of flowering plants.” Statement of Former SVP President P. David Polly, U.S. House Committee on Natural Resources (Mar. 13, 2019). Grand Staircase has also been a rich source of archaeological discovery, with an estimated 100,000 archaeological sites within its original boundaries. David B. Madsen, Utah Geological Surv., *A Preliminary Assessment of Archaeological Resources Within the Grand Staircase-Escalante National Monument, Utah* 5 (1997).

The Monument’s other prominent features include:

Escalante Canyons. Occupying the Monument’s northeast corner, the Circle Cliffs area “contains a significant number of cultural sites used by Ancestral Pueblos and the Fremont,” providing a portal into the lives of the region’s prehistoric occupants. Grand Staircase Proclamation at 57,338. The area also includes “portions of the Burr Trail, a route originally blazed by stockman John Atlantic Burr” and “at least 45 known paleontological sites, including one in which a nearly complete articulated skeleton of *Poposaurus* . . . was found.” *Id.*

West of Circle Cliffs, the Upper Escalante Canyons boast unparalleled geological formations, including Spooky Gulch, Zebra and Tunnel Slot Canyons, Egypt Slots, Peek-a-boo Canyon, and Brimstone

Canyon. *Id.* These canyons house “a high density of Fremont prehistoric sites, such as pithouses, villages, and storage cysts,” as well as “rock writings” and panels. *Id.* More recently, early European settlers left inscriptions throughout the region, and early-twentieth-century occupants created pathways, such as the Boulder Mail Trail, to traverse the landscape. *Id.* at 57,339.

Running south of Upper Escalante Canyons, “the historically significant Hole-in-the-Rock Road . . . generally follows the route that Latter-day Saint pioneers constructed” when crossing Utah. *Id.* Rich paleontological sites from the Jurassic Period, including Twentymile Wash Dinosaur Megatrackway, contain hundreds of individual dinosaur tracks, as well as a “rare, mid-line tail-drag impression” left by a “sauropod, or long-necked dinosaur.” *Id.*

Kaiparowits Plateau. Lying at the Monument’s center, the Kaiparowits Plateau houses “evidence of at least 15 previously unknown species of dinosaur” and fossils “preserved in stunning detail rarely seen in North America, including traces of soft tissue and the impressions of skin, beaks, and claws.” *Id.* at 57,340. The area also includes a “remarkable record of vertebrate species,” and prehistoric flora and

fauna, rendering it “an important scientific resource providing insight to the Late Cretaceous biosphere.” *Id.*

The plateau’s eastern portion contains “a high density of archaeological sites, including masonry structures, which have architectural styles suggesting that” various branches of the Fremont culture and Ancestral Pueblos converged there. *Id.* Evidence of pioneer life, including “historic cabins, fences, and stock trails,” enlivens the “sparse landscape,” as do “fossil resources containing evidence of primitive mammals, . . . straight cone cephalopods, ammonites, gastropods, pelecypods, and Cretaceous shark teeth.” *Id.* at 57,341. The Straight Cliffs and Fiftymile Mountain dominate the skyline, and iconic geological features, including Woolsey Arch and Sooner Rocks, dot the landscape. *Id.* at 57,340–41. Fiftymile Bench hosts numerous archeological sites, as well as locales sacred to several tribal nations. *Id.*

The plateau’s southern portion features the Cretaceous Wahweap Formation, “the site of many important fossil finds, including turtle shells, dinosaurs, and crocodile teeth.” *Id.* at 57,341. The Wahweap Hoodoos, “ghostly white formations with brown capstones that can

appear to float in the right conditions,” rise out of the ground like gigantic mushrooms. *Id.*

