IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**

MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Antiquities Act of 1906 authorizes the President to designate national monuments and make reservations of land "confined to the smallest area compatible with the proper care and management of the objects to be protected [therein]." 54 U.S.C. § 320301(b). On December 4, 2017, President Trump signed Proclamation 9682 modifying the Grand Staircase-Escalante National Monument ("Monument") to reflect what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. *See* Proc. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017). Plaintiffs—The Wilderness Society, Grand Staircase Escalante Partners, and other organizations—filed suit immediately thereafter.[1]

But Plaintiffs' complaints suffer multiple, incurable defects. To begin with, they have brought suit prematurely. They cannot demonstrate that the mere issuance of the Proclamation caused them or their members an actual or imminent, concrete or particularized injury. To the extent Plaintiffs allege they *could* suffer injuries when specific actions are taken pursuant to the Proclamation in the future, the time to invoke the Court's jurisdiction is then and not now. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998). In any event, Plaintiffs' claims largely focus on seeking relief directly against the President, and they fail to show that such extraordinary relief would redress their injuries as a practical matter, or is even appropriate in the circumstances. *See Franklin v. Massachusetts*, 505 U.S. 788, 796-801, 827 (1992).

Even ignoring these threshold defects, Plaintiffs' claims simply have no merit. Although Plaintiffs wish it were otherwise, the President lawfully exercised his authority under the

[1] Compl., *The Wilderness Soc'y v. Trump*, No. 17-cv-2587, (D.D.C. Dec. 4, 2017) ("TWS Compl."), ECF No. 1; Compl., *Grand Staircase Escalante Partners v. Trump*, No. 17-cv-02591 (D.D.C. Dec. 4, 2017), ECF No. 1 ("GSEP Compl."). This memorandum will refer to the "TWS Plaintiffs" or the "GSEP Plaintiffs," respectively, or to "Plaintiffs" collectively.

Antiquities Act to modify the boundaries of the Monument to what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. 54 U.S.C. § 320301(b). Nothing in the Antiquities Act precludes one President's modification of another's determination on this basis, and congressional acquiescence to the practice over many decades leaves this Court in no position to say otherwise. Further, whether the President properly exercised the authority granted him under the Antiquities Act is not reviewable. *See Dalton v. Specter*, 511 U.S. 462 (1994); *Tulare Cty v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002). And because the President was acting under the congressional authorization in the Antiquities Act, Plaintiffs' claims that the Proclamation violated myriad constitutional provisions fail outright. Finally, Plaintiffs' claims against the Secretary of the Interior and Deputy Director of the Bureau of Land Management ("BLM") (together "Agency Defendants") under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, fail to identify final agency action, and fail to identify discrete actions that these officials are legally obligated to take. *See Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55 (2004).

STATUTORY AND FACTUAL BACKGROUND

A. The Antiquities Act

In 1906, Congress passed the Antiquities Act, delegating to the President power to declare landmarks, structures, and objects of historic and scientific interest to be national monuments, and to reserve federal lands for their protection. *See* Act of June 8, 1906, Pub. L. No. 59-209, ch. 3060, 34 Stat. 225 (codified at 54 U.S.C. § 320301). The legislation stemmed from proposals, primarily from archaeological organizations, to protect objects of antiquity on federal lands. *See Utah Ass'n of Ctys. v. Bush* ("*UAC*"), 316 F. Supp. 2d 1172, 1178 (D. Utah 2004). At the turn of the twentieth century, public lands were generally open to the public and available for homestead, mining, oil, gas, and other claims, unless Congress or the Executive Branch had

"withdrawn" the land from the public domain and/or "reserved" the land for a particular purpose. As a result, many historic sites on public lands had been looted and destroyed. *See* H.R. Rep. No. 59-2224, at 3 (1906).

For several years, Congress debated proposals to provide withdrawal authority to the President or the Secretary of the Interior to protect historic and other resources. *See UAC*, 316 F. Supp. 2d at 1178. In particular, some members of Congress were concerned that such proposed legislation would permit large areas of land to be withdrawn from entry. For example, Rep. John Stephens of Texas asked, "How much land will be taken off the market in the Western States by the passage of the bill?" The bill's sponsor, Rep. Lacey, responded, "Not very much. The bill provides that it shall be the smallest area [necessary] for the care and maintenance of the objects to be preserved." 40 Cong. Rec. 7888 (1906). The House Report on the enacted bill also noted that it was intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times." H.R. Rep. No. 59-2224, at 1 (emphasis added).

Congress understood that initial reservations of land might be inaccurate or uninformed, and therefore could be temporary or subject to modification. For example, the report of Professor Edgar L. Hewett, a chief architect of the Antiquities Act, was incorporated into the House Report and indicates that many withdrawals would only be temporary in nature: he explained that while some lands "are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks[, m]any others should be temporarily withdrawn and allowed to revert to the public domain after the ruins thereon have been examined by competent authority[.]" *Id.* at 3; *see also id*. at 7-8 (stating that "the permanent withdrawal of tracts of land from the public domain for the purposes of protecting

ruins thereon would seem to be unnecessary except where the ruins are of such character and extent as to warrant the creation of permanent national parks").

As enacted, the Antiquities Act authorized the President "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ." § 2, 34 Stat. at 225. The statute also authorized the President to reserve only those lands necessary to protect the monument objects, stating that he "may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

In 2014, the Antiquities Act was recodified, and now reads, in relevant part:

> (a) Presidential declaration—The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) Reservation of land—The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

54 U.S.C. § 320301.

B. Presidential Action under the Antiquities Act.

Theodore Roosevelt, President at the time of the Antiquities Act's passage, used this new authority to proclaim eighteen monuments.[2] His successor, President Taft, proclaimed ten

[2] *See* Nat'l Park Serv., Archeology Program, Monuments List, available at: https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Sept. 26, 2018); Nat'l Park Serv., Archeology Program, Frequently Asked Questions, available at: https://www.nps.gov/archeology/sites/antiquities/FAQs.doc (last visited Sept. 26, 2018).

monuments, but also diminished two monuments established by President Roosevelt. In 1911, President Taft determined that the Petrified Forest National Monument, "through a careful geological survey of its deposits of mineralized forest remains," reserved "a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirement of the act authorizing the creation of National Monuments." Proc. 1167, 37 Stat. 1716 (Jul. 31, 1911). He reduced the area of the monument by more than 40 percent. *Compare id.* (reducing reservation to 25,626.60 acres); *with* Proc. 697, 34 Stat. 3266 (Dec. 8, 1906) (reserving 60,776.02 acres). President Taft also reduced the Navajo National Monument in Arizona three years after its establishment, finding that, "after careful examination and survey of the prehistoric cliff dwelling pueblo ruins," the original proclamation "reserve[d] a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912). He substantially reduced the monument to three separate tracts—two containing 160 acres each, and one containing forty acres—to protect three ruins. *Id.* at 1734.

Many other Presidents have reduced monuments, finding that the removed lands "are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument." *See, e.g.*, Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940) (reduction of Grand Canyon National Monument by President Franklin Roosevelt); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (reduction of Black Canyon of the Gunnison National Monument by President Eisenhower). President Kennedy modified the boundaries of Bandelier National Monument, adding lands but removing other lands "containing limited archaeological values which have

been fully researched and are not needed to complete the interpretive story of [the Monument]." Proc. 3539, 77 Stat. 1006 (May 27, 1963).

Presidents have also cited other rationales as the basis for monument reduction. For example, President Truman excluded lands from Santa Rosa National Monument because those lands were needed by "the War Department for military purposes . . .." Proc. 2659, 59 Stat. 877 (Aug. 13, 1945); *see also* Proc. 3089, 69 Stat. c27 (Mar. 31, 1955) (elimination by President Eisenhower of some lands from Glacier Bay National Monument that were "being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes"); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (reduction of Wupatki National Monument by President Franklin Roosevelt, noting that "such lands are needed in the construction and operation of a diversion dam in Little Colorado River to facilitate the irrigation of lands on the Navajo Indian Reservation"); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (reduction by President Franklin Roosevelt of White Sands National Monument to allow for U.S. Highway 70). In some cases, Presidents reduced monument reservations without providing any explanation. For example, Mount Olympus National Monument (now Olympic National Park) was diminished—on three separate occasions by three different presidents—without any reason cited in the proclamations. *See* Proc. 1191, 37 Stat. 1737 (Apr. 17, 1912) (President Taft); Proc. 1293, 39 Stat. 1726 (May 11, 1915) (President Wilson); Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (President Coolidge).[3]

[3] Presidents have also found that additional lands are required for the protection of the original objects identified in a proclamation based on new or different information. For example, in 1909, President Taft added lands to the Natural Bridges National Monument, noting that "at the time this monument was created nothing was known of the location and character of the prehistoric ruins in the vicinity of the bridges, nor of the location of the bridges and the prehistoric cave springs…." Proc. 881, 36 Stat. 2501, 2502 (Sept. 25, 1909). Recently, President Obama expanded Papahānaumokuākea Marine National Monument based on his

And Presidents have eliminated and added lands within the same proclamation. President Eisenhower revised the boundaries of Hovenweep National Monument (established by President Truman) on the basis that certain lands "contain[ing] no objects of historic or scientific interest were erroneously included" in the Monument. Proc. 3132, 70 Stat. c26 (Apr. 6, 1956) (also adding lands containing valuable ruins which were "erroneously omitted from the monument); *see also* Proc. 3138, 70 Stat. c31 (Jun. 7, 1956) (President Eisenhower, removing and adding lands to Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (President Eisenhower, removing and adding lands to Colorado National Monument); Proc. 3360, 74 Stat. c79 (Jul. 22, 1960) (President Eisenhower, modifying Arches National Monument to exclude lands "which have no known scenic or scientific value," while adding other lands found necessary for the proper care and management of the objects on those lands and the original monument). All told, Presidents have eliminated lands from existing monuments on at least eighteen occasions.[4]

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finding that additional area was required to protect the resources identified in the original monument. Proc. 9478, 81 Fed. Reg. 60227 (Aug. 26, 2016).

