No. 23-4106

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH, ET AL.,
Plaintiffs-Appellants,

ZEBEDIAH GEORGE DALTON, ET AL.,
Consolidated Plaintiffs-Appellants,

v.

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

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

On Appeal from the United States District Court for the District of Utah, No. 4:22-CV-0059 (Nuffer, J.)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS GARFIELD COUNTY, UTAH, ET AL.

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Presidential Proclamations

Congressional Materials

Rules & Regulations

Other Authorities

PRIOR OR RELATED APPEALS

Dalton et al. v. Biden et al., No. 23-4107 (10th Cir.), is related to and was consolidated with this appeal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because Utah alleged that Federal Defendants violated federal law. 28 U.S.C. §1331. This Court has jurisdiction because Utah appeals from a final order dismissing its entire case. *Id.* §1291. The district court entered that order on August 11, 2023, and Utah timely appealed three days later. J.A. Vol. IV at 965-993.

STATEMENT OF ISSUES

1. The Antiquities Act authorizes the President to declare as a national monument a "historic landmark[]," "historic and prehistoric structure[]," or "other object[] of historic or scientific interest." 54 U.S.C. §320301(a). It authorizes him to "reserve" surrounding land if it is the "smallest area compatible" with the monument's care. *Id.* §320301(b). President Biden declared over 500 things in Utah as national monuments and then reserved 3.23 *million* acres. Utah claimed these declarations and reservations exceeded statutory authority. "Sovereign immunity does *not* prevent a suit against a federal officer who is acting in excess of his authority." *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir. 1960). Does sovereign immunity bar Utah's suit? (No.)

2. President Biden interpreted the Act's category for "other objects of historic or scientific interest" to include hundreds of plants and animals, generic items, and ubiquitous items—from "mule deer" to "boulders" to "potato[es]." He then reserved 3.23 million acres as the "smallest area compatible" with their care even though proper caretaking of any valid monument requires much less. Did these national monument declarations and reservations exceed the scope of the Antiquities Act? (Yes.)

3. An agency action is final if it takes effect without further review and has legal consequences, even if labeled as "interim." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020). After President Biden declared the monuments and created the reservations, agencies enacted management plans that took effect without further review and that regulate activities on the land. Were they final agency action? (Yes.)

STATEMENT OF THE CASE

This case is about limiting the unlawful "trend of ever-expanding antiquities" under the Antiquities Act of 1906. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (statement of Roberts, C.J.). The Act authorizes the President to declare national monuments and reserve land for their protection only under narrow, limited circumstances. 54 U.S.C. §320301(a)-(b). Congress intended the Act to allow only "small reservations." H.R. Rep. 59-2224, 59th Cong., 1st Sess. 1 (1906). But recent Presidents have, despite judicial reproach, "transformed" the Act "into a power without any discernible limit to set aside vast and amorphous expanses of terrain." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

President Biden's choices exemplify the problem. In 2021, he invoked the Antiquities Act to reserve 3.23 million acres of land in Utah—double the size of the entire State of Delaware—for the Bears Ears and Grand Staircase Escalante National Monument reservations. In doing so, he made it a crime for southern Utahns to go on land that they have lived and worked on for generations to turn over soil, do roadwork, prevent wildfires, remove invasive species, or care for wildlife.

The State of Utah, Garfield County, and Kane County—for simplicity, "Utah"—sued to challenge President Biden's two national monument reservations as beyond statutory authority. The district court dismissed their claims. It held that *no one* can challenge national monument reservations or the agency actions implementing and

enforcing them. This holding splits from every court to decide that question and reads the Antiquities Act's limits out of its text. This Court should reverse and remand.

I. Congress authorizes the President to declare national monuments and reserve land for their proper care and management, but only when strict preconditions are met.

A. The Antiquities Act of 1906 imposes two important preconditions on the creation of national monument reservations.

The Antiquities Act authorizes the President to create national monument reservations through a two-step process.

First, the President may declare something on federal land to be a national monument, but only if it falls into one of three narrow categories:

> The President may, in the President's discretion, declare by public proclamation [1] ***historic landmarks***, [2] ***historic and prehistoric structures***, and [3] ***other objects of historic or scientific interest*** that are ***situated*** on land owned or controlled by the Federal Government to be national monuments.

54 U.S.C. §320301(a) (emphases added). If something falls within one of those three categories, the President need not declare it a national monument—he simply "may, in [his] discretion." But if it doesn't fall within one of those three categories, he may not proceed any further.

Second, if the President validly declares something to be a national monument, he may reserve—*i.e.*, limit the use of—a parcel of land containing that national monument. But the Act mandates that his reservation be the "smallest" parcel of land needed for the national monument's care and management:

> The President may reserve parcels of land as a part of the national monuments. The ***limits*** of the parcels ***shall be confined to the smallest area compatible with the proper care and management of the objects to be protected***.

54 U.S.C. §320301(b) (emphases added). This "unique constraint" means that any land reserved under the Act cannot be larger than necessary to protect a validly declared national monument. *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.).

Consistent with that textual limit, and with the Act's congressional report that the Act would allow only "small reservations" of land to protect ancient relics, H.R. Rep. No. 59-2224, early reservations under the Act were often a few hundred acres, *e.g.*, Proclamation 695, *El Morro National Monument*, 34 Stat. 3264, 3264-65 (Dec. 8, 1906) (originally 160 acres).

The Act also added a third provision to the U.S. Code. Codified in a different title, it punishes anyone who harms such a monument:

> A person that appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated, shall be imprisoned not more than 90 days, fined under this title, or both.

18 U.S.C. §1866(b).

"Most commentators who have considered the [Antiquities] Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archaeological sites." Squillace, *The Monumental Legacy of the Antiquities Act of*

1906, 37 Ga. L. Rev. 473, 477 (2003). The Act's congressional report emphasized its limits. H.R. Rep. 59-2224. The sponsor assured his colleagues that "[n]ot very much" land could be encumbered through the Antiquities Act. 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey). Congress rejected proposals to reach broader items like "natural wonders" and "curiosities." H.R. 11021, 56th Cong. (1900) (published in Rogers, *History of Legislation Relating to The National Park System Through the 82d Congress (the Antiquities Act)*, Dep't of Interior, App'x A (1958), perma.cc/AS9A-JRB2).

