

Nos. 23-4106, 23-4107

IN THE
**United States Court of Appeals
for the Tenth Circuit**

GARFIELD COUNTY, UTAH, *et al.*,
Plaintiffs-Appellants,

and

ZEBEDIAH GEORGE DALTON, *et al.*,
Consolidated Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., *et al.*,
Defendants-Appellees,

and

HOPI TRIBE, *et al.*,
Defendant Intervenors-Appellees

Appeal from the United States District Court for the District of Utah
Case No. 4:22-cv-00059-DN (Hon. David Nuffer)

**BRIEF FOR UTAH DINÉ BIKÉYAH, FRIENDS OF CEDAR MESA,
ARCHAEOLOGY SOUTHWEST, PATAGONIA WORKS, THE ACCESS
FUND, AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION
IN THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF
TRIBAL NATION INTERVENORS AND SUWA INTERVENORS
AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER**

Brent Manning
MANNING CURTIS BRADSHAW & BEDNAR
136 East South Temple
Suite 1300
Salt Lake City, Utah 84111
(801) 363-5678

January 16, 2024

Adam M. Kushner
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
adam.kushner@hoganlovells.com

Counsel for Amici Curiae

Additional counsel listed on inside cover

Jim Banks
William E. Havemann
Michael J. West
Brian Malat
Olivia Molodanof
Rebecca Wilton*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004

**Admitted only in Minnesota;
practice supervised by principals of the firm admitted in D.C.*

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Utah Diné Bikéyah, Friends of Cedar Mesa d/b/a Greater Bears Ears Partnership, Archaeology Southwest, Patagonia Works, The Access Fund, and the National Trust for Historic Preservation in the United States disclose that each has no parent corporation, that no publicly held company holds 10% or more of their stock, and that there is no publicly held corporation which is not a party to the proceeding before this Court with a financial interest in the outcome of the proceeding.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE.....	1
INTRODUCTION	2
ARGUMENT	5
I. PLAINTIFFS’ CLAIMS FAIL AS A MATTER OF LAW.....	5
A. The Statutory Text Refutes Plaintiffs’ Arguments	5
B. Congress Has Endorsed This Longstanding Presidential Interpretation Of The Antiquities Act.....	9
1. Presidents since 1906 have used the Act to protect the same categories of objects at issue here.....	9
2. Congress has endorsed this longstanding practice.....	18
C. The Legislative History Confirms That Congress Granted Presidents Broad Powers.....	22
D. The Supreme Court Has Held That Presidents Have Broad Authority Under The Antiquities Act	24
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF DIGITAL SUBMISSION	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES:	
<i>Anaconda Copper Co. v. Andrus</i> , No. A79-cv-161, 1980 BL 175 (D. Alaska July 1, 1980)	23, 25
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983).....	21
<i>Mountain States Legal Found. v. Bush</i> , 306 F.3d 1132 (D.C. Cir. 2002).....	25
<i>Cameron v. United States</i> , 252 U.S. 450 (1920).....	4, 24, 25
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976).....	4, 24, 25
<i>Catron Cnty. Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.</i> , 75 F.3d 1429 (10th Cir. 1996)	9
<i>Dalton v. Specter</i> , 511 U.S. 462 (1994).....	8
<i>Haig v. Agee</i> , 453 U.S. 280 (1981).....	22
<i>Mass. Lobstermen’s Ass’n v. Raimondo</i> , 141 S. Ct. 979 (2021).....	3
<i>Medellín v. Texas</i> , 552 U.S. 491 (2008).....	9, 18
<i>Tulare Cnty. v. Bush</i> , 306 F.3d 1138 (D.C. Cir. 2002).....	25
<i>United States v. George S. Bush & Co.</i> , 310 U.S. 371 (1940).....	8

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Utah Ass’n of Counties v. Bush</i> , 316 F. Supp. 2d 1172 (D. Utah 2004).....	24
<i>Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.</i> , 50 F.4th 164 (D.C. Cir. 2022).....	21
<i>Wyoming v. Franke</i> , 58 F. Supp. 890 (D. Wyo. 1945).....	21

STATUTES:

16 U.S.C. § 119.....	19
16 U.S.C. § 119a.....	19
16 U.S.C. § 201.....	19
16 U.S.C. § 202.....	19
16 U.S.C. § 203.....	19
16 U.S.C. § 204.....	19
16 U.S.C. § 205.....	19
16 U.S.C. § 206.....	19
16 U.S.C. § 207c.....	19
16 U.S.C. § 221.....	19
16 U.S.C. § 222.....	19
16 U.S.C. § 223.....	19
16 U.S.C. § 224.....	19
16 U.S.C. § 225.....	19
16 U.S.C. § 226.....	19

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
16 U.S.C. § 227	19
16 U.S.C. § 228j	19
16 U.S.C. § 251	19
16 U.S.C. § 252	19
16 U.S.C. § 253	19
16 U.S.C. § 254	19
16 U.S.C. § 255	19
16 U.S.C. § 256i	19
16 U.S.C. § 272	19
16 U.S.C. § 272g	19
16 U.S.C. § 273	19
16 U.S.C. § 273f	19
16 U.S.C. § 341	19
16 U.S.C. § 342	19
16 U.S.C. § 343d	19
16 U.S.C. § 344	19
16 U.S.C. § 345	19
16 U.S.C. § 346e	19
16 U.S.C. § 401	19
16 U.S.C. § 402g	19
16 U.S.C. § 410aaa	19

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
16 U.S.C. § 410aaa-1	19
16 U.S.C. § 410aaa-2	19
16 U.S.C. § 410aaa-3	19
16 U.S.C. § 410aaa-4	19
16 U.S.C. § 410aaa-5	19
16 U.S.C. § 410aaa-6	19
16 U.S.C. § 410aaa-7	19
16 U.S.C. § 410fff	19
16 U.S.C. § 410fff-1	19
16 U.S.C. § 410fff-2	19
16 U.S.C. § 410fff-3	19
16 U.S.C. § 410fff-4	19
16 U.S.C. § 410fff-5	19
16 U.S.C. § 410fff-6	19
16 U.S.C. § 410fff-7	19
16 U.S.C. § 410fff-8	19
16 U.S.C. § 410fff-9	19
16 U.S.C. § 410fff-10	19
16 U.S.C. § 410hh	19
16 U.S.C. § 410hh-1	19
16 U.S.C. § 410hh-2	19

