IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' REPLY
IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

In modifying the Grand Staircase-Escalante National Monument ("Monument") to reflect what he determined to be "the smallest area compatible" with the proper care and management of the Monument objects, the President properly invoked his authority under the Antiquities Act of 1906. *See* Proc. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).[1] Plaintiffs' meritless claims challenging the Proclamation, filed on the day that it issued, fail for lack of jurisdiction and failure to state a claim, as Federal Defendants demonstrated in their opening brief. *See* Fed. Defs.' Mem. Supp. Mot. Dismiss, ECF No. 43-1 ("Defs. Br.").

Plaintiffs' responses fail to show that this Court has jurisdiction to hear their claims or that they are otherwise entitled to any relief. *See* TWS Pls.' Opp. Mot. Dismiss, ECF No. 61 ("TWS Br."); GSEP Pls.' Mem. Opp. Mot. Dismiss, ECF No. 63 ("GSEP Br."). By relying on post-complaint developments and transparent speculation to show injury, Plaintiffs effectively concede they did not have standing at the time they filed the complaints, and that their claims are unripe. Plaintiffs also fail to overcome Federal Defendants' showing that Proclamation 9682 was consistent with the text, purpose, and history of the Antiquities Act—and Congress' clear acquiescence to that application when it enacted the Federal Land Policy and Management Act ("FLPMA") in 1976. Later-enacted statutes transferring ownership and making minor boundary adjustments for certain parcels did not supersede presidential authority or otherwise codify the external boundary of the Monument. And contrary to Plaintiffs' assertions, Proclamation 9682 did *not* "*revok*[*e*] monument status and protections." TWS Br. 20. The Monument remains,

[1]Federal Defendants will use the same abbreviations for the parties and pleadings as they did in their opening memorandum. *See* Defs. Br. 1-2 & n.1. This brief also cites the Supplemental Declaration of Edwin Roberson ("Supp. Decl."), filed herewith.

reserving over 1,000,000 acres of federal land encompassing thousands of objects of scientific and historic interest—but no greater than what the President has, in his discretion, deemed to be necessary for the proper care and management of those objects. Plaintiffs barely stir themselves to defend their constitutional claims, which they acknowledge to be duplicative, and their claims under the Administrative Procedure Act ("APA") are unavoidably premature and defective. The Court should dismiss the complaints.

ARGUMENT

I. Plaintiffs Fail to Show that the Court has Jurisdiction over their Claims.

A. Plaintiffs have not demonstrated standing.

Courts "analyze[] standing 'as of the time a suit commences.'" *Save Jobs USA v. U.S. Dep't. of Homeland Sec.*, 210 F. Supp. 3d 1, 7 (D.D.C. 2016) (Chutkan, J.) (quoting *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009)), *appeal docketed* No. 16-5287 (D.C. Cir. Sept. 30, 2016). Plaintiffs failed to establish standing as of December 4, 2017, the day they filed their complaints, because they did not, and could not, plausibly allege that the bare issuance of the Proclamation caused them injury that was both "actual or imminent" and "concrete and particularized" to any organization or member. *Summers v. Earth Island Inst*, 555 U.S. 488, 493 (2009). *See* Defs. Br. 12-18. Plaintiffs' responses fail to show otherwise.

1. Post-complaint events cannot be used to establish standing.

Plaintiffs' responses discuss and attach materials concerning post-complaint activity in support of standing. *See, e.g.*, GSEP Br. 15, 18 & ECF 63-2, 63-3; TWS Br. 14. This is improper. Because "the 'existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed,' . . . a plaintiff may not supplement the record with materials that post-date the complaint in order to establish standing." *Save Jobs*, 210 F. Supp. 3d. at 6 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992)); *Tracie Park v. Forest Serv.*,

205 F.3d 1034, 1037–38 (8th Cir. 2000) (holding plaintiff may not "use evidence of what happened after the commencement of the suit" to show "a real and immediate threat" of injury). Accordingly, Plaintiffs' materials relating to post-complaint events should be stricken, and arguments for standing based upon such events should be disregarded. *See id.* at 7 (granting motion to strike post-complaint "appendix"). However, even if they were considered, the post-complaint developments do not demonstrate that injury is imminent even now.

2. The TWS Plaintiffs have not plausibly alleged a substantial probability of injury to any member from notice-level exploration activity.

The TWS Plaintiffs pursue a single theory of standing in their response: that "notice-level" mineral exploration ("notice-level activity") threatens their members with a "substantial risk" of injury. TWS Br. 11-15. Although they refer to claim-staking and "casual use" as well, the TWS Plaintiffs do not argue that those activities cause injury, much less concrete, particularized, or imminent injury. Nor would such an allegation be plausible, because Plaintiffs' asserted injuries stem from "surface-disturbing" activity, TWS Br. 13, and staking and "casual use" involve at most negligible surface-disturbance. Defs. Br. 15 n.8; 43 C.F.R. § 3809.5.[2] Thus, jurisdiction over TWS's claims depends upon whether they pleaded facts demonstrating that, as of December 4, 2017, notice-level activity threatened a particular member with imminent injury under the D.C. Circuit's "substantial risk" test. *See Food & Water Watch*

[2]TWS also refers to "leasing" activity (*i.e.*, for oil, gas, and coal), TWS Br. 12, but BLM is currently precluded from expending funds on leasing and pre-leasing activity in the prior Monument boundaries. *See* Consol. Approp. Act 2018, § 408, Pub. L. No. 115-141 (March 23, 2018) (continued by Dep't. of Defense et al. Approp. Act, 2019, and Continuing Approp. Act, 2019, Pub. L. No. 115-245, Div. C. § 101, 132 Stat. 2981 (2018) (amended by H.J. Res. 143, Making further continuing appropriations for fiscal year 2019, and for other purposes, Pub. L. No. 115-298 (2018))). The rider distinguishes these cases from *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985 (D. Alaska 2018).

v. Vilsack (*F&WW*), 808 F.3d 905, 915 (D.C. Cir. 2015).[3] They did not plead those facts.

In this circuit, "the proper way to analyze" a substantial-risk claim is, first, "to consider the ultimate alleged harm" to a given member, and then "to determine whether the increased risk of such harm makes injury to [that member] sufficiently 'imminent' for standing purposes." *F&WW*, 808 F.3d at 915 (quoting *Pub. Citizen, Inc. v. NHTSA (Pub. Citizen I*), 489 F.3d 1279, 1298 (D.C. Cir. 2007)). That second determination, in turn, requires finding "at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Pub. Citizen I*, 489 F.3d at 1295. This analysis involves "a very strict understanding" of what "count[s] as 'substantial.'" *F&WW*, 808 F.3d at 915 (citation omitted).[4] Thus, contrary to the TWS Plaintiffs' claim that they need only allege that the Proclamation "weaken[s] or remove[s] barriers to third-party activity that would harm them," TWS Br. 12, they must actually plead facts showing a "*substantially*" increased risk of "harm" that results in a "*substantial*" probability of injury to a particular member. *See Pub. Citizen, Inc. v. Trump* (*Pub. Citizen II*), 297 F. Supp. 3d 6, 18 (D.D.C. 2018).

The TWS Plaintiffs make no serious attempt to satisfy the substantial-risk test. First, they failed to plead facts showing that the "ultimate alleged harm" from notice-level activity is particularized. *F&WW*, 808 F.3d at 915; *Summers*, 555 U.S. at 499 (plaintiffs asserting "probabilistic standing" must "identify members who suffer the requisite harm"). The complaint

[3]To demonstrate imminence, Plaintiffs must make allegations showing that injury was "certainly impending" or showing "'a substantial risk' that the harm will occur" as of the day they filed suit. *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626-27 (D.C. Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 n.15 (2013)). The TWS Plaintiffs depend exclusively on the "substantial risk test." *See* TWS Br. 12.