Confirming the point, early administrators of the Act recognized that it "does not provide for the reservation of public land for the protection of scenery." Rothman, *America's National Monuments: The Politics of Preservation*, ch. 5 (1989), perma.cc/PMN6-T5MJ. It does not "remotely refer to scenery, as a possible raison d'etre for a public reservation." Lee, *The Antiquities Act of 1906*, at 109 (1970), perma.cc/P22X-F4LZ (citing Bond, *The Administration of Nat'l Monuments, Proceedings of the Nat'l Park Service Conference held at Yellowstone Nat'l Park, Sept. 11 and 12, 1911*, at 80-81 (1912)).

An early national monument reservation illustrates how the Act was supposed to work. In December 1906, President Theodore Roosevelt declared as a national monument "Montezuma's Castle" in Arizona. Proclamation 696, *Montezuma Castle National Monument*, 34 Stat. 3265, 3265-66 (Dec. 8, 1906). Montezuma's Castle was a valid national monument because it is a one-of-a-kind "prehistoric structure," *id.* at 3265—a towering ancient dwelling, with five stories and twenty rooms. *Foundation Document: Montezuma Castle National Monument*, Nat'l Park Serv., 3 (Mar. 2016), perma.cc/PPL5-EFPX.

For the "proper care and management" of Montezuma's Castle, President Roosevelt reserved a parcel of land of only 160 acres—less than .005% of the land President Biden reserved here. 34 Stat. 3265-66.

B. National monument reservations change the rules for managing federal lands.

A national monument reservation locks down federal land. Absent a monument reservation, federal lands must be managed for multiple uses, including recreation, grazing, timber, watershed, and wildlife habitat. 16 U.S.C. §§528 et seq. States, counties, and their citizens engage in a wide range of activities on federal land, have official duties on federal land, enact laws and policies with respect to federal land, and use federal land for a multitude of purposes. When the land is managed for multiple uses, they manage vegetation and soils, graze cattle, engage in roadwork, care for wildlife, and recreate. J.A. Vol. II at 344-73; *see also, e.g.*, 54 U.S.C. §302303 (assigning duties to state employees on federal land). A national monument reservation displaces this multiple-use management regime; prohibits or limits "recreational, commercial, and agriculture uses" of the land; and impedes state and local activities. *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

C. Chief Justice Roberts calls for stricter enforcement of the Act's plain textual limits.

Modern presidents have repurposed the Antiquities Act to reserve large parcels of America as national monuments. Though most early reservations are under 10,000 acres, modern presidents from both parties have used the Act to declare as national

monuments things that fall outside the Act's three limiting categories and to reserve parcels of land with no respect for its smallest-area-compatible requirement. *Nat'l Monument Facts and Figures*, Nat'l Park Service, perma.cc/GK6C-GNJQ.

In 2021, Chief Justice Roberts identified and condemned this "trend of ever-expanding antiquities." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). He called for the Supreme Court to decide—in a more appropriate case and for the first time—whether landscape-scale national monument reservations "can be justified under the Antiquities Act." *Id.* at 981. He wrote that expansive monument reservations would not strike "a speaker of ordinary English" as lawful under the Antiquities Act's text. *Id.* at 980. As he read the statutory text, the smallest-area-compatible limit imposed a "unique constraint" that "has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea." *Id.* at 980-81. And he emphasized that the Supreme Court "ha[s] never considered how a monument of … 3.2 million acres … can be justified under the Antiquities Act." *Id.* at 981.

II. The history of Grand Staircase-Escalante and Bears Ears National Monuments in Utah typifies the problems with presidential overreach under the Antiquities Act.

A. Presidents Clinton and Obama establish Grand Staircase-Escalante and Bears Ears National Monuments.

In 1996, President Clinton reserved 1.7 million acres of land in south-central Utah as the "Grand Staircase-Escalante National Monument." Proclamation 6920,

Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996). The Grand Staircase reservation was predicated on President Clinton's declaring that dozens of things in the region qualified as national monuments, including "sedimentary rock layers," "occupation sites," "five life zones," and a strip of carbon-spewing coal. *Id.* at 50223-24.

In late 2016, President Obama reserved 1.35 million acres of land in southeast Utah—starting about 25 miles east of the Grand Staircase reservation and extending almost to the Colorado border—as the "Bears Ears National Monument." Proclamation 9558, *Establishment of the Bears Ears National Monument*, 82 Fed. Reg. 1139 (Dec. 28, 2016). The Bears Ears reservation was predicated on President Obama's declaring that dozens of things in the region qualified as national monuments, including "ricegrass," the "diversity of the soils," and the "quality of deafening silence." *Id.* at 1141.

These two reservations left the land beloved by southern Utahns less well preserved, more difficult to protect, more susceptible to damage and desecration, impossible to work on, and more difficult to coexist with. J.A. Vol. II at 338-39. The reservations drew attention to and caused vandalism of relics that had gone untouched for centuries. *Id.* at 335-37.

B. After careful review, President Trump reduces the boundaries of both monuments.

Responding to local pleas, President Trump in 2017 reduced the two reservations by over 60 percent. Proclamation 9681, *Modifying the Bears Ears National Monument*, 82

Fed. Reg. 58081 (Dec. 4, 2017); Proclamation 9682, *Modifying the Grand Staircase-Escalante National Monument*, 82 Fed. Reg. 58089 (Dec. 4, 2017). His reductions restored the multiple-use approach in the areas that were previously subject to the reservations. The two reduced reservations still totaled 1.11 million acres combined.

C. President Biden expands both monuments, then agency defendants adopt management plans that take effect immediately for each monument.

In 2021, President Biden issued proclamations nearly tripling the combined size of these two national monument reservations. Proclamation 10285, *Bears Ears National Monument*, 86 Fed. Reg. 57321 (Oct. 8, 2021); Proclamation 10286, *Grand Staircase-Escalante National Monument*, 86 Fed. Reg. 57335 (Oct. 8, 2021). He expanded Grand Staircase to 1.87 million acres and Bears Ears to 1.36 million acres. President Biden's combined 3.23-million-acre reservations are twice as large as Delaware, more than 150 times the size of Manhattan, and larger than 20 percent of all the nations in the world. They are orders of magnitude larger than the other four national monuments in southern Utah.[1]

[1] Hovenweep National Monument (President Harding) is 784 acres. Cedar Breaks National Monument (President Roosevelt) is 6,155 acres. Natural Bridges National Monument (President Roosevelt) is 7,636 acres. Rainbow Bridge National Monument (President Taft) is 160 acres.