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
16 U.S.C. § 410hh-3.....	19
16 U.S.C. § 410hh-4.....	19
16 U.S.C. § 410hh-5.....	19
16 U.S.C. § 410ii.....	19
16 U.S.C. § 410ii-1	19
16 U.S.C. § 410ii-2	19
16 U.S.C. § 410ii-3	19
16 U.S.C. § 410ii-4	19
16 U.S.C. § 410ii-5	19
16 U.S.C. § 410ii-6	19
16 U.S.C. § 410ii-7	19
16 U.S.C. § 410ooo.....	19
16 U.S.C. § 410ooo-1.....	19
16 U.S.C. § 410ss.....	19
16 U.S.C. § 410ss-1	19
16 U.S.C. § 410uu.....	19
16 U.S.C. § 410uu-1.....	19
16 U.S.C. § 410uu-2.....	19
16 U.S.C. § 410uu-3.....	19
16 U.S.C. § 410uu-4.....	19
16 U.S.C. § 410zz	19

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
16 U.S.C. § 410zz-1	19
16 U.S.C. § 410zz-2	19
16 U.S.C. § 410zz-3	19
16 U.S.C. § 3101	20
16 U.S.C. § 3213(a)	20
43 U.S.C. § 1701	22
54 U.S.C. § 320301(a)	2, 5, 7, 8
54 U.S.C. § 320301(b)	3, 5, 7, 8
54 U.S.C. § 320301(d)	20
Pub. L. No. 94-567, § 309, 90 Stat. 2732 (1976)	19
Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)	22
Pub. L. No. 95-625, § 301, 92 Stat. 3467 (1978)	19
Pub. L. No. 104-333, § 205, 110 Stat. 4094 (1996)	19
Pub. L. No. 105-355, § 201, 112 Stat. 3247 (1998)	19
Pub. L. No. 105-376, § 3, 112 Stat. 3388 (1998)	19
34 Stat. 3236 (Sept. 24, 1906)	9
34 Stat. 3264 (Dec. 8, 1906)	16
34 Stat. 3265 (Dec. 8, 1906)	16
34 Stat. 3266 (Dec. 8, 1906)	16
35 Stat. 2119 (Mar. 11, 1907)	16
35 Stat. 2162 (Nov. 16, 1907)	16

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
35 Stat. 2168 (Dec. 19, 1907)	16
35 Stat. 2174 (Jan. 9, 1908)	11
35 Stat. 2175 (Jan. 11, 1908)	10
35 Stat. 2175 (Nov. 11, 1908).....	14
35 Stat. 2177 (Jan. 16, 1908)	15
35 Stat. 2183 (Apr. 16, 1908)	15
35 Stat. 2205 (Sept. 15, 1908).....	16
35 Stat. 2247 (Mar. 2, 1909).....	10, 12, 15
36 Stat. 2491 (Mar. 20, 1909).....	16
36 Stat. 2498 (July 31, 1909).....	10, 14
36 Stat. 2703 (May 30, 1910)	15
37 Stat. 1681 (May 24, 1911)	15
38 Stat. 1991 (Jan. 31, 1914)	11, 16
39 Stat. 1752 (Oct. 4, 1915).....	16
39 Stat. 1785 (July 8, 1916).....	11, 12, 15
39 Stat. 1792 (Aug. 9, 1916).....	10
40 Stat. 1855 (Sept. 24, 1918).....	10, 17
42 Stat. 2286 (Oct. 21, 1922).....	16
43 Stat. 1914 (June 8, 1923)	10, 14
43 Stat. 1946 (Apr. 18, 1924)	15

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
43 Stat. 1947 (May 2, 1924)	10, 15
43 Stat. 1988 (Feb. 26, 1925).....	10-12, 15, 17
46 Stat. 2988 (Apr. 12, 1929)	15
47 Stat. 2547 (Dec. 22, 1932)	14
47 Stat. 2557 (Mar. 1, 1933).....	10, 11
47 Stat. 2558 (Mar. 2, 1933).....	14
48 Stat. 1705 (Aug. 22, 1933).....	14, 15
50 Stat. 1856 (Aug. 2, 1937).....	14
52 Stat. 1541 (Apr. 26, 1938)	17
64 Stat. A371 (Oct. 25, 1949).....	16
75 Stat. 1058 (May 11, 1961)	16
76 Stat. 1441 (Dec. 28, 1961)	10, 12
83 Stat. 924 (Jan. 20, 1969)	14, 17
93 Stat. 1446 (Dec. 1, 1978)	13
93 Stat. 1450 (Dec. 1, 1978)	11, 13
93 Stat. 1451 (Dec. 1, 1978)	11, 13, 17
93 Stat. 1453 (Dec. 1, 1978)	10, 13
93 Stat. 1455 (Dec. 1, 1978)	13, 15
93 Stat. 1457 (Dec. 1, 1978)	11, 13
93 Stat. 1462 (Dec. 1, 1978)	13

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
93 Stat. 1463 (Dec. 1, 1978)	11, 13
93 Stat. 1465 (Dec. 1, 1978)	13
93 Stat. 1466 (Dec. 1, 1978)	11, 13, 15
93 Stat. 1468 (Dec. 1, 1978)	11, 13, 14
93 Stat. 1470 (Dec. 1, 1978)	11, 13, 14
110 Stat. 4561 (Sept. 18, 1996).....	11, 13-15
REGULATIONS:	
17 Fed. Reg. 691 (Jan. 23, 1952)	12
65 Fed. Reg. 24,095 (Apr. 15, 2000)	11, 13
65 Fed. Reg. 37,243 (June 9, 2000)	13-16
65 Fed. Reg. 37,249 (June 9, 2000)	11, 13, 15
65 Fed. Reg. 37,253 (June 9, 2000)	11, 13
65 Fed. Reg. 37,259 (June 9, 2000)	11, 13
65 Fed. Reg. 69,227 (Nov. 9, 2000).....	12-15
65 Fed. Reg. 2817 (Jan. 11, 2000)	11, 13, 16
65 Fed. Reg. 2821 (Jan. 11, 2000)	11, 13, 15
65 Fed. Reg. 2825 (Jan. 11, 2000)	11, 13, 14, 16
66 Fed. Reg. 7339 (Jan. 17, 2001)	12, 13, 17
66 Fed. Reg. 7343 (Jan. 17, 2001)	13