In the plateau’s northern portion, Fremont and Ancestral Pueblo “rock writings, rock shelters, cliffside storage structures, and pithouses” survive to this day. *Id.* Shale badlands formations, “unique on the Colorado Plateau,” accumulated in the Late Cretaceous Period, allowing for unparalleled preservation of “fossils found nowhere else on Earth, including one of the largest oviraptors ever discovered.” *Id.* at 57,341–42. Grosvenor Arch—“a rare double arch” geological formation—can also be found here, as can “more than a hundred known recorded paleontological sites.” *Id.*

Grand Staircase. The Monument’s eponymous Grand Staircase formation draws worldwide renown for its geological abundance. Along the former shoreline of the ancient Lake Dixie lies the most well-preserved section of the marine fossil record, including “fossilized fish, dinosaurs, and early reptiles, as well as multiple tracksites.” *Id.* at 57,343. The area also contains pictographs of the tracks “left by ancient indigenous peoples living in nearby communities,” as well as evidence of prehistoric hunter-gatherer residential structures. *Id.*

B. The Bears Ears Proclamation Identified Objects Dispersed Throughout 1.36 Million Acres.

Recent paleontological discoveries demonstrate Bears Ears’ great potential for improving our scientific understanding of the ancient history of life. These include “Hills Have Teeth,” where SVP members have identified hundreds of reptile teeth fossils so far. The site is the most productive and diverse Triassic microvertebrate site in Utah—and very likely one of the top ten most productive and diverse sites nationwide from this period. Another major finding from the region is a collection of some of the oldest footprints ever discovered in the southwestern United States. These footprints represent some of the northernmost occurrences of the phytosaur trace *Apatopus* and the aetosaur trace *Brachycheirotherium* in the nation. Moreover, in 2017, SVP members discovered a site near White Canyon containing several large, unidentified, enigmatic bones that have yet to be fully excavated. The previous year, SVP identified what is likely Utah’s most important Triassic fossil site, known as P2N. This site is nearly sixty-three square meters—one of the largest in the world from this age—and incredibly dense with rare paleontological resources, including the only known complete phytosaur skeletons. Several years before President Obama

established Bears Ears, looters ransacked the site and removed a phytosaur skull. Only recently was this missing piece rediscovered and reunited with the rest of the animal, now housed at the National History Museum of Utah. This site offers the potential for novel scientific discoveries—things that scientists may never see unless the site is adequately protected. There are decades of research to perform before this site will be fully explored.

The Monument's other prominent features include:

Indian Creek. In the northernmost portion of Bears Ears sits one of the Monument's most famous sites: Newspaper Rock, “a massive petroglyph panel displaying a notable concentration of rock writings from persons of the Basketmaker and Ancestral Pueblo periods, the Ute and Navajo people who still live in the Four Corners area and beyond, and early settlers of European descent.” Bears Ears Proclamation at 57,324. Along the creek lie countless other petroglyph panels, as well as “fossilized trackways of early tetrapods and fossilized traces of marine and aquatic creatures such as clams, crayfish, fish, and aquatic reptiles dating to the Triassic Period.” *Id.*

Comb Ridge. Running south from Indian Creek is Comb Ridge, a geologically remarkable series of “serrated cliffs” peppered with archaeological and paleontological sites. *Id.* at 57,327. One of those sites, Butler Wash, evidences “centuries of human habitation, including cliff dwellings, such as the well-known Butler Wash Village and Monarch Cave, kivas, ceremonial sites, and rock writings, like the . . . Lower Butler Wash Panel, a wall-sized mural depicting San Juan Anthropomorph figures,” critical to “understanding the daily life and rituals of the Basketmaker people.” *Id.* Paleontologists prize Comb Ridge for its rich natural history, reflected in “an Upper Triassic microvertebrate site with greater taxonomic diversity than any other published site of the same nature in Utah” and “rich bonebeds of lumbering sauropods.” *Id.*

Valley of the Gods. Along the Monument’s southern border lies the Valley of the Gods, “a broad expanse of sandstone monoliths, pinnacles, and other geological features . . . contain[ing] evidence of our own planet’s distant past, including early tetrapod trackways, Paleozoic freshwater sharks, . . . and multiple unique taxa of mammal-like reptiles.” *Id.* at 57,327–28. Paleontologists have venerated the Valley of the Gods for

decades, exploring a “Mars-like landscape” rich in “notable plant macrofossils including ancestral conifers, giant horsetail-like plants, ferns the size of trees, and lycopsids.” *Id.* at 57,328.

