IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**
AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendants-Intervenors.	

REPLY IN SUPPORT OF TWS PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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To eliminate unnecessary repetition, TWS Plaintiffs in this matter (concerning Grand Staircase-Escalante National Monument) and NRDC Plaintiffs in the related *Hopi Tribe v. Trump* matter (concerning Bears Ears National Monument) have set forth their merits arguments only once, in this brief. This brief therefore cites to filings in both sets of cases. For clarity, Plaintiffs use the following naming conventions.

Filings in *The Wilderness Society v. Trump*, No. 17-cv-02587

TWS Pls.' Am. Compl.	TWS Plaintiffs' Amended and Supplemented Complaint for Injunctive and Declaratory Relief, ECF No. 119 (Nov. 7, 2019)
TWS Pls.' Br.	Memorandum in Support of TWS Plaintiffs' Motion for Partial Summary Judgment, ECF No. 132-1 (Jan. 9, 2020)
TWS Pls.' SUF	TWS Plaintiffs' Statement of Undisputed Facts, ECF No. 132-2 (Jan. 9, 2020)
Pls.' JA	Plaintiffs' Joint Appendix, ECF No. 131-1 (Jan. 9, 2020)
Defs.' GSE Br.	Federal Defendants' Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Motions for Partial Summary Judgment, ECF No. 136-1 (Feb. 19, 2020)
Defs.' Resp. to TWS Pls.' SUF	Federal Defendants' Responses to TWS Plaintiffs' Statement of Undisputed Facts and Federal Defendants' Further Statement of Material Facts, ECF No. 136-4 (Feb. 19, 2020)
Intervenors' GSE Br.	Defendants-Intervenors' Joint Memorandum in Support of Federal Defendants' Cross-Motion for Partial Summary Judgment, ECF No. 138 (Mar. 5, 2020)
TWS Pls.' Reply SUF	TWS Plaintiffs' Response and Reply Statement of Material Facts and Statement Pursuant to Local Civil Rule 7(h)(1) (Apr. 10, 2020)

Filings in *Hopi Tribe v. Trump*, No. 17-cv-2590

NRDC Pls.' Am. Compl.	NRDC Plaintiffs' Amended and Supplemented Complaint for Injunctive and Declaratory Relief, ECF No. 149-1 (Nov. 8, 2019)
NRDC Pls.' Br.	Memorandum in Support of NRDC Plaintiffs' Motion for Partial Summary Judgment, ECF No. 165-1 (Jan. 9, 2020)
NRDC Pls.' SUF	NRDC Plaintiffs' Statement of Undisputed Facts, ECF No. 165-2 (Jan. 9, 2020)
Defs.' BE Br.	Federal Defendants' Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Motions for Partial Summary Judgment, ECF No. 169-1 (Feb. 19, 2020)
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INTRODUCTION

The parties' cross-motions for partial summary judgment have reduced the issues before this Court to a single, narrow question of statutory interpretation: Did the Antiquities Act authorize the President to dismantle an existing national monument—Grand Staircase-Escalante National Monument—leaving countless objects of historic and scientific interest stranded outside its dramatically reduced boundaries? The answer is no. The Act delegates to the President the power to declare national monuments and reserve parcels of land as a part thereof, but it does not confer the power to revoke monument protections.

Defendants stake their entire defense of President Trump's proclamation on the Antiquities Act's "smallest area" clause. But the "smallest area" clause *limits* the President's authority, when establishing a national monument, to "reserve" public lands "as part of" that monument. It is not a freestanding grant of authority to perpetually revisit and unilaterally remove lands from existing national monuments years after they were created. Defendants' contrary reading improperly adds words to the Act and defies Congress's demonstrated practice, in contemporaneous public-land statutes, of granting the Executive Branch authority to "modify" or "revoke" land reservations clearly and expressly, if at all.

Congress withheld such authority in the Antiquities Act so that *it* could retain control over when, if ever, to remove protections from irreplaceable national monuments like Grand Staircase. Under Defendants' reading, however, the boundaries of all national monuments could contract and expand with each change in presidential administration—a result that is antithetical to the Act's protective purpose and fifty-five years of unbroken practice. Indeed, as Defendants admit, among the nearly 900,000 acres of land that President Trump removed from Grand Staircase were roughly 80,000 acres that *Congress itself* previously added to the Monument by

statute. There is no support in the Antiquities Act for the assertion of such destructive power. The power to revoke a monument reservation, in whole or in part, belongs to Congress alone.

Because the President thus had no authority to dismantle Grand Staircase, because Defendants concede that TWS Plaintiffs have standing, and because the parties have identified no genuine issues of material fact, the Court should grant summary judgment to TWS Plaintiffs on their First, Second, and Third Claims for Relief.

ARGUMENT

I. The Undisputed Facts Establish Plaintiffs' Standing, and Defendants Do Not Argue Otherwise.

Defendants do not contest Plaintiffs' standing to sue. *See* Defs.' GSE Br. at 12 n.5 (ECF No. 136-1). As demonstrated by undisputed facts set forth in Plaintiffs' member declarations and other evidence, Plaintiffs have associational standing based on ongoing and future harms to their members' interests from hardrock mining activity. *See* TWS Pls.' Br. at 10-22 (ECF No. 132-1).

The Trump Proclamation "open[ed]" previously protected Monument lands to location and entry under the General Mining Law. Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017); *see also* Defs.' Resp. to TWS Pls.' SUF ¶ 37 (ECF No. 136-4). Between February 2018 (when the Trump Proclamation took effect) and November 2019, Defendants concede that "20 [new hardrock] mining claims location notices were recorded" on lands excluded from the Monument. Defs.' Resp. to TWS Pls.' SUF ¶ 49 (ECF No. 132-2). Those claims include the "Creamsicle" mine site, *id.* ¶ 50, where Defendants admit surface-disturbing activity has already begun, leaving "gouges in the exposed faces of pale pink and orange cliffs" and "visible vehicle tracks leading to the mine site," TWS Pls.' SUF ¶ 51. They also include "Berry Patch 4" near the picturesque Grosvenor Arch, *id.* ¶ 56, where Defendants admit the claimant has submitted plans to open a "'pit quarry … on top of the hill'" and to extract "'50-100

ton[s]'" of alabaster per year using a "'backhoe or trackhoe'" and potentially "'explosives,'" *id*. ¶ 57 (citations omitted).

It is undisputed that Plaintiffs have members who enjoy visiting areas near these new mining claims, including Creamsicle and Berry Patch 4, for quiet recreation, study, and aesthetic appreciation. Their enjoyment of these areas will be diminished or ruined by the sights and sounds of notice- or plan-level mining activity—which Defendants do not dispute can include scars on the landscape, waste piles, dust, light pollution, noise, and truck traffic traveling to and from the mine sites. *See* Defs.' Resp. to TWS Pls.' SUF ¶¶ 45-47.[1] For example, it is undisputed that notice-level activity at Creamsicle is visible at least from parts of the Cottonwood Canyon Road, which Steve Allen (a member of plaintiff Great Old Broads for Wilderness) uses to access hiking trailheads and to which he plans to return in 2020. *Id*. ¶ 55.[2] Similarly, Defendants raise no genuine dispute that the proposed mining activity at Berry Patch 4 will likely be visible from Grosvenor Arch, which Ray Bloxham (a member of The Wilderness Society, Southern Utah

[1] Defendants object to using the general phrases "mining activity" or "mining operations" to describe notice-level activity (such as that occurring at Creamsicle), *see, e.g.*, Defs.' Resp. to TWS Pls.' SUF ¶¶ 50, 52, 55, but that semantic disagreement is immaterial. *See* TWS Pls.' Reply SUF ¶¶ 42, 50. There is no dispute that "[n]otice-level activities may include road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment" and the removal of "up to one thousand tons of presumed ore," with only fifteen days' notice to the Bureau of Land Management (BLM). *Id.* ¶¶ 42, 43. Nor do Defendants dispute that noticed activities at Creamsicle include excavation with a "Cat[erpillar] excavator" to remove "up to 125 tons of material per year." *Id.* ¶ 50.

[2] This concession renders immaterial Defendants' asserted disputes about whether the activities at Creamsicle are visible from *other* viewpoints. *See* TWS Pls.' Reply SUF ¶¶ 52-54; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986) (Rule 56 "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original).

Wilderness Alliance, and Natural Resources Defense Council) and Laura Welp (a member of Western Watersheds Project) both intend to visit in 2020. *Id.* ¶ 58.

Plaintiffs have demonstrated other imminent harms as well, *see* TWS Pls.' Br. at 18, but the undisputed facts above suffice to establish their standing—and Defendants do not argue otherwise. *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (once a court finds standing for one party, it "need not consider the standing of the other" parties to decide the claim in question). The Trump Proclamation harms Plaintiffs' members' ability to "view and enjoy" the landscape in its natural, undeveloped state, and to "observe it for purposes of studying and appreciating its history." *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014); *see also In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016). Plaintiffs have standing to sue.

II. The Antiquities Act Does Not Authorize the President to Dismantle National Monuments.

Defendants urge the Court to find a broad, freestanding power to dismantle national monuments hidden within the Antiquities Act's "smallest area" clause, but neither the text of the statute nor any canon of statutory interpretation supports Defendants' reading. Unlike other contemporaneous public land statutes delegating withdrawal and reservation powers to the Executive Branch—which granted modification and revocation authority expressly, if at all—the Antiquities Act confers only the power to create national monuments, not the power to destroy them. Defendants' argument is incompatible with the Act's legislative history and protective purpose, and it conflicts with Congress's own enactments adding lands to Grand Staircase. None of Defendants' other extra-textual arguments—a hodgepodge of supposed presumptions, inapt analogies, and a selective retelling of the Executive Branch's contradictory post-enactment practices—warrant departing from the statute's straightforward text.

A. The Act's text confers the power to create monuments, not to destroy them.

1. The "smallest area" clause limits the President's reservation authority; it does not confer a separate, ongoing power to dismantle monuments.

By its terms, the Antiquities Act authorizes the President to take two actions: *first*, to "declare" national monuments, and *second*, to "reserve parcels of land as a part" thereof. 54 U.S.C. § 320301(a), (b). The Act thereby delegates a discrete aspect of Congress's Property Clause power to the President for the purpose of creating national monuments and conferring protections on public lands. It does not grant the opposite power to *revoke* those protections.