To justify those massive reservations under the Antiquities Act, President Biden declared "the entire landscape[s] within the boundaries reserved" to be "other objects of historic or scientific interest." 86 Fed. Reg. at 57330-31; 86 Fed. Reg. at 57344. He also declared virtually everything within those landscapes to fall within the same category. *Id.* He declared as national monuments "soil," "shrubs," "grasses," "bees," "bighorn sheep," "minnow[s]," "beetles," "pinyon," "juniper," "areas," "forested slopes," "wheel ruts," "unimpeded views of the night sky," and hundreds of other random things. 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46; 82 Fed. Reg. at 1139-46 (incorporated by 86 Fed. Reg. 57346).

All told, President Biden declared over five hundred things to be "objects of historic or scientific interest." He declared as objects of historic or scientific interest approximately 200 plants and animals—like "pinyon" and "bats," J.A. Vol. II at 383-84; dozens of qualities and experiences—like "deafening silence" and "unimpeded views of the night sky," *id.* at 373-74; dozens of generic geological items—like "red sandstone cliffs" and "multihued cliffs," *id.* at 374-75; approximately 150 specific geological items—like "[a] perennial stream" and "Beef Basin," *id.* at 375-76; and over 150 archaeological and paleontological items—like "potential fossil yield" and "stock trails," *id.* at 377-80. Most of these items were nondescript, inconspicuous, animate, not fixed to the land, of no special past significance, or large and nebulous. *Id.* at 371-80. And to reiterate, among the objects of historic or scientific interest that President Biden

declared were both of the million-plus-acre landscapes themselves—large areas of land never before formally associated. *Id.* at 371.

No more than nine of the items declared to be "national monuments" likely qualify for protection. Those nine require no more than a few thousand acres for their proper care and protection. *Id.* at 380-87.

The federal government does not even know what items are within about 90 percent of the reservations. As of 2022, less than 10 percent of the area within the reservations had been physically inventoried by archaeologists. As a result, the government knows little about the distribution, densities, and types of items within about 2.97 million acres. *Id.* at 388.

For the "proper care and management" of his hundreds of declared national monuments, President Biden reserved parcels of land coterminous with the "landscapes" themselves. 86 Fed. Reg. at 57330-33; 86 Fed. Reg. at 57343-46. He did not explain what "care and management" was actually appropriate for any of the items. *Id.*

By declaring as national monuments hundreds of items, plants, animals, regions, and landscapes, the proclamations make it a federal crime to "injure[]" any of those things. *See* 18 U.S.C. §1866(b). They effectively ban a wide range of activities by making it a federal crime to injure every blade of "grass[]"; every inch of "soil"; and every "bee," "shrub," and "beetle" within the millions of reserved acres. They also ban anyone from taking any action "to appropriate, injure, destroy, or remove any feature of the monument." 86 Fed. Reg. at 57333. They explicitly direct that all federal lands within

the enlarged reservations be "withdrawn from all forms of entry, location, selection, sale, or other disposition"; from "location, entry, and patent under the mining laws"; and from "disposition under all laws relating to mineral and geothermal leasing." *Id.* at 57331, 57345. And they "retire from livestock grazing" any voluntarily relinquished allotments. *Id.* at 57332, 57346.

Two months after the proclamations were issued, Defendant Department of Interior published interim management plans governing activities within the reservations. *Interim Management of the Bears Ears National Monument*, Dep't of Int. (Dec. 16, 2021), perma.cc/8WU9-MMH9 [hereinafter, Bears Ears Management Plan]; *Interim Management of the Grand Staircase-Escalante National Monument*, Dep't of Int. (Dec. 16, 2021), perma.cc/8J37-ELHR [hereinafter, Grand Staircase Management Plan]. Those management plans interpret the proclamations and governing law and implement detailed and restrictive rules about activities on the land. They state that any planned activity on the reservations must yield to a "determin[ation] that the proposal is also consistent with the protection of the monument objects and values." Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3. They acknowledge a wide range of activities affected by their rules, including "certain [vegetation] treatment methods allowed under the [previous] monument management plans." Bears Ears Management Plan 5; Grand Staircase Management Plan 5. Defendants' agents have prohibited Utah and others from engaging in planned activities in the reservations. *E.g.*, J.A. Vol. II at 344-57, 367,

400; J.A. Vol. IV at 849, 854-55, 859-60, 864-65. These interim management plans are not subject to any further review until permanent plans are finalized years later.

III. National monument reservations harm Utah, its people, its relics, and its land.

"The creation of a national monument is of no small consequence." *Mass. Lobsterman's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). Monument reservations increase vandalism, desecration, and theft. J.A. Vol II at 345-48. In the case of these two reservations, what were once cherished places known only by locals have become soiled with trash, litter, and human biological waste. *Id.* at 318, 336, 338, 346-47, 352-53, 360, 400. Visitors drawn by the reservations have degraded local roads and brought on unprecedented looting. *Id.* at 318, 345-48, 366-68.

The monument reservations prevent Utahns from caring for the land they love. By declaring as national monuments things like plants and soils, the reservations prevent vegetation management, wildfire prevention, and wildlife support that would otherwise occur on the federal lands. As a result, lush landscapes decay and native plants and animals die. *Id.* at 348-49, 352-60.

Meanwhile, the lands and items within the reservations are already protected by other federal laws. The Antiquities Act was designed for an age when it was otherwise legal to unilaterally acquire federal land, use it for any purpose, or take anything found on it. *Id.* at 325-28. Now, a vast array of land-use and criminal laws protect *all* federal

land against acquisition, appropriation, and uses detrimental to historical and cultural items, vulnerable habitats, and the environment. *Id.* at 328-34.