Colorado River. Framing the Monument’s western border is the Colorado River, the banks of which host “an extensive complex of steep and narrow canyons . . . [with] a rich paleontological history,” including “track sites in the Triassic Moenkopi Formation and an assemblage of invertebrate burrows.” *Id.* at 57,326. Archaeologists revere the region for its “unique density of Pueblo I to early Pueblo II village sites,” including “a collapsed two-story block masonry structure that appears to be an early version of a great house, [which] was built during a time when the development of this kind of community structure was only beginning in Chaco Canyon.” *Id.* at 57,325.

Bears Ears. The Monument’s center houses its eponymous formation: a pair of “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.’” Obama Proclamation at 1139. The Bears Ears Buttes, “soar over the surrounding landscape” and “hold historical significance to the Navajo

people, as the landscape and natural cliff dwellings served as hiding places to escape the United States military during the forced Long Walk.”

Bears Ears Proclamation at 57,324.

C. As Comprehensive Units, Grand Staircase and Bears Ears Warrant Protection Under the Antiquities Act.

For paleontologists, the importance of the geological context in which the fossils sit rivals the importance of the fossils themselves. The rocks and other formations that surround a given fossil allow paleontologists to understand the climate, temperature, and rainfall of the world in which the fossil creature once lived. Another important way to understand the biological, climatological, and environmental context of large vertebrate paleontological sites is through study of invertebrate and plant fossils found in the area. Without protection of the geological context and invertebrate and plant fossils throughout the Monuments, these resources will be compromised.

Meanwhile, archaeologists prize the evidence of Indigenous habitation that suffuses the Monuments. A multitude of tribal nations, “including the Hopi Tribe, the Kaibab Band of Paiute Indians, the Navajo Nation, the Paiute Indian Tribe of Utah, the San Juan Southern Paiute Tribe of Arizona, the Pueblo of Acoma, the Pueblo of San Felipe, the

Pueblo of Tesuque, and the Pueblo of Zuni, have ancestral, cultural, or historical ties to this area and continue to use the area to this day.” Grand Staircase Proclamation at 57,337. The wider context in which these ancient historical and archaeological sites exist plays a critical role in elucidating the life and culture of these early societies. Moreover, the continuing connection between contemporary Indigenous peoples and the lands confirms the historical and cultural significance of these sites and underscores the necessity of safeguarding them.

The objects highlighted in the preceding two sections constitute only a small sample of the Monuments’ manifold historic and scientific objects that Plaintiffs-Appellants incorrectly dismiss as “random,” “nondescript,” and “nebulous.” Garfield Br. 11. Stories, rich in historic and scientific value, stand behind every single one of the “45 known paleontological sites” that dot Grand Staircase’s Circle Cliffs, Grand Staircase Proclamation at 57,338; every one of the “many thousands of fossil sites [that] have been documented on [Kaiparowits Plateau],” *id.* at 57,340; and each and every one of the arches, bridges, slot valleys, boneyards, and cultural sites listed by name in the Grand Staircase

Proclamation.³ The same goes for each of the “freestanding Pueblo masonry structures and towers” along Indian Creek, Bears Ears Proclamation at 57,324; each of the many “cliff dwellings and other archaeological sites” sheltered by the steep walls of Mule Canyon, *id.* at 57,327; and every last surviving panel, building, and village created by the Indigenous habitants of the land now protected within Bears Ears.⁴ These myriad features—“objects of historic or scientific interest” by any definition—sprawl across vast areas, from Big Water to Boulder, Mexican Hat to Monticello. Grand Staircase and Bears Ears—in their current forms and as safeguarded by the Antiquities Act—play an indispensable role in protecting these invaluable resources.