Defendants contend that President Trump "did not invoke an 'opposite' power," Defs.' GSE Br. at 19, but that is precisely what they are arguing for: the power to revoke monument status from parcels of land, and thus to *un*-reserve them. Defendants try to locate that power in the Act's "smallest area" clause, which provides that, when the President exercises his discretion in the first instance to create a monument and to reserve land as part of that monument, the reservation "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). Like other mandatory limitations on the Act's grant of discretionary authority, however, the "smallest area" clause cabins the exercise of delegated power to confer monument status on and "reserve" parcels of land. *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (explaining that the Act supplies "intelligible principles to guide the President's actions," such as the requirement that monuments be designated to protect objects of historic or scientific interest). It is not a freestanding grant of an entirely different and opposite power to revoke monument status from—and effectively un-reserve—parcels of land.

The clause's placement in the Act is telling. As originally enacted, the "smallest area" clause is a dependent clause, attached to and qualifying the grant of authority to "reserve" parcels of land "as a part" of a national monument:

> [T]he President of the United States is hereby authorized, 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, *and 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 ….

Pub. L. No. 59-209, ch. 3060, § 2, 34 Stat. 225 (1906) (emphasis added). This statutory language remained substantively unchanged when Congress re-codified the Act in 2014:

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

54 U.S.C. § 320301 (emphasis added). Structurally, in both the Public Law and its present-day codification, the "smallest area" clause does nothing but qualify the affirmative grant of

reservation power.[3] It therefore applies when—and only when—the President exercises that authority to "reserve" land "as a part of" a national monument.[4]

Defendants erroneously try to transform the "smallest area" clause into something else, separate from the reservation power it cabins, by seizing on the phrase "shall be confined." *See* Defs.' GSE Br. at 15-17. Defendants misconstrue the phrase's significance. First, their emphasis on the word "shall" is misplaced because Plaintiffs agree that the "smallest area" clause is mandatory: It is a mandatory *limitation* on a discretionary power. Or, as Defendants put it, "[t]he President's authority to 'reserve' lands is expressly constrained by the 'shall be confined to the smallest area compatible' requirement." *Id*. at 19.

Second, Defendants wrongly contend that Congress "chose the word 'confine'" to "indicate[] an ongoing action or constraint," and thus one that continues perpetually after a monument has been established. *Id.* at 16 (citation omitted). The dictionary on which Defendants rely does not establish that "confining" must be an ongoing activity. Rather, it defines the verb "confine" as follows: "To restrain within limits; to restrict; to limit; to bound; to shut up; to [e]nclose; to keep close." Webster's Int'l Dictionary of the English Language 300 (W.T. Harris

[3] Defendants suggest that the original placement of the "confinement obligation … in the same *sentence* as the declaration and reservation provision" supports their view that the clause confers a freestanding grant of power, Defs.' GSE Br. at 22, but it is unclear how. The Act's original one-sentence formulation only highlights the dependent nature of the "shall be confined" clause. And, as Defendants concede, Defs.' BE Br. at 36 n.23, the minor changes in Congress's 2014 re-codification were expressly non-substantive. *See* TWS Pls.' Br. at 28 n.10.

[4] Further, and contrary to Defendants' suggestion, *see* Defs.' GSE Br. at 6-7 n.3, presidents' authority to expand monuments is a straightforward exercise of this statutory power. A president may effectively expand a monument by "declar[ing]" and "reserv[ing] … as a part of the national monument[]" additional acres of land. 54 U.S.C. § 320301(a), (b); *see* TWS Pls.' Br. at 36 n.14 (describing, e.g., the Papahānaumokuākea Expansion).

ed. 1907), at https://catalog.hathitrust.org/Record/100598138.[5] Consistent with this definition, the Act's "shall be confined" phrase provides that the President, when establishing a monument reservation, must "restrict," "limit," "[e]nclose," or set "bound[s]" on that reservation. *Id*. The phrase does not by itself direct the President continually to adjust those boundaries after the fact.

Third, Defendants fail to interpret the phrase in its structural and grammatical "context." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion) (citation omitted). Defendants argue that the supposed "broad power … *to confine*" stands on par with, and separate from, the President's power to "declare" monuments and "reserve" land. Defs.' GSE Br. at 12 (emphasis added). But that is not the text Congress enacted. The Act authorizes the President to "declare" and to "reserve," while using "confined" in past participle form. *See United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 621 (D.D.C. 2018) (discussing significance of verb tenses and past participles in statutory interpretation). Read in the context of the words around it, the phrase "shall be confined" simply describes the "limits of the parcels" the President "may reserve … as a part of" a monument. 54 U.S.C. § 320301(b). It does not separately "convey the power to bring those conditions about" at a later time by *eliminating* lands from existing monuments. *Concord Mgmt.*, 317 F. Supp. 3d at 621.

In effect, Defendants ask the Court to re-write the Act by inserting a new power, authorizing subsequent presidents to ensure that monument lands "are *and remain* 'confined' to the smallest area" that they deem appropriate. Defs.' GSE Br. at 16 (emphasis added); *id.* at 17 (similar). But that is not what the Act says, and courts do not "add words to the law to produce

[5] The first six of Webster's seven definitions describe actions that may be taken once. *See* Webster's Int'l Dictionary of the English Language 300 (W.T. Harris ed. 1907). Only the very last definition in the list ("to keep close," *id.*) could imply any sort of ongoing action—but it could just as easily mean a one-time action with permanent effects.

what is thought to be a desirable result." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015). It is "a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quotation marks and brackets omitted). Defendants' interpretation violates this basic principle.

2. Contemporaneous statutes confirm that Congress meant what it said.

Supplementing the statutory text, as Defendants urge the Court to do, "is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language." *Rotkiske*, 140 S. Ct. at 361; *accord Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994). As illustrated by the many contemporaneous public-lands statutes cited in Plaintiffs' opening briefs, TWS Pls.' Br. at 25-27, when Congress wanted to delegate authority to revoke or modify land withdrawals and reservations, it did so clearly and expressly. *Cf. Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 877-78 (1999) (construing 1909 and 1910 reservation statutes narrowly, in light of omitted terms that were made "explicit" in other contemporaneous statutes). Defendants attempt to brush aside those statutes by fixating on irrelevant particulars. *See* Defs.' GSE Br. at 24-26 & nn.12-13. But they offer no coherent reason to ignore Congress's consistent practice, in the years before and after the Antiquities Act's passage, of granting modification and revocation authority clearly and expressly, if at all.

For example, the 1902 Reclamation Act authorized the Interior Secretary to "withdraw" lands for irrigation works from public entry, and further provided that the Secretary "*shall restore* to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act." Pub. L. No. 57-161, § 3, 32 Stat. 388, 388 (1902) (emphasis added). In other words, the Reclamation Act did expressly what Defendants contend

the Antiquities Act did obliquely. If Congress had truly wanted to "obligat[e]" the President to ensure that monument reservations "remain 'confined' to the smallest area the President deems to be consistent with protection of the monument objects," as Defendants insist, Defs.' GSE Br. at 16, Congress could have used the Reclamation Act's formulation: e.g., directing that the President "shall restore to public entry any of the lands reserved as part of a national monument when, in his judgment, such lands are not required for the proper care and management of the objects to be protected." But that is not how Congress drafted the Antiquities Act.[6] Indeed, Congress later considered and *rejected* subsequent bills that would have granted the President, for example, the power to "restore to the public domain lands reserved … as national monuments" when, "in the opinion of the President," those lands "are not needed for such purpose." S. 3840, 68th Cong. (2d Sess. 1925) (Pls.' JA084); *see also infra* at 37-38 & n.27; TWS Pls.' Br. at 34-35 (discussing failed bills and other enactments). Instead, Congress opted to continue exercising that power itself. *See infra* at 37-38 & n.27.

Congress's treatment of national monuments in the Antiquities Act and subsequent monument-related enactments also contrasts sharply with its treatment of forest reserves in the Forest Service Organic Administration Act of 1897. Amending an 1891 statute that gave the

[6] Defendants argue the Reclamation Act is "distinguishable" because it "*required* the Secretary of the Interior to withdraw lands from entry when investigating potential reclamation projects," whereas the Antiquities Act's "initial power to declare and reserve land for monuments [i]s discretionary." Defs.' GSE Br. at 25-26 (emphasis added). It is unclear why Defendants think that distinction matters, especially given their separate argument (described above, *supra* at 7) that the "smallest area" clause is mandatory. But even assuming it matters, the Reclamation Act also conferred express modification authority in a second, discretionary context, where it provided that the Interior Secretary is "authorized"—not required—"to withdraw from entry … any public lands believed to be susceptible of irrigation from said works … [p]rovided, [t]hat … if determined to be impracticable or unadvisable he *shall* thereupon *restore* said lands to entry." Pub. L. No. 57-161, § 3, 32 Stat. at 388-89 (emphasis added). Defendants' attempt to distinguish the Reclamation Act ignores that section entirely.

President the power to "declare the establishment of [forest] reservations and the limits thereof," 26 Stat. 1095, 1103 (1891), Congress in 1897 expressly conferred on the President the additional power to modify or revoke those reservations at any time:

> The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

30 Stat. 11, 36 (1897) (Pls.' JA013). Defendants invoke the remarks of a few legislators who believed this amendment to be unnecessary because, in their view, "'[t]he President has had that power always.'" Defs.' GSE Br. at 24 (quoting statement of Rep. Pickler, 29 Cong. Rec. 2677 (Mar. 3, 1897)). But their view was contested, including by Representative Lacey, who later sponsored the Antiquities Act. *See, e.g.*, 29 Cong. Rec. 2677 (Mar. 3, 1897) (Pls.' JA001) (Rep. Lacey, responding to Rep. Pickler: "The gentleman is mistaken. The act of 189[1] gave [the President] the power to create a reserve, but no power to restrict it or annul it …. This provision will give that authority.").[7] And Congress did, in the end, enact the amendment into law. Thus, while there may have been disagreement among some legislators about the President's authority prior to the 1897 Act's passage, Congress acted to "remove any doubt" and replace it with clarity, specifying in the 1897 Act that the President is "*hereby* authorized" to modify or revoke a forest reserve. 30 Stat. at 34, 36 (Pls.' JA011, JA013) (emphasis added). "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect[,] … not just to state an already existing rule." *Stone v. INS*, 514 U.S. 386, 397 (1995).

[7] *See also* 30 Cong. Rec. 914 (May 6, 1897) (Defs.' US_APP000122) (Sen. Gray: "[T]he Executive himself who made the orders, President Cleveland, … was of the opinion, after the orders were made, that if he had the power to modify them he would be glad to do so; but he doubted, as I doubt, whether, having been made, there was any legal authority to modify those orders. So the matter was taken up and the amendment was incorporated [to give him that authority] ….").