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
66 Fed. Reg. 7354 (Jan. 22, 2001)	12
66 Fed. Reg. 7359 (Jan. 17, 2001)	12, 13
66 Fed. Reg. 7364 (Jan. 17, 2001)	13
71 Fed. Reg. 36,443 (June 15, 2006)	13
74 Fed. Reg. 1557 (Jan. 6, 2009)	13
74 Fed. Reg. 1565 (Jan. 6, 2009)	12, 13
74 Fed. Reg. 1577 (Jan. 6, 2009)	13
77 Fed. Reg. 24,579 (Apr. 20, 2012)	13
77 Fed. Reg. 59,275 (Sept. 21, 2012)	12, 13
78 Fed. Reg. 18,783 (Mar. 25, 2013)	12, 14
78 Fed. Reg. 18,789 (Mar. 25, 2013)	11-14
79 Fed. Reg. 30,431 (May 21, 2014)	12, 15-16
79 Fed. Reg. 62,303 (Oct. 10, 2014)	12, 15
80 Fed. Reg. 41,975 (July 10, 2015)	12, 14, 15
80 Fed. Reg. 41,983 (July 10, 2015)	17
80 Fed. Reg. 9975 (Feb. 19, 2015)	12, 14, 15
81 Fed. Reg. 65,161 (Sept. 15, 2016)	14
81 Fed. Reg. 8365 (Feb. 12, 2016)	12, 15
81 Fed. Reg. 8371 (Feb. 12, 2016)	15

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
81 Fed. Reg. 8379 (Feb. 12, 2016)	12, 14, 15
82 Fed. Reg. 1139 (Dec. 28, 2016)	15
82 Fed. Reg. 1149 (Dec. 28, 2016)	12, 14-15
86 Fed. Reg. 57,321 (Oct. 8, 2021)	4, 5, 8, 23
 RULE:	
Fed. R. App. P. 29(a)(6)	1
 CONGRESSIONAL MATERIALS:	
H.R. 817, 112th Cong. (2011)	21
H.R. 11021, 56th Cong. § 1 (1900)	24
H.R. Rep. No. 59-2224 (1906)	22
H.R. Rep. No. 94-1163 (1976)	22
<i>National Monument Fairness Act of 2001</i> , H.R. 2114, 107th Cong. (2001)	21
<i>National Monument Fairness Act of 1997</i> , S. 477, 105th Cong. (1997)	21
<i>Preserve Land Freedom for Americans Act</i> , H.R. 382, 113th Cong. 1st Sess. (2013)	21
<i>Public Lands Management Participation Act of 1997</i> , S. 691, 105th Cong. (1997)	21
 OTHER AUTHORITIES:	
Cong. Rsch. Serv., <i>The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress</i> (2019)	18, 24

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Nat’l Park Serv., <i>Abolished National Monuments</i> , https://www.nps.gov/articles/000/abolished-national-monuments.htm#:~:text=Years%20of%20negligence%20at%20Fossil,monument%20better%20than%20the%20NPS (last visited Jan. 16, 2024).....	20
Nat’t Park Serv., <i>Nat’l Monument Facts and Figures</i> , https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last visited Jan. 16, 2024).....	18
John C. Ruple, <i>The Trump Administration and Lessons Not Learned From Prior National Monument Modifications</i> , 43 Harv. Envtl. L. Rev. 1 (2019)	18
Carol Hardy Vincent, Cong. Rsch. Serv., R41330, <i>National Monuments and the Antiquities Act</i> , https://sgp.fas.org/crs/misc/R41330.pdf (updated Jan. 2, 2024)	18
Webster’s International Dictionary of the English Language (1907).....	5, 6
Webster’s New International Dictionary of the English Language (1913).....	5, 6

INTERESTS OF AMICI CURIAE¹

Utah Diné Bikéyah, Friends of Cedar Mesa d/b/a Greater Bears Ears Partnership, Archaeology Southwest, Patagonia Works, The Access Fund, and the National Trust for Historic Preservation in the United States are a coalition of diverse organizations with cultural, spiritual, conservation, recreational, scientific, and archaeological interests in protecting the Bears Ears region. *See* UDB Mot. to Intervene at 6-12 (Sept. 15, 2023) (detailing interests). They devoted significant resources to securing national monument status for Bears Ears under President Obama, and when President Trump revoked the designation of the monument, they filed suit in federal court to restore it. They again devoted significant resources to restoring national monument status for Bears Ears during the Biden Administration. Based on these interests, amici sought intervention in the District Court; that motion was denied without prejudice. D. Ct. ECF No. 176. This Court denied their motion to intervene on appeal. *See* Order at 3 (Oct. 11, 2023).

Amici’s longstanding advocacy for the Bears Ears region gives them an exceptionally important interest in this case. While amici maintain that intervention

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

is warranted, they file this brief pursuant to this Court’s recognition that they may participate in the proceedings as amici. *See id.*

INTRODUCTION

Recognizing the cultural, historic, and scientific importance of the Bears Ears region and the need to protect its resources, in 2021, President Biden invoked his authority under the Antiquities Act of 1906 to re-establish the Bears Ears National Monument. The Defendants’ answering briefs explain why Plaintiffs’ suits challenging the restoration of Bears Ears fail on threshold grounds. This brief supplements those arguments by explaining why Plaintiffs’ arguments rest on a grievous misinterpretation of the Antiquities Act.

Plaintiffs’ principal argument is that many of the objects protected under the 2021 Proclamation do not qualify for monument protection because the Antiquities Act does not protect “landscapes,” “plants,” “animals” and certain other objects the 2021 Proclamation designates for protection. *See* Dalton Br. 25-29; Garfield Br. 35-38. This argument flouts every tool of statutory interpretation—the statutory text, post-enactment history, legislative history, and precedent.

The text gives Presidents broad authority to declare as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest”—a capacious phrase that easily encompasses the objects protected in Bears Ears. 54 U.S.C. § 320301(a). The Act also endows the President

with authority to reserve as part of national monuments parcels of land that are “confined to the smallest area compatible with the proper care and management of the objects to be protected.” *Id.* § 320301(b). Given the density and size of significant cultural, historical, and archaeological objects distributed across the Bears Ears landscape, President Biden determined that the entire landscape was the “smallest area” necessary for the proper care, management, and protection of those objects.

Even if the text left any doubt, the historical practice of monument designations refutes Plaintiffs’ interpretation. From the very beginning, Presidents have used the Antiquities Act to protect the very same categories of objects protected in Bears Ears—landscapes, plants, animals, geological features, and archaeological and paleontological resources. And although Congress has retained its inherent authority to oversee federal lands, it has *never* abolished—or even reduced the size of—a monument for covering objects that Congress deemed unprotectable. Instead, Congress has done the opposite—it has *enlarged* many monuments and converted others into national parks.

The legislative history likewise underscores the flaws in Plaintiffs’ arguments. “The Antiquities Act originated as a response to widespread defacement of Pueblo ruins in the American Southwest.” *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting denial of certiorari). Indeed,

Congress was concerned about ruins located *in the Bears Ears region itself*—ruins that President Biden explicitly identified when restoring the Monument. As the 2021 Proclamation explains, protecting the Bears Ears region “was an impetus for passage of the Antiquities Act” itself. 86 Fed. Reg. 57,321, 57,321 (Oct. 8, 2021).