[4] *See* Proc. 1167, 37 Stat. 1716 (July 31, 1911) (Petrified Forest National Monument); Proc.1186, 37 Stat. 1733 (Mar. 14, 1912) (Navajo National Monument); Proc. 1191, 37 Stat. 1737 (April 17, 1912) (Mount Olympus National Monument), Proc. 1293, 39 Stat. 1726 (May 11, 1915) (Mount Olympus National Monument), Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (Mount Olympus National Monument); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (White Sands National Monument); Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940) (Grand Canyon National Monument); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (Wupatki National Monument); Proc. 2499, 55 Stat. 1660 (Jul. 18, 1941) (Craters of the Moon National Monument); Proc. 2659, 59 Stat. 877 (Aug. 13, 1945) (Santa Rosa National Monument); Proc. 3089, 69 Stat. c27 (Mar.. 31, 1955) (Glacier Bay National Monument); Proc. 3132, 70 Stat. c26 (Apr. 6, 1956) (Hovenweep National Monument); Proc. 3138, 70 Stat. c31 (June 7, 1956) (Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (Colorado National Monument); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (Black Canyon of the Gunnison National Monument); Proc. 3360, 74 Stat. c79 (July 22, 1960) (Arches National Monument); Proc. 3486, 76 Stat. 1495 (Aug. 14, 1962) (Natural Bridges National Monument); Proc. 3539, 77 Stat. 1006 (May 27, 1963) (Bandelier National Monument).

C. Grand Staircase-Escalante National Monument

The Grand Staircase-Escalante National Monument (the "Monument") was established and its boundaries initially designated by President Clinton in 1996. *See* Proc. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (the "1996 Proclamation"). In his discretion, the President reserved approximately 1.7 million acres of federal land managed by the BLM for the Monument, and withdrew those lands from entry, location, selection, sale, leasing, or other disposition under the public land laws, subject to all valid existing rights. *See id.* at 50,225.

The 1996 Proclamation caused an instant controversy; there was significant local and national opposition to the creation, and size, of the Monument. *See UAC*, 316 F. Supp. 2d 1182-83; *see also Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094, 1096 (10th Cir. 2006). This led to immediate litigation, with two suits consolidated in the District of Utah. *See UAC*, 316 F. Supp. 2d 1172. The district court ultimately rejected these challenges to the Monument's designation, concluding that, given the broad grant of discretion to the President in the Antiquities Act, the Proclamation was subject only to narrow review for compliance with the requirements of the Act. *See id.* at 1183.

In the meantime, the BLM adopted a management plan for the Monument (the "Monument Plan") to implement the Proclamation's directives. TWS Compl. ¶ 81; Decl. of Edwin Roberson ("Roberson Decl.") ¶ 7 and Ex. B thereto; 65 Fed. Reg. 10,819 (Feb. 29, 2000). Consistent with the 1996 Proclamation, the Monument Plan recognized restrictions on mineral leasing and exploration, grazing, and travel within the Monument. *Id.*, Ex. B at 40, 46-48, 51-52. For instance, the Monument Plan described how the Proclamation's withdrawal would affect mineral development within the Monument, recognizing that the BLM would not authorize new mineral leases and specifying conditions of approval for the development of existing leases to the

extent those leases constituted valid existing rights. *Id.* at 51-52. The Monument Plan has been in effect since it was published in 2000. TWS Compl. ¶ 81; 65 Fed. Reg. at 10819.

On December 4, 2017, President Trump issued Proclamation 9682 to make "certain modifications" to the boundaries of the Monument. Proc. 9682, 82 Fed. Reg. at 58,089. Pursuant to the authority delegated to him by the Antiquities Act, the President declared "that the boundary of the . . . Monument is hereby modified and reduced to those lands and interests in land owned or controlled by the Federal Government" within three "modified monument areas," which would be known as the Grand Staircase, Kaiparowits, and Escalante Canyons units. *Id.* at 58,093. The President determined that the modified boundaries, which encompass more than 1 million acres, comprise "the smallest area compatible with the proper care and management of the objects to be protected" by the Monument designation. *Id.*; *see also* 54 U.S.C. § 320301(b).

While the Proclamation reduces the number of acres that are within the Monument, the lands now removed from the Monument remain in federal ownership, subject to management and protection under numerous federal statutes. *See* 82 Fed. Reg. at 58,090. These statutes include, *inter alia*, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1787; the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§ 470aa-470mm; the National Historic Preservation Act, 54 U.S.C. §§ 300101-320303; the Federal Cave Resources Protection Act of 1988, 16 U.S.C. §§ 4301-4310; and the Paleontological Resources Preservation Act ("PRPA"), 16 U.S.C. §§ 470aaa-470aaa-11. Certain of these statutes (such as the PRPA and ARPA) make violations punishable by criminal penalties. *See* 16 U.S.C. §§ 470ee; 470aaa-5. Moreover, approximately 221,436 acres of the lands that were formerly within the Monument and are now excluded continue to be managed as Wilderness Study Areas ("WSAs"), which under FLPMA must be managed "so as not to

impair the suitability of such areas for preservation as wilderness . . . ." 43 U.S.C. § 1782(c); Roberson Decl. ¶¶ 6, 10.

Proclamation 9682 directs the Secretary of the Interior to prepare management plans for each of the three units of the Monument through a public planning process. On January 16, 2018, the BLM issued a notice commencing this process for the three units of the Monument and the federal lands that were previously included within the Monument. *See* Notice of Intent to Prepare Resource Management Plans for the Grand Staircase-Escalante National Monument, 83 Fed. Reg. 2179 (Jan. 16, 2018). This planning process has and will continue to entail seeking input from the public, Tribes, state and local governments, and other federal agencies. *Id*. at 2180.[5] Until the BLM revises or amends the Monument Plan (either through this comprehensive land use planning process, or through site-specific land use plan amendments), the Monument Plan governs the BLM's management of these lands. Roberson Decl. ¶ 12.

D. Plaintiffs' Complaints

Plaintiffs are organizations representing individuals with asserted recreational, aesthetic, scientific, and cultural interests in the federal lands currently and formerly included in the Monument. *See* TWS Compl. ¶¶ 22-52, 104-05; GSEP Compl. ¶¶ 19-24; 33-35; 42. Plaintiffs filed complaints challenging the Proclamation shortly after it issued. Asserting claims against the President and the Secretary of the Interior (and in the TWS Complaint, the Deputy Director of the BLM), Plaintiffs allege that:

[5] On August 17, 2018, the BLM published draft monument management plans and an accompanying draft environmental impact statement. Notice of Availability, 83 Fed. Reg. 41,108 (Aug. 17, 2018). The BLM then published modified draft monument management plans and an accompanying draft environmental impact statement on August 31, 2018 to correct an error in the prior drafts. 83 Fed. Reg. 44,659 (Aug. 31, 2018). The BLM is inviting public comment through November 30, 2018. *Id.*

(i) the Proclamation exceeded the scope of the President's delegated authority under the Antiquities Act or was otherwise an abuse of discretion (TWS Counts I & IV; GSEP Counts II, III, & IV);

(ii) the Proclamation violated certain constitutional provisions and the separation of powers (TWS Counts II & III; GSEP Counts I & IV); and

(iii) the implementation of the Proclamation (or non-implementation of the prior Proclamation) is therefore unlawful and can be enjoined under the APA (TWS Count V; GSEP Count V).

Based on these allegations, Plaintiffs seek a declaratory judgment that the Proclamation is invalid and an injunction barring its implementation. *See* TWS Compl. at 56-57; GSEP Compl. at 55-56. The GSEP Plaintiffs also seek a declaration that the 1996 Proclamation remains "operative," an injunction requiring the President to "recognize" as much, and an injunction directing the Secretary to enforce the 1996 Proclamation. GSEP Compl. at 55-56.

STANDARD OF REVIEW

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *Gammill v. U.S. Dep't of Educ*., 989 F. Supp. 2d 118, 120 (D.D.C. 2013). Although it must assume all of the factual allegations in the complaint to be true, the court "must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim" because "subject matter jurisdiction focuses on the court's power to hear the claim . . . ." *Id*. at 120–21 (internal citation omitted). A court may consider materials outside the pleadings in order to resolve the question of its jurisdiction. *Fludd v. Mitchell*, 181 F. Supp. 3d 132, 137-38 (D.D.C. 2016).