Moreover, the Monuments hold the promise of untold new scientific and historic discoveries. The Bears Ears Proclamation notes that “paleontologists have only recently begun to systemically survey and study much of the fossil record in this region” and that “experts are

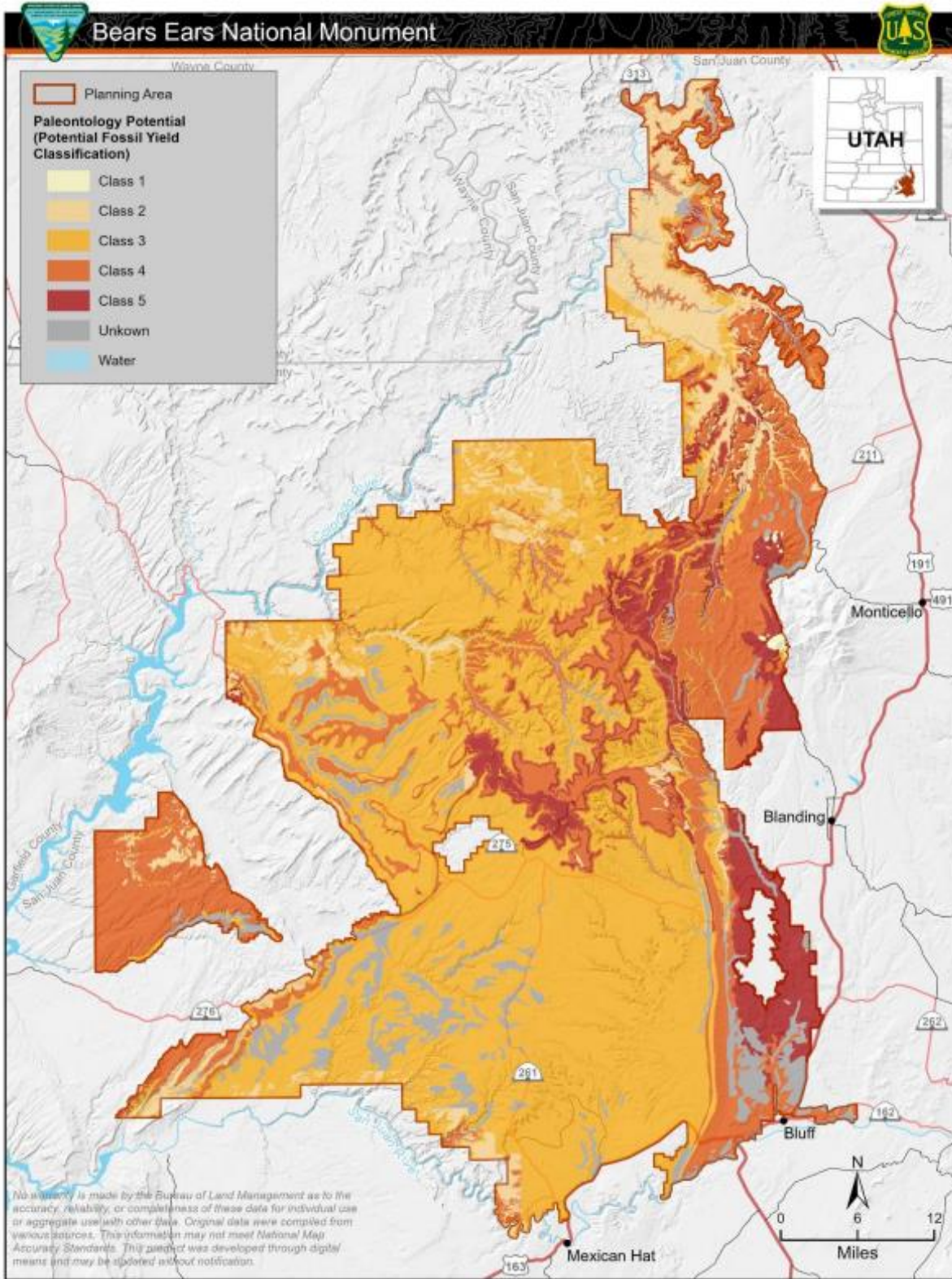
³ Additional examples include Maverick Natural Bridge, Phipps Arch, Escalante Natural Bridge, Bowington Arch, Dry Fork of Coyote Gulch, Little Jumbo Arch, Uncle Charley’s Bonebed, and Bull Valley Gorge. Grand Staircase Proclamation at 57,338–42.