Finally, Plaintiffs’ arguments run headlong into more than a century of judicial precedent. The Supreme Court has recognized that both the Grand Canyon and a rare species of fish are protectable objects under the Act. *See Cameron v. United States*, 252 U.S. 450, 455-456 (1920); *Cappaert v. United States*, 426 U.S. 128, 141-142 (1976). Lower courts have followed suit. Under those cases, the Bears Ears landscape and the many distinct geological features composing it, as well as the rare species calling that landscape home, are protectable objects.

As the District Court concluded and Defendants explain, Plaintiffs’ complaints suffer from jurisdictional flaws that make it unnecessary for this Court to address Plaintiffs’ claims on the merits under Rule 12(b)(6). Moreover, this Court’s usual practice is to remand issues that were not ruled on below to be resolved by the district court in the first instance. *See* SUWA Br. 20-21, 25-26. But the glaring flaws in Plaintiffs’ arguments leave no doubt that their claims are doomed. Regardless of how this Court rules on the threshold jurisdictional arguments, the manifest errors in Plaintiffs’ merits arguments underscore why this Court should

reject Plaintiffs' invitation to rule that their complaint survives a motion to dismiss without a district court ruling addressing that question and plenary briefing.

ARGUMENT

I. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW.

A. The Statutory Text Refutes Plaintiffs' Arguments.

Plaintiffs' claims rest on a fatal misreading of the Antiquities Act. Under the Act, the "President may, in the President's discretion," declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal land to be "national monuments." 54 U.S.C. § 320301(a). The President then "may reserve parcels of [federal] land as part of the national monuments." *Id.* § 320301(b). This plain text clearly authorizes the 2021 Proclamation.

First, the 2021 Proclamation explained that the Bears Ears landscape and the identified objects are "objects of historic or scientific interest." 86 Fed. Reg. 57,321, 57,331 (Oct. 8, 2021). The clause protecting "other objects of historic or scientific interest" is capacious. Contemporaneous dictionaries defined *object* as something "visible or tangible." Webster's Int'l Dictionary of the English Language 990 (1907) ("Webster's 1907"); *see also* Webster's New Int'l Dictionary of the English Language 1482 (1913) ("Webster's 1913") (same). *Historic* was defined as "[o]f or pertaining to history, or the record of past events." Webster's 1907, *supra*, at 696; *see also* Webster's 1913, *supra*, at 1021 (similar). *Scientific* was defined as "of or pertaining to science;" and *science* was defined as knowledge "relat[ing] to the

physical world ... , the qualities and functions of living tissues, etc.” Webster’s 1907, *supra* at 1287. Finally, *interest* was defined as “concern.” *Id.* at 776. An object is thus of historic or scientific interest if it is a visible thing of particular concern to understanding past human events or the physical world.

Every object identified in the 2021 Proclamation falls within this definition; indeed, it is difficult to know what the Act protects if *not* these objects. They include:

- **archaeological and cultural sites** that have “special significance” to Native peoples and that are “important for understanding” their ancestry and history, including petroglyph panels, “Pueblo I to early Pueblo II village sites,” and “alcoves in Whiskers Draw that have sheltered evidence of human habitation for thousands of years.” 86 Fed. Reg. at 57,324-27.
- **fossil objects**, such as Indian Creek’s “fossilized trackways of early tetrapods” and an “Upper Triassic microvertebrate site” in Comb Ridge “with greater taxonomic diversity than any other [similar] published site ... in Utah.” *Id.* at 57,324-29.
- **geological features**, such as the Bears Ears Buttes, which “hold historical significance to the Navajo people,” the “Abajo Mountains,” which “are held sacred by a number of Tribal Nations,” the Valley of the Gods, and Cedar Mesa. *Id.*
- **rare animals and their habitats**, including “eyries for peregrine falcons,” “habitat for the threatened yellow-billed cuckoo,” and “two endangered fish species.” *Id.* at 57,324, 57,328.
- **rare plants and their habitats**, including a “unique vegetative community” in the South Cottonwood Canyon and “a relict plant community.” *Id.* at 57,325-26, 57,329-30.

The Proclamation also recognizes that the Bears Ears region provides for “world class outdoor recreation opportunities,” including “unparalleled rock

climbing” in the canyons in Indian Creek. *Id.* at 57,322, 57,330. Although the Proclamation recognizes these resources as important, the Proclamation expressly notes that they are “not objects of historic and scientific interest,” *id.* at 57,322, confirming that the “other objects” clause is not all-encompassing.

Plaintiffs attempt to narrow the plain meaning of the “other objects” clause by invoking the canon of construction requiring courts to interpret a general term in a statutory list as “akin to” the specific terms in the list. Dalton Br. 16; *see* Garfield Br. 37. This canon only underscores Plaintiffs’ error. The Act’s first two clauses protect “historic landmarks” and “historic and prehistoric structures.” 54 U.S.C. § 320301(a). When the Act was enacted, *landmark* was defined as, among other things, a “prominent object.” Webster’s 1907, *supra*, at 828. Iconic geological features like the Bears Ears Buttes, Cedar Mesa, and the Valley of the Gods, are not merely akin to “prominent object[s],” they *are* prominent objects. Likewise, plants and animals endemic to the area are prominent features of the region. As for historic *structures*, there can be no serious question that objects like the many “cliff dwellings” located throughout the region, *e.g.*, 86 Fed. Reg. at 57,324, 57,326-27, qualify.

Second, the Act’s reservation-of-land-provision confirms that the 2021 Proclamation does not transgress the Act’s limits. Under the Act, “[t]he President may reserve parcels of land as a part of the national monuments.” 54 U.S.C.

§ 320301(b). The Act adds 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.” *Id.* Read in conjunction with the clause allowing the President to “declare ... national monuments” “in the President’s discretion,” this provision gives the President broad discretion to determine whether a particular reservation of land is the “smallest area compatible with the proper care and management of the objects to be protected.” *Id.* § 320301(a)-(b). Where Congress authorizes the president in his discretion to make such a judgment, any review is exceptionally deferential. *See, e.g., United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940); *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

Exercising this discretion, President Biden designated the entire Bears Ears landscape as an object of historic and scientific interest due to the fact that the land itself is “sacred” and of “spiritual significance” to many Native peoples, as well as the unique “density of significant cultural, historical, and archaeological artifacts spanning thousands of years” distributed “across the Bears Ears Landscape,” some of which “are also sacred to Tribal Nations.” 86 Fed. Reg. at 57,321, 57,322, 57,331. This appropriately avoided a patchwork of overlapping monuments that would not have provided adequate protection.