On a Rule 12(b)(6) motion for failure to state a claim, a court must assess whether the complaint alleges sufficient facts that, if accepted as true, state an entitlement to relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the

Court must accept the facts pleaded as true, legal assertions devoid of factual support are not entitled to this assumption. *See Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). A complaint that presents merely "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

ARGUMENT

I. Plaintiffs' Failure to Demonstrate Standing Deprives this Court of Jurisdiction.

Consistent with Article III's case-or-controversy requirement, a plaintiff "must demonstrate standing to sue." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). To do so, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Where, as here, standing is addressed at the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (internal citation omitted).

Plaintiffs failed to do so here. In their rush to bring this suit, Plaintiffs neglected their burden to show the Proclamation caused them an injury in fact that is concrete and imminent, or that entry of remedies against the first-captioned defendant—the President—would provide them with redress, or even be appropriate in the circumstances, given the possibility of remedies against subordinate officials. This Court does not have jurisdiction to award Plaintiffs symbolic

remedies for hypothetical injuries. The complaints should be dismissed.

A. The Plaintiffs have not demonstrated cognizable injury.

Neither the TWS Plaintiffs nor the GSEP Plaintiffs can demonstrate a concrete and imminent injury resulting from the Proclamation, because their allegations of injury depend upon future events that may or may not occur, or may occur under conditions that would not cause actual injury to Plaintiffs' members. Similarly, the GSEP Plaintiffs' attempt to allege organizational standing is also inadequate. In addition, Plaintiffs fail to demonstrate that their alleged injuries would be redressed by a favorable decision.

1. The TWS Plaintiffs have not demonstrated injury in fact.

The TWS Plaintiffs' claims fail on the first prong of the standing analysis; they do not allege imminent, concrete, and particularized harm to their members.[6] Rather, their allegations sketch out broad categories of *potential future* injuries to their members that they believe *could* result if the Agency Defendants were to approve future proposals, or were to administer existing legal protections (against looting, for example), in a way Plaintiffs might deem to be inadequate. *See* TWS Compl. ¶¶ 112, 118, 123, 131, 134. But plaintiffs who rest their "claims for declaratory and injunctive relief on predicted future injury" bear "a 'more rigorous burden' to establish standing." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989)). Plaintiffs' "'threatened injury must be *certainly impending* to constitute injury in fact,'" and "[a]llegations of *possible* future injury are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v.*

[6] An organization can assert standing on its own behalf, on behalf of its members or both. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric*. ("*PETA*"), 797 F.3d 1087, 1093 (D.C. Cir. 2015). The TWS Plaintiffs appear to rely on "associational standing" rather than "organizational standing." To the extent they assert organizational standing, they fail to make factual allegations supporting such assertion under *PETA*.

Arkansas, 495 U.S. 149, 158 (1990) (emphasis in original)). *See also Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 21 (D.D.C. 2018) ("'[A]llegations of *possible* future injury' premised on 'attenuated chain[s] of inferences' will not suffice" (quoting *Clapper*, 568 U.S. at 409, 414 n.5 (second alteration in original))). And, of course, "standing is assessed as of the time a suit commences . . . ." *Del Monte Fresh Prod.. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009).

The TWS Plaintiffs cannot meet the rigorous burden described in *Arpaio* and *Clapper*. They do not attempt to show that any concrete and particularized injury is "certainly impending," but rather identify four categories of activities that they assert could—in the future—impair their enjoyment of the excluded lands. *See, e.g.*, TWS Compl. ¶¶ 114-37 (alleging that Proclamation renders excluded lands "vulnerable" to coal mining, oil and gas leasing, hard-rock mining, and reduced regulation of off-highway vehicle use). But identifying categories of activities that might occur across hundreds of thousands of acres does not establish concrete and particularized injury. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009); *Lujan v. Nat'l Wildlife Fed'n ("Nat'l Wildlife Fed'n"),* 497 U.S. 871, 889 (1990).

Moreover, none of the predicted activities—let alone any injuries that might result—are imminent. The Proclamation itself does not, as a practical matter, immediately change whether most of the activities Plaintiffs identify—leasing of coal, oil and gas, additional vehicle use, *e.g.*—will occur on former Monument lands. Under FLPMA, authorization of such activities is discretionary, and whether (and on which lands) such activities may be permitted will be determined through the BLM's land use planning process, which it initiated on January 16, 2018. *See* Notice of Intent, 83 Fed. Reg. at 2179. Pending modification through that process (or through site-specific land use plan amendments), the Monument Plan continues to govern the excluded lands, just as it did before Proclamation 9682. Roberson Decl. ¶ 12. The Monument

Plan does not identify any lands it governs as open to the issuance of new mineral leases, and limits travel to specific designated routes. *Id.* ¶ 15 & Ex. B at 46, 51.[7]

Second, many of the potential future activities and uses alleged to cause Plaintiffs injury can occur only through an application and environmental review process that could result in denial or modification of particular projects in ways that would *avoid* those alleged injuries. For instance, assuming the Monument Plan will be amended to allow these activities on some of the lands excised from the Monument, development of leasable minerals (such as coal or oil and gas) or minerals locatable under the Mining Law of 1872, 30 U.S.C. §§ 21-54 (such as gold, silver, and uranium),[8] or other uses causing substantial surface disturbance would require multiple steps before commencement. These steps include actions by third parties, as well as the BLM's approval —in compliance with the National Environmental Policy Act ("NEPA") and other applicable statutes—on a site-specific or project-specific basis. *See, e.g.,* Roberson Decl. ¶¶ 17-18, 20, 23. *See Food & Water Watch, Inc. v. Vilsack* ("*F&WW"*), 808 F.3d 905, 913 (D.C. Cir.

[7] Plaintiffs also ignore the fact significant amounts of the excluded lands are subject to other protective proscriptions or designations. For instance, over 200,000 acres of excluded lands occur within WSAs, which are subject to additional protections. Roberson Decl. ¶¶ 6, 10.

[8] For locatable minerals, one activity that now may occur even absent Monument Plan amendment is the staking or "location" of new mining claims. Roberson Decl. ¶ 21. But claim location typically does not result in more than negligible disturbance or cause resource impacts. *Id*. And, contrary to Plaintiffs' allegations, the Proclamation does not authorize mining *operations*, which are governed by the BLM's regulations. Before any extractive mining operations (and some exploration operations) may occur, the operator must obtain the BLM's approval of a plan of operations, following environmental review under NEPA, and would have to comply with all other applicable federal, state, and local laws. *Id.* ¶¶ 23-24. And while "notice-level" operations do not require affirmative BLM approval, they may not proceed if the BLM determines that the notice does not contain measures to prevent unnecessary or undue degradation. *Id.* Additionally, both plan and notice-level operations must be accompanied by a financial guarantee to cover reclamation costs in an amount acceptable to the BLM and the State of Utah. *Id.* ¶ 25. And, the BLM retains the discretion to restrict both plan and notice-level operations that unlawfully impact resources. To date, the BLM has not received *any* proposals or notices related to mining operations on lands excluded from the Monument. *Id.* ¶ 29.

2015) ("'[W]hen considering any chain of allegations for standing purposes, [a court] may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)'" (internal citations omitted)).

Finally, while the TWS Plaintiffs' allegations make clear that they believe development under future coal and oil and gas leases on former Monument lands will be the driver for most of their alleged injuries, *see, e.g.*, TWS Compl. ¶¶ 8, 102, 115-25, federal law presently bars the BLM from approving such development. Specifically, the BLM presently is precluded from expending funds for any preleasing or leasing activities under the Mineral Leasing Act on lands that were within the Monument as of January 20, 2001. *See* Consolidated Appropriations Act 2018, § 408, Pub. L. No. 115-141, 132 Stat 348 (March 23, 2018) (continued by Dept. of Defense *et al.* Approp. Act, and Continuing Approp. Act, 2019, H.R. 6157, Div. C. § 101 (signed Sept. 28, 2018)). As a result, the BLM presently cannot issue new leases for coal or oil and gas. Under these circumstances, the TWS Plaintiffs cannot plausibly allege a concrete and *imminent* injury in fact.

2. The GSEP Plaintiffs similarly fail to allege injury in fact.

The GSEP Plaintiffs' complaint makes similar—but even more generic and conclusory—allegations of potential harm to its members to allege associational standing. *See, e.g.,* GSEP Compl. ¶¶ 80, 82, 105 (making various conclusory allegations "on information and belief").[9] These allegations, like those of the TWS Plaintiffs, do not establish any imminent harm for the reasons explained above.

[9] The GSEP Plaintiffs also identify leasing for coal and oil and gas as primary drivers for their alleged injuries. *See* GSEP Compl. ¶¶ 71, 78. As was the case for the TWS Plaintiffs, the appropriations restriction makes such injuries purely speculative.

In Declarations attached to their Complaint (and their motion for partial summary judgment), the GSEP Plaintiffs provide some additional detail, but ultimately still rely on future, conjectural injuries. For instance, they predict harm to paleontological resources on lands now excluded from the Monument. *See* ECF No. 1-4, ¶ 13; ECF No. 21-5 ¶ 5. But the alleged harms they identify, namely "bulldozer use, drilling rigs, and road construction," ECF No. 21-1 at 19, cannot occur under the Monument Plan and therefore are not imminent.[10] Moreover, the GSEP Plaintiffs ignore the robust protections of the PRPA, 16 U.S.C. §§ 470aaa-470aaa-11, which was enacted after the creation of the Monument. The PRPA generally makes it a crime to "excavate, remove, damage, or otherwise alter or deface," (or to attempt to excavate, remove, etc.) "any paleontological resources located on Federal land . . . ." 16 U.S.C. § 470aaa-5.[11] The GSEP Plaintiffs' speculation that fossils will be harmed by "unauthorized commercial collection efforts, ATV use, and site vandalism," ECF No. 21-1 at 19, simply fails to account for the protections afforded by (and the criminal penalties imposed by) this Act, which applies—and is enforced by the BLM—regardless of the "Monument" status of the land.[12]

[10] Even assuming "bulldozer use" could constitute a "notice-level" activity that is permissible without modification to the Monument Plan, that use would still require notice, and be subject to the requirements discussed *supra* in footnote 8. Roberson Decl. ¶¶ 24-25.