[4]For example, if an action increases the risk of harm from 2% to 10%, the five-fold increase in risk may be substantial, but the 10% probability of harm to any person may not be substantial enough to demonstrate imminence.

alleges no facts showing that any member faces a particularized harm from notice-level activity, only that certain members "visit the Monument, including the areas that have now been stripped of protection." TWS Compl. ¶¶ 22, 25, 28, 33, 41, 44, 46, 50. Although courts must presume a plaintiff's "general allegations embrace those specific facts necessary to support the claim," *Defs. of Wildlife*, 504 U.S. at 561, that presumption has limits: courts do not "accept inferences that are unsupported by the facts set out in the complaint," and they "may reject as overly speculative those links which are predictions of . . . future actions to be taken by third parties[.]" *F&WW*, 808 F.3d at 913 (quoting *Arpaio v. Obama*, 797 F.3d 11, 19, 21 (D.C. Cir. 2015)); *Save Jobs*, 210 F. Supp. 3d at 7. Because the TWS Plaintiffs allege injuries based on actions of third parties, they must plead concrete facts to support the inferences they seek. They have not. [5]

Here, it cannot be presumed that third parties will engage in notice-level exploration where it will be observed or otherwise cause injury to one of Plaintiffs' members. The excluded lands encompass over 800,000 acres, a land area larger than Rhode Island, and mineral potential and visitor use across that area vary broadly. Moreover, mineral exploration cannot be conducted under a "notice" in Wilderness Study Areas ("WSAs"), which account for more than 220,000 acres of the excluded lands. *See* 43 C.F.R. § 3809.11(c); Supp. Decl. ¶ 6-7. Thus, the Court cannot make an inference of particularized injury from TWS's complaint because it does not contain factual allegations identifying a *particular* area where a third party is able and likely to engage in notice-level activity and that one of Plaintiffs' members is likely to visit. *See Lujan*

[5]In the cases cited at TWS Br. 12, there were concrete allegations of third-party conduct in specific areas. *See Sierra Club v. Jewell*, 764 F.3d 1, 7-8 (D.C. Cir. 2014) (plaintiffs identified two *active* mining permits, one "in use"); *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (petitioners identified member who lived near facility that had a pending application to burn hazardous waste prior to filing of petition); *see also, e.g.*, *In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016) (plaintiff named member who lived near two mine sites, one "currently operating" and one where operator had "concrete plan" to proceed).

v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990) (holding that injury is not established by "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory" where mining could occur); *see also, e.g., Elec. Privacy Info. Ctr. v. FAA* (*EPIC*), 892 F.3d 1249, 1254 (D.C. Cir. 2018) (rejecting organization's "generic allegations" that drone use would increase in areas where its members live and travel).

The TWS Plaintiffs have also failed to plead facts showing a "substantially increased risk of harm" from notice-level activity, even to some hypothetical member. *Pub. Citizen I*, 489 F.3d at 1295 (emphasis omitted). That some claims have been staked—after these suits began—does not demonstrate that anyone had (or has) concrete plans to engage in notice-level activity, and the TWS Plaintiffs' "[b]are allegations about what is likely to occur are of no value." *Save Jobs*, 210 F. Supp. 3d at 7 (citation omitted). There is no direct link from staking of a claim to notice-level activity on that claim.[6]

Further, TWS Plaintiffs cannot show a "substantially increased risk of harm" from notice-level activity because they have not pleaded facts showing that all potentially authorized notice-level activities would cause cognizable harm. Plaintiffs simply assume that third parties will engage in certain *types* of notice-level activity *and* that BLM will fail to carry out its legal obligations to prevent that activity from causing "unnecessary or undue degradation." 43 C.F.R. § 3809.415 & 3809.420. *See* Defs. Br. 15 n.8. Both assumptions should be rejected. The allegations about third-party conduct are "overly speculative," *F&WW*, 808 F.3d at 913, and courts "may not assume" that agency decisionmakers will exercise their discretion with respect

[6]Staking is not a costly exercise, and many claims are never developed. Those that are may be developed through means *other* than notice-level activity; it is not a necessary step. Thus, the link from claim staking to notice-level activity is far more attenuated than the link between, for example, a lease sale (which can involve a substantial investment) and an application to drill.

to that conduct in any particular way. *Pub. Citizen II*, 297 F. Supp. 3d at 25 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006)). BLM's review of notices is no rubber stamp. *See* Roberson Decl. ¶¶ 23-25. Thus, the Court may not assume, as the TWS Plaintiffs do, that BLM will simply disregard the protection of resources when notices are filed for activities such as road construction and the use of earth-moving equipment. *See* TWS Br. 14.[7]

Finally, the TWS Plaintiffs do not satisfy the substantial-risk test because they have not identified any member for whom injury is a "*substantial* probability." *Pub. Citizen I*, 489 F.3d at 1295. As noted, the TWS Complaint does not link notice-level activity to any particular areas that Plaintiffs' members have plans to visit. Even if this Court were to infer that there is *some* chance a member could wander into an area where notice-level activity could occur, and that there is *some* risk that the activity occurring there could cause cognizable injury, Plaintiffs have not shown that those probabilities add up to a "substantial probability" of injury, and certainly not under a "strict understanding" of what "count[s] as substantial," *F&WW*, 808 F.3d at 915. *See Summers*, 555 U.S. at 499 (allegations that a member may be "roughly in the vicinity of a project site" are not sufficient); *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018) ("A petitioner that asserts a harm that may occur 'some day,' with no 'specification of when the some day will be,' does not establish its standing." (citations omitted)).

[7] *See also EPIC,* 892 F.3d at 1254 (the plaintiff "bears the burden to show" that agency will authorize the activities asserted to cause injury); *Attias*, 865 F.3d at 626 (explaining that *Clapper* rejected the plaintiffs' "assumption that independent decisionmakers . . . would exercise their discretion in a specific way"); *see also, e.g.*, *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24-25 (D.C. Cir. 2018) (declining to "hypothesize[ ] as to the outcome" of future agency proceedings); *Pub. Citizen II*, 297 F. Supp. 3d at 30 (declining to speculate how draft rule might be modified); *Conference of State Bank Supervisors v. OCC,* 313 F. Supp. 3d 285, 300 (D.D.C. 2018) (declining to assume regulator would charter new "fintech" companies).

3. The GSEP Plaintiffs also failed to demonstrate actual or imminent injury to any member as of December 4, 2017.

Like the TWS Plaintiffs, the GSEP Plaintiffs have limited their theory of associational standing to a narrow set of predicted injuries, and they do not plausibly assert an imminent injury from mineral leasing, claim staking, or casual use. *See, e.g.*, GSEP Compl. ¶¶ 27-28 (alleging imminent harm only from mineral leasing and only "once th[at] process commences").[8] Their other theories of injury fail.

a. Mining Activity

The GSEP Plaintiffs assert standing based on allegedly imminent injury from mining activity, also with a focus on notice-level exploration activity. GSEP Br. 17-19. That assertion fails for the reasons above. The GSEP Plaintiffs did not plead any facts to show that, at the time they filed suit, an injury was "certainly impending" or that there was a substantial probability of injury to any member from notice-level activity—which is not even mentioned in the complaint.

Although this Court may not find standing based on assertions that are not in the complaint, *see Arpaio*, 797 F. 3d at 21, the GSEP Plaintiffs' brief also fails to demonstrate imminent injury. Their argument rests on speculation that *if* certain notice-level activities are authorized in certain areas, *some* member *might* observe them or the "context" for *some* member's research will be "detrimentally impact[ed]." GSEP Br. 19. *See, e.g.*, *id.* at 16-17 (speculating that "mining trucks" will be "sent up" the Old Burr Trail when a member who visits the "Circle Cliffs region" might see them); ECF No. 63-2 (alleging that Colt Mesa claims are in

[8]The GSEP Plaintiffs also contend that "development of excised lands will be visible from, and increase traffic through, areas retained *within* the Monument, including by increasing air and noise pollution." GSEP Br. 17 n.16. This kitchen-sink allegation does not merit a response because it was not in the complaint and is raised here in a footnote. Even so, it is not particularized and rests on "a series of contingent events"—such as the issuance of final management plans and the opening of particular roads—"none of which was alleged to have occurred by the time of the lawsuit." *Attias*, 865 F.3d at 628.

areas with fossil potential but not alleging that any member has plans to conduct research there).[9] Plaintiffs' brief "stacks speculation upon hypothetical upon speculation," and "does not establish . . . imminent injury." *Kansas Corp. Comm'n*, 881 F.3d at 931 (citation and quotation omitted).

The GSEP Plaintiffs' new allegations about Glacier Lake Resources ("Glacier Lake") concern post-complaint developments that cannot establish standing, as the GSEP Plaintiffs appear to acknowledge. *See* GSEP Br. 11-12, 18; *id.* at 11 n.49 (stating that they "do not . . . rely on [post-complaint] events to establish standing"). These allegations are also inaccurate: Glacier Lake has not "staked" any claim on the lands excluded from the Monument, *id.* at 11. *See* Roberson Decl. ¶ 29. Although it announced it had acquired some claims last spring, the company has not recorded any acquisition with BLM. Supp. Decl. ¶¶ 9-10. The GSEP Plaintiffs quote a June 2018 press release in which Glacier Lake stated that it intended to begin work at Colt Mesa "in the near future," GSEP Br. 18, yet, in August, Glacier Lake publicly stated (in a securities filing) that "[t]he Company has not finalized any plans on whether it will or will not proceed in going forward with this project," and it reiterated that uncertainty last month.[10] Glacier Lake's aspirational statements do not establish imminent injury.

b. Research funding

In addition to their asserted injuries from mining activity, the GSEP Plaintiffs allege that the members of the Society for Vertebrate Paleontology ("SVP") have been harmed by a loss of research opportunities. GSEP Br. 14-16. These allegations fail because they lack particularity

[9]GSEP contends that Colt Mesa is in the Circle Cliffs "region" and that its members visit the "area," GSEP Br. 16, but that "area" could encompass hundreds of miles. Supp. Decl. ¶ 20. Further, Colt Mesa is a historical mine site where the surface is already disturbed. *Id.*, ¶ 11.