⁴ Additional examples include Doll House, Scorup Cabin, Arch Canyon Great House, House on Fire, Procession Panel, Sand Island Petroglyph Panel, River House, Junction Village, Split Level Village, Bannister House, and Perfect Kiva. Bears Ears Proclamation at 57,326–29.

confident that scientifically important paleontological resources remain to be discovered” on the Colorado Plateau. *Id.* at 57,323–24. And the Grand Staircase Proclamation declares that “we have thus far uncovered only a fragment of Grand Staircase-Escalante’s paleontological story,” Grand Staircase Proclamation at 57,337, and thus, “[n]ew scientific discoveries are likely just around the corner,” *id.* at 57,336. Although such objects have yet to be unearthed, the Monuments exist to protect the promise of the “many new taxa and new temporal and geographic occurrences,” *id.* at 57,340, that await discovery.

The vast areas of Grand Staircase and Bears Ears with high potential for fossil discovery are depicted in red and orange in these BLM maps:⁵

⁵ Bureau of Land Mgmt., *2 Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Proposed Resource Management Plans and Final Environmental Impact Statement*, app. A at 8 (2019); Bureau of Land Mgmt., *Bears Ears National Monument: Resource Management Plan and Environmental Impact Statement* 6-148 (2022).



GSEP *Amici* know first-hand the effects of failing to protect these Monuments. Grand Staircase’s original boundaries enclosed strata from the Permian through Cretaceous Periods, all with “medium” to “high” potential for paleontological resources. President Trump’s reductions systematically excluded all of the Permian sections (including the type section of the Kaibab Formation) and most of the Triassic and Jurassic sections of fossil resources. President Trump excised more than 700 scientifically important localities, including many of the original Cretaceous mammal sites. President Obama established Bears Ears in 2016 to protect paleontological sites from the Pennsylvanian through Cretaceous Periods. President Trump’s subsequent reduction systematically excluded the oldest Paleozoic and youngest Cretaceous fossil units, including important early tetrapod sites, and most of the Triassic sections, some of which were pilfered prior to Monument designation. Sites in the excluded areas had considerably less protection, especially against mineral, oil, and gas extraction, than they did within the original Monuments. After CLF developed (in 2018) a smartphone application for citizens to report illegal damage to sensitive resources, users reported 272 instances within Grand Staircase, including damage

to an ancient Native American fire pit and vandalism of irreplaceable archaeological art panels.

The countless geological, archaeological, and paleontological discoveries just over the horizon cement Grand Staircase and Bears Ears as indispensable resources for scientists and historians, including GSEP *Amici*'s members. By safeguarding these irreplaceable repositories of history and science, the Proclamations guarantee that *Amici*'s members can continue their critical efforts to uncover and document the past—from the Mesozoic Era through the early twentieth century.

II. If This Court Remands, It Should Instruct the District Court to Employ Highly Deferential Judicial Review.

If this Court determines that challenges to Antiquities Act proclamations are reviewable in federal court and that Plaintiffs-Appellants have standing, it should remand for the district court to consider, in the first instance, substantive grounds for dismissal under Federal Rule of Civil Procedure 12(b)(6). In the event of a remand, this Court should also take the opportunity to instruct the district court that, contrary to the probing standard advocated for by Plaintiffs-Appellants, any judicial scrutiny of presidential proclamations under the Antiquities Act must be highly deferential.