B. Congress Has Endorsed This Longstanding Presidential Interpretation Of The Antiquities Act.

Congress’s endorsement of Presidents’ longstanding interpretation of the Antiquities Act reinforces the plain meaning of the statutory text. “[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, can raise a presumption that the action had been taken in pursuance of its consent.” *Medellín v. Texas*, 552 U.S. 491, 531 (2008) (quotation marks and brackets omitted). And “when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change,” Congress’s decision not to repeal the interpretation “is persuasive evidence that the interpretation is the one intended by Congress.” *Catron Cnty. Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996) (internal quotation marks and citation omitted). This case exemplifies this doctrine.

1. Presidents since 1906 have used the Act to protect the same categories of objects at issue here.

Landscapes. Plaintiffs’ theory that the Act does not cover landscapes crashes into a consistent practice stretching back to the very first national monument. Three months after the passage of the Act, President Roosevelt created Devil’s Tower National Monument to protect “the lofty and isolated rock” formation as “a natural wonder and an object of historic and great scientific interest.” 34 Stat. 3236, 3236 (Sept. 24, 1906). In 1908, President Roosevelt declared the Grand Canyon *itself* to

be “an object of unusual scientific interest” warranting protection “as a National Monument.” 35 Stat. 2175, 2175 (Jan. 11, 1908). The following year, he identified the “slopes of Mount Olympus and the adjacent summit” as “objects of unusual scientific interest.” 35 Stat. 2247, 2247 (Mar. 2, 1909). Months later, President Taft declared Mukuntuweap (now Zion) Canyon *itself* to be “of the greatest scientific interest.” 36 Stat. 2498, 2498 (July 31, 1909).

This practice has continued ever since. In 1916 and 1918, President Wilson identified Capulin Mountain and a valley of hot springs to be objects of scientific interest. 39 Stat. 1792, 1792 (Aug. 9, 1916); 40 Stat. 1855, 1856 (Sept. 24, 1918). In 1923, President Harding declared the “*lands ... known as Bryce Canyon*” to be of “scientific interest.” 43 Stat. 1914, 1914 (June 8, 1923) (emphasis added). In 1924, President Coolidge created Craters of the Moon National Monument on account of its “weird and scenic landscape.” 43 Stat. 1947, 1947 (May 2, 1924). The following year, he identified the “area” around Glacier Bay, Alaska, as scientifically and historically significant. 43 Stat. 1988, 1988-89 (Feb. 26, 1925). President Hoover created Saguaro National Monument because its “lands are of outstanding scientific interest.” 47 Stat. 2557, 2557 (Mar. 1, 1933). President Kennedy explained that Buck Island’s “lands and their related features are of great scientific interest.” 76 Stat. 1441, 1441 (Dec. 28, 1961). President Carter identified certain Alaskan “lands” as scientifically interesting, 93 Stat. 1453, 1453 (Dec. 1, 1978), and President Obama

said the same thing about “[t]he lands” of the San Juan Islands. 78 Fed. Reg. 18,789, 18,789 (Mar. 25, 2013).

Plants. Plaintiffs’ plants-are-not-protectable theory likewise ignores longstanding practice. In the Act’s first thirty years, Presidents identified a grove of redwood trees, 35 Stat. 2174, 2175 (Jan. 9, 1908); giant cacti, 38 Stat. 1991, 1991 (Jan. 31, 1914), 47 Stat. 2557, 2557 (Mar. 1, 1933); the “flora” of Mount Desert Island, 39 Stat. 1785, 1791 (July 8, 1916); and Glacier Bay’s “great variety of forests,” 43 Stat. 1988, 1988 (Feb. 26, 1925), as objects of scientific interest. In 1978, President Carter designated many Alaskan plants as objects of scientific interest.² Presidents Clinton, George W. Bush, and Obama followed suit: Roughly half of the national monuments they created identify plants as objects of scientific interest.³

² 93 Stat. 1450, 1450 (Dec. 1, 1978) (Becharof’s varied “plant ... species”); 93 Stat. 1451, 1452 (Dec. 1, 1978) (“tundra plant communities”); 93 Stat. 1457, 1457 (Dec. 1, 1978) (“boreal spruce forest”); 93 Stat. 1463, 1463 (Dec. 1, 1978) (“a uniquely representative series of interrelated plant communities”); 93 Stat. 1466, 1467 (Dec. 1, 1978) (“Pacific silver and subalpine fir trees”); 93 Stat. 1468, 1468 (Dec. 1, 1978) (Noatak’s “diversity of the flora”); 93 Stat. 1470, 1470 (Dec. 1, 1978) (“[b]iologically unique subspecies of flora and fauna”).

³ 110 Stat. 4561, 4563 (Sept. 18, 1996) (“endemic plants”); 65 Fed. Reg. 2817, 2817 (Jan. 11, 2000) (“diversity of vegetative communities”); 65 Fed. Reg. 2821, 2821 (Jan. 11, 2000) (“diverse blend of ... vegetation types”); 65 Fed. Reg. 2825, 2827 (Jan. 11, 2000) (“Giant Mojave Yucca cacti”); 65 Fed. Reg. 24,095, 24,095-96 (Apr. 15, 2000) (“giant sequoia groves”); 65 Fed. Reg. 37,249, 37,249 (June 9, 2000) (“rosaceous chaparral”); 65 Fed. Reg. 37,253, 37,253 (June 9, 2000) (“Umtanum desert buckwheat”); 65 Fed. Reg. 37,259, 37,259 (June 9, 2000) (“Ironwood trees”);

Animals and their habitats. Plaintiffs contend that “animals” cannot be protected under the Act. Garfield Br. 36; Dalton Br. 29. But protecting certain animals or their habitats as objects of scientific interest is longstanding practice. In 1909, President Roosevelt created Mount Olympus National Monument because it forms “the summer range and breeding grounds of the Olympic Elk.” 35 Stat. 2247, 2247 (Mar. 2, 1909). President Wilson in 1916 and President Coolidge in 1925 both identified a region’s “fauna” when establishing monuments. 39 Stat. 1785, 1791 (July 8, 1916); 43 Stat. 1988, 1988 (Feb. 26, 1925). President Truman identified “a peculiar race of desert fish” and the pool in which they live as objects of scientific interest. 17 Fed. Reg. 691, 691 (Jan. 23, 1952). President Kennedy’s Buck Island Reef proclamation discusses the area’s “rare marine life.” 76 Stat. 1441, 1442 (Dec.