The reservations cause Utah to lose revenues from mineral leasing and grazing fees. *Id.* at 362-65. They disrupt Utah's planned activities on the land, including vegetation removal, wildfire prevention, road maintenance, soil management, wildlife support, and general use. *Id.* at 353-58. They render state and local laws ineffective, including laws about resource yields from federal land, grazing promotion, wildlife management, and search-and-rescue procedures. *Id.* at 356-58, 368-71. They cause a series of financial burdens and lost revenue for things like new equipment, additional obligations for state employees, hundreds of thousands of dollars in additional search-and-rescue expenses, difficult and expensive road-maintenance burdens, and increased expenditures for the service of restroom facilities within the reservations. *E.g.*, *id.* at 345-52, 366-68; J.A. Vol. IV at 847-871. And they harm Utah's land and wildlife property. J.A. Vol. II at 345-49, 352-58, 371-82.

IV. Utah sues and the district court dismisses its claims as unreviewable.

A. Utah challenges President Biden's national monument declarations and reservations.

In 2022, Utah sued President Biden and the agencies and officers responsible for administering and enforcing the national monument reservations, including the Department of Interior, Bureau of Land Management, Department of Agriculture, National Forest Service, and their respective heads—collectively, Federal Defendants. J.A. Vol.

I at 51. Individual Plaintiffs—Zebediah George Dalton, BlueRibbon Coalition, Kyle Kimmerle, and Suzette Ranea Morris—sued in a separate case, and the cases were consolidated. *Id.* at 29. Two coalitions intervened to defend the reservations. *Id.* at 30, 40-41.

Utah's amended complaint raised two pairs of claims. First, Utah alleged that both national monument reservations exceeded statutory authority, or were "ultra vires," because the declared national monuments did not fit the Antiquities Act's three categories and the reserved land was more than the smallest area compatible with any valid monument's proper care and management. J.A. Vol. II at 404-406 (Counts I & II). Second, Utah alleged that both agency management plans regulating activities on the national monument reservations also exceeded statutory authority. *Id.* at 406-408 (Counts III & IV). Utah sought a declaration that both reservations and both management plans are unlawful, and sought an injunction against their enforcement. *Id.* at 409.

Federal Defendants moved to dismiss Utah's amended complaint. They argued that Utah lacked standing, failed to allege with specificity which parcels of reserved land are excessive, did not state a violation of the Antiquities Act, and was barred by sovereign immunity or the Administrative Procedure Act's final-agency-action requirement. J.A. Vol. II at 424-25.

Utah opposed the motion to dismiss. J.A. Vol. III at 763. It explained that Utah has standing because the reservations deprive it of specific sources of revenue, deny the effect of its laws, impede its planned activities on the land, impose financial costs, and

threaten its property interests in land and wildlife. *Id.* at 801-820. Utah explained that its action was not barred by sovereign immunity because its claims allege that President Biden acted ultra vires and because Section 702 of the APA waived sovereign immunity for its claims against all Federal Defendants except the President. *Id.* at 836-38. Specifically, Utah explained that President Biden exceeded his statutory authority and therefore acted ultra vires because he declared ineligible things as national monuments and because the land he reserved was not confined to the smallest area compatible with their proper care and management. *Id.* at 821-33. And it explained that the management plans were final agency action because they were effective immediately and determined the rights of those who wished to undertake now-banned activities on the reservations. *Id.* at 838-39.

B. The district court dismisses Utah's claims as barred by sovereign immunity.

The district court dismissed all claims under Rule 12(b)(6). J.A. Vol. IV at 992.

First, the district court dismissed Utah's ultra vires claims. It acknowledged that an ultra vires claim for an action beyond statutory authority presents an "exception to sovereign immunity." *Id.* at 920. But it held that Utah did not allege an ultra vires claim. It said that no plaintiff can ever challenge an Antiquities Act reservation—no matter how broad that reservation's reach—because "no court of appeals has addressed how to interpret the Act's 'smallest area compatible' requirement." *Id.* at 982 (cleaned up). "[W]ithout additional guidance from Congress or a higher court," the district court said

"the President's actions are not ultra vires." *Id.* So, according to the court, "President Biden's judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court." *Id.* at 992. The court suggested the President has discretion in determining whether something satisfies the Act's limits. *Id.* at 982-83. And it said that because Utah conceded that the President could *sometimes* act within the Act's limits, Utah could not *ever* allege that he exceeded those limits. *Id.* It also clarified that even if the plaintiffs "were granted leave to amend their complaint, … they would not be able to plead the ultra vires exception." *Id.* at 982. In so holding, the district court did not address, acknowledge, or attempt to distinguish any of the court of appeals or district court opinions that reach the opposite conclusion—that a plaintiff *can* bring an ultra vires claim against a national monument reservation. *See id.* at 981-83.

The district court also held that Section 702 of the APA could not waive sovereign immunity as to any Federal Defendants. It explained that because the President *authored* the proclamations, Utah could not obtain an injunction against any subordinate officers and agencies because the APA does not waive sovereign immunity against the President. *Id.* at 979-81.

Finally, the district court dismissed the APA claims challenging the management plans. *Id.* at 983-90. It held that they were not final agency action because they were labeled "interim," were directed to government officials, and were merely interpretive. *Id.*

The district court dismissed the Individual Plaintiffs' complaint on the same grounds. *See generally id.* at 976-92.

Utah timely appealed. J.A. Vol. IV at 995-996.

SUMMARY OF ARGUMENT

I. The district court erred in holding that Utah's claims were barred by sovereign immunity. The "traditional exception to sovereign immunity" known as the ultra vires doctrine "permit[s] suits for prospective relief when government officials act beyond the limits of statutory authority." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232-33 (10th Cir. 2005). That's because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). To state an ultra vires claim, a plaintiff therefore must allege that the executive official acted "beyond those powers Congress extended." *Wyoming v. United States*, 279 F.3d 1214, 1229 (10th Cir. 2002).

The Antiquities Act limits the President's authority in two respects. First, he can declare only three narrow categories of things—certain (1) landmarks, (2) structures, and (3) objects—to be national monuments. Second, he can reserve only the "smallest [land] area compatible" with the monument's proper care and management. 54 U.S.C. §320301. The President has no discretion to redefine those limits, which courts must independently enforce. *See Cappaert v. Unites States*, 426 U.S. 128, 142 (1976).

Here, Utah alleged that Federal Defendants exceeded both limits because President Biden declared ineligible objects and reserved more land than what's compatible with any valid monument's proper care and management. A "raft of precedent" holds that such claims are not barred by sovereign immunity. *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54 (D.D.C. 2018).