A. Courts Have Uniformly Adopted Deferential Review in Challenges to National Monuments.

For a century, courts have consistently upheld designations of national monuments after deferring to the President’s findings and conclusions. As the Supreme Court and the U.S. Courts of Appeals for the D.C. and Ninth Circuits have repeatedly recognized, the Antiquities Act affords the President broad discretion in creating monuments.

Each time the Supreme Court has grappled with challenges to national monument designations, it has made clear that review is highly deferential. In *Cameron*, the Court summarily accepted the President’s determination that the Grand Canyon “is an object of unusual scientific interest.” 252 U.S. at 455. Similarly, in *Cappaert*, the Court accepted the President’s assertion that a natural pool and its rare inhabitants are “objects of historic or scientific interest.” 426 U.S. at 142. And in *United States v. California*, 436 U.S. 32 (1978), the Court swiftly brushed aside claims that the President could not reserve submerged lands and waters, reaffirming the Act’s broad grant of executive power. *Id.* at 36 (“There can be no serious question . . . that the President . . . had power under the Antiquities Act to reserve the submerged lands and waters . . .”).

The two courts of appeals to consider these issues have taken similarly deferential approaches. In *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), the D.C. Circuit held that the Antiquities Act does not “require[] the President to include a certain level of detail in . . . Proclamation[s],” nor does it “impose upon the President an obligation to make any particular investigation.” *Id.* at 1141–42. *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) described the Supreme Court as repeatedly “confirming the broad power delegated to the President under the Act.” *Id.* at 1135. And the Ninth Circuit recently noted that “the fact that the Supreme Court has never overturned an Antiquities Act proclamation underscores the statute’s vitality.” *Murphy Co. v. Biden*, 65 F.4th 1122, 1133 (9th Cir. 2023).

These cases establish that a plaintiff’s allegations must cross a high threshold before a court will interfere with the legislative-executive cooperation codified in the Antiquities Act. As a district court in this Circuit has noted—in analyzing and rejecting a nearly identical challenge to Grand Staircase as that brought by Plaintiffs-Appellants—the Act imposes two requirements on the President: (1) declaring, “in his discretion, objects of scientific or historic value” and (2) “setting aside, in

his discretion, the smallest area necessary to protect the objects.” *Utah Ass’n of Cnty. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

To this first requirement, no appellate court has ever concluded that the President abused his discretion because an object did not qualify under the Antiquities Act. Courts have accepted declarations of geologic structures, *Cameron*, 252 U.S. at 411; “submerged lands” and “waters located on or over federal lands,” *California*, 436 U.S. at 36 & n.9; “ecosystems and scenic vistas,” *Tulare County*, 306 F.3d at 1142; and “mountains and deserts,” *Murphy Co.*, 65 F.4th at 1125. As for the second requirement, the D.C. Circuit has held that a complaint must “identify the [allegedly] improperly designated lands with sufficient particularity,” *Tulare County*, 306 F.3d at 1142, and that it is “incumbent upon [a plaintiff] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect,” *Tulare County v. Bush*, 317 F.3d 227 (mem.) (per curiam).

The deferential standard of review set out in a century of case law does not mean that this Court must rubberstamp presidential

proclamations. Deference does not mean lawlessness.⁶ But whatever the real limits on the President’s discretion, they are not implicated here. Like the proclamations at issue in prior cases, President Biden’s Proclamations “speak[] in detail of the Monument[s]’ natural and archeological resources and indicate[] that the designated area[s are] the smallest consistent with the protection of those resources.” *Utah Ass’n*, 316 F. Supp. at 1186.

Plaintiffs-Appellants point to no change in the law justifying a departure from a century of deferential review in Antiquities Act cases. And for good reason: there is none.