When Congress enacted the Antiquities Act just a few years later, it "could have used language similar" to the 1897 Act's if, indeed, it "had desired to" convey similar modification and revocation authority with respect to national monuments. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 354 (2013). But Congress did not do so, which makes it "improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Id.* at 353. It "defies logic" that Congress, having gone through the exercise of conferring express modification and revocation authority in the 1897 Act, would then, only a few years later, fail to include such authority in the Antiquities Act if it wished to convey it. Defs.' GSE Br. at 25. The inescapable conclusion is that Congress withheld modification and revocation authority in the Antiquities Act—a perfectly logical choice, given national monuments' and forest reserves' different purposes. *See infra* at 14.

Defendants fare no better in their efforts to distinguish the 1910 Pickett Act. *See* Defs.' GSE Br. at 25. The Pickett Act authorized the President to "temporarily withdraw" public lands for water-power sites and other purposes, and further provided that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Pub. L. No. 61-303, § 1, 36 Stat. 847, 847 (1910). By expressly providing that these withdrawals were "temporary" and could be "revoked" by the President, *id.*, Congress demonstrated again that when it wanted to give the President authority not only to withdraw land, but also to revoke those withdrawals, it said so in the statute. *See also, e.g.*, Pub. L. No. 74-286, § 4(c), 49 Stat. 660, 661 (1935) (authorizing the President "to withdraw from sale, public entry or disposal of such public lands of the United States as he may find to be necessary" to carry out a study of water use in the Rio Grande River, but providing further that "any such withdrawal may subsequently be revoked by the President"). Defendants never persuasively explain why Congress would expressly

provide for presidential revocation in the Pickett Act, and yet would fail to mention presidential revocation in the Antiquities Act, if it wanted national monuments to be similarly revocable.

In sum—and in stark contrast with the 1897 Act, the 1902 Reclamation Act, and the 1910 Pickett Act—the 1906 Antiquities Act authorizes the President to "reserve" land as national monuments, but not to "restore to entry," "modify," "vacate," or "revoke[]" those reservations after the fact. "Where Congress has consistently made express its delegation of a particular power, its silence [in another statute] is strong evidence that it did not intend to grant the power." *Alcoa S.S. Co. v. Fed. Mar. Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965). And that is especially so here, where Congress considered and rejected subsequent proposals to grant such power with respect to national monuments. *See infra* at 37-38. Congress must be taken at its word.

B. President Trump's assertion of authority is incompatible with the Antiquities Act's protective purpose and legislative history.

1. Congress empowered the President to protect irreplaceable resources for future generations, not to dismantle those protections.

Congress did not grant authority to dismantle national monuments in the Antiquities Act for good reason: The Act is a protective, preservation-focused statute. As described in Plaintiffs' opening brief, Congress envisioned national monuments as "a *perpetual* source of education and enjoyment for the American people." TWS Pls.' Br. at 31-32 (quoting H.R. Rep. No. 59-2224, at 2-3 (1906) (Pls.' JA077-78) (emphasis added)). Enabling the President to swiftly confer protections, while retaining legislative control over when (if ever) to lift those protections, was central to achieving Congress's "essential purpose": the preservation of certain irreplaceable public resources "'for the enjoyment of future generations.'" *Alaska v. United States*, 545 U.S. 75, 103 (2005) (quoting what is now 54 U.S.C. § 100101(a)); *accord* 16 U.S.C. § 7202(a) (monuments managed by BLM must be managed for the "benefit of current and future

generations"); *see also infra* at 32-41 (explaining that inconsistent instances of *post*-enactment presidential reductions do not establish congressional acquiescence).

This protective purpose also explains why Congress drafted the Antiquities Act differently from the other turn-of-the-century land statutes described above. Defendants profess that they cannot imagine why, having given the President "the power to correct overbroad [forest] reservations" in the 1897 Act, "Congress would then enact a statute that did not include this authority." Defs.' GSE Br. at 25. The answer is simple. Forest reserves are multiple-use land designations, where the desirable balance of a range of uses will change over time, justifying executive flexibility.[8] In contrast, "the Antiquities Act focuses on protecti[on]" above all other uses. *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 542 (D.C. Cir. 2019) (contrasting national monuments with marine sanctuaries, which require balancing among multiple uses and management objectives); *see also* TWS Pls.' SUF ¶ 21 (quoting BLM's acknowledgement that a national monument must be managed to protect designated objects, and "'[a]ll other considerations are secondary to that edict'" (citation omitted)). Given the Antiquities Act's purpose of protecting those objects for future generations, it makes sense that Congress wrote the Act as it did—retaining for itself the power to undo those protections, if ever.

In fact, that Congress authorized executive modification and revocation of multiple-use designations like forest reserves, while withholding that same power for preservation-focused designations like national monuments, "fits" the broader "patterns of public-lands law." Jedediah

[8] *See, e.g.*, 30 Stat. 11, 35 (1897) (Pls.' JA012) (enumerating multiple uses of forest reserves, i.e., "to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States," while providing that they should not include "lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes"); *see also Ark Initiative v. Tidwell*, 816 F.3d 119, 122 (D.C. Cir. 2016) (describing 1897 Act and subsequent laws as directing "multiple use[]" management of national forests).

Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 Ecology L.Q. 921, 947 (2018). As Plaintiffs previously explained, Congress has similarly restricted the Executive Branch's ability to diminish other categorically protected land designations that—like national monuments—aim to conserve resources that, once damaged or destroyed, are gone forever. *See* TWS Pls.' Br. at 30-31 & n.11 (noting, e.g., wilderness study areas designated under 43 U.S.C. § 1782). Defendants largely ignore these other one-way delegations of protective authority, and—by arguing that presidents may unilaterally dismantle national monuments—advocate instead for an "anomalous power that cuts against the patterned logic of the rest of the public-lands regime." Britton-Purdy, *Whose Lands?*, 45 Ecology L.Q. at 948.

Defendants fail to reconcile President Trump's dismantling of Grand Staircase with the Antiquities Act's essential purpose. They do not (and cannot) dispute that "Congress intended the Act to provide permanent—not temporary—protections," Defs.' GSE Br. at 27, and they even reaffirm "the United States' continuing position[] that monuments are 'permanent' in that they cannot be completely abolished by unilateral action of the President," Defs.' BE Br. at 51 n.32. Yet they suggest there is a difference between "whether a monument is 'permanent'" and "whether it c[an] be modified." *Id.* Defendants repeat this supposed distinction several times in their briefs. *See, e.g.*, Defs.' GSE Br. at 20 (distinguishing *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013 (D. Alaska 2019), *appeal docketed*, No. 19-35460 (9th Cir.), as addressing whether the President may "vacate a prior withdrawal of lands *in its entirety*"); Defs.' BE Br. at 51 n.32 (arguing, erroneously, that the Alaska National Interest Lands Conservation

Act's (ANILCA's) legislative history speaks only to "whether a monument … could be repealed in its entirety, rather than whether it could be modified").[9]

Defendants' purported distinction is hollow. If Defendants were correct that the Antiquities Act empowered the President to eliminate monument protections from reserved lands, nothing would appear to prevent him from abolishing an entire monument reservation by deeming it "unnecessary." Defs.' GSE Br. at 27. Defendants' position seems to be that "monuments" are severable from the land they comprise. *See, e.g.*, *id.* (arguing that even if "Congress intended the Act to provide permanent … protections," monument "*reservations* can [still] be modified" (emphasis added)). That purported distinction is inconsistent with the Act itself, which provides that the President may "reserve parcels of land as *part of* the national monument[]." 54 U.S.C. § 320301(b) (emphasis added). Moreover, here, it is undisputed that President Trump eliminated not only *land* from the Monument's boundaries—nearly 900,000

[9] Contrary to Defendants' characterization, ANILCA's legislative history reflects Congress's understanding that a monument's "boundary … can only be corrected by legislative action." H.R. Rep. No. 96-97, pt. 1, at 143 (1979) (Pls.' JA141); *see also* TWS Pls.' Br. at 39. That is precisely why Congress acted legislatively to modify, abolish, or convert to other designations certain existing national monuments, *see* ANILCA, Pub. L. No. 96-487, Title II, § 201, 94 Stat. 2371 (1980), *codified at* 16 U.S.C. § 410hh, and why it imposed a state-specific acreage limit on future monuments and other executive reservations in Alaska, *see id.*, Title XIII, § 1326, 94 Stat. at 2488, *codified at* 16 U.S.C. § 3213(a) (requiring notice to Congress before any future executive reservation "exceeding five thousand acres" becomes effective in Alaska).

acres, or roughly half of Grand Staircase[10]—but also the very *objects* of historic and scientific interest for which the Monument was designated.[11]

The central question in this case is thus: Does the Antiquities Act authorize the President to *revoke* monument protections from existing monument lands and the objects located there? Given their interpretation of the "smallest area" clause, Defendants' answer—whether the President purports to eliminate 50%, 85%, or even 100% of a monument's land—must necessarily be "yes." Intervenors think so, too. *See* Intervenors' GSE Br. at 4 (ECF No. 138) (asserting that "[t]he power to take a discretionary action includes the power to revoke … that action"). Taking Defendants' theory to its logical end, nothing would prevent the President from unilaterally abolishing a monument reservation *in its entirety*, leaving behind a monument in name only, protecting no land at all.

Moreover, even if Defendants' asserted authority were somehow cabined to prevent the complete elimination of a monument—and Defendants provide no useful limiting principle—it would *still* be inconsistent with the Antiquities Act's "essential purpose" of providing enduring protection. *Alaska*, 545 U.S. at 103. If subsequent presidents could remove lands from existing

[10] *See* Defs.' Resp. to TWS Pls.' SUF ¶¶ 28-29 (Defendants "do not dispute" that the Trump Proclamation "exclude[d] from … designation and reservation approximately 861,974 acres" of Grand Staircase). The President's reduction of Bears Ears National Monument was even more extreme, removing roughly 85% of the monument's acreage. *See* Defs.' Resp. to NRDC Pls.' SUF ¶ 15 (Defendants "do not dispute" that the Trump Proclamation "exclud[ed] 'approximately 1,150,860 … acres'" from Bears Ears).

[11] *See* Proclamation No. 9682, 82 Fed. Reg. at 58,090 (acknowledging objects eliminated from Grand Staircase); Defs.' Resp. to TWS Pls.' SUF ¶ 33 (Defendants "do not dispute that some particular examples of objects of interest are no longer within the Monument"); *id*. ¶ 34 (Defendants "do not dispute" quoted BLM statements about resources cut from Grand Staircase, including "'some of the highest site densities and most important [archaeological] sites in the Planning Area'"). The same is true for Bears Ears. *See* Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,082, 58,084 (Dec. 4, 2017) (acknowledging objects eliminated from Bears Ears); Defs.' Resp. to NRDC Pls.' SUF ¶ 19 (Defendants "do not dispute" that the Trump Proclamation "exclude[d] lands on which 'some of the particular examples of the[] objects'" are located).

monuments with the stroke of a pen, the boundaries of any and all national monuments could contract, expand, and contract again with each change in administration. Defendants never explain how this potentially "endless see-sawing of monument protections," TWS Pls.' Br. at 30, is in any way consistent with Congress's undisputed intent for "the Act to provide permanent—not temporary—protections," Defs.' GSE Br. at 27.