[10] Glacier Lake Resources, Inc., *Management Discussion and Analysis for the Three Months Ended June 30, 2018*, at 10 (Aug. 23, 2018); Glacier Lake Resources, Inc., *Management Discussion and Analysis for the Six Months Ended September 30, 2018*, at 11 (Nov. 26, 2018) (same), both available at http://www.sedar.com (search "Glacier Lake").

and depend upon speculative actions of third parties, such as grant-making institutions.

The GSEP Plaintiffs contend that, based on the change in the status of the excluded lands, SVP members are no longer eligible for funding from a BLM program relating to National Landscape Conservation System ("NLCS") lands, and that their ability to seek other funding and publication is jeopardized. *Id.* at 14-15. However, there are no allegations in the complaint or declarations showing that these predicted injuries were concrete and particularized to any SVP member as of December 4, 2017. With respect to NLCS funding, SVP past president David Polly states that such funding was "available" to SVP members before the Proclamation and that projects on the excluded lands are now "ineligible" for such funding, GSEP ECF No. 1-4, ¶ 13.b.i, but his assumption about program eligibility is unsupported, *see* Supp. Decl. ¶ 22. Further, neither he nor the complaint alleges that any SVP member actually *intended* to seek NLCS funding for a project on the excluded lands and would have done so but-for the Proclamation. *See id.*; GSEP Compl. ¶ 37 (identifying two members with research interests in the Monument without reference to funding).

The GSEP Plaintiffs similarly fail to show particularity with respect to non-BLM funding and publication. While Polly attests that SVP members "risk" losing funding, he does not allege that any member of SVP has sought funding (or publication) for research and had that request denied because of the Proclamation, or that any member is currently seeking funding (or publication) and encountering difficulties because of the Proclamation. GSEP ECF No. 1-4, 13.b.ii; Compl. ¶ 37. Likewise, while Emily Sadler avers that grant-making institutions and publications will reject proposals that cannot demonstrate adequate protection of research sites, GSEP ECF No. 21-6, ¶ 14.D, she does not state that she has concrete plans to conduct research projects on the excluded lands and does not identify any institution or publication that has

indicated an intent to restrict eligibility for projects on the excluded lands.

Moreover, the GSEP Plaintiffs cannot show that the protections afforded by the future management plan (which is still in development) and enforcement of the Paleontological Resources Preservation Act ("PRPA") and other applicable law will be insufficient to protect resources they are interested in. GSEP Br. 19. Because the Monument Management Plan remains in place, and monitoring and law enforcement patrols have continued at pre-modification levels, Supp. Decl. ¶¶ 12-17, any such allegations are necessarily speculative, and entail impermissible assumptions about how the future management plan will address particular places and resources, how third parties will react to the plan, and how it will be implemented. *See* p.7, *supra*. The draft plan was released after the complaints were filed and cannot establish standing. The GSEP Plaintiffs also fail to allege facts plausibly showing a concrete injury to any member from "casual collection" of common invertebrate fossils (such as shells) and "visual and aesthetic disturbances at dig sites" from hypothetical notice-level activity. GSEP Br. 19. They therefore fail to plausibly allege imminent injury to any members as of December 4, 2017.

4. The GSEP Plaintiffs have not demonstrated organizational injury.

The GSEP Plaintiffs also fail to establish jurisdiction based on organizational injury because they have not demonstrated that the Proclamation impedes their operations. *See* Defs. Br. 18. "It is clear from the [D.C.] Circuit's holdings . . . that having a concrete injury to an organization's interests means that the challenged activity must hamper the organization's ability to do what it does." *N.E. Anti-Vivisection Soc'y v. U.S. FWS*, 208 F. Supp. 3d 142, 166 (D.D.C. 2016). The GSEP Plaintiffs imply it is sufficient merely to show that each organization has spent money on campaigns relating to the Monument. GSEP Br. 20-21. That is not correct. When alleging organizational injury, "[n]ot all uses of resources count." *Ctr. for Responsible*

Sci. v. Gottlieb (*"CRS"*), No. 17-cv-2198, 2018 WL 5251741, at *4 (D.D.C. Oct. 22, 2018). In particular, "resources spent educating the public or the organization's members cannot establish Article III injury unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Id.* (quoting *F&WW*, 808 F.3d at 920). That showing is necessary, because, for an organization to suffer concrete injury, "the challenged activity must hamper the organization's ability to do what it does." *N.E. Anti-Vivisection Soc'y*, 208 F. Supp. 3d at 166.

The GSEP Plaintiffs have not alleged that the Proclamation has caused them to incur operational costs beyond those normally expended that impair their ability to "do what they do." Although GSEP and the Conservation Lands Foundation ("CLF") contend that they have "been required to divert resources" to protecting the Monument (GSEP Br. 20), protecting conservation lands *is* the mission of these organizations. *See* GSEP Compl. ¶¶ 18-19; 39.[11] They have not plausibly alleged that their conservation and monitoring campaigns go beyond what they would normally expend or that their ability to provide those services is impaired. *See CRS*, 2018 WL 5251741, at *6 (allegation that organization had reallocated resources to a new campaign "cannot save the day" when the campaign is "functionally similar to the organization's normal-course campaigns independent of the challenged conduct").[12]

Further, because the protections of the Monument Management Plan and other statutes remain in place, any alleged increase in vandalism is not fairly traceable to the Proclamation.

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[11]The TerraTruth app permits users to report damage on "the National Conservation Lands," comprising "36 million acres" of BLM-managed lands. Conservation Lands Foundation Launches Terra Truth Application (Jan. 24, 2018), https://conservationlands.org/conservation-lands-foundation-launches-terratruth-app (last visited Dec. 12, 2018). TerraTruth is not specific to lands excluded from Grand Staircase and does not show a use of resources "beyond those normally expended," *F&WW*, 808 F.3d at 920 (citation omitted).

[12]*See also, e.g.*, *Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54, 62-63 (D.D.C. 2017); *Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 258-63 (D.D.C. 2016).

GSEP's and CLF's use of resources to protect against a speculative future increase in vandalism tied to the Proclamation is self-inflicted injury that does not give rise to standing. *See Pub. Citizen II*, 297 F. Supp. 3d at 38-39 ("plaintiffs may not turn an unduly speculative or hypothetical injury into a concrete injury 'by inflicting harm on themselves based on their fears of [the] hypothetical future harm.'" (quoting *Clapper*, 568 U.S. at 416)); *see also, e.g.*, *Turlock*, 786 F.3d at 25 (finding conservation group's "unsupported presumptions" and "guesswork about what future tourists might do" was "insufficient"). GSEP's and CLF's use of resources to provide *additional* protection beyond what the plan provides is not a cognizable injury.

As for SVP, the GSEP Plaintiffs allege that it has "been devoted to education around the rich paleontological resources at the Monument" and that this "effort . . . is now limited and compromised by the exclusion of vast portions of those resources." GSEP Br. 21. This statement does not allege injury in fact because it does not identify injury to SVP distinct from the purported injury to its members. To demonstrate injury in fact, "complaining that the organization's ultimate goal has been made more difficult is not sufficient." *New England Anti-Vivisection Soc'y*, 208 F. Supp. 3d at 166 (citation omitted).

In sum, neither set of Plaintiffs has shown that they or their members were suffering an injury in fact sufficient to establish jurisdiction as of December 4, 2017, or today.

B. Plaintiffs' claims for relief against President Trump should be dismissed.

If this Court concludes there is injury in fact to support jurisdiction over Plaintiffs' claims, all claims for relief should be dismissed to the extent they are brought against the President because Plaintiffs now acknowledge that their asserted injuries can be redressed by a declaratory judgment and potential remedies directed to the Agency Defendants. TWS Br. 16-17; GSEP Br. 22. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). In this circumstance, Circuit law forecloses an order of remedies directed to the President. *See*

Swan v. Clinton, 100 F.3d 973, 976-977 & n.1 (D.C. Cir. 1996).[13] Thus, the proper course of action is for the Court to dismiss the President as a defendant and dismiss Plaintiffs' claims to the extent they name the President as a defendant. Plaintiffs have not identified any circumstance where a remedy against the President would be needed to afford them adequate relief, or would afford them any relief beyond the symbolic. *See* Defs. Br. 19-20.

II. Plaintiffs' Claims are neither Constitutionally nor Prudentially Ripe.

Because Plaintiffs have not demonstrated their standing to sue at the time they commenced these actions, their claims are not constitutionally ripe. *See Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013) (internal citation omitted)); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999). But even if Plaintiffs had standing, their claims should be dismissed for lack of prudential ripeness.

Prudential ripeness requires an analysis of "the fitness of the issues for judicial decision and the extent to which withholding a decision will cause hardship to the parties." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (internal quotation omitted). Arguably, Plaintiffs' claims addressing the lawfulness of Proclamation 9682 meet the first prerequisite—fitness for review—because they present primarily legal issues for the Court's consideration, and because the Proclamation is final. *See id.* But the same cannot be said for both of their Fifth Counts, which address *implementation* of the Proclamation.