65 Fed. Reg. 69,227, 69,228 (Nov. 9, 2000) (“Welsh’s milkweed”); 66 Fed. Reg. 7339, 7339 (Jan. 17, 2001) (“the forked fiddleneck”); 66 Fed. Reg. 7354, 7354-55 (Jan. 22, 2001) (“rich diversity, density, and distribution of plants”); 66 Fed. Reg. 7359, 7360 (Jan. 17, 2001) (“abundant plant life”); 74 Fed. Reg. 1565, 1565-67 (Jan. 6, 2009) (“*Pisonia grandis* forest”); 77 Fed. Reg. 59,275, 59,275 (Sept. 21, 2012) (“cholla cactus”); 78 Fed. Reg. 18,789, 18,789-90 (Mar. 25, 2013) (“over 200 species of moss”); 78 Fed. Reg. 18,783, 18,783 (Mar. 25, 2013) (“native grasslands”); 79 Fed. Reg. 30,431, 30,433 (May 21, 2014) (“many endemic ... plant[s]”); 79 Fed. Reg. 62,303, 62,305 (Oct. 10, 2014) (“1,000-year-old limber pines”); 80 Fed. Reg. 9975, 9977 (Feb. 19, 2015) (“stunning array of wildflowers”); 80 Fed. Reg. 41,975, 41,975-77 (July 10, 2015) (“highly unusual plant assemblages”); 81 Fed. Reg. 8379, 8379, 8381 (Feb. 12, 2016) (“native plant species”); 81 Fed. Reg. 8365, 8365-66 (Feb. 12, 2016) (“hotspot of botanical diversity”); 81 Fed. Reg. 59,121, 59,124-25 (Aug. 24, 2016) (“trees over 250 years old”); 82 Fed. Reg. 1149, 1150 (Dec. 28, 2016) (“endemic and rare” plant species).

28, 1961). Fourteen of President Carter’s proclamations identify animals or their habitats as objects of scientific interest.⁴ So, too, with fifteen of President Clinton’s proclamations,⁵ four of President Bush’s,⁶ and at least ten of President Obama’s.⁷

⁴ 93 Stat. 1446, 1447 (Dec. 1, 1978) (“bald eagles”); 93 Stat. 1448, 1448 (Dec. 1, 1978) (“significant process of biological succession of ... animal species”); 93 Stat. 1450, 1450 (Dec. 1, 1978) (“Alaska brown bear”); 93 Stat. 1451, 1452 (Dec. 1, 1978) (“Old World bird species”); 93 Stat. 1453, 1453 (Dec. 1, 1978) (“musk-oxen”); 93 Stat. 1455, 1455 (Dec. 1, 1978) (“caribou”); 93 Stat. 1457, 1457 (Dec. 1, 1978) (same); 93 Stat. 1462, 1462 (Dec. 1, 1978) (“mountain goat ... and bald eagle”); 93 Stat. 1463, 1463 (Dec. 1, 1978) (“northern furbearing mammals”); 93 Stat. 1465, 1465 (Dec. 1, 1978) (“osprey[] and endangered peregrine falcon”); 93 Stat. 1466, 1467 (Dec. 1, 1978) (“wolves”); 93 Stat. 1468, 1468 (Dec. 1, 1978) (“prime habitat for ... several predator species”); 93 Stat. 1470, 1470 (Dec. 1, 1978) (four species of bear); 93 Stat. 1473, 1474 (Dec. 1, 1978) (“several species of waterfowl”).

⁵ 110 Stat. 4561, 4563 (Sept. 18, 1996) (“desert bighorn sheep”); 65 Fed. Reg. 2817, 2818 (Jan. 11, 2000) (deer); 65 Fed. Reg. 2821, 2821-22 (Jan. 11, 2000) (“Guadalupe fur seal”); 65 Fed. Reg. 2825, 2827 (Jan. 11, 2000) (“Kaibab squirrels”); 65 Fed. Reg. 24,095, 24,096 (Apr. 15, 2000) (“rare amphibians”); 65 Fed. Reg. 37,243, 37,244 (June 9, 2000) (“[c]rucial habitat for the Mesa Verde nightsnake”); 65 Fed. Reg. 37,249, 37,249 (June 9, 2000) (habitat critical to “the threatened Northern spotted owl”); 65 Fed. Reg. 37,253, 37,253-54 (June 9, 2000) (“bobcats”); 65 Fed. Reg. 37,259, 37,259 (June 9, 2000) (“64 mammalian and 57 bird species”); 65 Fed. Reg. 69,227, 69,228 (Nov. 9, 2000) (“pronghorn antelope”); 66 Fed. Reg. 7339, 7339 (Jan. 17, 2001) (“California condor”); 66 Fed. Reg. 7343, 7343 (Jan. 17, 2001) (“Western bluebirds”); 66 Fed. Reg. 7354, 7355 (Jan. 17, 2001) (“endangered Sonoran pronghorn”); 66 Fed. Reg. 7359, 7359-60 (Jan. 17, 2001) (“the most viable elk herd in Montana”); 66 Fed. Reg. 7364, 7364-65 (Jan. 17, 2001) (“Humpback whales”).

⁶ 71 Fed. Reg. 36,443, 36,443 (June 15, 2006) (“7,000 marine species”); 74 Fed. Reg. 1577, 1577 (Jan. 6, 2009) (“whitetip reef sharks”); 74 Fed. Reg. 1565, 1565-67 (Jan. 6, 2009) (“hawksbill turtle”); 74 Fed. Reg. 1557, 1557 (Jan. 6, 2009) (“sharks”).

⁷ 77 Fed. Reg. 24,579, 24,579-80 (Apr. 20, 2012) (“rare and endemic ... animals”); 77 Fed. Reg. 59,275, 59,275 (Sept. 21, 2012) (“golden eagles”); 78 Fed. Reg. 18,789,

Geological features. Plaintiffs interpret the Act to bar designating “generic” geological features as objects of scientific interest. Garfield Br. 27. But the 2021 Proclamation does no such thing. What the 2021 Proclamation *does* protect are specific geological features, including particular canyons; cliffs, peaks, mountains, plateaus, and mesas; and natural rock arches and sandstone monoliths, pinnacles, and spires.

These are exactly the types of geological features that Presidents since Theodore Roosevelt have protected under the Act. Nine Presidents across 19 proclamations recognized canyons as objects of scientific interest.⁸ Six Presidents

18,789 (Mar. 25, 2013) (“varied collection of wildlife”); 78 Fed. Reg. 18,783, 18,784 (Mar. 25, 2013) (“significant diversity of mammals and birds”); 78 Fed. Reg. 18,763, 18,764 (Mar. 25, 2013) (“migratory birds, fish, and wildlife”); 80 Fed. Reg. 9975, 9977 (Feb. 19, 2015) (“the sensitive boreal toad”); 80 Fed. Reg. 41,975, 41,977 (July 10, 2015) (“108 species of dragonfly and damselfly ... 16 reptiles and amphibians, 6 rare insects, and 80 species of butterfly”); 81 Fed. Reg. 8379, 8380 (Feb. 12, 2016) (“12 federally listed threatened and endangered animal species”); 81 Fed. Reg. 65,161, 65,161 (Sept. 15, 2016) (“marine mammals”); 82 Fed. Reg. 1149, 1149-51 (Dec. 28, 2016) (“threatened Mojave desert tortoise”).