2. The legislative history does not support Defendants' position.

Congress's choice to delegate one-way protective authority is also reflected in the Antiquities Act's legislative history, which makes clear that Congress sought to authorize the President to confer "permanent" protections on public lands. H.R. Rep. No. 59-2224, at 2-3 (Pls.' JA077-78); *see also* TWS Pls.' Br. at 31-32. Defendants concede that Congress "intended to preserve" irreplaceable public resources via the Antiquities Act, but they speculate that Congress was "equally concerned with the Executive Branch making unnecessarily large reservations of public land." Defs.' GSE Br. at 26-27. Even assuming that were true, the snippets of legislative history on which Defendants rely do not support their further contention that Congress therefore gave presidents the power to dismantle monuments *after the fact*.

To be sure, some legislators wanted to constrain the size of presidents' monument reservations. Congress accommodated those concerns in the final version of the Act: Having considered earlier bills that proposed specific acreage limits,[12] Congress ultimately opted for the qualitative "smallest area" limitation on the President's reservation power. Defendants cite Representative Lacey's assurances to a fellow legislator that the Antiquities Act would not result

[12] *See, e.g.*, H.R. 9245, 56th Cong. (1st Sess. 1900) (Pls.' JA021) (proposing a 320-acre limit); S. 5603, 58th Cong., § 2 (2d Sess. 1904) (Pls.' JA061) (proposing a 640-acre limit, i.e., "one section of land").

in reservations of "very much" land, Defs.' GSE Br. at 17 (quoting 40 Cong. Rec. 7888 (1906)), but critically, neither Representative Lacey nor any other legislator described the "smallest area" clause as allowing presidents to shrink *existing* monuments, as Defendants now contend.[13] And the fact that legislators invoked forest reserves and contrasted them with national monuments during debates over the Antiquities Act, *see* Defs.' GSE Br. at 17, only reinforces that Congress's omission of modification and revocation authority in the Antiquities Act—after having expressly provided such authority over forest reserves in the 1897 Act—was deliberate. *See id*. (quoting Representative Lacey's observation that "[t]he object" of the Antiquities Act "is entirely different" from that of the 1897 Act (citation omitted)); *see also supra* at 14.

It is entirely consistent with the legislative history to read the Act's "smallest area" clause as applying, as it does on its face, "only to the [President's] initial reservation" of land. *Contra* Defs.' GSE Br. at 17. If that initial reservation later turns out to be too large, Congress can always modify or abolish it by statute—and Congress has frequently done just that. *See* TWS Pls.' Br. at 34 n.13, 40 n.15 (citing examples). Tellingly, Defendants barely acknowledge Congress's active role in diminishing and abolishing national monuments by legislation over the past century. And Defendants have no support for their theory that Congress meant to empower

[13] Defendants also quote remarks by Professor Edgar Hewett during a debate over "predecessor" bills, *see* Defs.' GSE Br. at 3-4 (quoting US_APP000152-53), but those predecessor bills did not even include the "smallest area" clause on which Defendants now stake their case. *See* H.R. 13478, 58th Cong. (2d Sess. 1904) (Pls.' JA040); H.R. 13349, 58th Cong. (2d Sess. 1904) (Pls.' JA055); S. 5603, 58th Cong. (2d Sess. 1904) (Pls.' JA060). Professor Hewett's opinion that a temporary withdrawal made by the Interior Department for the proposed Pajarito National Park was larger than necessary, *see* Defs.' GSE Br. at 4, therefore sheds no light on what Congress later authorized the President to do in the Antiquities Act. *See infra* at 20-21 (discussing inadequacy of Interior's preexisting temporary withdrawal power and Hewett's view on the need for national monuments legislation); *see also* Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior for the Fiscal Year Ended June 30, 1901, at 151 (1901) (Pls.' JA161) (mentioning temporary withdrawal for proposed Pajarito National Park).

presidents to dismantle monuments as swiftly as they could establish them. The Act's legislative history reveals legislators' sense of urgency about preserving vulnerable objects in the public domain—a task for which the lengthy legislative process was often inadequate[14]—but it does not suggest that legislators felt any similar sense of urgency about *lifting* those protections. Instead, Congress gave the President one-way authority, enabling swift monument creation while ensuring that the revocation of monument protections can occur only after deliberative action by Congress itself.

3. Intervenors' speculation about Congress's intent is unfounded.

Intervenors offer a competing, and equally unfounded, theory of congressional intent. Unlike Defendants, Intervenors contend that Congress meant the Antiquities Act to provide only temporary—not "permanent"—protection. Intervenors' GSE Br. at 2. But Intervenors fail to reconcile their theory with the fact that, when the Antiquities Act was enacted, the Interior Department *already* asserted the "power to withdraw specific tracts from sale or entry for a *temporary* period" when it wanted to protect "antiquities on public land" from immediate short-term threats. TWS Pls.' Br. at 31 (quoting Ronald F. Lee, *The Story of the Antiquities Act*, ch. 5 (2001 ed.) (emphasis added)). Congress enacted the Antiquities Act to satisfy a different need:

[14] *See, e.g.*, H.R. Rep. No. 59-2224, at 3 (1906) (Pls.' JA078) (opining that legislation to protect antiquities was "urgently needed"); Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior for the Fiscal Year Ended June 30, 1904, at 60 (1904) (Pls.' JA172) (opining that the "failure to secure legislation, though urgently pressed in successive sessions of Congress, to protect such localities as the Petrified Forest in Arizona … has sufficiently proved the futility of attempting to accomplish, by means of a special act of Congress in each instance, the protection of all the localities throughout the public domain requiring such action," and arguing that "the time has come for some general enactment on the subject which shall enable action to be taken promptly, in each instance, as the cases arise from time to time").

the Executive Branch's need for a *permanent* protective power it did not already have. *See id*. at 31-32 (citing legislative history).

That is precisely the point of the passage in the attachment to the House Report on which Intervenors mistakenly rely. *See* Intervenors' GSE Br. at 2 & n.8 (citing H.R. Rep. No. 59-2224, at 7-8). Describing the "urgent need" to protect archaeological sites from looting and destruction, Professor Hewett argued first that "the [existing] authority of the Department of the Interior should be immediately exercised to protect *all* ruins on the public domain." H.R. Rep. No. 59-2224, at 2, 7 (Pls.' JA077, JA082) (emphasis added). Second, for a smaller subset of antiquities "of such character and extent as to warrant the creation of permanent national parks," Professor Hewett urged Congress to enact "general legislation authorizing the creation of such national parks." *Id.* at 7-8 (Pls.' JA082-83). Of course, Congress did not need to enact general legislation to authorize *itself* to create national parks; as Intervenors note, Congress had already established several national parks by 1906. *See* Intervenors' GSE Br. at 2 & n.4. The "general legislation" for which Professor Hewett advocated was legislation giving the Executive Branch a new power to confer lasting protections, distinct from the stop-gap, temporary authority it already exercised. Congress fulfilled that need with the Antiquities Act. *See* TWS Pls.' Br. at 31-32.

Intervenors contend that reading the Antiquities Act as written—i.e., conferring protection that can be revoked only by legislative action—would convert national monuments into "de facto" national parks. Intervenors' GSE Br. at 1. But the D.C. Circuit has now twice rejected similar attempts to construe the Antiquities Act to avoid overlap between national monuments and other protective designations (specifically, wilderness areas and national marine sanctuaries), explaining that federal law may provide "'overlapping sources of protection' for environmental values." *Mass. Lobstermen's*, 945 F.3d at 542 (quoting *Mountain States*, 306 F.3d

at 1138). Moreover, as with those other protective designations, national monuments and national parks can "serve different overall goals." *Id.* National monuments "focus[] on protecting specific 'objects' of historic or scientific interest," *id.* (quoting 54 U.S.C. § 320301(a)), and they tend to offer minimal visitor facilities.[15] National parks prioritize conservation, too, but they also tend to offer more extensive visitor facilities, subject to the Park Service's non-impairment mandate. Thus, when Congress has acted by legislation to convert national monuments into national parks, it has often done so with an eye towards facilitating appropriate visitor access—and not, as Intervenors contend, to turn ephemeral protections into permanent ones.[16] Congress has even legislatively established national monuments from time to time.[17] Under Intervenors' theory, any legislatively established monument would be vulnerable to unilateral presidential revocation simply because Congress designated it for protection as a "monument" instead of as a "park." Intervenors have no support for that extraordinary result. *Cf.* Defs.' GSE Br. at 37

[15] *See* Desormeau Decl., Exh. A at iv (ECF No. 132-3 at 8) (1999 Monument Management Plan) ("The Proclamation and the Antiquities Act provide a clear mandate … to protect the myriad historic and scientific resources in the Monument. … To achieve these priorities, visitor development in the Monument will be limited to minor facilities such as interpretive kiosks and pullouts, located in small areas on the periphery of the Monument.").

[16] *See, e.g.*, An Act to Establish the Grand Canyon National Park, Pub. L. No. 65-277, § 2, 40 Stat. 1175, 1177 (1919) (converting Grand Canyon National Monument into a national park, and providing for "concessions for hotels, camps, transportation, and other privileges of every kind and nature for the accommodation or entertainment of visitors"); S. Rep. No. 96-665, at 2, 6 (1980) ("recommending the renaming of Biscayne National Monument to Biscayne National Park" because "a national park … can provide a very different type of visitor experience and enjoyment," and noting that "[w]ith redesignation of the area as a national park, a significant increase in visitation can be anticipated"); 158 Cong. Rec. H5433, H5434 (daily ed. July 31, 2012) (Rep. Sablan, describing purpose of bill converting Pinnacles National Monument into a national park: "While the name change will not significantly alter management of the area, it will raise the profile of this beautiful resource and hopefully attract even more visitors.").

[17] *See, e.g.*, ANILCA, Pub. L. No. 96-487, Title II, § 201, *codified at* 16 U.S.C. § 410hh (establishing several "national parks" and "national monuments," including Cape Krusenstern National Monument, side by side).

(acknowledging that President cannot remove lands "to the extent Congress did establish … the Monument's boundary").

In short, there is no conflict between national parks and national monuments, and no support for Intervenors' speculation that Congress intended only parks, and not monuments, to confer lasting protection.