GSEP's Fifth Count alleges that if Federal Defendants modify the existing management

[13]The GSEP Plaintiffs cite *Swan* to show that "the federal judiciary can and has issued declaratory relief against the President in the past," GSEP Br. 22 n.70, but on the cited page the court expresses doubt that those earlier decisions "remain good law" after *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). *See Swan*, 100 F.3d at 977. In *Blumenthal v. Trump*, 17-cv-1154, 2018 WL 4681001 (D.D.C. 2018), the President was the only defendant and there were no implementing decisions by subordinate officials alleged.

plan for the Monument, they must "follow the procedures specified in FLPMA and NEPA." GSEP Compl. ¶ 147. But they provide no factual allegations (nor is there any reason to believe) that the Agency Defendants will not do so, given that BLM is presently engaged in a land use planning process under FLPMA and NEPA to address future management of the relevant lands. Defs. Br. 10. Similarly, the TWS Plaintiffs' Fifth Count centers on allegations that BLM will "no longer protect the objects of historic and scientific interest identified in the 1996 Proclamation" and will instead authorize mineral development and discontinue efforts to protect the lands "from the harmful impacts of roads, off-road vehicles, and other activities." TWS Compl. ¶ 170. As demonstrated in Federal Defendants' opening brief—and undisputed in Plaintiffs' responses—these allegations are indisputably speculative and premature, and are based entirely upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). *See also Tulare Cty v. Bush*, 185 F. Supp. 2d 18, 30 (D.D.C. 2001) ("The plaintiffs cannot demonstrate ripeness . . . because the Secretary of Agriculture has not yet implemented the final management plan called for in the Proclamation."), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

Plaintiffs do not demonstrate cognizable hardship for *any* of their claims. As demonstrated above, Plaintiffs have not adequately alleged imminent injury resulting from the Proclamation itself—nor from any as-yet undetermined land management decisions or speculative NEPA or FLPMA violations. Most injuries asserted by Plaintiffs (such as those related to certain mineral development or vehicle use) would require additional authorization by BLM, subject to compliance with NEPA and other applicable laws—and would be subject to challenge. *See Wyo. Outdoor Council*, 165 F.3d at 50–51 (no hardship where Plaintiffs could

seek relief via NEPA claim). Furthermore, while Plaintiffs assert "growing levels of vandalism, looting, and unauthorized ATV and motorized vehicle use on the excised lands," GSEP Br. 25, such activities are just as unlawful today as they were before the 2017 Proclamation. Plaintiffs cannot show that vacatur of the 2017 Proclamation will reduce unlawful conduct by third parties.

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

A. Plaintiffs ignore the limited review applicable to their claim.

The Supreme Court has recognized that where the President is exercising authority delegated from Congress, judicial review of presidential decisionmaking is extremely limited in scope. *See Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."). Thus, judicial review in this case is limited to determining whether the President has clearly exceeded his authority. *Mountain States Legal Found. v. Bush (Mountain States)*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

Implicit in this limited standard of review is the principle that courts should afford some level of deference to the President's determination of the scope of the authority delegated by Congress. With respect to such determinations made by an executive *agency*, the Supreme Court has made clear that the courts are to defer to the agency's "interpretation of a statutory ambiguity that concerns the scope of [its] statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (rejecting argument that an "*ultra vires*" challenge was not subject to deference requirement). *See also Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) (recognizing "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (quoting *City of Arlington*, 569 U.S. at 301).

While the courts have not expressly addressed the issue, there is no reason why similar –

or even greater – deference should not be afforded the President in addressing statutory delegations of authority to him. *See* Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 563-568 (2005) (arguing that "the reasons for according *Chevron* deference to the president are even stronger than those for applying it to agency action").[14] Indeed, courts afford deference to agencies interpreting statutory authority that was directed to the President. *See Consarc Corp. v. U.S. Treas. Dep't,* 71 F.3d 909, 914 (D.C. Cir. 1995) (deferring to agency, authorized to implement relevant "Presidential authorities" under 50 U.S.C. § 1702(a), in its interpretation of that statute); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991) (applying deference to EPA's interpretation of statute that vested initial authority in "the President," who had delegated his authority to the EPA).

Here, the President did not exceed his authority in modifying the boundaries of the Monument to ensure that the reservation of land is confined to the smallest area compatible with the proper care and management of the monument objects, as provided in the Antiquities Act. *See* 82 Fed. Reg. at 58,093. The Act's text does not foreclose the President's assertion of this authority—it reinforces it. *See Safari Club Int'l*, 878 F.3d at 326. *See also Youngstown Sheet &*

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[14]An amicus brief filed in *Western Watersheds Project v. BLM*, No. 08-cv-1472, 2009 WL 5045735 (D. Ariz.), by Law Professors and Practitioners (including some of the individuals who seek permission to file amicus briefs in this case) cites favorably to this article, and argues that presidential interpretations of statutes should be afforded something akin to *Chevron* deference:

> While the Supreme Court has not yet definitively resolved the level of deference due a President's view of the scope of authority delegated to him by statute, lower courts have almost *uniformly granted a substantial degree of deference*. *See* Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 563-568 (2005) (citing cases). This has been the case in Antiquities Act litigation. *See Mountain States Legal Foundation*, 306 F. 3d 1132; *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003). One commentator has argued persuasively that something akin to the so-called Chevron deference accorded agency interpretations of their statutory authority should be accorded to presidential interpretations as well. Stack, at 585-601 . . .

Id. (emphasis added).

Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."). This circumstance is corroborated by the fact that Presidents have repeatedly exercised the authority to reduce national monuments and Congress has not taken *any* step to curtail that conduct in 110 years, despite a clear opportunity to do so in the enactment of FLPMA in 1976. Defs. Br. 32-33.

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

1. Presidential modification authority is consistent with the Act's plain language and context.

The Antiquities Act's delegation of authority to the President is "broad," *Mountain States*, 306 F.3d at 1135, and expressly leaves the decisions both to declare a monument, and to reserve any particular "parcels of land," to his discretion. 54 U.S.C. § 320301. Only one instruction in the statute is mandatory—that any land reserved "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b). Plaintiffs seek to minimize this language, suggesting that it applies only to a President's *initial* choice to reserve lands for a monument, TWS Br. 22; GSEP Br. 30-31. While it does impose a limitation on the initial exercise of the reservation authority, the mandatory and non-discretionary language of this provision also supports Congress' intent to authorize Presidents to correct prior reservations that do not comport with that limit. Defs. Br. 25-29.

Plaintiffs argue the Act's language sustains only two narrow actions: declaring and reserving—not the "opposite power" of "revoking" monument status. TWS Br. 20; GSEP Br. 30-31. But the Proclamation did not invoke an "opposite power"—rather, it invoked the President's ongoing authority to ensure that lands reserved for a monument are "confined to the smallest area compatible with the proper care and management" of the protected objects. Defs. Br. 26-27. As such, Plaintiffs' reliance on *Cochnower v. United States*, 248 U.S. 405, 406

(1919), is misplaced. There, the Court held that a statute authorizing the Secretary of Treasury "to increase and fix the compensation of inspectors of customs" did not include the authority to "decrease" the compensation. *Id.* But *Cochnower* provides no guidance here, where the President invoked a constituent, not an "opposite," authority under the statute. Nor does *North Dakota v. United States*, 460 U.S. 300, 312 (1983), support their position. The question there was whether *a state* could withdraw its consent to the United States' acquisition of wetland habitat—where consent was a prerequisite to the acquisition under the applicable statute. The Court's determination that the state could not withdraw its consent was based on the absence of any suggestion to that effect in the statute's text, *as well as* the inconsistency of the state's position with pre-enactment practice (since state consent had not previously been required); and critically, the possibility that the state's interpretation would "severely hamper[]" the land acquisition program authorized under the statute. *Id.* at 314. None of those circumstances exists here.[15]

Plaintiffs next argue that Federal Defendants' interpretation of the confinement requirement violates the "fundamental canon of statutory construction that the words of a statute must be read in their context." TWS Br. 22 (quoting *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016)). Not so. The text imposing the confinement obligation was originally in the same *sentence* as the designation and reservation text.[16] And the authorization and obligation it imposes "in all cases" to confine monument reservations to the "smallest area compatible" with

[15]The other cases cited by Plaintiffs are completely inapposite. *See In re Aiken County*, 725 F.3d 255, 261 (D.C. Cir. 2013) (opining in dicta that "the President does not have unilateral authority to refuse to spend the funds" appropriated for a specific project); *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (finding that line-item veto violated non-delegation clause).
[16]As TWS Plaintiffs note, these later modifications were not intended to modify the Act's substance. TWS Br. 22 n.8.

protection of the objects is fully consistent with the remainder of the statute—including its purpose of protecting objects, limited by obligation to ensure only those lands necessary to do so are included. *See infra* at Part III.B.[17]

Plaintiffs claim that Federal Defendants' reliance on this obligatory requirement is "illogical" because it would impose an "onerous obligation" on Presidents to review all past monument designations. TWS Br. 23 n.9. To the contrary, a statute can authorize Executive Branch action without imposing a mandatory duty to conduct a particular review. *See, e.g.*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) (statute may be "mandatory as to the object to be achieved," but leave the agency "a great deal of discretion in deciding how to achieve it"); *Anglers Conservation Network v. Pritzker*, 808 F.3d 664, 671 (D.C. Cir. 2016) (distinguishing between grants of discretionary and mandatory authority).