⁸ 35 Stat. 2175, 2175-2176 (Nov. 11, 1908), 47 Stat. 2547, 2547-48 (Dec. 22, 1932) (Grand Canyon); 36 Stat. 2498, 2498 (July 31, 1909) (Zion/Mukuntuweap Canyon); 43 Stat. 1914, 1914 (June 8, 1923) (Bryce Canyon); 47 Stat. 2558, 2558 (Mar. 2, 1933) (Black Canyon of the Gunnison); 48 Stat. 1705, 1705 (Aug. 22, 1933) (Cedar Breaks); 50 Stat. 1856, 1856 (Aug. 2, 1937) (Capitol Reef); 83 Stat. 924, 924 (Jan. 20, 1969) (Marble Canyon); 93 Stat. 1468, 1468 (Dec. 1, 1978) (Noatak); 93 Stat. 1470, 1470 (Dec. 1, 1978) (Wrangell-St. Elias); 110 Stat. 4561, 4561-62 (Sept. 18, 1996) (Grand Staircase-Escalante); 65 Fed. Reg. 2825, 2825-26 (Jan. 11, 2000) (Grand Canyon-Parashant); 65 Fed. Reg. 37,243, 37,243-44 (June 9, 2000) (Canyons of the Ancients); 65 Fed. Reg. 69,227, 69,227 (Nov. 9, 2000) (Vermilion Cliffs); 78 Fed. Reg. 18,783, 18,783-84 (Mar. 25, 2013) (Rio Grande del Norte); 79 Fed. Reg.

across 19 proclamations protected a region’s cliffs, peaks, and mountains.⁹ And six Presidents across ten proclamations identified natural arches, natural bridges, and similar geological features as objects of scientific interest.¹⁰

Archaeological and paleontological resources. Plaintiffs contend that Presidents cannot designate “generic” or “nondescript” archaeological and paleontological resources like “rock art,” “ancient cliff dwellings,” an “Ancestral

30,431, 30,431-33 (May 21, 2014) (Organ Mountains-Desert Peaks); 80 Fed. Reg. 9975, 9978 (Feb. 19, 2015) (Browns Canyon); 82 Fed. Reg. 1139, 1139-42 (Dec. 28, 2016) (Bears Ears); 82 Fed. Reg. 1149, 1149-50 (Dec. 28, 2016) (Gold Butte).

⁹ 35 Stat. 2247, 2247 (Mar. 2, 1909) (Mount Olympus); 39 Stat. 1785, 1785, 1788 (July 8, 1916) (Sieur de Monts); 43 Stat. 1988, 1988 (Feb. 26, 1925) (Glacier Bay); 48 Stat. 1705, 1705 (Aug. 22, 1933) (Cedar Breaks); 93 Stat. 1455, 1455 (Dec. 1, 1978) (Denali); 93 Stat. 1466, 1466-67 (Dec. 1, 1978) (Misty Fiords); 93 Stat. 1470, 1470 (Dec. 1, 1978) (Wrangell-St. Elias); 110 Stat. 4561, 4561-62 (Sept. 18, 1996) (Grand Staircase-Escalante); 65 Fed. Reg. 2821, 2821 (Jan. 11, 2000) (California Coastal); 65 Fed. Reg. 37,243, 37,244 (June 9, 2000) (Canyons of the Ancients); 65 Fed. Reg. 37,249, 37,249 (June 9, 2000) (Cascade-Siskiyou); 65 Fed. Reg. 69,227, 69,227 (Nov. 9, 2000) (Vermilion Cliffs); 79 Fed. Reg. 30,431, 30,431-34 (May 21, 2014) (Organ Mountains-Desert Peaks); 79 Fed. Reg. 62,303, 62,303-05 (Oct. 10, 2014) (San Gabriel Mountains); 80 Fed. Reg. 41,975, 41,975-78 (July 10, 2015) (Berryessa Snow Mountain); 81 Fed. Reg. 8371, 8371-73 (Feb. 12, 2016) (Mojave Trails); 81 Fed. Reg. 8379, 8379-80 (Feb. 12, 2016) (Sand to Snow); 81 Fed. Reg. 8365, 8365-66 (Feb. 12, 2016) (Castle Mountains); 82 Fed. Reg. 1139, 1139-41 (Dec. 28, 2016) (Bears Ears).

¹⁰ 35 Stat. 2177, 2177 (Jan. 16, 1908) (Pinnacles); 35 Stat. 2183, 2183 (Apr. 16, 1908) (Natural Bridges); 36 Stat. 2703, 2703-04 (May 30, 1910) (Rainbow Bridge); 37 Stat. 1681, 1681 (May 24, 1911) (Colorado); 43 Stat. 1946, 1946 (Apr. 18, 1924) (Chiricahua); 43 Stat. 1947, 1947 (May 2, 1924) (Craters of the Moon); 46 Stat. 2988, 2988 (Apr. 12, 1929) (Arches); 110 Stat. 4561, 4562 (Sept. 18, 1996) (Grand Staircase-Escalante); 65 Fed. Reg. 37,243, 37,243-44 (June 9, 2000) (Canyons of the Ancients); 82 Fed. Reg. 1139, 1140 (Dec. 28, 2016) (Bears Ears).

Pueblo village,” and “fossilized remains.” JA388. But Presidents have been declaring similar archaeological resources to be objects of scientific interest since 1906.¹¹ And, contrary to Plaintiffs’ contention, Presidents did not itemize every object they intended to protect; they protected these objects categorically. *See, e.g.*, 35 Stat. 2119, 2119 (Mar. 11, 1907) (protecting the “innumerable and valuable relics of a prehistoric people”). President Biden had authority to do the same.