C. Congress's own modifications to Grand Staircase foreclose Defendants' assertion of authority under the Act.

As explained above, Congress deliberately withheld the authority to diminish national monuments in the Antiquities Act and retained for itself the decision whether, if ever, to lift protections for monument objects and lands. Congress has repeatedly exercised this power with respect to Grand Staircase itself—enacting legislation not only to remove certain parcels from the Monument, but also to add other parcels (totaling roughly 180,000 additional acres) and to otherwise safeguard the Monument's integrity and eliminate competing uses. *See* TWS Pls.' Br. at 6-8. President Trump's assertion of authority to slice the Monument by half—and to re-open for extractive development those excluded lands and other mineral interests that Congress itself acted to protect—is flatly incompatible with these legislative acts. *Id.* at 40-43.

Most notably, it is undisputed that President Trump removed from the Monument "approximately 80,000 acres of land and 16,600 acres of mineral interests that Congress had added to the Monument through the 1998 Lands Exchange Act." Defs.' Resp. to TWS Pls.' SUF ¶ 30. The Lands Exchange Act ratified and enacted an "historic agreement" between the United States and the State of Utah: The United States acquired roughly 176,000 acres of state-held land and 24,000 acres of mineral interests located within Grand Staircase, and in exchange it gave Utah equivalent federal lands and mineral interests outside the Monument's boundaries, plus $50 million. Pub. L. No. 105-335, §§ 2-3, 7, 112 Stat. 3139, 3139-42 (1998); *see also* Murdock

Decl., Exh. B (ECF No. 132-5) (map of parcels acquired by the United States). Defendants argue that the state parcels acquired by the United States were not "necessarily" made part of the Monument, Defs.' GSE Br. at 38, but that is manifestly incorrect. The underlying agreement, which Congress "ratified and confirmed," Pub. L. No. 105-335, § 3(b), unequivocally provided that "*[a]ny* lands and interests … acquired by the United States within the exterior boundaries of the Monument … *shall become a part of the Grand Staircase-Escalante National Monument*." Agreement to Exchange Utah School Trust Lands Between the State of Utah and the United States of America, § 5(A) (May 8, 1998) (Pls.' JA234) (emphases added).

Moreover, Defendants ignore a principal reason why Congress wanted all state inholdings to become part of the Monument. It was not only because "[c]ertain" state lands "within the Monument" have "substantial noneconomic scientific, historic, … and natural resources" that are themselves worthy of protection, Pub. L. No. 105-335, § 2(2), but also because securing the Monument's integrity inside its boundaries would help to protect *all* the Monument's objects of interest. As Congress explained:

> Development of surface and mineral resources on State school trust lands within the Monument could be *incompatible* with the preservation of these scientific and historic resources for which the Monument was established. Federal acquisition of State school trust lands within the Monument would *eliminate this potential incompatibility*, and would *enhance management* of the Grand Staircase-Escalante National Monument.

Id. § 2(3) (emphases added). Congress therefore acquired all the state inholdings that were scattered, checkerboard style, inside the Monument's exterior boundaries, *see* Murdock Decl., Exh. B, to "eliminate" the threat of mineral development and to "enhance management" of the Monument as a single integrated whole, Pub. L. No. 105-335, § 2(3). Defendants do not explain how President Trump's later, unilateral decision to remove roughly 80,000 acres of those

acquired lands from that whole and to reopen them to mineral development, TWS Pls.' SUF ¶ 30, could possibly be consistent with Congress's enactment.[18]

Instead of joining the issue, Defendants argue with a strawman, contending that the Lands Exchange Act did not "establish permanent Monument boundaries." Defs.' GSE Br. at 38. The statute did not purport to "'finaliz[e]' the Monument's boundaries," *id.*, because Congress retained *its* power to continue adjusting them—which it subsequently did by enacting additional statutes that removed some parcels from Grand Staircase and added others. *See* TWS Pls.' Br. at 7 (citing 1998 Heritage Area Act and 2009 Omnibus Act). These statutes illustrate that, even assuming Congress was "concerned with the Executive Branch making unnecessarily large reservations of public land," Defs.' GSE Br. at 26; *see supra* at 18-19, there was no need for Congress to delegate modification authority to the President in the Antiquities Act. Congress

[18] Defendants further attempt to downplay the Lands Exchange Act's significance by noting that it also involved transfer of state lands and mineral interests in other parts of Utah, consummating a land-exchange effort that "started with a 1993 statute." Defs.' GSE Br. at 37-38 & nn.20-21. That is true, but irrelevant. The 1993 statute addressed only state parcels *outside* the area that ultimately became Grand Staircase. *See* Pub. L. No. 103-93, 107 Stat. 995 (1993). Negotiations over those parcels stalled until the Monument's designation in 1996 prompted a broader agreement to exchange state parcels *inside* Grand Staircase (roughly 176,000 acres of land plus additional mineral interests), as well as those other parcels previously identified (roughly 200,000 acres of land plus additional mineral interests). So while Defendants are correct—barely—that the "majority" of lands exchanged in the Lands Exchange Act "were not associated with the Monument," Defs.' GSE Br. at 37, they are plainly wrong in supposing the Monument was somehow unimportant or tangential. The Monument was fundamental to the Lands Exchange Act—as evidenced by the Act's structure, which begins with Congress's findings about the Monument, *see* Pub. L. No. 105-335, § 2(1)-(4), before referencing the other lands identified in the 1993 law, *see id.* § 2(5)-(6), (9)-(10).

itself is more than capable of addressing any such reservations by statute, where appropriate. *See, e.g.*, TWS Pls.' Br. at 34 n.13 (listing examples of other legislative monument reductions).[19]

Defendants also mischaracterize (or at least misunderstand) TWS Plaintiffs' position when they contend that the Lands Exchange Act did not "abrogate[]" or "eliminate" the President's purported modification authority under the Antiquities Act. Defs.' GSE Br. at 37-38. The Lands Exchange Act, like Congress's further enactments addressing Grand Staircase and other national monuments, is evidence that the President *never had* such authority under the Antiquities Act in the first place. *See* TWS Pls.' Br. at 40-41 (explaining that these enactments "highlight the incongruity" of President Trump's assertion of authority under the Act). Defendants cannot explain why Congress would have acquired state lands and mineral interests within Grand Staircase to "eliminate" potentially incompatible development, Pub. L. No. 105-335, § 2(2)-(3), if the President had preexisting unilateral authority to undo those efforts by reopening those same lands and rights to mineral development with the stroke of a pen.

Indeed, Defendants appear to concede, incongruously, that the President lacked authority to remove at least *some* of the lands that Congress added to Grand Staircase. In 1998, only one week after the Lands Exchange Act, Congress added to the Monument approximately 5,500

[19] Given Congress's relatively frequent adjustments to monument boundaries, the appropriations provision that Defendants cite (Defs.' GSE Br. at 40) may well have been contemplating future *legislative* boundary reductions. Or it could have been hedging against any unlawful assertions of executive authority to diminish monument boundaries (such as President Trump's here) to ensure that no mineral leasing or preleasing occurs before the unlawful action is overturned in court. *Cf.* Letter from Cong. Betty McCollum and Sen. Tom Udall to Comptroller General, U.S. Gov't Accountability Office (May 22, 2019), at https://www.tomudall.senate.gov/imo/media/doc/DOC052219.pdf (requesting legal opinion on whether Interior Department violated a similar appropriations provision in planning activities for lands excluded from Grand Staircase). In any event, that Congress has sought to *protect* monument lands from mineral leasing activities is a poor indication that it wants the President to have unilateral power to *remove* protections for those lands, as Defendants suggest.

acres of federal land contiguous to the Monument's southern edge, known as East Clark Bench. *See* Pub. L. No. 105-355, § 201, 112 Stat. 3247, 3252-53 (1998). Defendants observe that the Trump Proclamation "carefully left those portions in place." Defs.' GSE Br. at 37. Yet Defendants do not explain what distinguishes these lands (which President Trump apparently realized he could not remove from the Monument) from the other 80,000 acres that Congress had added to Grand Staircase only one week earlier, and which President Trump *did* remove.

Nor do Defendants explain how it could possibly fit with Congress's design for President Trump to remove from the Monument all the lands *around* East Clark Bench. That is clearly not what Congress contemplated when it modified the "boundaries" of Grand Staircase to "*include* the parcel known as East Clark Bench." Pub. L. No. 105-355, § 201(b) (emphasis added). Defendants use the term liberally when they describe East Clark Bench as still "*within* the Monument." Defs.' GSE Br. at 39 (emphasis added). In fact, it is now two isolated strips marooned miles away from any other Monument lands. *See* Desormeau Decl., Exh. F (ECF No. 132-3 at 82) (BLM map of diminished monument); Defs.' Resp. to TWS Pls.' SUF ¶ 32.

Congress's subsequent decision to appropriate an additional $19.5 million to acquire remaining mineral leases within the Monument in fiscal year 2000 further undermines Defendants' position. *See* Defs.' GSE Br. at 39. True, Congress did not name the "specific leases" to be repurchased with the appropriated funds, Defs.' Resp. to TWS Pls.' SUF ¶ 31, but that is irrelevant. Congress specified that the appropriation was for "acquir[ing] mineral rights *within the Grand Staircase-Escalante National Monument*," Pub. L. No. 106-113, app. C, tit. VI, § 601, 113 Stat. 1501, 1501A-215 (1999) (emphasis added), and Interior used them for that purpose, *see* TWS Pls.' SUF ¶ 13 (quoting BLM's 1999 Monument Management Plan, which recognized that purchasing the coal leases "'improved [BLM's] ability to manage the lands

within the Monument boundaries as an unspoiled natural area'"). Yet President Trump undisputedly revoked monument status from lands where some of these repurchased coal leases were located. *Id.* ¶ 31 (citing Murdock Decl. ¶ 13 & Exh. C).

Defendants cannot reconcile President Trump's unilateral action with Congress's own enactments to ensure the integrity of Grand Staircase as a unified whole and the long-term protection of its resources. The Lands Exchange Act and the other statutes described above make sense only in light of Congress's continued understanding that national monument reservations are permanent unless and until Congress decides otherwise. The President's elimination of 80,000 acres that Congress added to the Monument in the Lands Exchange Act "independently violates" that Act, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996), and further demonstrates that the President's assertion of authority is incompatible with Congress's own understanding of the Antiquities Act.

D. No presumptions or analogies can sustain Defendants' asserted authority.

Because the traditional tools of statutory construction do not support Defendants' interpretation of the Antiquities Act, Defendants invoke a series of supposed presumptions and analogies in an effort to buttress their flawed reading. None can sustain President Trump's assertion of authority to dismantle Grand Staircase.