As to all Federal Defendants except the President, sovereign immunity is doubly waived. Section 702 of the APA waives sovereign immunity for non-monetary claims like these, regardless of whether they allege an excess of statutory authority. 5 U.S.C. §702.

II. Utah stated a claim that the national monument reservations exceed the Antiquities Act. Most of the things declared to be national monuments do not satisfy even a broad interpretation of the category that they supposedly all fall into: "other objects of historic or scientific interest." 54 U.S.C. §320301(a). That category must refer to items akin to "historic landmarks" or "historic and prehistoric structures." *See Yates v. United States*, 574 U.S. 528, 536 (2015). But the things that President Biden declared to be national monuments are animate, ubiquitous, nondescript, or inconspicuous things like plants, animals, and common geological features. And even accepting all of President Biden's items to be valid objects, 3.23 million acres is at least an order of magnitude larger than the "smallest area compatible" with the proper care and management of those objects.

III. The management plans governing the reservations are final agency action and therefore reviewable as beyond statutory authority. An agency action is "final" whenever it marks the "consummation of the agency's decisionmaking process" and has "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An "interim" action meets the first element "as long as the interim decision is not *itself* subject to further consideration by the agency," which these are not. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (emphasis added); *accord Nat'l Air Carrier Ass'n v. C.A.B.*, 436 F.2d 185, 191 (D.C. Cir. 1970). And an action meets the second element even if it simply states how the agencies interpreted the law, which these do. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). The management plans here are therefore final. Any other result would allow agencies to act unlawfully for years while escaping judicial scrutiny.

This Court should reverse and remand.

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim, including due to sovereign immunity. *Silva v. United States*, 45 F.4th 1134, 1137 (10th Cir. 2022); *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022). In so doing, this Court must "take Plaintiffs' well-pleaded facts as true, view them in the light most favorable to Plaintiffs," "draw all reasonable inferences from the facts in favor of Plaintiffs," and "presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Brooks v. Mentor Worldwide*

LLC, 985 F.3d 1272, 1281 (10th Cir. 2021); *SUWA v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). After making all those presumptions and assumptions in the plaintiffs' favor, the only question is whether the plaintiffs' legal claims are "facially plausible." "A claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 858 (10th Cir. 2016).

ARGUMENT

I. Utah's claims are not barred by sovereign immunity.

Sovereign immunity does not protect officers who act "ultra vires," which means beyond statutory limits. *Simmat*, 413 F.3d at 1232-33. The Antiquities Act limits both what can be declared a national monument and how much surrounding land can be reserved. Its limits are objective and enforceable. Utah alleged that President Biden exceeded both limits. It therefore brought standard ultra vires claims. Beyond that, Section 702 of the APA independently waives sovereign immunity because this action seeks non-monetary relief against the federal executive officers who enforce currently binding rules that govern activities within the reservations. *See* 5 U.S.C. §702.

A. Ultra vires claims are exempt from sovereign immunity.

"Sovereign immunity does not prevent a suit against a federal officer who is acting in excess of his authority." *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir. 1960). The "traditional exception to sovereign immunity, commonly referred to as the ultra vires doctrine, permit[s] suits for prospective relief when government officials

act beyond the limits of statutory authority." *Simmat*, 413 F.3d at 1232-33. The ultra vires doctrine "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

The doctrine flows from the common-sense conclusion that when the executive goes beyond the power that the legislature has granted, its action is no longer the sovereign's. "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action." *Larson*, 337 U.S. at 689. The officer is no longer "doing the business which the sovereign has empowered him to do." *Id.* "To permit [the Executive Branch] to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to [it] power to override Congress." *Wyoming*, 279 F.3d at 1229. So if not for the ultra vires doctrine, "sovereign immunity would unjustifiably protect the Government in the exercise of powers it does not possess." *Id.* at 1225.

To state an ultra vires claim, a plaintiff therefore must allege that the executive officer acted "beyond those powers Congress extended." *Id.* at 1229. The Supreme Court and this Court have stated this rule in a variety of ways, but it always turns on whether the plaintiff alleges an executive action beyond the limits of statutory authority. The plaintiff must allege that "the officers have exceeded their statutory powers," *Pierson*, 284 F.2d at 652, went "beyond their statutory powers," *Dugan v. Rank*, 372 U.S. 609, 621 (1963), or acted "beyond the limits of statutory authority," *Simmat*, 413 F.3d at 1233; *see also Dalton v. Specter*, 511 U.S. 462, 472 (1994) ("beyond his statutory

powers"). If the plaintiff alleges an act beyond the limits of statutory authority, then the executive defendants cannot escape judicial review through "[t]he cloak of immunity." *Frost v. Garrison*, 201 F. Supp. 389, 391 (D. Wyo. 1962).

This Court's decision in *Pierson* is illustrative. 284 F.2d 649. In *Pierson*, an energy-company plaintiff sued BLM and Interior under the ultra vires doctrine. *Id.* at 650. The company alleged that when they sought to cancel its oil lease in an administrative proceeding, they acted beyond their statutory authority. *Id.* at 651. By statute, the agencies could cancel the company's lease administratively only if the land did not "contain valuable deposits of oil or gas." *Id.* at 654. The company alleged that the land here *did* contain valuable deposits of oil and gas, so the agencies exceeded their authority and therefore had no sovereign immunity. *Id.* This Court agreed. It held that the executive defendants had no sovereign immunity because the company alleged an act beyond statutory authority. *Id.* at 656. A plaintiff "aggrieved by governmental action, and precluded from a suit against the sovereign by the doctrine of immunity" may bring a suit against "the government officer responsible for that action" when it alleges that "the officers have exceeded their statutory powers." *Id.* at 651-52. This Court therefore reversed the district court's dismissal and held on the merits that the plaintiffs stated a claim because the defendants' administrative cancellation was "without statutory authority." *Id.* at 656.

The ultra vires doctrine remains a standard mechanism for challenging executive actions beyond statutory authority. *See, e.g.*, *California v. Trump*, 379 F. Supp. 3d 928

(N.D. Cal. 2019) (holding presidential wall-funding order ultra vires); *Make the Road N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y 2020) (holding presidential immigration proclamation ultra vires); *Texas v. Biden*, 2023 WL 6281319, at *2 (S.D. Tex. Sept. 26) (holding presidential wage directive ultra vires); *see also* Section I.B.3, *infra* (compiling cases allowing ultra vires Antiquities Act challenges).