[11] Obtaining a permit to collect paleontological resources requires a rigorous showing by the applicant—including that the collection is "undertaken for the purpose of furthering paleontological knowledge or for public education." 16 U.S.C. § 470aaa-3(b)(2).

[12] The GSEP Plaintiffs also assert that members who own local businesses may lose tourist business as a result of the Proclamation. *See* ECF No. 21-1 at 21. But they have not alleged facts showing those allegations to be plausible. For example, they assert that visitors come "to see a spectacular and expansive national monument" with significant "name recognition," *id.*, but the Monument *is still* spectacular and expansive (over 1 million acres), and its name is unchanged. *See* Proc. 9682, 82 Fed. Reg. at 58093. Viewed objectively, the GSEP Plaintiffs' pessimism is manufactured—not "plausible." *See Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015).

The GSEP Plaintiffs also assert organizational standing, but fail to adequately support this assertion. "To establish organizational standing, a party must show that it suffers 'a concrete and demonstrable injury to [its] activities, distinct from a mere setback to [the organization's] abstract social interests." *See Elec. Privacy Info. Ctr. v. FAA ("EPIC")*, 892 F.3d 1249, 1255 (D.C. Cir. 2018) (alterations in original) (citations omitted). The organization must show "a direct conflict between the defendant's conduct and the organization's mission," *id.* (citation omitted), and an expenditure of resources that makes the injury concrete. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015). The D.C. Circuit has characterized this as a two-part inquiry: the court must "ask, first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *F&WW*, 808 F.3d at 919.

Both inquiries defeat the GSEP Plaintiffs' asserted organizational standing. As to the first part, the GSEP Plaintiffs allege nothing more than a "setback to their abstract social interests," *EPIC*, 892 F.3d at 1255 (citation omitted). They have not shown a "direct conflict" with each organization's mission," *id.* (citation and emphasis omitted), or alleged facts showing that the Proclamation "perceptibly impaired [their] ability to provide services," *F&WW*, 808 F.3d at 919 (citation omitted). As to the second part, the GSEP Plaintiffs allege only that they have "divert[ed] funding away from preservation and restoration projects, and toward advocacy," ECF No. 1-5 ¶ 10. Because "the expenditure of resources on advocacy is not a cognizable Article III injury," the GSEP Plaintiffs' allegations "will not suffice" to demonstrate organizational standing, and their claims should be dismissed. *Turlock*, 786 F.3d at 24.

B. Plaintiffs' claims against the President are not redressable.

Plaintiffs have brought, collectively, nine claims against the President, for which they seek declaratory and injunctive relief. Plaintiffs have not shown that entry of their requested

declaratory and injunctive relief against the President would redress their injuries, or that the Court is likely to award such relief against the countervailing separation of powers concerns. *See, e.g.*, *Swan*, 100 F.3d at 976 n.1 (noting that injunction against the President would present separation of powers concerns and "similar considerations regarding a court's power to issue relief against the President himself appl[ied] to [the plaintiff's] request for a declaratory judgment"); *Newdow v. Bush*, 391 F. Supp. 2d 95, 106-07 (D.D.C. 2005) (dismissing suit to enjoin President from presenting prayers at inauguration in part because court was "without the authority" to enter declaratory or injunctive relief against the President); *Barnett v. Obama*, No. SACV09-0082 DOC (ANX), 2009 WL 3861788, at *11 (C.D. Cal. Oct. 29, 2009) (dismissing suit to declare President ineligible for office because court could not enter declaratory or injunctive relief against the President), *aff'd sub nom. Drake v. Obama,* 664 F.3d 774 (9th Cir. 2011). Thus, even if Plaintiffs had articulated injury in fact, their injuries would not be redressable by remedies against the President. Plaintiffs therefore lack standing to pursue the claims against him.

Further, Plaintiffs' alleged injuries generally stem from future *implementation* of the Proclamation by subordinate officials—not from the mere issuance of the Proclamation by the President. For instance, Plaintiffs seek an injunction barring implementation of the Proclamation, *see* TWS Compl. at 57, GSEP Compl. at 55, but Plaintiffs have not alleged facts showing that an injunction barring *the President* from implementing the Proclamation would serve any practical purpose. The GSEP Plaintiffs specifically seek an order barring the President from "enforcing or otherwise carrying out" the Proclamation, GSEP Compl. at 55, but they have not alleged that the President has any ongoing role in "enforcing or otherwise carrying out" the

Proclamation.[13] In fact, the Proclamation directs the Secretary to do so. *See* 82 Fed. Reg. at 58,094. Thus Plaintiffs fail to demonstrate that an injunction against the President would have any practical consequence for redressing any concrete and particularized injury they claim to be suffering.

Even if Plaintiffs alleged specific implementation steps to be taken by the President (and the Proclamation does not indicate there are any such steps), Plaintiffs would face an exceedingly high bar to show that there are circumstances making the "extraordinary measure" of an injunction against the President appropriate, particularly when injunctive relief against subordinate officials is available. *See Swan*, 100 F.3d at 978. *See also Franklin*, 505 U.S. at 802 (entry of injunction against the President "should have raised judicial eyebrows"); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties").[14] Plaintiffs have not requested a specific injunction prohibiting any specific act by the President, and Plaintiffs have not made any factual allegations that could justify consideration of such an injunction, even in the abstract.[15]

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[13] Similarly, the TWS Plaintiffs seek declaratory and injunctive relief invalidating the Proclamation—but all of their claims addressing the Proclamation are asserted solely against the President. *See* TWS Compl. ¶¶ 143-64.

[14] Even in the *Hawaii v. Trump* litigation, where the district court entered a sequence of injunctions precluding enforcement of executive orders on immigration, the Ninth Circuit held that entry of an injunction against the President personally was "not appropriate." *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (per curiam) (vacating preliminary injunction directed to the President), *vacated as moot*, 138 S. Ct. 377 (2017).

[15] The GSEP Plaintiffs also fail to show standing to seek mandatory relief against the President. Their request for an injunction "requiring President Trump to recognize that the 1996 Proclamation remains operative" would be improper against any federal official, no less the President. GSEP Compl. at 55. *See Swan*, 100 F.3d at 977 (courts "do not have authority under the mandamus statute to order any government official to perform a discretionary duty"). No provision of law would require the President to make an official statement if Plaintiffs were to prevail, and the GSEP Plaintiffs do not allege how their injuries would be redressed if he did.

II. Plaintiffs' Claims are not Ripe.

Plaintiffs' claims are also not ripe for adjudication. "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). In the absence of any site-specific decision implementing the Proclamation, Plaintiffs present an "abstract disagreement[] over administrative policies" that seeks "judicial interference [before] an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. The ripeness doctrine has both constitutional and prudential facets. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir. 2017). A court can find a case unripe under either facet. *See id.* Plaintiffs' claims are unripe under both.

The first facet (the "jurisdictional" or "constitutional" facet) "is subsumed into the Article III requirement of standing, which requires a petitioner to allege inter alia an injury-in-fact that is 'imminent' or 'certainly impending.'" *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013) (internal citation omitted)). Ultimately, this facet of "the ripeness requirement excludes cases not involving present injury." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999). As described above, given the speculative and contingent nature of the harm they allege, Plaintiffs have not demonstrated an injury that is imminent or certainly impending. Rather, their alleged injuries stem largely from future, discrete agency decisions, which can be challenged if and when they occur.

Plaintiffs likewise fail to articulate claims that are prudentially ripe. *See Ohio Forestry*, 523 U.S. at 732. The D.C. Circuit assesses prudential ripeness based on "'the fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship

to the parties.'" *Am. Petroleum Inst. v. EPA*, 683 F3d 382, 387 (D.C. Cir. 2012) (quoting *Abbott Labs*, 387 U.S. at 149). Among other factors, the fitness for review "depends on whether [the issue] is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Id.* (citations omitted). Here, Plaintiffs' claims are built upon injuries that cannot generally occur until the agency takes further actions to amend or replace the existing Monument Plan and *then* takes specific steps to authorize an action Plaintiffs have identified as the source of harm. And while the Proclamation modifies the management overlay for lands excluded from the Monument, it does not *itself* authorize the mineral development or vehicle use that Plaintiffs allege will cause them harm.[16]

Further, delayed review will result in no hardship to Plaintiffs. If the BLM later issues a site-specific decision authorizing a particular development or other use that will cause Plaintiffs' members a concrete and particularized injury, then Plaintiffs may challenge such decision at that time. *See Wyo. Outdoor Council*, 165 F.3d at 50–51 ("There is no 'hardship' here since [plaintiff] may pursue its NEPA claim based on the Forest Service's compliance as of the date of lease issuance . . . ."); *see also Ohio Forestry*, 523 U.S. at 734 (fact that it might be easier "to mount one legal challenge against the [Forest] Plan now, than to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead," did not constitute cognizable hardship).