Plaintiffs also attempt to distinguish cases holding that the "power to reconsider is inherent in the power to decide," *Albertson v. FCC*, 182 F.3d 397, 399 (D.C. Cir. 1950), as instances where agencies "sought to repair factual or legal errors in their adjudicative decisions." TWS Br. 24 n.11. But that is what Proclamation 9682 does; it corrects, based on updated information, determinations in the original proclamation, to ensure that the reservation of land comports with the Antiquities Act's mandate. Furthermore, Plaintiffs are incorrect that there is no presumption that executive actions can be reversed by subsequent executive action. Numerous statutes authorize various Executive Branch officers to regulate, administer, and make decisions, without expressly saying that those decisions can be repealed or modified. But courts routinely uphold

[17]The facts here are therefore completely inapposite to those in *Nestor v. Hershey*, 425 F.2d 504, 516 (D.C. Cir. 1969) (cited at TWS Br. 22), where the court made the common-sense determination that a statute's sentence clarifying that "[n]othing in this paragraph shall be deemed to preclude the President from" undertaking actions already granted under a prior subsection was not itself "a grant of authority."

agency authority to make such modifications. *E.g.*, *Pennsylvania v. Lynn*, 501 F.2d 848, 856 (D.C. Cir. 1974) ("A court is properly reluctant to conclude that Congress forbade the Secretary [to halt a program] when he has good reason to believe that exercising his authority would be contrary to the purposes for which Congress authorized him to act."). And while these cases address agency action, it would be anomalous if agencies were given greater discretion to reconsider decisions than the President.

Plaintiffs cite *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000), as contrary to this principle (TWS Br. 23), but there the court determined that the Attorney General lacked denaturalization authority because the statute in question was not "'silent' with respect to 'the specific issue,'" and also included an "express statutory procedure" for denaturalization. That stands in contrast to the Antiquities Act, which contains no express statutory procedure for modifying monument boundaries. And it is beyond cavil that presidential executive orders are routinely revised or revoked by subsequent presidents. Plaintiffs present no valid reason why national monument proclamations should be given a different status, effectively equivalent to legislation.

2. Contemporaneous statutes do not indicate that modification authority must be express.

Plaintiffs contrast the Antiquities Act with other statutes that more expressly reference modifications of reservations, implying that Congress' failure to do so in the Antiquities Act was intentional. TWS Br. 21; GSEP Br. 31. But close inspection of these statutes reveals that their argument is misplaced.

First, the statutes relied upon by Plaintiffs did not contain any language comparable to the limiting conditions on the scope of reservations that are found in the Antiquities Act. For example, the Forest Reserve Act of 1891 simply authorized the President to reserve "public land bearing forests," with no constraints on the scope of those reservations. Act of Mar. 3, 1891, Ch.

563, § 24, 26 Stat. 1103; *see also* Pickett Act of 1910, Ch. 421, 36 Stat. 847, 847 (authorizing President to "temporarily withdraw from settlement, location, sale, or entry *any* of the public lands of the United States" (emphasis added)). Moreover, the Pickett Act, contrary to Plaintiffs' contention, does not contain language expressly granting revocation authority to the President—rather it assumes that authority exists. *See* 36 Stat. at 847 (providing that "such withdrawals or reservations shall remain in force until revoked by [the President] *or by an act of Congress*") (emphasis added). The clause referencing revocation authority was not necessary to reserve such authority to Congress, but the Act mentioned it regardless, indicating that the President's revocation authority, mentioned in the same clause, was likewise undisputed.

Plaintiffs also rely heavily on the Forest Service Organic Administration Act of 1897, addressing presidential authority to modify or revoke forest reserves created under the Forest Reserve Act of 1891. TWS Br. 21. While Plaintiffs claim that Congress believed the 1897 statute was necessary because the 1891 statute did not grant the President this authority, the legislative history shows that Congress' rationale was more complex. During debates leading up to its enactment, several members of Congress thought the President already had the authority. *See* 29 Cong. Rec. 2677 (Mar. 3, 1897) (Rep. Pickler: "The President has had that power always."); 30 Cong. Rec. 917 (May 6, 1897) (Sen. Clark, noting "that it was expressly decided in the Department of the Interior . . . that the Executive always had the exact right . . . to modify an Executive proclamation"); 29 Cong. Rec. 921 (May 6, 1897) (Sens. Hawley and Pettigrew, suggesting that the Executive already has the right to modify reservations).[18] The 1897 statute therefore expressly adopted a "belt and suspenders" approach, providing "*to remove any doubt which may exist pertaining to the authority of the President* thereon to, the President of the

[18]These and other documents are contained in an appendix filed herewith.

United States is hereby authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations." Act of June 4, 1897, 30 Stat. 11, 34 (emphasis added).[19]

Finally, that Rep. Lacey did not agree that the President possessed implied modification authority for forest reserves is by no means dispositive. *See Mass. Lobstermen's Assn. v. Ross*, 17-cv-406, 2018 WL 4853901, at *10 (D.D.C. Oct. 5, 2018) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history, . . . particularly where the record lacks evidence of an agreement among legislators on the subject." (internal quotations omitted)). Moreover, he also unequivocally maintained that the President *should* be able to correct overbroad reservations of land. 29 Cong. Rec. 2677 (Mar. 2, 1897); *see also* 30 Cong. Rec. 911 (May 6, 1897) (Rep. Gray admitting "it should have been in the power of the President to modify, repeal, or abrogate the orders already made"). It defies logic that, after the sponsor of the Antiquities Act and a majority of Congress agreed that the President either already possessed, or should possess, the power to correct overbroad reservations of land, Congress would then enact a statute that did not include this authority.

C. The Legislative History and Purposes of the Antiquities Act Confirm that the President Has Authority to Modify Monument Boundaries.

Plaintiffs argue that the legislative history and "essential purpose" of the Antiquities Act are incompatible with presidential authority to modify monument boundaries. TWS Br. 25. But modification of a monument to ensure that the reservation meets Congress' instruction that "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," is in no way contrary to the "essential purpose" of

[19]Plaintiffs also note that Congress in one instance expressly authorized the President to modify the boundaries of a specific monument, the Colonial National Monument. GSEP Br. 31 (citing Act of July 3, 1930, 46 Stat. 855 (1930)). But that statute specifically instructed the President to create the monument, and therefore is irrelevant to the President's ordinary, unilateral exercise of his authority under the Antiquities Act. *See* 46 Stat. at 855.

the Antiquities Act. *See* 54 U.S.C. § 320301(b).

In fact, it is consistent with Congress' overall intent. In the years leading up to the passage of the Antiquities Act, Congress was equally concerned with the Executive Branch making unnecessarily large reservations of public land. *See, e.g.*, 29 Cong. Rec. 2678 (Mar. 2, 1897) (Rep. Mondell objecting that "they have reserved these vast areas" as forest reserves within Montana); *id*. (Rep. Gamble objecting to "immense area" of forest reserves in South Dakota); 29 Cong. Rec. 909-10 (May 6, 1897) (Sen. Wilson expressing concern about large reservations in Washington). Thus, when debating the Antiquities Act, numerous members of Congress expressed their concern about the potential for the President to "lock[] up" large swaths of land using this authority, and were repeatedly assured that the bill would not permit this.[20] Thus, while Congress intended to preserve objects of historic significance, it firmly intended to ensure unnecessarily large amounts of land for monuments were not reserved. The President's issuance of Proclamation 9682 falls squarely within the purpose of the statute.[21]

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

Presidents have modified monument boundaries to exclude lands at least eighteen times, with the first modification taking place only five years after the passage of the Antiquities Act.

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[20]*See, e.g.*, 40 Cong. Rec. 7888 (1906) (Rep. Lacey representing that the bill would not take much land "off the market" and would, in this respect, be different from the Forest Reserve Act); Hearings Before the Committee on Public Lands for Preservation of Prehistoric Ruins on the Public Lands, 59th Cong. 11 (1905) (Rep. Lacey confirming that the bill's language permitting withdrawal of "only the land necessary for such preservation" in bill would limit withdrawals to "a very small amount."); *id*. at 17 (colloquy between Rep. Rodey and Edgar Hewett that the bill would not result in an "over-reservation" of land, and noting that with respect to the timber reserves, "too much has been withdrawn; but the Department has gone to work to lop off and turn back what is not necessary"); H.R. Rep. No. 59-2224 at 1 (emphasizing that the bill "proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.").

[21]While GSEP argues that a prior version of the Act contained "elimination" authority, that does not mean that Congress considered and rejected modification authority. *See* GSEP Br. 34-35.

Defs. Br. 30-31. That modification was based, like Proclamation 9682, on the President's finding that the original reservation covered "a much larger area of land than is necessary to protect the objects for which the Monument was created." Proc. 1167, 37 Stat. 1716 (July 31, 1911). Certainly, eighteen modifications over many decades qualifies as the "longstanding 'practice of the government,'" which can "inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quoting *McCulloch v. Maryland*, 4 Wheat 316, 401 (1819)); *Al-Bihani v. Obama*, 619 F.3d 1, 26 (D.C. Cir. 2010).