First, Defendants' resort to deference doctrines cannot salvage their erroneous interpretation. As Defendants acknowledge, even where *Chevron* deference traditionally applies (i.e., where a statute delegates interpretive authority to an agency), the initial question is whether "the statutory text forecloses the agency's assertion of authority." Defs.' GSE Br. at 13. Here, for the reasons explained above (*supra* at 5-9), the text of the Antiquities Act forecloses President Trump's assertion of authority because it delegates no power to dismantle or diminish a national

monument. And even if the text alone were unclear (which it is not), other "traditional tools of statutory interpretation"—such as the Act's "purpose" and "history," as well as related "legislative acts" that bear on the question—confirm that President Trump's proclamation "exceeds the … authority that Congress granted." *Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81, 89-90 (D.D.C. 2019) (citing, *inter alia*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)), *appeal docketed*, No. 19-5222 (D.C. Cir.); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (deference is appropriate "only when th[e] legal toolkit is empty"). Accordingly, the Court need not consider the question of what deference—if any—a President's interpretation of an ambiguous statutory delegation of authority might warrant.[20]

Second, Defendants err in analogizing proclamations establishing national monuments to the types of executive orders that presidents may routinely revise. *See* Defs.' GSE Br. at 18. While presidents are generally "free to revoke, modify, or supersede" executive orders issued pursuant to their Article II powers, Vivian S. Chu & Todd Garvey, Cong. Res. Serv., Executive Orders: Issuance, Modification, and Revocation 7 (2014), at https://fas.org/sgp/crs/misc/RS20846.pdf, that is not always true when presidents act pursuant to a statutory delegation of *Congress's* power, *see id.* at 9 (distinguishing executive orders "issued pursuant to authority provided to the President by Congress"). In that latter scenario, Congress

[20] The only case Defendants cite that purportedly deferred to a President's interpretation is *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc), but there, the D.C. Circuit also stressed that "the President's view of his own authority under a statute is not controlling," *id.* at 790. And, as Defendants acknowledge, the D.C. Circuit relied heavily on the fact that the challenged interpretation was "long-standing," Defs.' GSE Br. at 13-14, which is not the case here, *see infra* at 34-35. Defendants also neglect to mention that in a later case involving the same statute, the federal government "d[id] not attempt to defend [*Chevron*-like] deference to the President's interpretation." *Reich*, 74 F.3d at 1325.

controls whether to provide the President with any revocation or modification authority. *Cf. Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 516 F. Supp. 2d 90, 109 (D.D.C. 2007) ("Of course, an executive order cannot supersede a statute." (in parenthetical; citation omitted)). As explained above, Congress withheld such authority in the Antiquities Act.

Defendants protest that they see "no valid reason" why monument proclamations should be treated "effectively equivalent to legislation," Defs.' GSE Br. at 23, but the reason is straightforward: Presidential proclamations and orders are "accorded the force and effect given to a statute" when they are issued pursuant to a delegation of authority from Congress. *Am. Fed'n of Gov't Emps., AFL-CIO v. Freeman*, 498 F. Supp. 651, 658 (D.D.C. 1980). As the Attorney General has observed, an executive land reservation made pursuant to delegated statutory authority "has the validity and sanctity which belong to the statute itself," and thus cannot be undone "unless it be within the terms of the power conferred by that statute." Rock Island Military Reservation, 10 U.S. Op. Att'y Gen. 359, 364 (1862); *accord* Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 U.S. Op. Att'y Gen. 185, 187 (1938) (favorably quoting Rock Island in the national monuments context).[21] Thus, Defendants' apples-to-oranges comparison of presidential monument proclamations with dissimilar types of executive orders misses the point. The proper analogy is to compare presidentially established

[21] Intervenors contend that the 1938 Attorney General opinion "misstates the relevant holding of the 1862 opinion," Intervenors' GSE Br. at 12, but they are wrong. The 1862 opinion considered whether the President, having reserved Rock Island for military use pursuant to a statutory delegation of authority, 10 U.S. Op. Att'y Gen. at 361, could subsequently undo the reservation and "transfer [the land back] to the body of the public lands," *id*. at 363. The Attorney General answered that question in the "negative." *Id*. The President could "cease to use the fort" for military purposes if he so chose, but "he had no power to take [the lands] out of the class of reserved lands, and restore them to the general body of public lands," because "no such power is conferred on the President in the act under which the [reservation] … was made." *Id*.

monuments with congressionally established monuments (*see supra* at 22), and both are permanent unless Congress says otherwise.

Third, Defendants and Intervenors are likewise mistaken when they analogize to agency reconsiderations. Defs.' GSE Br. at 17-18, 22; Intervenors' GSE Br. at 5. Notably, Defendants do not argue that the President actually *had* inherent reconsideration power here; rather, they look to a handful of agency adjudication cases for supposed "corroborat[ion]" of their textual reading. Defs.' GSE Br. at 22. The cases they cite, however, do not aid them even in that limited respect. The D.C. Circuit has generally "assumed" that agencies may reconsider their decisions in certain contexts "if done in a timely fashion," such as within the time available for taking an appeal. *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (citing, *inter alia*, *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)); *see also, e.g.*, *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (affirming agency's authority to reopen decision tainted by fraud, but recognizing several "limitation[s]" on agency reconsideration authority, including that it "must occur within a reasonable time"). These cases provide no support, however, for the perpetual modification authority Defendants try to read into the Antiquities Act—especially given that President Trump dismantled Grand Staircase more than two decades after its creation. *See, e.g.*, *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987) (concluding, based on passage of time, that the Interior Secretary "exceeded his authority in reconsidering and in revoking the trust status of plaintiff's land"); *cf. Albertson*, 182 F.2d at 399 (approving of reconsideration motion filed "within the twenty days allowed for

appeal"); *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (approving of reconsideration "well within 90 days" of original determination).[22]

Intervenors fare no better in contending, based on the example of agency rulemakings, that Congress had to "expressly" withhold modification or revocation authority in the Antiquities Act if it wished to retain that power for itself. Intervenors' GSE Br. at 5-6. To the contrary, courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (citation omitted). "Whenever a question concerning administrative … reconsideration arises, … the determinative question is not what [an agency] thinks it should do but what Congress has said it can do." *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321-22 (1961).

In sum, Congress deliberately limited the President's authority to a one-way protective power. The plain language of the Act, its context and contrast with other contemporaneous public-lands statutes, and its purpose and legislative history all point to the same result: The President lacked authority to revoke monument protections from 900,000 acres of land and innumerable objects of scientific interest in Grand Staircase.

E. Prior modifications of national monuments cannot expand the scope of statutory authority delegated by Congress.

Finally, Defendants attempt to justify President Trump's *ultra vires* action here by arguing that Congress has acquiesced to sporadic—and now long dormant—prior monument

[22] Defendants' reliance on *Sierra Club v. Van Antwerp* is similarly misplaced, as that case addressed agencies' requests for voluntary remand in litigation timely challenging their earlier decisions. 560 F. Supp. 2d 21, 23 (D.D.C. 2008). Here, various plaintiffs *did* timely challenge the designation of Grand Staircase, but that litigation concluded long ago; the federal government *defended* the Monument and its size, and the district court agreed that President Clinton had set aside "the smallest area necessary to protect the [Monument's] objects." *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

modifications. *See* Defs.' GSE Br. at 28-35. But "[p]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 531-32 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). And Defendants' argument that Congress did not "curtail" or "reverse" those prior modifications, Defs.' GSE Br. at 28, 31, places unsupportable weight on congressional inaction—especially when contrasted with Defendants' disregard for Congress's many affirmative statutory enactments respecting Grand Staircase. *See supra* at 23-28; *see also, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (rejecting "the theory that the Legislature's inaction reflects considered acceptance of the Executive's practice").

As an initial matter, Defendants err in relying heavily on cases "interpret[ing] … constitutional provisions," *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (citation omitted), or the allocation of power between branches of government in the *absence* of a statute, *see United States v. Midwest Oil*, 236 U.S. 459, 469-71 (1915); *see also Medellín*, 552 U.S. at 528 ("congressional acquiescence is pertinent when the President[] … acts in absence of either a congressional grant or denial of authority" (quotation marks and citation omitted)). By contrast, as Defendants acknowledge, "[t]he fundamental question" here "is whether presidents have the authority *under the Antiquities Act* to modify the boundaries of national monuments." Defs.' GSE Br. at 12 (emphasis added). In the statutory interpretation context, the Supreme Court has repeatedly explained that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969); *see also, e.g.*, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) (explaining that the Court approaches claims of "congressional acquiescence to administrative interpretations of a statute" with "extreme care"); *SW Gen.*, 137 S. Ct. at 943 (similar); *Cent. Bank of Denver*, 511 U.S. at 186 (similar); *Citizens for Resp. & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 410 n.47

(D.D.C. 2018) (collecting cases, and explaining that "[n]on-action by Congress is not often a useful guide to statutory interpretation." (quotation marks and citation omitted)); Amicus Br. of Members of Congress at 2-3, 14-15, ECF No. 95 (Mar. 20, 2019) (describing relevance of historical practice in constitutional versus statutory cases).[23]

Regardless, Defendants' proffer falls well short of the bar for acquiescence in any context, constitutional or statutory. Their scattered, inconsistent, and long-dormant examples are nothing like a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952)).

First, Defendants have not identified a single presidential monument reduction in the fifty-five years preceding President Trump's proclamation here. *See* Defs.' GSE Br. at 7 (listing President Kennedy's 1963 modification of Bandelier National Monument as the most recent example). The practice is therefore far from "unbroken." *Dames & Moore*, 453 U.S. at 686; *cf. Midwest Oil*, 236 U.S. at 470-71 (describing a "multitude" of consistent executive actions over "the past eighty years"); *Haig v. Agee*, 453 U.S. 280, 297-98, 303 (1981) (noting the importance of consistent and "unbroken" executive interpretation and practice in finding acquiescence);

[23] Acquiescence to post-enactment practice was not at issue in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010). *Contra* Defs.' GSE Br. at 29. Instead, the opinion concurring in the denial of rehearing en banc on which Defendants rely looked to actions that presidents *historically* took in wartime (i.e., pre-enactment) as an indication of what Congress meant when it passed the Authorization for Use of Military Force (AUMF) in 2001. *Al-Bihani*, 619 F.3d at 26 (Kavanaugh, J.). The concurrence concluded that Congress did not "intend to impose … international-law constraints on the President's war-making authority" as it had been historically understood. *Id*. at 25. In fact, the concurrence actually undermines the statutory interpretation argument Defendants press here: It concluded that the AUMF's "omission" of any reference to international law was "critically important" because "Congress has enacted many [other] statutes … that expressly refer to international law," demonstrating that "Congress knows how to accord domestic effect to international obligations when it desires such a result." *Id*. (citation omitted).