B. The Text, Structure, and History of the Antiquities Act Support a Deferential Standard of Review.

In addition to being foreclosed by a century of precedent, Plaintiffs-Appellants’ proposed approach conflicts with the text, structure, and history of the Antiquities Act.

The Antiquities Act provides that the “President may, *in the President’s discretion*, declare by public proclamation historic landmarks,

⁶ And of course, deference is inappropriate when the President takes action that the Antiquities Act plainly does not authorize, such as abolishing or shrinking a monument. *See generally* Complaint for Declaratory and Injunctive Relief, *Grand Staircase Escalante Partners v. Trump*, No. 1:17-cv-02591 (D.D.C. Dec. 4, 2017).

historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. § 320301(a) (emphasis added). The Act also provides that the President “may reserve parcels of land as a part of the national monuments.” *Id.* § 320301(b). The Act places a single restriction on the President’s discretion to reserve parcels of federal land: “The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” *Id.* This statutory structure confirms that the President’s designation of historic landmarks, structures, and objects as “national monuments” and reservation of land “as a part of the national monuments” are not subject to a searching standard of judicial review.

First, when interpreting statutes, courts are “obliged to give effect, if possible, to every word Congress used.” *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 632 (2018). If courts could routinely second-guess the President’s fact-finding determinations under the Act, the phrase “in the President’s discretion” would be rendered virtually meaningless. *Cf. Hain v. Mullin*, 436 F.3d 1168, 1174 (10th Cir. 2006) (rejecting a statutory construction that “fail[s] to give effect . . . to every clause and

word of the statute” (quotation marks omitted)). Instead, courts must give effect to the phrase. Because the President enjoys “discretion” when designating and reserving land for national monuments, courts should exercise significant restraint before encroaching upon that presidential prerogative. *Cf. Webster v. Doe*, 486 U.S. 592, 594, 600–01 (1988) (holding that an agency decision was “committed to agency discretion by law” where the statute provided that the agency officer could make the decision “in his discretion”).⁷

Second, the Antiquities Act’s broad grant of authority and use of capacious terms—including “[l]andmark,” “historic,” and “other objects of historic or scientific interest”—reaffirm that the Act affords the President considerable latitude in designating monuments and reserving parcels of land. As long as the President’s designation and reservation of land

⁷ *Amici* in support of Plaintiffs-Appellants argue that these designations could violate the nondelegation doctrine. *See* Br. of *Amici Curiae* Manhattan Inst. 9–11. But courts have never applied the nondelegation doctrine to the Property Clause. That may be because grants of Article IV power to decide monument designations involve administrative rather than legislative power, so they do not implicate the concerns that animate the nondelegation doctrine. *See* Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 J. Const. L. 761, 764 (2019). But even if the nondelegation doctrine could apply in this context, it is clear that “the Antiquities Act represents a proper delegation of congressional authority to the President under the Property Clause.” *Tulare County v. Bush*, 185 F. Supp. 2d 18, 26 (D.D.C. 2001).

“comport[] with the [Act’s] textual limits” without abusing his discretion, the judicial inquiry ceases. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–09 (2018) (rejecting searching review where Congress made a “comprehensive delegation” and the President fulfilled the statute’s “sole prerequisite”); see *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge . . . discretion.”).

Third, the structure of the Antiquities Act, including its lack of language providing for judicial review, confirms that review is limited. The Act is short and focused on a *grant* of authority to the President. The statute’s very first words provide that the President may designate national monuments in his discretion. The remaining provisions couch the President’s authority in terms of two factual findings that he may make in his discretion—the kind of objects he can designate, and the amount of land he can reserve—and not as express limitations on his power. *Cf.*, e.g., International Emergency Economic Powers Act, 50 U.S.C. § 1702(b) (providing for “[e]xceptions to grant of authority” in which the otherwise broad “authority granted to the President by [the statute] does not include the authority to” act in certain areas). The Act

does not expressly provide for review of these findings, and courts are reluctant to imply a searching standard of review in such situations. To the contrary, courts have long applied a clear statement rule that “would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.” *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Given that the Act authorizes the President to make findings and does not prescribe review of those findings, let alone searching review, judicial restraint is appropriate.