Plaintiffs argue, based a few instances of contrary statements, that "[e]xecutive practice in this area has hardly been consistent." GSEP Br. 36. But the Supreme Court has emphasized that it has "treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute." *Noel Canning*, 134 S. Ct. at 2560. Further, those instances where the Court has not found a "particularly longstanding practice" are quite distinct. *See Medellin v. Texas*, 552 U.S. 491, 532 (2008). For instance, in *Medellin*, the Court found congressional acquiescence not applicable when the action at issue was described by the "United States itself . . . as 'unprecedented action,'" and was unable to identify a single, parallel instance. *Id.* This stands in marked contrast to the situation here.

Moreover, the handful of data points identified by Plaintiffs—suggesting that in the mid-1920s, there was some question within the Department of the Interior about the scope of the President's authority—do not undermine the long history of Presidents *actually exercising* their modification authority. In 1924, the Interior Solicitor opined, in cursory fashion, that the President lacked statutory authority to restore lands from two specific monuments "to entry" (e.g., to claims by homesteaders, miners, and others).[22] M. 12501 and M. 12529 at 1 (June 3,

[22]Plaintiffs also cite a 1932 Interior Solicitor's Opinion, M. 27025, quoting it as "concluding that

1924). The 1925 request by *Interior* for legislation clarifying *presidential* authority to restore monument reservations to the public domain resulted from this cursory, unsupported opinion.

But multiple other federal officials concluded the opposite. Much closer to the Act's passage, Interior's Solicitor opined in 1915 that the President possessed authority to modify the boundaries of the Mount Olympus National Monument. Solicitor's Opinion of Apr. 20, 1915. And in 1935, the Solicitor reviewed all the prior opinions, and prepared a detailed legal analysis (unlike the 1924 Opinion) concluding that the three proclamations reducing Mount Olympus National Monument were valid. Solicitor's Opinion, M. 27657 (Jan. 30, 1935). He opined that, like the withdrawal authority upheld by the Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the "history of Executive Order national monuments and analogous Executive order Indian reservations shows a similar long continued exercise of the power to reduce the area of these reservations by the President with the acquiescence of Congress." M. 27657 at 4. He noted that more than 23 such orders had been issued for Executive Order Indian reservations, and that eight national monument reductions had been issued between 1909 and 1929. Since "Congress has made no objection to these orders, and so far as it has been determined it has continued to appropriate money for the administration of the reduced areas," the Solicitor concluded that there was an implied power to reduce monument reservations. *Id.* at 5. Again in 1947, the Solicitor concluded that the President is authorized to reduce the area of national monuments. M-34978, 60 Interior Dec. 9 (1947). Thus, the opinion of an Interior official in 1924 cannot overcome the more consistent contrary opinions by executive officials—

'upon the issuance of a proclamation …. The lands thus declared to be a national monument are permanently withdrawn.'" TWS Br. 30. This is not the conclusion of the opinion (which concerned whether a monument could be declared while continuing to permit mining claims), however, but rather a quote from the Park Service's inquiry to the Solicitor.

and extensive evidence of actual exercise of this authority by numerous Presidents.[23]

Plaintiffs also assert that "many of the prior monument modifications were different in kind" and thus distinguishable. GSEP Br. 27. This contention is irrelevant: if the President had authority to modify monuments eighteen prior times, there is no reason why he lacks it here. Moreover, Plaintiffs are wrong that the prior modifications materially differ from Proclamation 9682. Just five years after its enactment, President Taft invoked the Act to reduce the Petrified Forest National Monument by 42% (60,776 acres to 35,250.42 acres).[24] Proc. 1167; NPS Monuments List, *supra* n.26. Similarly, President Wilson diminished Mount Olympus National Monument in 1915 by nearly 50% (almost 300,000 acres). Proc. 1293; NPS Monuments List. Finally, that some prior reductions were smaller in size necessarily flows, in part, from the enormous size of the Monument compared to the vast majority of other monuments established under the Act. *See generally* NPS Monuments List.[25] Accordingly, this effort by Plaintiffs to

[23]Plaintiffs also misread the Attorney General's 1938 opinion, which confirmed the President's authority to "diminish[] the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.'" Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185, 188 (1938). The Opinion's statement that "it does not follow from his power to so confine that area that he has the power to abolish a monument entirely" recognizes the diminishment power as a legitimate exercise of statutory authority.

[24]Similarly, President Taft reduced the Navajo National Monument from an estimated size of 160 *square miles*, to three parcels comprising 380 *acres,* after finding that the original proclamation reserved "a much larger tract of land than is necessary." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912); Nat'l Park Serv., Archeology Program, Monuments List ("NPS Monuments List"), at: https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Dec. 7, 2018).

[25]Plaintiffs refer to a few instances where legislation purportedly providing Presidential authority to undo monument designations, or to restore monument lands to the public domain was not enacted. GSEP Br. 38. But "'[n]on-action by Congress is not often a useful guide" to statutory interpretation . . . , because '[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.'" *Citizens for Resp. & Ethics v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C. 2018) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) & *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001))), *appeal docketed,* No. 18-5261 (D.C. Cir. Aug. 30, 2018).

negate Congress' acquiescence fails.

Plaintiffs' next argument, relying on the enactment of FLPMA (and its express prohibition of *the Secretary* modifying any withdrawal creating a national monument), ultimately is conclusive, but contrary to Plaintiffs' position. In FLPMA, Congress acted to comprehensively govern the executive branches' withdrawal and reservation authority. In Section 1714, FLPMA addresses the Secretary of the Interior's authority. Subsection 1714(j), relied upon by Plaintiffs, does not focus on monuments alone, but comprehensively establishes limits on the Secretary's withdrawal authority:

> (j) Applicability of other Federal laws withdrawing lands as limiting authority
> The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under chapter 3203 of title 54; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. . . .

43 U.S.C. § 1714(j).

Elsewhere, FLPMA deliberately and specifically addresses (and limits) the President's authority. In Section 704(a), FLPMA expressly repealed all "implied authority of the president to make withdrawals and reservations resulting from acquiescence of the Congress"—and also repealed, in part or entirely, 30 specific statutes addressing withdrawal and reservation authority. Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976). FLPMA did not, however, limit the authority of the President to modify "any withdrawal creating national monuments under chapter 3203 of title 43." *Cf. id.* Under these circumstances, FLPMA must be interpreted as continuing Congress' acceptance and acquiescence to the President's authority to modify national monuments. *Nat'l Ass'n of Broadcasters v. FCC (NAB)*, 569 F.3d 416, 421 (D.C. Cir. 2009) (noting that an "omission is intentional where Congress has referred to something in one

subsection but not in another").

Plaintiffs, in an about-face from their earlier argument, contend that their portrayal of the legislative history should override FLPMA's plain language and unambiguous context. Their argument completely contravenes the "first canon" of statutory construction—"that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 818 (D.C. Cir. 2008); *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (explaining that "rebutting the presumption created by clear language is onerous" (internal quotation omitted)).

But even ignoring this canon, none of Plaintiffs' convoluted theories adequately explain why Congress chose to expressly clarify that the Secretary did not have monument modification authority—and yet, despite allegedly intending the same for the President—inexplicably failed to make that limitation clear in the statute. Plaintiffs argue that the House Report for FLPMA indicated that under the statute, Congress alone would have authority to modify monument withdrawals. TWS Br. 34 (citing H.R. Rep. No. 94-1163 at 9 (1976)); GSEP Br. 39. But as the Supreme Court has emphasized, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation omitted). *See also Overseas Educ. Ass'n v. FLRA*, 876 F.2d 960, 974 (D.C. Cir. 1989) (Buckley, J., concurring) (discounting "the reliability of legislative history," including committee reports, "as a tool of statutory construction").

Indeed, the D.C. Circuit rejected a similar argument to Plaintiffs' in *NAB v. FCC*, 569 F.3d at 418–19. At issue there was the FCC's authority to regulate distance separations between four types of FM radio stations under the Radio Broadcasting Preservation Act ("Preservation Act"), which "restricted the [FCC's] authority to eliminate or reduce those separations in only

one category, third-adjacent channels." *Id.* at 421. Plaintiff NAB argued that the Preservation Act should be deemed to also restrict the FCC's authority for the other categories of stations based on, inter alia, the Preservation Act's legislative history. Like Plaintiffs here, NAB referred to a statement from the legislative history indicating "the bill *maintains Congressional authority* over any future changes made to the interference protections that exist in the FM dial today." *Id.* (quoting 146 Cong. Rec. 5,611 (2000)). But the court rejected the argument—relying instead on analysis of the language and structure of the statute. *Id.* at 422 (reasoning that "an omission is intentional where Congress has referred to something in one subsection but not in another"). The court rejected NAB's "evidence that Congress had a broader purposes" because the statement had "no statutory reference point." *Id.* (quoting *Shannon*, 512 U.S. at 583-43).