Finally, even if the Court were to find all of the other claims justiciable, the TWS Plaintiffs' Fifth Count (alleging that the Agency Defendants will act unlawfully by failing to "manag[e] the public lands under the pre-1996, less protective multiple use regime" (TWS

[16] And, as noted above, the BLM is presently prohibited from undertaking any leasing or preleasing activity on the relevant lands. Roberson Decl. ¶ 15.

Compl. ¶ 170), and the GSEP Plaintiffs' Fifth Count (alleging that the Agency Defendants must "follow the procedures specified in FLPMA and NEPA if they wish to" modify the Monument Plan) (GSEP Compl. ¶ 147), are indisputably unripe. Both counts rely completely upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

The TWS Plaintiffs' challenge to Defendants' future management regime is necessarily premature: there has been no final agency action or decision regarding what that management regime will entail. *Cf. Tulare Cty v. Bush*, 185 F. Supp. 2d 18, 30 (D.D.C. 2001) ("The plaintiffs cannot demonstrate ripeness with respect to their claim that the current management of the Monument violates their rights because the Secretary of Agriculture has not yet implemented the final management plan called for in the Proclamation."), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002). And the GSEP Plaintiffs' claim is even more speculative. They seek an order requiring Defendants to comply with NEPA and FLPMA in any future planning process. Plaintiffs cannot seek a prophylactic order broadly instructing the agencies to comply with the law—especially when the Court must assume that they will do so. *See Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 164 (2010) ("Until such time as the agency decides whether and how to exercise its regulatory authority, . . . the courts have no cause to intervene."); *Swope v. Dept. of Justice*., No. 12-cv-1439 (RJL), 2012 WL 12874490, at *1 (D.D.C. Dec. 13, 2012) (noting that "agencies are accorded a good-faith presumption that they are following the law" and citing cases). Both claims are unripe.

III. Plaintiffs' *Ultra Vires* Claims Fail as a Matter of Law.

To the extent the Court determines it has Article III jurisdiction over Plaintiffs' *ultra vires* claims as to any defendant, it should dismiss those claims pursuant to Rule 12(b)(6).

Plaintiffs assert that the President lacked the authority to issue the Proclamation. To the contrary the President possesses broad power under the Antiquities Act to modify reservations of land for national monuments, and in particular, to ensure compliance with the statutory directive to confine the reservation to the "smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). The President expressly relied upon and exercised this authority, and further judicial review of the President's exercise of discretion in complying with the statutory requirements is foreclosed by Circuit precedent. *See Tulare*, 306 F.3d at 1141-42. The TWS Plaintiffs' Counts I and IV and the GSEP Plaintiffs' Counts I, II, III, and IV therefore should be dismissed.

A. Judicial Review of Presidential Action Under the Antiquities Act Is Extremely Limited.

Where the President acts pursuant to a delegation of authority from Congress, judicial review of presidential decisionmaking is extremely limited in scope. This longstanding rule originates in concerns about separation of powers and the potential involvement of the judiciary in "considerations which are beyond the reach of judicial power." *Dakota Cent. Tel. Co. v. S. Dakota*, 250 U.S. 163, 184 (1919); *see also Dalton*, 511 U.S. at 476 ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) ("For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains."). Thus, judicial review of presidential action is "not available when the statute in question commits the decision to the discretion of the President." *Dalton*, 511 U.S. at 474.

Judicial review of presidential action under the Antiquities Act follows these principles. It is available, at most, "to ensure that the Proclamations are consistent with constitutional

principles and that the President has not exceeded his statutory authority." *Mountain States*, 306 F.3d at 1136 (citing *United States v. California*, 436 U.S. 32, 35-36 (1978) and *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976)). *See also Tulare*, 306 F.3d at 1138 (rejecting claims that monument proclamation was *ultra vires* based on alleged failure "to include a certain level of detail," designation of nonqualifying objects, and failure to comply with the "smallest area compatible" requirement).

Here, these precedents limit judicial review to addressing only whether the President's decision to modify the Monument is authorized by the Antiquities Act. It is. The Antiquities Act authorizes the President to modify monument reservations to ensure that the area reserved is "confined to the smallest area" necessary to protect the identified resources, and that is exactly what Proclamation 9682 does. *See* 82 Fed. Reg. at 58,093 ("it is in the public interest to modify the boundary of the monument to exclude from its designation and reservation approximately 861,974 acres of land that I find are no longer necessary for the proper care and management of the objects to be protected within the monument"). As demonstrated below, the President's authority to take this action is confirmed by the text and legislative history of the Antiquities Act, a longstanding and extensive practice of modifying monument boundaries, and congressional acquiescence in the exercise of this authority over many decades.

B. The Text and Legislative History of the Antiquities Act Authorize the President to Modify Monument Boundaries.

Presidential authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)). On multiple occasions, the Supreme Court has confirmed that the Antiquities Act delegates "broad power" to the President to designate national monuments and reserve lands for

those monuments. *See Mountain States*, 306 F.3d at 1135 (citing *California*, 436 U.S. 32; *Cappaert*, 426 U.S. at 141-42; *Cameron v. United States*, 252 U.S. 450, 40 (1920)). By its terms, the statute grants the President substantial flexibility, expressly leaving the declaration of a monument to the President's "discretion." 54 U.S.C. § 320301(a). Similarly, the decision to reserve lands for a monument is entirely discretionary. *See id.* § 320301(b) ("The President *may* reserve parcels of land . . . ." (emphasis added)).

The Antiquities Act also provides an instruction to the President. If lands are reserved for a monument, "[t]he 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.* In contrast to the discretionary language used in the rest of the statute, Congress used strong and mandatory terms—"shall be confined"—to limit the area of lands reserved for a monument. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Dictionaries contemporaneous with the passage of the Antiquities Act confirm that "shall" indicated a firm obligation, defining the term as "[t]o be obliged; must." *See* Webster's Int'l Dictionary of the English Language 1322 (1907, W.T. Harris ed.), available at https://catalog.hathitrust.org/Record/100598138. Congress also chose the word "confine," which indicates an ongoing action or constraint. *See id.* at 300 (defining "confine" as "[t]o restrain within limits" and "to keep close"). Congress could not have been more plain that Presidents are to ensure that monument reservations are and remain "confined" to the smallest area the President deems to be consistent with protection of the monument objects. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary,

common meaning." (internal quotation marks and citation omitted)).

The importance of confinement is also confirmed by the Act's legislative history, where the limits on reservations were consistently emphasized. *See* H. R. Rep. No. 59-2224, at 1 (Antiquities Act intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times" (emphases added)); 40 Cong. Rec. 7888 (1906) (colloquy between Rep. John Stephens and Rep. John Lacey noting that "not very much" land will be withdrawn under the Antiquities Act because of the "smallest area necess[a]ry" provision). Indeed, Congress could have simply directed the President to "reserve" land in "*an* area compatible" with protection of monuments; its express instruction to "confine" the reservation to "*the*" area that is the "*smallest*" compatible with protection must be given significant weight.

It would be nonsensical to interpret this compulsory instruction from Congress to "confine" monument reservations as not encompassing the authority to modify monument reservation boundaries when the President finds that "the smallest area" compatible with protection is smaller than the area presently reserved. The President cannot fully comply with Congress' instruction to ensure that monument reservations remain "confined" to the smallest area without the power to revisit prior reservations. It is a well-settled principle that government entities have broad authority to reconsider decisions and correct errors. *See, e.g., Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide."); *Sierra Club v. Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (same). And Congress clearly understood that initial reservations of land might require revision, based on new understandings as to what the "smallest areas compatible" should comprise. *See* H.R. Rep. No. 59-2224, at 3 (noting some monument lands "should be temporarily withdrawn and allowed to

revert to the public domain after the ruins thereon have been examined by competent authority"); *see also id*. at 7-8 (stating that "the permanent withdrawal of lands" would be "unnecessary except where the ruins are of such character and extent as to warrant the creation of permanent national parks.").

Plaintiffs completely ignore the importance of the Act's confinement requirement; their complaints are premised on the notion that the President's authority to reserve land is, in effect, a one-way ratchet—that is, a President can reserve lands, but cannot later determine that some of those lands are not necessary for protection of the monument objects. Plaintiffs purport to find that restriction in the grant of authority to "declare" and "reserve." *See, e.g.*, TWS Compl. ¶ 69: GSEP Compl. ¶ 2. But courts must "follow the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (internal citation omitted). Here, the "smallest area" requirement shows that, where it wanted to impose significant limitations on the President's authority, Congress did so expressly—in clear, precise, and mandatory terms. Given this context, it would be inconsistent to find that Congress meant to imply a one-way-ratchet restriction of equal or greater significance through its use of the terms "declare" and "reserve." The term "declare" simply authorizes the President "to make known by language" his designation of a monument; it does not constrain his authority to modify the reservation to comply with the statutory command. *See* Webster's Int'l Dictionary (1907), at 377. And as discussed above, the President's authority to "reserve" lands is expressly constrained by the "shall be confined to the smallest area compatible" requirement.