B. Utah alleged that Federal Defendants exceeded their statutory authority.

Utah brought textbook ultra vires claims. It alleged that Federal Defendants' "powers are limited by statute" and that the national monument reservations went "beyond those limitations." *Larson*, 337 U.S. at 689.

1. The Antiquities Act limits the President's authority in two ways.

The Antiquities Act's plain text discloses two critical limits. First, before the President can declare something a national monument, that item must be "situated" on federal land and fall within one of only three specific categories: (1) "historic landmarks," (2) "historic and prehistoric structures," or (3) "other objects of historic or scientific interest." 54 U.S.C. §320301(a). Second, the parcel of land reserved for that national monument "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* §320301(b).

A president acts ultra vires by exceeding either of those statutory limits. A president exceeds the first limit if he declares as a national monument *anything* that is not situated on federal land or not a historic landmark, historic or prehistoric structure, or

other object of historic or scientific interest. For example, he exceeds the first limit if he declares as a national monument the State of Colorado or a raindrop. And a president exceeds the second limit if he reserves more than the smallest area compatible with the proper care and management of a valid object. For example, he exceeds the second limit if his object needs one acre for its protection, but he reserves one hundred acres. That's why Chief Justice Roberts called on courts to more stringently enforce both the limit on "[t]he scope of the objects that can be designated under the Act" and the limit on "the area necessary for their proper care and management." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

The district court, however, held that the Act does not limit the President's authority. "President Biden's judgment in drafting and issuing the Proclamations as he sees fit," the district court held, "is not an action reviewable by a district court." J.A. Vol. IV at 992. The district court did not base that conclusion on an analysis of the Act's text. Instead, it refused to enforce the text because "[n]o court of appeals has addressed … how to interpret" it. *Id.* 982. "[W]ithout additional guidance from Congress or a higher court," the district court held, "the President's actions are not *ultra vires*." *Id.*

But Congress already set strict statutory limits—and multiple courts of appeals have already held that those limits are enforceable. *See* Section I.B.3, *infra*. In any event, the Act's limits must be applied regardless of whether a higher court has defined them; even without the prior precedent on these questions, Utah's claims would have

presented "question[s] of first impression" of the kind that district courts often must answer. *Anderson v. Commerce Const*, 531 F.3d 1190, 1195 (10th Cir. 2008). The district court cited no cases licensing it to ignore statutory limits because it thought them not previously and sufficiently defined by higher courts. It erred in concluding that it could.

2. Utah alleged that Federal Defendants exceeded both limits.

Because the Act has limits, Utah properly stated ultra vires claims if it alleged that Federal Defendants went "beyond" those limits. *Larson*, 337 U.S. at 689. Utah did just that for both of the Act's limits.

Utah alleged that President Biden exceeded the first limit because he declared as national monuments many things that are *not* historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest. 54 U.S.C. §320301(a). For example, he declared as national monuments entire one-million-plus acre "landscapes." He declared as national monuments plants and animals like "potato[es]" and "sheep." And he declared as national monuments generic things like "boulders." President Biden declared over 500 things, over the course of two lengthy proclamations, to be national monuments. 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46. Utah's amended complaint contains factual allegations addressing those objects one-by-one and alleged that all but nine of them did not qualify for protection under the Act. J.A. Vol. II at 382-91. For nearly every object, Utah alleged multiple reasons why it did not qualify, such as that it was "animate" and "generic." *Id.* Utah therefore alleged that President Biden

violated the Act's first limit by declaring as national monuments things "beyond his statutory powers." *Dalton*, 511 U.S. at 472.

Utah also alleged that President Biden exceeded the Act's second limit because, even if all of his separate objects satisfied the first limit, his 3.23 million-acre reservations were not the "smallest area compatible" with their "proper care and management." 54 U.S.C. §320301(b). Utah's amended complaint contains factual allegations describing the relevant threats to each item, the measures needed to protect them from those threats, and the space needed to implement those measures. J.A. Vol. II at 392-93. Utah provided maps showing the areas needed for protection of qualifying items and cited real-life examples of proper protection. *Id.* at 394-401. It explained that even accepting every item on the map of qualifying objects that *Federal Defendants* themselves submitted, and even granting each item a more-than-necessary and non-overlapping 1,000 acres per item, that would justify reserving—at most—less than six percent of the land covered by the current reservations. *Id.* at 428-29. Utah therefore properly alleged that in reserving 3.23 million acres, President Biden again went "beyond his statutory powers." *Dalton*, 511 U.S. at 472.

The district court suggested Utah did not allege an excess-of-statutory-authority claim because Utah does not dispute that—in the abstract—presidents have "the authority to withdraw federal land as national monuments" *somewhere*. J.A. Vol. IV at 982. The court therefore conceived of Utah's claims as arguing not a "lack of delegated power," but an "error in the exercise of that power." *Id.* at 981-82. But every ultra vires

claim assumes that the statute has some valid applications. It would have been no defense in *Pierson*, for example, to observe that the Secretary could cancel oil leases in *other circumstances*. 284 F.2d at 654. Because Utah alleged that the national monument reservations *here* exceeded the Antiquities Act's two limits, Utah's amended complaint alleges all facts necessary for this lawsuit to state claims falling within the "traditional exception to sovereign immunity, commonly referred to as the *ultra vires* doctrine, permitting suits for prospective relief when government officials act beyond the limits of statutory authority." *Simmat*, 413 F.3d at 1233.

3. The district court's holding splits with every other court's sovereign-immunity holdings—without even acknowledging those contrary holdings.