So too here. Congress' express restriction of the Secretary's authority to modify monuments, and its restriction of other withdrawal authority of the President, demonstrates that its decision not to restrict the President's monument modification authority was intentional. And the statement that Congress had a broader purpose of maintaining *all* modification authority for itself, like in *NAB*, "appears nowhere in the statute." 569 F.3d at 422.

This fundamental argument failing, Plaintiffs turn to subsequent congressional action, but nothing they point to is persuasive. Their citation to 54 U.S.C. § 100101(b)(2), addressing legislative policy for the National Park System, fails because (1) the Monument is not part of the National Park System; and (2) the statute says nothing about modifying land designations. *See* 54 U.S.C. § 100101(b)(2) (describing broad policy that *management* of NPS units, including authorization of activities, "shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress). They also refer to isolated statements in the legislative history of the Alaska National

Interest Lands Conservation Act ("ANILCA"). But ANILCA's legislative history cannot be relied upon to interpret earlier-enacted statutes. *See Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc*., 447 U.S. 102, 117–18 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc*., 173 F.3d 870, 878–79 (D.C. Cir. 1999) ("Post-enactment legislative history—perhaps better referred to as 'legislative future'—becomes of absolutely *no significance* when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute.") (emphasis added). This is even more the case because ANILCA did not address modification authority for national monuments. See Pub. L. 96-487, 94 Stat. 2371 (1980).[26] In sum, Plaintiffs cannot rebut Congress' longstanding acquiescence to the President's exercise of modification authority under the Antiquities Act, and their claims fail.

E. Congress Did not Codify the Monument Boundaries by Statute.

Plaintiffs argue that any adjustment of the Monument's boundaries by Presidential proclamation is unlawful because Congress has "set the boundaries of Grand Staircase." GSEP Br. 36; *see also* TWS Br. 37. But this argument fails because most of the statutes invoked by Plaintiffs did no such thing—and to the extent Congress did establish or modify limited portions of the Monument's boundary, the Proclamation carefully left those portions in place. Plaintiffs nowhere explain why Congress' exercise of *its* authority under the Property Clause automatically abrogates authority it also granted to the President under the Antiquities Act.

Plaintiffs first argue that the President "purports to excise roughly 80,000 acres that

[26]Furthermore, many of the statements cited by Plaintiffs are not relevant—they address only whether a monument designation can be completely repealed absent Congressional action—not whether a monument could be modified. *See* TWS Br. 35-36; GSEP Br. 39.

Congress itself added to the Monument" in the Utah Schools and Lands Exchange Act ("Exchange Act"). TWS Br. 37; *see also* GSEP Br. 28. But the Exchange Act's function was not to identify the appropriate boundaries of the Monument, but to transfer state-owned acreage within various federal land management units (including the Monument) to the United States to remove obstacles to coherent land management. Pub. L. No. 105-335, §§ 8 & 9, 112 Stat. 3139 (1998); S. Rep. No. 105-574 at 2 (1998). And the Land Exchange Act addressed more than just the Monument—indeed, the United States obtained more acres of state-owned lands within the boundaries of *other* federal land management units (200,000 acres of surface estate and 76,000 acres of mineral estate) than it did within the Monument boundaries (176,600 acres of surface estate, and 24,165 acres of mineral estate). Pub. L. No. 105-335, § 1. Nor did the Exchange Act opine as to the outer boundaries of the Monument (or any of the other federal land management units at issue). *Id.* And Plaintiffs' suggestion that Congress found that the newly-acquired lands should necessarily be part of the Monument is rebutted by the language of the statute. The Exchange Act noted only that "*certain* State school trust lands within the Monument . . . have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources," clearly implying that "certain" other such State school trust lands within the Monument did *not* (and therefore were not necessarily appropriately within the Monument). *Id.* § 2.[27] The statute cannot reasonably be interpreted as "finalizing" the Monument's boundaries.

Next, while Congress made minor Monument boundary adjustments in the Automobile National Heritage Area Act ("Heritage Act") (which otherwise addressed unrelated topics), that legislation does not advance their position either. The Heritage Act slightly adjusted the

[27]In contrast, Congress noted that "*many* of the State school trust lands within the monument may contain significant economic quantities of mineral resources . . ." Pub. L. No. 105-335, § 2.

Monument's boundary by excluding lands near four Utah communities, primarily to address several "issues of concern to local citizens and their representatives;" added some federal lands to the Monument along East Clark Bench; and transferred some Monument lands out of federal ownership so they could become part of a Utah state park. *Id.*; *Hearing on H.R. 3963 et al*., 105th Cong., 98 (1998). The Act's minor adjustment of discrete boundaries does not evidence a greater, and certainly unstated, Congressional intent to eliminate the President's power to modify the Monument—and indeed, part of its function was to convey federal lands to the State. Moreover, the lands along East Clark Bench remain within the Monument. *See* 82 Fed. Reg. at 58,096.[28] Similarly, there is no merit to Plaintiffs' reliance on the Omnibus Public Land Management Act ("OPLMA"), which conveyed 25 acres of federal lands managed as part of the Monument to a private party. *See* GSEP Br. 13-14; Pub L. 111-11, § 2604, 123 Stat. 991 (2009). Like the Heritage Act, OPLMA was not intended to codify the boundaries of the Monument, but to convey certain lands out of federal ownership. *See* Pub. L. No. 111-11, § 2604.[29]

Finally, GSEP's argument that the "codification" of the National Landscape Conservation System ("NLCS") in the OPLMA eliminated the President's authority to modify monuments finds no support in either the statute or its legislative history. OPLMA disclaimed any intent to modify any other statutory authority. *Id.* § 7202(d)(1). Furthermore, as GSEP admits, the NLCS had been administratively created in 2000 by BLM. S. Rep. No. 110-116

[28]With respect to the boundary adjustments, the administration expressly informed Congress that it did "not believe a boundary adjustment is necessary," but merely agreed with the propriety of adjusting the boundaries in continuance of recent cooperation between the administration, Congress, and local Utah interests. *Hearing on H.R. 3963 et al*., at 98.

[29]TWS argues that Congress "appropriated $19.5 million to buy back preexisting coal leases [for lands in the Monument] to prevent their development." TWS Br. 49. But the 2000 Appropriations Act it cites merely appropriates funds "to acquire mineral rights within the [Monument]"—it certainly did not speak to the President's modification authority. Pub. L. No. 106-113, 113 Stat. 1501 (1999).

(2007). GSEP does not explain why "formalizing" BLM's existing program could result in altering the President's authority under the Antiquities Act.

Ultimately, the statutes identified by Plaintiffs demonstrate no congressional intent to eliminate the President's modification authority under the Antiquities Act. After all, Congress has retained and exercised the power to *create* and enlarge monuments, and Plaintiffs do not argue that its exercise of this authority has rendered the delegation of those powers to the President "unnecessary and untenable." *See* TWS Br. 36. Plaintiffs' argument fails.

F. The President's Exercise of Discretion in Modifying the Monument Boundaries is not Reviewable.

Plaintiffs' alternative claims, that the Proclamation violated the President's modification authority under the Antiquities Act, also fail as a matter of law. Judicial review of presidential action under the Antiquities Act is extremely limited, and allows at most a determination of whether the President, on the face of the Proclamation, exercised his authority in accordance with the Act's standard. Defs. Br. 37-38; *Mountain States*, 306 F.3d at 1137; *Tulare*, 306 F.3d at 1141. The Proclamation concludes that the original boundaries of the monument do not reflect "the smallest area compatible with the proper care of these objects . . ." *Id.* at 58,089-90, and thus adverts to the statutory standard. *See Tulare*, 306 F.3d at 1141.

Plaintiffs claim, however, that the Proclamation did not just diminish the Monument, but also "strips monument protection from objects of scientific and historic interest." TWS Br. 41. But modifying monument boundaries such that some objects no longer fall within it is consistent with the Antiquities Act, to the extent excluded lands are not necessary for the objects' protection. *See* 54 U.S.C. § 320301(b) (reservation must be "confined to the smallest area compatible with the proper care and management of the objects *to be protected*") (emphasis added). Indeed, Presidential modifications of monuments did so the past. *See, e.g.*, Proc. 1191

(diminishing monument established by Proc. 1186 to protect "all prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric peoples, situated upon the Navajo Indian Reservation" to three parcels comprising 360 acres surrounding three specific sites); Proc. 1293 & H. Graves, Mem. Report, 8-9 (Jan. 20, 1915), cited in M. 27657 (removing over 300,000 acres from the Mt. Olympus National Monument, including portions of the summer range and the breeding grounds of Olympic Elk, which were identified for protection in Proc. 869); Proc. 3486 (removing spring caves from Natural Bridges National Monument); Proc. 3539 (removing 3,925 acres of known archaeological resources within the Otowi section of the Bandelier National Monument).