It is not possible to reconcile Plaintiffs' cramped view of the President's authority under the statute with the general principle that reconsideration "is inherent in the power to decide."

See, e.g., Albertson, 182 F.2d at 399; *Antwerp*, 560 F. Supp. 2d at 23. A President is free to revoke prior Presidents' executive orders, and take other actions—including reversals of prior decisions—necessary to fulfill his constitutional duty to "take Care that the Laws be faithfully executed." *See* U.S. Const., art II, § 3; Vivian S Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 7 (2014) ("The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor."). So too here: a President is free to revise the boundaries of a predecessor's national monument designation to ensure compliance with the Antiquities Act's confinement requirement. Indeed, recognition of presidential modification authority here appropriately puts the Executive on equal footing with the Legislature, as the Supreme Court has recognized that "one legislature may not bind the legislative authority of its successors." *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citation omitted).

Put simply, a President cannot comply with the statutory instruction to ensure that the reserved lands are "confined to the smallest area" necessary to protect the objects if he can never remove lands from a monument reservation. The Antiquities Act grants the President this authority.

C. There Is a Longstanding and Extensive History of Presidential Modification of Monument Boundaries, and Congressional Acquiescence to this Practice.

While the text, purpose, and history of the reservation provision amply demonstrate that modification of monuments is within the scope of the President's delegated authority, that conclusion is cemented by decades of presidential practice in modifying monument designations and congressional acquiescence to that practice despite numerous opportunities to curtail it.

When the elected branches of government are in accord on the meaning of a statute, courts are properly reluctant to intervene. "[T]he longstanding 'practice of the government' can

inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 401 (1819), and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Thus, courts afford a presumption of congressional consent to presidential action that is "known to and acquiesced in by Congress" over an extended period of time. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Dames & Moore*, 453 U.S. 686 (same). *See also Medellin*, 552 U.S. at 524 ("Presidential authority can derive support from 'congressional inertia, indifference or quiescence.'" (quoting *Youngstown*, 343 U.S. at 637)); *Al-Bihani v. Obama*, 619 F.3d 1, 26 (D.C. Cir. 2010) (en banc) ("courts presume that Congress authorized the President, except to the extent otherwise prohibited by the Constitution or statutes, to take at least those actions that U.S. Presidents historically have taken . . .").

Here, the longstanding and extensive history of presidential modifications of monument boundaries, acquiesced in by Congress, corroborates the authority to make such modifications. First, as described above, Presidents have modified prior President's monument reservations—including by reducing them—since the statute's earliest days. Only five years after passage of the Antiquities Act, President Taft diminished the Petrified Forest National Monument based on his determination that it reserved "a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments." Proc. 1167, 37 Stat. 1716 (Jul. 31, 1911); *see also* Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912) (diminishing Navajo National Monument in Arizona because it reserved a larger tract of land than was necessary). And in numerous other instances, Presidents reduced monuments to comply with the statutory requirement that reservations be confined to the smallest area

necessary.[17] *See, e.g.*, Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960); Proc. 3539, 77 Stat. 1006 (May 27, 1963). This practice is entirely consistent with Congress' expectation, as evidenced by the statute's legislative history, that subsequent study of monument objects might necessitate a change to monument boundaries. *See supra* pp.3-4 (quoting Hewett report). Since enactment of the Antiquities Act, Presidents have eliminated lands from Monuments on at least eighteen occasions. *See supra* 7 n.4.

The Executive Branch's interpretation of the Antiquities Act as authorizing the President to modify a monuments to reduce the size of the associated reservation is also reflected in long-standing legal opinions. For example, a 1947 Interior Solicitor's Opinion concluded, relying on a 1935 Solicitor's Opinion, that the President is "authorized to reduce the area of a national monument" and that "[t]his authority has its source in the provision of the statute authorizing the establishment of national monuments, which states that their limits 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." National Monuments, 60 Interior Dec. 9, 10 (1947); *see also* Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Atty. Gen. 185, 188 (1938) (noting that "the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected'"). This enduring understanding of Presidential authority under the statute is entitled to substantial

[17] As noted above, Presidents exercised their authority to reduce monuments based on other reasons not specifically cited in the statute. *See supra* at p.5-7. Furthermore, the modification authority works both ways—Presidents have also determined that *additional* lands are required for the protection of the original objects identified in a proclamation, based on new information or circumstances. *See supra* at p. 6 n.3.

weight—particularly where, as President Taft's 1911 proclamation shows, it was the contemporaneous understanding near the time of the statute's passage. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (particular respect is due when practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new") (citation omitted); *Wash. Water Power Co. v. FERC*, 775 F.2d 305, 322–23 (D.C. Cir. 1985) ("The contemporaneous interpretation of the Department of the Interior is all the more to be deferred to in a case like this, where the statute and its interpretation by the Agency is almost eighty years old.").

In the face of this well-established presidential practice of modifying monument boundaries (including to remove lands from them), Congress has never revoked this authority, despite opportunities to do so. First, Congress's knowledge of presidential modification of monuments cannot reasonably be disputed. Congress has remained involved in the establishment and disestablishment of monuments, including several monuments that were modified by Presidents. For example, Congress created Olympic National Park, abolishing Mount Olympus National Monument, in 1938, but only after several Presidents had altered the Monument's boundaries. *See* Act of June 29, 1938, ch. 812 § 1, 52 Stat. 1241 (codified at 16 U.S.C. § 251); *see also* Act of Nov. 12, 1971, Pub. L. No. 92-155, 85 Stat. 422 (codified at 16 U.S.C. § 272) (abolishing Arches National Monument and creating Arches National Park); Act of Feb. 26, 1919, ch. 44, Pub. L. No. 65-277, §§ 1 & 9, 40 Stat. 1175, 1178 (codified at 16 U.S.C. § 221) (redesignating Grand Canyon National Monument as a national park).

Next, Congress has amended the Antiquities Act and separately, has expressly addressed Executive Branch withdrawal authority, but it never revoked the President's asserted authority to

modify monument boundaries. Specifically, Congress amended the Antiquities Act in 1950 to bar any "further extension or establishment of national parks or monuments in Wyoming" without express authorization of Congress. Act of Sept. 14, 1950, Pub. L. No. 81-787, § 1, 64 Stat. 849. And Congress declined another opportunity to modify presidential authority in the 1970s, when it conducted a comprehensive review and revision of federal public lands policy. That review focused particularly on land-withdrawal authority, and culminated in the 1976 enactment of FLPMA.

FLPMA declared it to be national policy that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4). But, despite this stated focus, FLPMA did not alter presidential authority under the Antiquities Act. In contrast, Congress *did* limit the Secretary of the Interior's authority, stating that the "Secretary of the Interior shall not . . . modify or revoke any withdrawal creating national monuments" under the Antiquities Act. *See* 43 U.S.C. § 1714(j). Under these circumstances, Congress' decision not to address Presidential modification authority is compelling evidence of congressional acquiescence to the exercise of this authority. *See Dames & Moore*, 453 U.S. at 686. This "longstanding 'practice of the government'" therefore decidedly corroborates the President's authority under the Act to modify monument boundaries, including by excluding lands from existing monument reservations. *See Noel Canning*, 134 S. Ct. at 2560.

D. Plaintiffs Cannot Rebut the Presumption of Congressional Consent.

Plaintiffs assert that Congress generally abrogated presidential authority to modify monument designations in FLPMA, and specifically abrogated that authority as it relates to the Monument in several enactments post-dating President Clinton's designation thereof. *See, e.g.*,

TWS Compl. ¶ 151; GSEP Compl. ¶¶ 125-129. These arguments find no basis in the very enactments cited by Plaintiffs.

As noted above, contrary to Plaintiffs' assertion, FLPMA did not curtail presidential authority under the Antiquities Act. In fact, the Antiquities Act's delegation of authority to the President was one of the delegations that Congress did *not* repeal, a choice that is presumed to be intentional, because Congress did clarify that the Secretary lacked authority to modify monument boundaries. *Cf. Gross v. FBL Fin. Servs.,* 557 U.S. 167, 174-75 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Thus, Congress' decision to leave the Antiquities Act delegation in place when it enacted FLPMA *strengthens* the presumption of congressional consent to presidential modification authority.

Next, Plaintiffs cite the Utah Schools and Land Exchange Act ("Land Exchange Act"), Pub. L. No. 105-335, § 3, 112 Stat. 3139 (1998), the Automobile National Heritage Area Act ("Heritage Area Act"), Pub. L. No. 105-355, 112 Stat. 3247, 3252-53 (1998), and the Omnibus Public Land Management Act of 2009 ("OPLMA"), 16 U.S.C. § 7202, and assert that these acts "affirm[Congress's] sole jurisdiction to regulate the Monument." TWS Compl. ¶ 151; *see also* GSEP Compl. ¶ 126. Plaintiffs contend that the Proclamation also independently violates these statutes. *See* TWS Count V; GSEP Counts II, III, V. These allegations fail as a matter of law.

As an initial matter, Plaintiffs provide no authority for their novel theory that these statutes have asserted Congress' sole "jurisdiction" or "prerogative" over the Monument (thereby eliminating the President's modification authority). And nothing in the statutes themselves supports Plaintiffs' theory either.