Kahn, 618 F.2d at 790 (finding congressional silence relevant only where executive's interpretation was "acted upon over a substantial period of time").[24] In essence, Defendants ask the Court to presume congressional acquiescence in an executive practice that has lain dormant and apparently abandoned for more than half a century—and they cite no case supporting their extraordinary position.

Second, even during the limited time period on which Defendants selectively rely (1911 to 1963), their examples reveal no consistent practice, but only an ad hoc, conflicting, and confused approach to diminishing national monuments. Defendants identify only "eighteen occasions" of prior presidential monument reductions. Defs.' GSE Br. at 7; *cf. Midwest Oil*, 236 U.S. at 471-75 (finding acquiescence in light of Executive Branch's "long-continued practice, known to and acquiesced by Congress," evidenced by "at least 252 executive orders making reservations" of land). And even that number is the result of Defendants' over-counting.

In fact, most of Defendants' examples are different in kind, reflecting ministerial corrections. *Cf. Int'l Paper Co. v. FERC*, 737 F.2d 1159, 1163-66 (D.C. Cir. 1984) (distinguishing the correction of ministerial or clerical errors from other substantive reconsiderations); *United States v. Seatrain Lines, Inc.*, 329 U.S. 424, 428-29 (1947) (similar). Four of Defendants' examples were premised on correcting inadequate surveys or typographical

[24] Defendants' heavy reliance on *Kahn* is particularly misplaced, *see* Defs.' GSE Br. at 31-32, as that case considered past practice only after finding that the statute's delegation of authority was "open-ended" and "imprecise," 618 F.2d at 788-89—which, as explained above, is not so here. Further, *Kahn* turned on whether the President had reasonably effectuated a statute's broadly described "goal" when exercising an indisputably delegated authority, *id.* at 789, not on whether Congress had acquiesced in the exercise of some other power. *See also id.* at 797 (Tamm, J., concurring) (emphasizing that the court's narrow holding "is predicated upon the close nexus between the purpose of the [executive order] and the goal of the Act" and "does not allow the President to exercise powers that reach beyond the Act's express provisions").

errors in the original proclamations.[25] Several more were adjustments made at least in part to exclude infrastructure or private lands.[26] No such considerations support the Trump Proclamation dismantling Grand Staircase. Thus, on even a brief examination, Defendants' list of eighteen examples quickly collapses into a scattered assortment of ad hoc instances that bear little if any resemblance to the proclamation at issue here. "Congress's failure to speak up does not fairly imply that it has acquiesced" in these long-ago actions, for it is "at least as plausible" that Congress "may not have noticed" them, or may have chosen not to respond with corrective legislation "just to make a point." *SW Gen.*, 137 S. Ct. at 943. And Defendants have not cited a single example of a president eliminating lands from a monument that Congress itself added by legislation, as President Trump purported to do here. *See supra* at 23-25.

Contrary to Defendants' assertion, the difference in kind between the largely ministerial modifications described above and President Trump's action here is "[]relevant," Defs.' GSE Br. at 32, when determining to *what*, if anything, Congress has acquiesced. The Supreme Court has

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[25] *See* Petrified Forest, 37 Stat. 1716, 1716 (1911) (revising boundary after a "careful geological survey"); Navajo, 37 Stat. 1733, 1733 (1912) (revising boundary "after careful examination and survey"); Hovenweep, 70 Stat. c26, c26 (1956) (fixing typographical error in monument coordinates and excluding lands that had been "erroneously included"); Arches, 74 Stat. c79, c79-c80 (1960) (excluding "720 acres" that "have no known scenic or scientific value").

[26] *See, e.g.*, Mount Olympus, 37 Stat. 1737, 1737 (1912) (removing homesteads); Mount Olympus, 45 Stat. 2984, 2984-85 (1929) (removing additional homestead); White Sands, 3 Fed. Reg. 2129, 2129 (1938) (removing lands in a highway right-of-way), Wupatki, 55 Stat. 1608, 1608 (1941) (removing 52 acres for dam); Craters of the Moon, 55 Stat. 1660, 1660 (1941) (removing "strip of land" for highway); Glacier Bay, 69 Stat. c27, c27 (1955) (removing "homesteads" and other lands that were "erroneously … included in the monument"); Black Canyon of the Gunnison, 74 Stat. c56, c56 (1960) (removing, among other things, "private[ly]" owned lands); *see also* John Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Designations*, 43 Harv. Envtl. L. Rev. 1, 53, 56-59 (2019) (discussing reductions of Mount Olympus in 1912 and 1929, Great Sand Dunes in 1956, and others).

repeatedly cautioned against "imput[ing] to Congress" endorsement of executive practice that does not evince a "consistent[] … pattern." *Kent v. Dulles*, 357 U.S. 116, 128 (1958); *see also Youngstown*, 343 U.S. at 611-12 (Frankfurter, J., concurring) (closely evaluating instances of past actions and concluding they were not comparable to the challenged steel mill seizures). Given the absence of any consistent pattern of monument reductions remotely resembling President Trump's proclamation, Defendants "cannot support the claim that Congress acquiesced in this *particular* exercise of Presidential authority." *Medellín*, 552 U.S. at 528 (emphasis added); *see also The Wilderness Soc'y v. Morton*, 479 F.2d 842, 868 n.58 (D.C. Cir. 1973) (en banc) (declining "to treat congressional acquiescence in one type of minor incursion as congressional acquiescence in incursions of a different order of magnitude").

Third, during even Defendants' selectively limited time period, the Executive Branch repeatedly acknowledged—*to Congress*—that the President *lacked* any authority under the Antiquities Act to reduce or rescind national monuments. As described in Plaintiffs' opening brief, throughout this time period, the Executive Branch repeatedly went to Congress with requests that Congress remove lands from particular monuments by statute—and Congress repeatedly obliged. *See* TWS Pls.' Br. at 34 n.13 (citing requests, and resulting legislation, from the 1920s through the 1960s). There would have been no need for Congress to act if the President himself had the power to make those changes unilaterally. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (relying on fact that "Congress has acted against the backdrop of the [Executive Branch's] consistent and repeated statements that it lacked authority"). Moreover, in the 1920s, the Executive Branch asked Congress to enact legislation authorizing the President himself to reduce monuments—a power that the Interior Secretary acknowledged the President lacked under existing law—and each time, Congress

declined. *See* TWS Pls.' Br. at 34-35 (citing failed bills).[27] Defendants try to downplay this damning record as "a few instances of contrary statements," Defs.' GSE Br. at 29, but they do not cite a single case where a court has found acquiescence in an assertion of executive power that the Executive Branch has repeatedly told Congress it lacks.

Defendants also quibble over whether the Executive Branch's statements about the President's authority originated with the Interior Department or with the President himself, *see id.* at 30,[28] but that is irrelevant to discerning *Congress's* understanding—and "the knowledge of the Congress" is the touchstone for acquiescence. *Dames & Moore*, 453 U.S. at 686 (citation omitted). What matters is that Congress heard from the Executive Branch, time and again, that the President lacked any authority under the Antiquities Act to reduce or rescind national monuments. Nor does it aid Defendants to pick and choose among Interior Solicitors' opinions that took inconsistent positions on the President's authority, particularly when there is no indication that Congress was aware of the opinions with which Defendants happen to agree. *See*

[27] "[N]on-action by Congress is not often a useful guide to statutory interpretation," Defs.' GSE Br. at 33 n.17 (citation omitted), but here we have more than mere inaction. On multiple occasions, Congress took action *inconsistent* with Defendants' present claim of acquiescence, affirmatively enacting legislation to reduce monuments at the Executive Branch's request. *See* TWS Pls.' Br. at 34 n.13. And in the 1920s, when the Executive Branch sought legislation to "eliminate" 160 acres from Casa Grande National Monument *and* to give the President authority to take "similar action in the future where conditions require," S. Rep. No. 69-423, at 2 (1st Sess. 1926) (Pls.' JA097), Congress "str[uck] out" bill language that would have authorized "the President … to eliminate lands from national monuments," 67 Cong. Rec. 6805 (1926) (Pls.' JA098), and instead enacted a statute making the requested change to Casa Grande directly, *see* Pub. L. No. 69-342, ch. 483, 44 Stat. 698, 698-99 (1926).

[28] *But see* H.R. Rep. No. 1119, at 1-2 (1925) (Pls.' JA089-90) (letter from Interior Secretary to Congress, advocating for legislation authorizing presidential modifications because of *the Attorney General's* opinion that delegated authority to "reserve the public lands does not necessarily include the power to restore them" to the operation of the general public land laws, but rather authorizes "a fixed reservation subject to restoration only by legislative act" (citing 32 U.S. Op. Att'y Gen. 488 (1921))).

Defs.' GSE Br. at 30-31. Given the Executive Branch's inability to maintain a consistent internal position, and its periodic representations to Congress that the President did *not* have the power to reduce monuments unilaterally, it is impossible to infer that Congress "kn[ew] … and acquiesced in" any "long-continued practice" of executive reductions, much less ones that were "never before questioned." *Dames & Moore*, 453 U.S. at 686 (citations omitted).[29]

Fourth and finally, the Federal Land Policy and Management Act (FLPMA) in no way "demonstrates acquiescence to presidential modification authority," much less "conclusively" so. Defs.' GSE Br. at 33. Quite the contrary. As Plaintiffs previously explained, FLPMA reaffirmed Congress's plenary power over public lands and clarified that any delegations of Congress's reservation or withdrawal authority must be express, not implied. *See* TWS Pls.' Br. at 37-38. FLPMA accomplished this end by, among other things, "eliminat[ing] the implied executive branch withdrawal authority recognized in *Midwest Oil*." *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 856 (9th Cir. 2017); *see* Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792 (1976). Notably, the 1935 Solicitor's Opinion on which Defendants now rely asserted that *Midwest Oil* supplied authority for presidential monument reductions. *See* U.S. Dep't of the Interior, Solicitor's Op. M-27657 at 3-5, 7 (Jan. 30, 1935) (Pls.' JA202-04, 206); *see also* Defs.' GSE Br. at 30-31 (favorably describing the 1935 Solicitor's "detailed legal analysis … concluding that there was an implied power to reduce monument reservations"). Whatever force that argument might have had in 1935, Congress unquestionably closed the door on it in 1976 when it enacted FLPMA.

Defendants nonetheless contend that FLPMA supports their position because it did not "limit" the President's purported authority to dismantle national monuments. Defs.' GSE Br. at

[29] Moreover, Defendants' parsing of the various Solicitor's Opinions simply highlights their failure to demonstrate a consistent and "unbroken" executive position. Defs.' GSE Br. at 30-31.