Furthermore, Plaintiffs do not identify any discrete "objects" identified in the original Proclamation that are now completely outside the boundaries.[30] They primarily identify large landscape features, including the Kaiparowits Plateau, Circle Cliffs, and the "Grand Staircase cliff sequence." GSEP Br. 41; TWS Br. 42. But Proclamation 6920 does not expressly identify any of these as "objects." *See* 61 Fed. Reg. 1788-1791. Furthermore, as Plaintiffs allege, only "portions" of the features they identify now fall outside the Monument's boundaries. *See* GSEP Br. 41 (noting "portions of the Kaiparowits Plateau and portions of the Grand Staircase cliff sequence"); TWS Br. 42 (arguing Proclamation excises "significant portions of the Circle Cliffs and Hole-in-the-Rock Trail"). Even more problematically, significant portions of many of these features—including the Kaiparowits Plateau, Circle Cliffs, and Hole-in-the-Rock Trail—were not included in the boundaries established by the original Proclamation. Suppl. Decl. ¶¶ 19-21.

[30]While Plaintiffs do not refer to it, Proclamation 6920 noted that "part of the Waterpocket Fold" was included in the Monument. 61 Fed. Reg. at 1789. Proclamation 9682 explained that this part of the feature would now be outside the boundaries in light of the fact that the Waterpocket Fold is "located mostly within the Capitol Reef National Park." 82 Fed. Reg. at 58,089.

And while the GSEP Plaintiffs assert that specific fossil and archaeological sites are now outside the Monument, the original Proclamation did not identify these specific sites. *See* Proc. 6920.

Finally, Plaintiffs claim that the Proclamation was arbitrary and capricious because it was based on "non-statutory extractive considerations and political factors." GSEP Br. 41. But the Proclamation, in making its determination, hewed to the statutory standard. Defs' Br. 38-39. The GSEP Plaintiffs' attempt to divine ulterior motives is not permissible. *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) ("For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains."). Because the President acted within the scope of his statutory authority and adhered to the statutory standard, inquiry into the President's exercise of that authority and subjective motivations is not permissible.

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

Plaintiffs' various constitutional claims—which duplicate their *ultra vires* claims—should be dismissed. *See* Defs. Br. 39-40. Congress has delegated authority to modify monument boundaries to the President in the Antiquities Act, and the President's exercise of this authority therefore cannot violate any constitutional principle. *Id.* at 39. But even if this were not the case, the claims fail on their own terms. *Id.* at 40-41.

Plaintiffs' opposition briefs do not show otherwise.[31] Moreover, because Plaintiffs' constitutional claims are all founded on the same allegations as their *ultra vires* claims, they should be dismissed for that reason alone. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a

[31]Indeed, TWS disavows its "Take Care clause" count, and it therefore should be dismissed. *See* TWS Br. 40 n.21.

constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996) (declining to address constitutional claim addressing FCC order when its validity could be addressed on statutory basis); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 40 (D.D.C. 2018) (dismissing separation of powers count because statutory claim alleged "the same infirmities that underlie their separation of powers claim"). The TWS Plaintiffs admit that their constitutional claims are duplicative, but argue that the count need not be dismissed given the ability to pursue alternative theories of liability. TWS Br. 40 (citing *Scott v. Dist. of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996)). But *Scott* does not address this issue, and Plaintiffs provide no reason why the Court should not dismiss their indisputably duplicative constitutional claims, given the "fundamental principle that courts should avoid adjudicating constitutional questions if it is unnecessary to do so." *Colm v. Vance*, 567 F.2d 1125, 1132 n.11 (D.C. Cir. 1977).

Even if this judicial canon could be avoided, Plaintiffs fail to allege a cognizable separation of powers violation. They provide no authority supporting their contention that a separation of powers claim could exist under the facts alleged. They do not, for instance, argue that the President acted under an authority that was not governed by "an intelligible principle." Defs. Br. 40 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). In light of Congress' proper delegation of its authority, and the President's invocation of that authority, there is no separation of powers concern or violation of the Property Clause here. *See Mountain States*, 306 F.3d at 1136-37.

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

Plaintiffs brought claims under the APA but now disclaim any cause of action to compel agency action under 5 U.S.C. § 706(1), and clarify that the agency action they seek to set aside under 5 U.S.C. § 706(2) is the Agency Defendants' "decision" to recognize the Proclamation as

valid law. *See* TWS Br. 43-45; GSEP Br. 43-45. Plaintiffs provide no authority for their astonishing claim that an agency's refusal to disobey a formal directive from the President constitutes a violation of the APA.[32]

Plaintiffs have also failed to allege a final agency action as a foundation for pursuing their claim. The APA defines "agency action" to mean "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). *See* 5 U.S.C. § 701(2). In *SUWA*, 542 U.S. at 62, the Supreme Court emphasized that "agency action" encompasses only "circumscribed, discrete agency actions." An agency's recognition of legal authority is not "the equivalent" of any agency action identified in the statute, let alone a "discrete" agency action. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 891 (D.C. Cir. 2014) ("a general follow-the-law directive . . . flunks *SUWA*'s discreteness test").

Moreover, to accept Plaintiffs' contrary position would render the APA's "final agency action" limitation meaningless. All of an agency's operations are conducted pursuant to some grant of authority and thus all could be said to embody a "decision" to recognize that authority as valid. And it is well established that an agency's ongoing implementation of the law, including changes in the law, does not constitute a discrete agency action. *See Nat'l Wildlife Fed'n*, 497 U.S. at 890. Here, to the extent the Agency Defendants could even be said to have made an affirmative "choice" to follow the Proclamation,[33] that choice is at best "[a] preliminary,

[32]The GSEP Brief characterizes their claim inconsistently with their complaint, which alleges that Defendants must comply with FLPMA and NEPA when they "modify any of [the Monument's] protections through changes to its management plan or structure." Compl. ¶¶ 142-43, 147. They provide no rebuttal that those allegations challenge unripe future agency action.
[33]The 2017 Proclamation modified the 1996 Proclamation. They are not "competing legal directives" GSEP Br. 44.

procedural, or intermediate agency action . . . subject to review on the review of the final agency action" that results, 5 U.S.C. § 704—*i.e.*, the record of decision that will issue when BLM adopts new management plans. *See Tulare*, 185 F. Supp. 2d at 28-29 (D.D.C. 2001) (plaintiffs failed to state APA claim based on agency memorandum, interim management plan, and unspecified acts of agency's foresters). *See also* Part II *supra* (addressing ripeness).

Unsurprisingly, Plaintiffs fail to identify any support for their position that "following the law" is reviewable agency action under the APA. The decision at issue in *Navajo Nation v. U.S. Department of the Interior*, 819 F.3d 1084 (9th Cir. 2016), is inapposite. The agency action in *Navajo* was a letter issued by the National Park Service ("NPS") concluding that certain objects removed from the Navajo reservation were in the government's "possession and control" for purposes of 25 U.S.C. § 3003(a) and thus subject to the Native American Graves Protection and Repatriation Act ("NAGPRA"). In so concluding, NPS rejected the Navajo's argument that the objects were not legally in the government's "possession and control" because certain treaties had established ownership in the tribe. A split panel of the Ninth Circuit concluded that the letter was final agency action—not because NPS had made a choice between the "competing legal directives," GSEP Br. 44, but because NPS had determined that NAGPRA applied to particular objects based on the text of the statute. *Navajo* does not hold that an agency's assumption that a law is valid is final agency action, which is Plaintiffs' contention here.

Plaintiffs also misrepresent the D.C. Circuit's decisions. They contend that *Tulare* involved APA claims "reviewing agency compliance with a Proclamation," GSEP Br. 44, when in fact they were claims challenging the agency's compliance with NEPA and the National Forest Management Act *based on* an alleged failure to act consistently with the proclamation.

Tulare, 185 F. Supp. 2d at 25.[34]

Finally, the fact that some "[a]gency actions implementing Presidential proclamations" may be reviewable under the APA does not mean any such actions are reviewable without regard to the APA's requirements. GSEP Br. 44; *but see Reich*, 74 F.3d at 1327-28 (finding that claims challenging Secretary's regulations came within waiver of immunity in § 702, which requires "agency action"). Further, Plaintiffs' assertion that they have "no other forum to challenge the Defendants' unlawful final action implementing the 2017 Proclamation" is not plausible. GSEP Br. 45. Even it were, it would be relevant only to the extent Plaintiffs had identified a "final agency action," 5 U.S.C. § 704, and they have not. Plaintiffs do not cite any authority that might preclude them from bringing an APA claim, asserting that the action was "contrary to law," when the Agency Defendants take some final agency action implementing the Proclamation in the future. *See* 5 U.S.C. § 706(2)(A).[35] Plaintiffs' premature attempt to challenge implementation of the Proclamation should be rejected.

CONCLUSION

Plaintiffs' Complaints should be dismissed.

Respectfully submitted this 13th day of December, 2018,

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/s/ Romney S. Philpott
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[34]That some courts may read *Tulare* as permitting the use of the APA to review agency action for compliance with a proclamation, *e.g., W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951 (D. Ariz. 2009), is irrelevant, since Plaintiffs are not challenging compliance with the Proclamation.
[35]To the extent the GSEP Plaintiffs are concerned that a claim of theirs would be barred because they chose not to assert that the Proclamation was unlawful in their comment letters, that concern can be addressed through the exhaustion doctrine and its exceptions as appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Romney S. Philpott
Romney S. Philpott