For instance, the Land Exchange Act addresses a narrow issue—the ownership of "school

lands" inholdings within federal lands in Utah, including those within the original Monument boundaries. As background, when Utah became a state, it was granted alternating sections of public domain lands to support its schools, ensuring that it would receive a broad sample of any valuable mineral, agricultural, timber, or commercial lands in the state. H. R. Rep. No. 105-598 at 1 (1998); *see also* S. Rep. 105-331 (1998). But before most of these lands could be developed or sold, the federal government shifted to a policy of retention of federal public lands; thus, many State school lands became isolated tracts surrounded by undeveloped federal land. H.R. Rep. No. 105-598, at 1. The Land Exchange Act allowed Utah to trade these inholdings—200,000 acres of land and 76,000 acres of mineral interests within the boundaries of national parks and forests in Utah, as well as 176,000 acres of land and 24,000 acres of mineral interests within the boundaries of the Monument—for federal lands and interests elsewhere in the State. *Id.*at 1-2. And in doing so, the Act ratified a land-exchange agreement between Utah and the Department of the Interior that was reached as part of a process begun *before* the Monument was established. *See* Pub. L. No. 105-335, §§ 3, 7, 112 Stat. 3139 (1998).[18] The Land Exchange Act, therefore, cannot reasonably be interpreted as intending to establish permanent Monument boundaries.

Nor can it be interpreted as partially repealing by implication the Antiquities Act. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974) ("repeals by implication are not favored" (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936))). The Land Exchange Act does not mention the Antiquities Act, or the President's authority under that Act, much less indicate that Congress intended to reduce or eliminate any authority as to the Monument. And when

[18] The Land Exchange Act was intended to fully implement a process started with a 1993 statute—well prior to the establishment of the Monument—to facilitate the exchange of state inholdings. H.R. Rep. No. 105-598, at 2. (noting that the land "exchanges anticipated in Public Law 103-93 were never consummated and the funds never expended" but the Land Exchange Act "will finally enact that process.")

Congress has intended to rescind Antiquities Act authority, it has done so expressly. *See* 64 Stat. 849 (removing authority to designate national monuments in Wyoming).

Similarly, the Heritage Area Act cannot be interpreted as altering the President's authority to issue the Proclamation. That Act excluded and included certain lands from the Monument, and Plaintiffs have not alleged that the Proclamation contravenes these provisions. *See* 112 Stat. at 3252-53. And like the Land Exchange Act, the Heritage Area Act does not address or indicate any intent to alter the President's authority under the Antiquities Act to make other boundary adjustments to the Monument. *See id.*

Finally, Plaintiffs also cite the OPLMA, which "established in the Bureau of Land Management the National Landscape Conservation System." 16 U.S.C. § 7202(a); TWS Compl. ¶¶ 86-87. Plaintiffs assert that by including areas designated as national monuments within that system, "Congress thereby expressly ratified the . . . Monument as defined in the 1996 Proclamation." TWS Compl. ¶ 87. The statute simply does not bear this reading. The OPLMA establishes a National Landscape Conservation System, consisting of many types of BLM lands, including national monuments, wilderness areas, wilderness study areas, forest reserves, and national conservation areas. But the statute does not establish new management requirements for these lands; rather, the Secretary is directed to manage these lands in "accordance with any applicable law (including regulations) relating to any component of the system" and "in a manner that protects the values for which the components of the system were designated." 16 U.S.C. § 7202(c). Furthermore, nothing in the statute remotely addresses boundary adjustment authority. To the contrary, Congress specifically disclaimed that it intended to modify any other statutory authority by providing, "[n]othing in this chapter enhances, diminishes or modifies any law or proclamation . . . under which the components of the system described in subsection (b)

were established or are managed . . . ." *Id.* § 7202(d)(1).

Thus, these statutes do not repeal or otherwise affect the President's authority to modify national monuments, and Plaintiffs' claims should be dismissed.

E. The President Acted Within the Scope of His Authority in Issuing the Proclamation.

In each of their Fourth Counts, both Plaintiffs allege that, even assuming presidential authority to modify monument boundaries, the President's modification in the Proclamation is without factual or legal basis. TWS Compl. ¶ 164; GSEP Compl. ¶ 138. These claims fail.

As discussed above, judicial review of presidential action under the Antiquities Act is extremely limited, and allows at most a determination of whether the President, on the face of the Proclamation, exercised his authority in accordance with that Act's standard. *See Tulare*, 306 F.3d at 1141 (addressing whether challenged proclamation "adverts to the statutory standard"); *Mountain States*, 306 F.3d at 1137 (noting that proclamation "recites grounds for the designation that comport with the Act's policies and requirements"); *UAC*, 316 F. Supp. 2d at 1183 (judicial review "is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act"). Indeed, the separation of powers concerns inherent in review of discretionary presidential action may "bar review for abuse of discretion altogether." *Mountain States*, 306 F.3d at 1135; *see also UAC*, 316 F. Supp. 2d at 1183 ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion." (citing *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940))). Plaintiffs' Fourth Counts contravene this precedent, and effectively ask this Court to determine whether the President's Proclamation is "arbitrary and capricious." *See, e.g.*, TWS Compl. ¶ 164 (alleging Proclamation "is based on considerations wholly outside the Antiquities Act and lacks legal or factual justification."); GSEP Compl. ¶ 137 (alleging

"Proclamation fails to articulate the clear, legal basis for undoing the 1996 Proclamation…"). But review under this standard is unavailable for Presidential actions, which are "not reviewable for abuse of discretion under the APA." *Franklin*, 505 U.S. at 801.

Reviewing the face of the Proclamation, it plainly comports with the Antiquities Act and is a proper exercise of the President's authority to modify a monument reservation to the smallest area compatible with the protection of the objects. First, the Proclamation notes that "[i]n the 20 years since the designation [of the Monument], the BLM and academic researchers have studied the monument to better understand the geology, paleontology, archeology, history, and biology of the area." 82 Fed. Reg. at 58,089. It notes expressly that "the Antiquities Act requires that any reservation of land as part of a monument be confined to the smallest area compatible with the proper care and management of the objects of historic or scientific interest to be protected." *Id.* The Proclamation then continues: "Determining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws." *Id.*

The Proclamation then proceeds to evaluate these factors, particularly considering that the "nearly 2 decades of intense study of the monument has provided a better understanding of the areas with the highest concentrations of fossil resources and the best opportunities to discover previously unknown species." *Id.* "The modified monument boundaries take into account this new information" and "retain the majority of the high-potential areas for locating new fossil resources that have been identified within the area reserved" by the 1996 Proclamation. *Id.* The Proclamation also concludes that the boundaries of the monument may be modified to exclude certain features, such as the Waterpocket Fold, "without imperiling the proper care and management of that formation." *Id.*

The Proclamation concludes that certain archaeological and historic objects identified within the original monument are not of unique or distinctive significance and that, in light of this, the original boundaries of the monument do not reflect "the smallest area compatible with the proper care of these objects . . . ." *Id.* at 58,089-90. The President concludes:

> Especially in light of the research conducted since designation, I find that the current boundaries of the . . . Monument established by Proclamation 6920 are greater than the smallest area compatible with the protection of the objects for which the lands were reserved and, therefore, that the boundaries of the monument should be reduced to three areas: Grand Staircase, Kaiparowits, and Escalante Canyons. These revisions will ensure that the monument is no larger than necessary for the proper care and management of the objects."

Id. at 58,091.

The Proclamation fully satisfies the applicable standard. It repeatedly "adverts to the statutory standard" for designating monument objects and reserving monument lands, *Tulare* 306 F.3d at 1141, and it "recites grounds for" the modification of the boundary that "comport with the Act's policies and requirements," *Mountain States*, 306 F.3d at 1137. This "compel[s] a finding in favor of the President's action [which is] essentially the end of the legal analysis." *UAC*, 316 F. Supp. 2d at 1183. Because no further inquiry is appropriate, TWS Count IV and GSEP Count IV should be dismissed for lack of jurisdiction and for failure to state a claim.

IV. Plaintiffs' Allegations that the Proclamation Violated the Constitution Fail to State a Claim.

Plaintiffs repackage their *ultra vires* claims as a variety of constitutional claims, invoking separation of powers principles. TWS Count II (Article II & Property Clause); TWS Count III (Take Care Clause); GSEP Counts I & III (Property Clause).

These claims fail outright. As established above, Congress has delegated authority to modify monument boundaries to the President in the Antiquities Act, and the President's exercise of this authority therefore cannot violate any constitutional principle. Furthermore,

Plaintiffs' attempts to restate their *ultra vires* arguments as constitutional claims violate the Supreme Court's admonition that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review . . . ." *Dalton*, 511 U.S. at 473-74.

Although these claims can be readily disposed of on these grounds, they fail for additional reasons. Plaintiffs' separation of powers claims assert that the President improperly exercised legislative authority by reducing the boundaries of the Monument. But, where a statute authorizes Executive branch action and "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," there is no constitutional concern. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citation omitted). The "intelligible principle" standard is clearly met here, where Congress has instructed the President to confine monument reservations to the "smallest area compatible" with protection of the objects. *See Mountain States*, 306 F.3d at 1136-37 (Antiquities Act "includes intelligible principles to guide the President's actions"); *Tulare*, 306 F.3d at 1143 (same). And because Congress has properly delegated its authority under the Property Clause to the President in the Antiquities Act, and the President has exercised this authority in issuing the Proclamation, there is no separation of powers concern or violation of the Property Clause here. *See Mountain States*, 306 F.3d at 1136-37 (rejecting Property Clause claim); *UAC*, 316 F. Supp. 2d at 1184 (same).