Every other court that has previously considered whether Antiquities Act challenges are barred by sovereign immunity disagrees with the district court's conclusion. Those courts "have consistently reviewed claims challenging national monument designations." *Am. Forest Res. Council v. United States*, 77 F.4th 787, 797 (D.C. Cir. 2023). "In reviewing challenges under the Antiquities Act," the D.C. Circuit has held, "review is available to ensure that … the President has not exceeded his statutory authority." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *accord Murphy Co. v. Biden*, 65 F.4th 1122, 1128-31 (9th Cir. 2023); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002). When "claims assert that the President exceeded his statutory authority under the Antiquities Act—*i.e.*, that the Proclamation was *ultra vires*—they are generally reviewable." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d at 54. Indeed, in

everywhere but the District of Utah, it is "well settled that courts may engage in ultra vires review of presidential proclamations that designate federal lands as national monuments." *W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951, 960 (D. Ariz. 2009). Courts faced with sovereign-immunity arguments "easily conclude that the plaintiffs' claims are reviewable." *Am. Forest Res. Council*, 77 F.4th at 797. Courts can—and must—engage in "review of the President's actions in this area." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

The district court's holding that sovereign immunity shields challenges to national monument reservations flouts this "raft of precedent." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d at 54. Unfortunately, the district court did not engage with any of those contrary cases. It did not even acknowledge them, let alone explain what they got wrong or try to distinguish them. J.A. Vol. IV at 981-84; *cf. United States v. Wilkins*, 30 F.4th 1198, 1209 (10th Cir. 2022) ("we are ordinarily reluctant to create a circuit split without a 'sound reason'"). They are not distinguishable. Every other court is right. Utah stated and properly pleaded ultra vires claims.

C. The President does not have discretion to define the Act's limits.

Nor does the Act make the President the final arbiter over what satisfies its limits. Within the first limit, a president can declare something to be a national monument if it is situated on federal land and a qualifying landmark, structure, or object. 54 U.S.C. §320301(a). If an item objectively qualifies as one of those three things, the President *need not* declare it a national monument—he simply "may, in [his] discretion." *Id.*

(emphasis added). But if it does not objectively qualify as one of those three things, he may not declare it a monument.

Federal Defendants have theorized that the word "discretion" in the Act instead gives the President unchallengeable discretion to decide *whether* something is a qualifying landmark, structure, or object. J.A. Vol. II at 438-39. On this account, the Act authorizes the President to declare *anything* a national monument. He could declare that a squirrel is a "historic landmark," and no court could second-guess him. The district court implied but did not explicitly say that it accepted Federal Defendants' "discretion" theory. *See* J.A. Vol. IV at 976 (quoting *Martin v. Mott*, 25 U.S. 19, 31-32 (1827)). Of course, if Federal Defendants' theory were true, then the President could not exceed the Act's first limit. Any ultra vires claim would have to proceed solely on the smallest-area-compatible limit.

But Federal Defendants' unchallengeable-discretion theory is wrong for at least three reasons. First, it's foreclosed by Supreme Court precedent. The Supreme Court has twice discussed the requirement that the President declare as monuments only qualifying landmarks, structures, and objects. In both cases, it held the President to an objective standard. In *Cappaert v. United States*, the Court held that the declared national monument objectively qualified as an "object[t] of historic or scientific interest" because it was a one-of-a-kind geological pool formation. 426 U.S. at 142. In *Cameron v. United States*, the Court said the same about the Grand Canyon, again based on objective criteria. 252 U.S. 450, 455-56 (1920). On Federal Defendants' theory, the Supreme

Court committed legal error by inquiring into whether these monuments qualified under objective criteria because only the President had discretion to decide that.

Second, Federal Defendants' theory is not consistent with ordinary usage. When a statute authorizes someone to take action "in his discretion" upon certain conditions, it means that the conditions are objective but the action is optional. When a statute says that the Attorney General "may, in [his] discretion" waive deportation for an alien if she is "the spouse, parent, son, or daughter of a citizen of the United States," 8 U.S.C. §1227(a)(1)(H), it means that the alien must objectively fall into one of those categories, but that the later waiver is optional. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 29-30 (1996) ("The meaning of this language is clear. While it establishes certain prerequisites to eligibility for a waiver of deportation, it imposes no limitations on the factors that the Attorney General … may consider in determining who, *among the class of eligible aliens*, should be granted relief.") (emphasis added).

Likewise, when a statute authorizes a district court to award attorney's fees "in its discretion" if someone is a "prevailing party," 42 U.S.C. §1988(b), it means that the party must objectively prevail, but that awarding fees is optional. *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235 (10th Cir. 2011) ("Whether a litigant qualifies as a 'prevailing party' under … §1988 is a question of law that we review de novo."). So when a statute authorizes the President to declare something a national monument "in [his] discretion" if it is a historic landmark, historic or prehistoric structure, or other object of historic

or scientific interest, 54 U.S.C. §320301(a), it means that the thing must objectively fall within one of those three categories, but that the declaration is optional.

Third, history belies Federal Defendants' theory. If the President had sole discretion to determine whether something is a qualifying landmark, structure, or object, then the drafters of the Antiquities Act would not have obsessed over the precise wording of those limits. But the Act was "carefully drawn" and reflected *years* of debate and compromise over those words. S. Rep. No. 59-3797, at 1 (1906); *see* Lee, *supra*, at 47-77 (documenting drafting history and debates); H.R. 11021, 56th Cong. (1900) (rejecting broader proposal for items of "scenic beauty," "natural wonders," and other "curiosities"). The "discretion" theory renders those years of legislative deliberation a pointless charade.

Federal Defendants' interpretation would also raise separation-of-powers concerns. If the President may declare *anything* a national monument, then the Antiquities Act would unconstitutionally delegate the legislative power to regulate federal land. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); U.S. Const., Art. IV, §3. And before holding that Congress conferred to the President the unreviewable power to lock down any federal land as a national monument, this Court would have to conclude that its intent to do so was "clear." *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022).

D. The APA independently waives sovereign immunity.

If Utah's claims did not fall within the ultra vires exception, Utah could still bring them as to every Federal Defendant except the President. Section 702 of the APA

waives sovereign immunity from suits for "non-monetary relief" against all federal "official[s]" other than the President. *Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012); *see also* 5 U.S.C. §702. "This waiver is not limited to suits under the Administrative Procedure Act." *Simmat*, 413 F.3d at 1233.

Utah's first pair of claims sought non-monetary relief—an injunction and declaration preventing enforcement of the proclamations—against all Federal Defendants. J.A. Vol. II at 404-06, 409. Federal Defendant officers and agencies implement and enforce the unlawful proclamations, and Utah wants them to stop. The district court held that Section 702 did not waive sovereign immunity as to those claims. J.A. Vol. IV at 979-81. It suggested that because the President *authored* the proclamations, Utah could not obtain an injunction against any subordinate officers and agencies. *Id.* But when a suit against the President himself is not available, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). Section 702's plain text waives sovereign immunity for this relief. *Simmat*, 413 F.3d at 1233. Therefore, even if the ultra vires doctrine were not satisfied, Utah's first two claims may proceed against everyone except the President.