Fourth, the subsequent history of the Antiquities Act confirms the importance of judicial deference because Congress, rather than the judiciary, has shown that it is well-positioned to review the size and content of national monuments. In response to controversies about monument size, Congress has sometimes broadly limited the President’s authority under the Antiquities Act. For example, after President Roosevelt designated Jackson Hole National Monument in 1943, Congress withdrew the President’s authority to extend or establish any further national monuments in Wyoming. Pub. L. No. 81-787, 64 Stat. 849 (1950) (codified as amended at 54 U.S.C. § 320301(d)). Amid

opposition to President Carter’s designation of millions of acres of monuments in Alaska, Congress barred the President from designating future Alaskan monuments of more than five thousand acres. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2488 (1980) (codified at 16 U.S.C. § 3213(a)). Other times, when Congress has disagreed with the President’s designations, it has revoked or reduced the size of specific monuments. *See* Pub. L. No. 104-480, 118 Stat. 3908 (2004) (reducing the size of Castillo de San Marcos National Monument); Pub. L. No. 84-447, 70 Stat. 61 (1956) (eliminating Castle Pinckney National Monument); Pub. L. No. 84-179, 69 Stat. 380 (1955) (eliminating Old Kasaan National Monument). And in yet other situations, Congress has modified the precise boundaries of national monuments, including several times for Grand Staircase. *See, e.g.*, Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-334, 112 Stat. 3139; Omnibus Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991, 1119–20; *see also Utah Ass’n*, 455 F.3d at 1097 (“Despite . . . criticisms of [Grand Staircase], . . . Congress has passed several pieces of

legislation that relate to the Monument”). This type of active congressional oversight confirms the importance of judicial deference.⁸

Thus, the Antiquities Act’s plain text requires deferential review, as confirmed by its statutory structure and subsequent history.

CONCLUSION

For the reasons given above, this Court should affirm the district court’s ruling. If this Court does not affirm, it should remand with instructions to address all substantive issues with the deference that the Antiquities Act requires.

⁸ Appellants are mistaken that the Antiquities Act must be read more narrowly in light of subsequent laws that provide other legal protections for resources on federal land. *See* Opening Br. Individual Pls. 30 & n.10. These laws do not relate to the Antiquities Act, and they provide far narrower protections. For example, the Paleontological Resources Preservation Act does not prohibit “casual collection” of fossils on federal land or disruption of the context of paleontological research through the staking of nearby mining claims. 16 U.S.C. § 470aaa-10(1).

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Respectfully submitted,

/s/ Raymond Scott Berry

Raymond Scott Berry
GRAND STAIRCASE ESCALANTE PARTNERS
P.O. Box 9491
Salt Lake City, UT 84109
(801) 556-8515
rsberryslc@gmail.com

Gary S. Guzy
John Mizerak
Scott Shelton
Timothy Duncheon
Daniel J. Nathan
COVINGTON & BURLING LLP
850 Tenth St. NW
Washington, D.C. 20001
(202) 662-5978
gguzy@cov.com

*Counsel for Amici Curiae Grand
Staircase Escalante Partners, Society of
Vertebrate Paleontology, and
Conservation Lands Foundation*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 6,073 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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3. In accordance with this Circuit's CM/ECF Procedures Section II(J), I also certify that this document: (1) complies with the privacy and redaction requirements of Circuit Rule 25.5 and Fed. R. App. P. 25(a)(5), (2) the hard copies to be submitted to the Clerk of the Court are exact copies of the version submitted electronically, and (3) the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

January 16, 2024

/s/ Raymond Scott Berry
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 16, 2024

/s/ Raymond Scott Berry
Counsel for Amici Curiae