34. But there was nothing for Congress to "limit" because the President never *had* such authority, as the Executive Branch repeatedly informed Congress before and after FLPMA's enactment. *See supra* at 37-38. Nor does the fact that FLPMA section 204(j) forbids the Interior Secretary from revoking or modifying national monuments somehow suggest that the President, by negative inference, *is* free to do so. *Contra* Defs.' GSE Br. at 33-35. Section 204(j) simply clarifies that the grant of revocation and modification authority to the Secretary in section 204(a) does not extend to national monuments—or to other categorically protected land reservations, such as national parks and wildlife refuges. *See* 43 U.S.C. § 1714(j).[30] The accompanying House Report explains that the provision "specifically reserve[s] to the Congress the authority to modify and revoke withdrawals for national monuments" (as well as national parks and wildlife refuges), so that "the integrity of the great national resource management systems will remain under the control of the Congress." H.R. Rep. No. 94-1163, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6183.

Defendants have no real answer to the House Report's explanation, so they argue instead that the Court should ignore it. *See* Defs.' GSE Br. at 34-35. But unlike the cases on which Defendants rely, the pertinent legislative history here *does* have a "statutory reference point," *id.*[31]—namely, section 204(j). The House Report explains why that provision clarifies the Secretary's lack of authority to modify or revoke national monuments, and why it lists national monuments alongside other categorically protective designations over which Congress retained

[30] *See also* Ruple, 43 Harv. Envtl. L. Rev. at 38-39 (identifying other possible explanations for the provision, all of which comport with the view that Congress retained for itself the power to revoke or modify national monument reservations).

[31] Defendants' heavy reliance on *National Association of Broadcasters v. FCC*, 569 F.3d 416 (D.C. Cir. 2009), is misplaced because Plaintiffs here do not contend that the Trump Proclamation violates FLPMA, but rather simply that FLPMA reinforces the President's lack of authority to dismantle national monuments under the Antiquities Act.

tight control. Defendants' theory, by contrast, offers no coherent reason why Congress would have gone out of its way to preclude the Interior Secretary's modification of national monuments in FLPMA if it had already delegated that same authority to the President seventy years earlier in the Antiquities Act. And, tellingly, subsequent administrations have evidently understood that Congress reaffirmed its paramount power over national monument reservations in FLPMA, as no President in the ensuing forty years (covering seven administrations, of both political parties) attempted to diminish or dismantle a national monument—until President Trump did so here.

III. Plaintiffs Are Entitled to Relief.

No material facts are in dispute, and the law is clear: The Antiquities Act did not authorize President Trump to dismantle existing national monuments. Plaintiffs have therefore demonstrated that they are entitled to summary judgment on their *ultra vires* claim, as well as their claim that the President violated the Lands Exchange Act.[32] While Intervenors—and to a lesser degree, Defendants—raise certain limited, remedy-related objections, they do not (and cannot) dispute that the Court has "power to review the legality" of the President's action and "to compel subordinate executive officials to disobey illegal Presidential commands." *Reich*, 74 F.3d at 1328 (citation omitted). Consistent with this settled law, Plaintiffs seek (1) a declaration that the Trump Proclamation is unlawful, and, secondarily, (2) an injunction prohibiting Agency Defendants from implementing it. The Court can, and should, issue such relief at this time.

[32] As noted in Plaintiffs' opening brief, "[t]he Court need not decide the constitutional question if it grants summary judgment to Plaintiffs on their *ultra vires* or statutory claims." TWS Pls.' Br. at 44 n.16 (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). That does not mean Plaintiffs' constitutional claim is "defective," however, *contra* Defs.' GSE Br. at 41, or that Defendants are entitled to summary judgment on that claim. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 576, 593 (2009) (where petitioners "raise[d] a statutory claim … and a constitutional claim, … [and a] decision for petitioners on their statutory claim would provide the relief sought," the Court held that "[p]etitioners are entitled to summary judgment on their [statutory] claim, and we therefore need not decide the underlying constitutional question").

Defendants do not object to Plaintiffs' request for declaratory relief as against the Agency Defendants. *See* Defs.' GSE Br. at 11 (acknowledging, in section heading, that "[r]elief is available against [s]ubordinate officials"); *see also id.* at 42. Such relief is routine and unquestionably within the Court's authority, *see, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1171 (D.C. Cir. 2003) (affirming district court order "declar[ing] invalid" an agency's *ultra vires* interpretation of statute), including in cases where presidential action is at issue. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018) (granting declaratory relief addressed to subordinate official charged with carrying out unlawful presidential directive), *aff'd*, 928 F.3d 226 (2d Cir. 2019); *see also League of Conservation Voters*, 363 F. Supp. 3d at 1031 (vacating unlawful section of executive order). Declaratory relief need not be "against the President" in any sense that might implicate the separation of powers doctrine. *Contra* Intervenors' GSE Br. at 15. Instead, the Court may simply address its declaratory judgment to Agency Defendants who are charged with carrying out the Trump Proclamation, and whose future actions Plaintiffs seek to have conform to the law. *See* TWS Pls.' Br. at 21; TWS Pls.' Am. Compl. at 58 (Prayer for Relief) (ECF No. 119). Given Defendants' non-opposition to declaratory relief addressed to the Agency Defendants, the Court should enter that relief now.

If the Court determines that "declaratory relief against the [agency defendants] alone" will likely redress Plaintiffs' injuries, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion), then the decision whether to issue injunctive relief too lies, as usual, within the Court's discretion. There is no question that courts *may* issue injunctive relief against agency officials to prevent them from carrying out an unlawful presidential directive, *see* TWS Pls.' Br. at 21 (citing, *inter alia*, *Youngstown*, 343 U.S. at 584, 589), and Plaintiffs have established that

injunctive relief is warranted in this case, *id*. at 44-45 (discussing factors under *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010)). Defendants make no effort to explain why they believe injunctive relief should not be issued here. *See* Defs.' GSE Br. at 42. Nor is there any basis for additional "remedy briefing" about "the need for injunctive relief." Defs.' GSE Br. at 42 n.25. "Federal Defendants have had ample opportunity" to respond to Plaintiffs' requested relief, and additional briefing would only "further delay" the resolution of this case, threatening further harm to the excluded lands and to Plaintiffs' members' interests. *California v. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019).[33]

Intervenors, for their part, erroneously argue that Plaintiffs' injuries are not "irreparable." Intervenors' GSE Br. at 19. In the case on which they primarily rely, the court denied a request for a preliminary injunction because the plaintiff had not shown that even "one of [its] members intends to visit the location [of the mine] … in the next several months, before the court resolves this case." *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-01582 (APM), 2016 WL 420470, at *9 (D.D.C. Jan. 22, 2016). Plaintiffs here, in contrast, *have* established that their members use specific areas that are already impacted or likely will be impacted by hardrock mining, and that they plan to return to those areas in the future. *See supra* at 2-4; *cf. Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 325 (D.C. Cir. 1987) (finding irreparable harm where plaintiff's "affidavits … specifically identify locations where its members' interests are threatened" by mining).

[33] Defendants also urge the Court to dismiss the President from the suit, but they cite no case holding that the Court must dismiss the President under Rule 12(b)(1), *cf. Doe 2 v. Trump*, 319 F. Supp. 3d 539, 542 (D.D.C. 2018) (dismissing the President, but noting that the caselaw does not clearly hold that "must" be the result), or that the availability of relief against subordinate officials somehow means Plaintiffs lack standing to sue the President. The Court may decide, in its discretion, not to issue relief against the President, *see supra* at 42, but that does not mean the Court lacks jurisdiction or that the President was not properly named as a party.

The injuries to Plaintiffs' interests are irreparable. "Environmental injury, by its nature, can seldom be adequately remedied by money damages." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also, e.g.*, *Sierra Club v. Block*, 614 F. Supp. 488, 493 (D.D.C. 1985) (finding irreparable harm where "cutting [of trees would] impose[] a scar on the wilderness areas that may take 70 years or more to heal"). To the extent Intervenors imply that hardrock mine sites in the excluded lands will someday be reclaimed, *see* Intervenors' GSE Br. at 19, they point to no evidence supporting that assertion here. Regardless, the prospect that mined *land* may be reclaimed at some future date does not cure the harm to Plaintiffs' members' *interests* in enjoying the affected lands now, in the coming year, and so long as mining activity continues. *See, e.g.*, TWS Pls.' SUF ¶ 50 (Creamsicle claimant's filings describe intent to remove "up to 125 tons of material per year"); *id.* ¶ 57 (Berry Patch 4 claimant's filings propose the extraction of "50-100 ton[s] [of alabaster] per year," with no specified end date).

Similarly irrelevant is Intervenors' laundry list of other land classifications and statutes that, as a general matter, afford varying types of protection to various public resources. *See* Intervenors' GSE Br. at 20-22. If Intervenors mean to suggest that these other statutes and land classifications could mitigate the harm that hardrock mining causes to Plaintiffs' members' enjoyment of the excluded lands, they do not explain how. Similarly, Intervenors' theory that monument designations "serve[] to increase, not limit, the destruction of cultural resources," Intervenors' GSE Br. at 23, is utterly unsupported by admissible evidence—and in any event, it has nothing to do with Plaintiffs' undisputed harms from mining activity.

In sum, the undisputed material facts establish that, because of the Trump Proclamation, Plaintiffs' members face irreparable harm from hardrock mining. Injunctive relief is warranted against Agency Defendants "barring their implementation of the Trump Proclamation,"

including the February 2020 management plans and any "subsidiary plans premised on the Trump Proclamation," and "directing them to carry out the mandatory duties imposed on them in the 1996 Proclamation." TWS Pls.' Am. Compl. at 58. Such equitable relief is urgently needed to restore monument status and protections to these vulnerable public lands. If the Court determines that declaratory relief alone will likely redress Plaintiffs' injuries, however, Plaintiffs respectfully request that the Court retain jurisdiction so that it may issue injunctive relief at a later date if declaratory relief proves to be insufficient. *See, e.g.*, *Food Chem. News v. Young*, 709 F. Supp. 5, 9 (D.D.C. 1989) (issuing declaratory relief, and providing that "plaintiffs retain the ability to apply for injunctive relief if the Court's confidence in federal defendant should prove to be misplaced"), *rev'd on other grounds*, 900 F.2d 328 (D.C. Cir. 1990); *Knight*, 302 F. Supp. 3d at 579 ("conclud[ing] that injunctive relief may be awarded" against subordinate official, but "declin[ing] to do so *at this time* because declaratory relief is likely to achieve the same purpose" (emphasis added)).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for partial summary judgment, deny Defendants' cross-motion for partial summary judgment, and, at a minimum, issue declaratory relief advising the agency defendants that the Trump Proclamation "modifying" Grand Staircase-Escalante National Monument is null and void *ab initio*.

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Respectfully submitted,

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