II. Utah stated valid claims.

If this Court agrees with every other American court and holds that sovereign immunity is no bar to relief, it should have little trouble concluding that Utah stated meritorious claims for relief. Taking all of Utah's factual allegations as true, as the Court

must at this stage, Utah's allegations that the President exceeded his statutory authority amply clear Rule 12's plausibility threshold. *Rhodes*, 843 F.3d at 858.

A. The President declared ineligible things as national monuments.

Utah stated a claim that President Biden declared as national monuments things that do not fit within the Act's three categories of historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. 54 U.S.C. §320301(a). Of the more than 500 items that President Biden's proclamations declare to be national monuments, all but a few handfuls do not fit any of those three categories. They are instead ordinary things like "soil," "shrubs," "rice-grass," "bees," "sunflower[s]," "bighorn sheep," "minnow[s]," "beetle[s]," "pinyon," "juniper," "areas," "views," and "forested slopes." 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46; 82 Fed. Reg. at 1139-46 (incorporated by 86 Fed. Reg. at 57346). In fact, President Biden declared as national monuments over 200 plants and animals, dozens of qualities and experiences, nearly 200 geological items, and over 150 archaeological and paleontological items. J.A. Vol. II at 382-91. Most of these were ubiquitous, generic, or nondescript, like "red sandstone cliffs" or "stock trails." *Id.* He even declared as national monuments the entire 3.23 million acre "landscapes" themselves. *Id.* at 382.

Federal Defendants have forfeited any argument that any of those items satisfy either of the Antiquities Act's first two categories. 86 Fed. Reg. at 57331, 57345; J.A. Vol. II at 477-83. They put all their chips on the final category, "other objects of historic or scientific interest." 54 U.S.C. §320301(a). But this category does not encompass

Federal Defendants' kitchen-sink list of items. To any "speaker of ordinary English," *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.), things like plants, animals, and landscapes are not "objects." And ubiquitous, generic, nondescript items like "boulders" are not "of historic or scientific interest."

In fact, sound statutory construction counsels a narrow reading of the Act's third category of "other objects of historic or scientific interest." The words in that phrase carry important restraints that cannot be reconciled with these two national monument reservations. "Historic," for example, describes only things that are "memorable, or assured of a place in history," not just things that are old. Fowler, *A Dictionary of Modern English Usage* 247 (1922).[2] And any qualifying "objects" must *also* be "situated on land," 54 U.S.C. §320301(a), which means they must be ""permanently fixed; placed; located." *Situate; Situated*, Webster's Dictionary (1913).

[2] *Accord Historical*, 2 Webster's New International Dictionary 1021 (1913) ("historical" is "the more usual form" for "[o]f, pertaining to, or of the nature of, history," whereas "historic" is "the more usual form" for "associated with, or famous in, history; as a historic spot; a historic event"); *Historic*, Oxford English Dictionary V (H-K) 304 (1913) ("the prevailing current sense" of "historic" was "[f]orming an important part or item of history; noted or celebrated in history; having an interest or importance due to conne[ct]ion with historical events").

The Act's third category also cannot be read broadly because it must "apply only to persons or things of the same general kind or class" as the first two categories. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012); *see also Wash. State Dep't of Soc. and Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (cleaned up)). Any qualifying "object of historic or scientific interest" *must be* akin to "historic landmarks" or "historic and prehistoric structures." In a closely analogous statutory-interpretation case, the Supreme Court held that where the phrase "tangible object" follows the words "record" and "document," it refers to "only objects one can use to record or preserve information, not all objects in the physical world." *Yates*, 574 U.S. at 536; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (similar). The Act's use of the word "other" further narrows this category. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020).

A narrow reading of the third category also is most consistent with the Act's title because an "antiquity" is a rare thing—a "relic or monument of ancient times"—not a nondescript or common thing. *Antiquity*, Webster's Dictionary (1913); *see I.N.S. v. Nat'l Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 189 (1991) ("the title … can aid in resolving an ambiguity in the legislation's text"); *accord Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). A narrow reading avoids constitutional delegation

problems. *See supra*, I.B.2; *see Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). And it's most consistent with the legislative history, which promised a modest Act for rare items, and discarded broader categories. H.R. Rep. No. 59-2224, at 1 ("small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times"); 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey) ("small reservations" only); H.R. 11021 56th Cong. (1900) ("scenic beauty," "natural wonders," "curiosities"); *see Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'").

B. The President reserved more land than the smallest area compatible with any valid monument's proper care and management.

Utah also stated a claim that President Biden exceeded his statutory authority by reserving more than the "smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. §320301(b). Utah alleged facts showing what the proper care and management of all listed items would require. It explained that the "smallest area compatible with the proper care and management of the objects to be protected" depends on the threats to those objects absent a reservation, the measures needed to protect from those threats, and the space needed to implement those measures. J.A. Vol. II at 395-400. Utah alleged, based on modern standards of

care, that even with the most generous assumptions afforded for the federal government, most items needed a reservation of often no more than a few acres, and almost none needed more than 160 acres. *Id.* And yet, even granting double that many acres to every item listed would justify reserving under six percent of the current reservations.

Alternatively, Utah alleged that, under the circumstances on the ground, no reservation is necessary for the proper care and management of most or all qualifying objects because large-scale reservations undermine proper care and management by drawing people to areas that will spread local rangers impossibly thin, and the objects are already properly cared for and managed under existing laws. J.A. Vol. II at 400. While an Antiquities Act reservation was necessary to properly care for and manage ruins on federal land early in the 20th century, new laws make it no longer so.

The "smallest area compatible" limitation imposes a "unique constraint." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). Congress wrote it to ensure that national monument reservations would implicate "[n]ot very much" land. 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey). It would not have passed without this constraint. Norris, *The Antiquities Act and the Acreage Debate*, 23 George Wright Forum 6, 8 (2006). And Congress used the term "shall" in reference to the "smallest area compatible" requirement, 54 U.S.C. §320301(b), to make this constraint inflexible. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("shall is mandatory and may is