There is likewise no violation of the "Take Care" clause. The Take Care Clause, U.S. Const. art. II, § 3, states that the President "shall take Care that the Laws be faithfully executed." "This Clause entrusts the power to enforce the laws of the United States in the hands of the Executive Branch." *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d

19, 25 (D.D.C. 2001). As an initial matter, Plaintiffs have not established a right of action to enforce the Take Care Clause against the President. The Supreme Court has recognized that this Clause is not an appropriate subject for judicial intervention, because of significant separation of powers concerns. *See Mississippi*, 71 U.S. (4 Wall.) at 499 (an attempt by the judiciary to enforce President's duty to see that the laws be faithfully executed would be "an absurd and excessive extravagance"). Moreover, the President is acting in accord with the Antiquities Act's instruction to confine monument reservations to the smallest area compatible with the protection of the objects. As shown above there is no conflict with the other statutes that Plaintiffs contend are not being enforced. *See* Part III.D, *supra*. *Compare* TWS Compl. ¶ 158. Simply put, there is no plausible violation of the Take Care clause.

Finally, Plaintiffs' allegations of constitutional violations would also fail *even if* the Court were to hold that the Proclamation somehow exceeded the delegation of authority in the Antiquities Act. The Proclamation makes clear that it was issued pursuant to the authority in the Antiquities Act and that authority only. *See* 82 Fed. Reg. at 58,089. Thus, if Plaintiffs were to demonstrate that the Proclamation was not authorized by the Antiquities Act, it would be unnecessary for the Court to review Plaintiffs' constitutional claims. No authority has been asserted by the President to support the Proclamation in the event the Antiquities Act is held not to authorize it.

But, of course, as demonstrated above, the Antiquities Act *does* authorize the Proclamation. In short, Plaintiffs' *ultra vires* claims fail, and Plaintiffs' constitutional claims fail with them. The Court should accordingly dismiss those counts of Plaintiffs' complaints alleging that the Proclamation violated the Property Clause, Take Care Clause, or constitutional separation of powers (TWS Counts II, III; GSEP Counts I, III).

V. Plaintiffs' APA Counts Fail to State a Claim.

Under the APA, a court may set aside final agency action found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2), and a court may compel a final agency action that has been unlawfully withheld or unreasonably delayed, *id*. § 706(1). Plaintiffs assert claims under both facets of the APA, alleging that the Agency Defendants will act unlawfully by implementing the Proclamation or by failing to implement the 1996 Proclamation. As demonstrated above, Plaintiffs do not have standing to bring these unripe claims. Furthermore, Plaintiffs fail to state a claim on these APA counts because they are premised on Plaintiffs' allegations that the Proclamation is *ultra vires* or otherwise unlawful, and, as shown above, those allegations fail as a matter of law. But even absent these defects, Plaintiffs' APA counts fail to state a claim and should be dismissed.

A. Plaintiffs Fail to State a Claim under 5 U.S.C. § 706(2).

Plaintiffs' claims to set aside agency action under § 706(2) fail because Plaintiffs have not alleged any final agency action by the Agency Defendants that is reviewable under the APA, 5 U.S.C. § 704. Under the two-part test in *Bennett v. Spear*, 520 U.S. 154 (1997), an agency action is final if it "mark[s] the consummation of the agency's decision-making process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal marks and citations omitted). A cause of action exists under the APA only "when and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Nat'l Wildlife Fed'n*, 497 U.S. at 894.

Plaintiffs have not alleged a "specific" final agency action by the Agency Defendants. *Id*. Plaintiffs' general allegations about a change in the BLM's policy do not describe a discrete agency action that "marked the consummation" of a BLM decision-making process or "determined" rights or obligations, *Bennett*, 520 U.S. at 177-178. For example, the TWS

Plaintiffs generally allege that "Defendants have decided not to carry out their duties under the 1996 Proclamation," TWS Compl. ¶ 138, and "will promptly revert to their pre-designation land management approach" under a multiple-use regime. *Id.* ¶¶ 101, 102. But it is well established that "an on-going program or policy is not, in itself, a final agency action," *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (quotation marks omitted), and alleged "[g]eneral deficiencies in compliance" with resource-protection obligations "lack the specificity" to support review under the APA. *SUWA*, 542 U.S. at 66. The APA does not provide a vehicle for "a broad programmatic attack" on agency management decisions. *Id*. at 64.

Nor can TWS Plaintiffs cure this defect with "information and belief" allegations about broad categories of agency actions that may occur in the future. *See, e.g.*, TWS Compl. ¶¶ 120 (new coal leases); 124 (oil and gas leases); 135 (road designations). Allegations about agency actions that could occur in the future do not demonstrate that final agency action has occurred under the APA. *See, e.g.*, *Friends of Animals v. Ashe*, 174 F. Supp. 3d 20, 37 (D.D.C. 2016) (dismissing challenge to Fish and Wildlife Service's policy for granting import permits as allegations about future permits did not identify final agency action); *Nat'l Wildlife Fed'n. v. EPA*, 945 F. Supp. 2d 39, 45 (D.D.C. 2013) ("[The] fact that an agency will apply a regulation if certain events take place in the future does not satisfy the final agency action requirement[.]").

Similarly, the GSEP Plaintiffs fail to identify any final agency action that they are challenging. In fact, the only action by the Secretary that the GSEP Plaintiffs identify is the Proclamation itself, *see, e.g.*, GSEP Compl. ¶ 145 ("[b]y shrinking Grand Staircase's boundaries, . . . Defendant Zinke attempt[s] to change by fiat the management regime…"). But the Proclamation is presidential action, not "agency action" that may be challenged under the APA. *See Dalton*, 511 U.S. at 469; *Franklin*, 505 U.S. at 801.

B. Plaintiffs also Fail to State a Claim for an Order Compelling Agency Action under 5 U.S.C. § 706(1).

Alternatively, Plaintiffs' APA counts seek an order under 5 U.S.C. § 706(1) compelling the Agency Defendants to implement the terms of the 1996 Proclamation. Under *SUWA,* the type of "failure to act" that is remediable under § 706(1) is "limited . . . to a discrete action," such as "the failure to promulgate a rule or take some decision by a statutory deadline." 542 U.S. at 63. The action must also be "legally required," just as the historical remedy of mandamus "was normally limited to enforcement of a specific, unequivocal command." *Id.* (internal quotation marks and citation omitted). *See also Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016). Plaintiffs fail to show either of these elements.

Plaintiffs' request for an order compelling the Secretary to comply with the general protective mandates in the 1996 Proclamation identifies no discrete action. *See* TWS Compl. ¶¶ 167, 170 & prayer for relief; GSEP Compl. ¶¶ 142, 147 & prayer for relief.[19] In *SUWA*, the Court held that general "compliance" with protective mandates (in that case, from a statute) is not a discrete agency action a court can compel. 542 U.S. at 66.[20] *See also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 891 (D.C. Cir. 2014) (provision containing "only a general follow-the-law directive . . . flunks *SUWA*'s discreteness test"); *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 27 (D.D.C. 2017) (finding regulation "far too general and amorphous to be the kind of agency action that can be enforced by a claim under § 706(1) of the APA").

[19] Plaintiffs do not support this claim with factual allegations. As detailed in Part V.A, the Complaints contain only general information-and-belief allegations about possible future actions by the Secretary. *See, e.g.*, TWS Compl. ¶¶ 101, 102; GSEP Compl. ¶¶ 144-147.

[20] The same is true to the extent the TWS Plaintiffs are alleging that the Secretary is acting unlawfully under the Omnibus Public Land Management Act. *See* TWS Compl. ¶ 168. They allege no discrete duty under that statute that the Secretary and Deputy Director are violating.

Plaintiffs' claims also fail the "legally required" element of *SUWA*. To the extent there are any inconsistencies with the 1996 Proclamation, Proclamation 9682 now controls. Plaintiffs cite no law that specifically and unequivocally commands the BLM to act contrary to the provisions of Proclamation 9682. Further, it is well settled that no general private cause of action exists to enforce obligations imposed on executive branch officials by executive orders. Such a cause of action exists only when the order's terms and purpose evidence the intent to create a private right of action. *See UAC*, 316 F. Supp. 2d at 1200. The 1996 Proclamation evidences no such intent. *See* 61 Fed. Reg. 50,223.[21]

CONCLUSION

Plaintiffs' Complaints should be dismissed for lack of Article III jurisdiction. To the extent the Court concludes it has Article III jurisdiction, all counts should be dismissed for failure to state a claim. To the extent the Court concludes the complaints state a claim, the President should be dismissed as a defendant to the claim(s) based on lack of jurisdiction.

Respectfully submitted this 1st day of October, 2018,

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[21] To the extent Plaintiffs could be construed as requesting an order to enforce the Monument Plan, that request suffers from the same defects as their request to enforce compliance with the prior Proclamation. *See* GSEP Compl. ¶ 147. A plan's statement that the agency "will" take action is not "a binding commitment that can be compelled under § 706(1) . . . [a]bsent clear indication of a binding commitment in the terms of the plan." *Norton*, 542 U.S. at 68.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1st, 2018, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Romney S. Philpott