So too with paleontological resources. In 1906, President Roosevelt created the Petrified Forest National Monument to protect its “mineralized remains of Mesozoic forests.” 34 Stat. 3266, 3266 (Dec. 8, 1906). In 1915, President Wilson used the Act to protect a “Dinosaurian and other gigantic reptilian remains.” 39 Stat. 1752, 1752 (Oct. 4, 1915). In 1922, President Harding created the Fossil Cycad National Monument to protect the area’s “rich Mesozoic deposits of fossil cycads.” 42 Stat. 2286, 2286 (Oct. 21, 1922). President Franklin Roosevelt used the Act to

¹¹ *See, e.g.*, 34 Stat. 3264, 3264 (Dec. 8, 1906) (pictographs); 34 Stat. 3265, 3265 (Dec. 8, 1906) (prehistoric structure); 35 Stat. 2119, 2119 (Mar. 11, 1907) (“pueblo ruins”); 35 Stat. 2162, 2162 (Nov. 16, 1907) (cliff dwellings); 35 Stat. 2168, 2168 (Dec. 19, 1907) (same); 35 Stat. 2205, 2205 (Sept. 15, 1908) (“Spanish ruin”); 36 Stat. 2491, 2491 (Mar. 20, 1909) (“cliff dwellings and pueblo ruins”); 38 Stat. 1991, 1991 (Jan. 31, 1914) (pictographs); 64 Stat. A371, A371 (Oct. 25, 1949) (“earth mounds”); 75 Stat. 1058, 1058 (May 11, 1961) (cave with evidence of “human habitation in excess of 8,000 years”); 65 Fed. Reg. 2817, 2817 (Jan. 11, 2000) (pueblo communities); 65 Fed. Reg. 2825, 2825 (Jan. 11, 2000) (similar); 65 Fed. Reg. 37,243, 37,243 (June 9, 2000) (“cliff dwellings, villages, great kivas, shrines, ... rock art sites, and sweat lodges”); 79 Fed. Reg. 30,431, 30,431 (May 21, 2014) (“rock art, dwellings, and other evidence of the Native peoples”).

protect “fossils of Pleistocene elephants and ancient trees.” 52 Stat. 1541, 1541 (Apr. 26, 1938). President Johnson referenced Marble Canyon’s “paleontological features” when establishing that monument. 83 Stat. 924, 924 (Jan. 20, 1969). Similar “paleontological” remains motivated President Carter to create the Bering Land Bridge National Monument. 93 Stat. 1451, 1451 (Dec. 1, 1978). For President Clinton, the “significant fossil assemblages” in the Carrizo Plain warranted a national monument. 66 Fed. Reg. 7339, 7340 (Jan. 17, 2001). And President Obama established Waco Mammoth National Monument because of the region’s fossil deposits and “anticipated” “[f]uture discoveries.” 80 Fed. Reg. 41,983, 41,983 (July 10, 2015). The 2021 Proclamation’s protection of several fossil deposits fits easily within this longstanding practice.

Large monuments. Plaintiffs complain about the size of Bears Ears. But Bears Ears’ size is a function of the quantity of protectable objects located in the area. And large monuments are by no means a modern development. Katmai National Monument, as established by President Wilson in 1918, covered more than a million acres. 40 Stat. 1855, 1856 (Sept. 24, 1918) (“approximately 1,700 square miles”). Glacier Bay National Monument, as established by President Coolidge in 1925, covered roughly 1.165 million acres, 43 Stat. 1988, 1989 (Feb. 26, 1925) (“approximately 1,820 square miles”). And Grand Canyon National Monument, Death Valley National Monument, and Joshua Tree National Monument all covered

more than 800,000 acres. See Cong. Rsch. Serv., *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress* 8 (2019) (Grand Canyon); Nat'l Park Serv., *Nat'l Monument Facts and Figures*, Table (Death Valley & Joshua Tree).¹² As these early proclamations show, Presidents have long interpreted the Act to allow large monuments.

2. Congress has endorsed this longstanding practice.

Evidence of congressional endorsement of this century-long Presidential practice abounds. Congress has “never before questioned” the “systematic, unbroken, executive practice” at issue here, *Medellín*, 552 U.S. at 531 (quotation marks and brackets omitted), and has endorsed that practice by enlarging monuments and converting them into national parks.

First, Presidential action under the Antiquities Act is subject to Congressional oversight. Congress passed the Act to allow the President to take “[s]wift action ... in the face of pressing threats.” John C. Ruple, *The Trump Administration and Lessons Not Learned From Prior National Monument Modifications*, 43 Harv. Envtl. L. Rev. 1, 25 (2019). But Congress retains its inherent constitutional authority “to create, modify, and abolish national monuments on federal lands.” Carol Hardy Vincent, Cong. Rsch. Serv., R41330, *National Monuments and the Antiquities Act*

¹² <https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm> (last visited Jan. 16, 2024).

4.¹³ Despite this, Congress has never abolished—or even reduced the size of—a national monument because that monument purported to protect land, plants and animals, or geological, archaeological, or paleontological resources. Instead, Congress has converted at least 21 national monuments protecting what Plaintiffs allege to be unprotectable objects into national parks.¹⁴ Congress has also enlarged at least another five monuments protecting allegedly unprotectable objects.¹⁵

Second, even when Congress has abolished national monuments, it has never done so because the objects involved were not protectable. Congress has instead abolished monuments because, for example, the site *no longer* includes the objects that were originally supposed to be protected as part of a national monument. *See*

¹³ <https://sgp.fas.org/crs/misc/R41330.pdf> (updated Jan. 2, 2024).

¹⁴ 16 U.S.C. §§ 201-207c (Lassen Peak and Cinder Cone); *id.* §§ 221-228j (Grand Canyon and Marble Canyon); *id.* §§ 341-343d (Sieur de Monts/Acadia); *id.* §§ 344-346e (Zion); *id.* §§ 401-402g (Bryce Canyon); *id.* §§ 251-256i (Mount Olympus/Olympic) (June 29, 1938); *id.* §§ 119-119a (Petrified Forest); *id.* §§ 272-272g (Arches); *id.* §§ 273-273f (Capitol Reef); *id.* §§ 410hh-410hh-5 (Kenai Fjords and Kobuk Valley); *id.* §§ 410ii-410ii-7 (Chaco Canyon); *id.* §§ 410ss-410ss-1 (Tumacacori); *id.* §§ 410uu-410uu-4 (Mound City Group/Hopewell Culture); *id.* §§ 410zz-410zz-3 (Saguaro); *id.* §§ 410aaa-410aaa-7 (Death Valley); *id.* §§ 410fff-410fff-10 (Black Canyon of the Gunnison); *id.* §§ 410ooo-410ooo-1 (Pinnacles).

¹⁵ Pub. L. No. 94-567, § 309, 90 Stat. 2732, 2736 (1976) (Bandelier); Pub. L. No. 105-376, § 3, 112 Stat. 3388, 3389 (1998) (Bandelier II); Pub. L. No. 95-625, § 301, 92 Stat. 3467, 3474 (1978) (Montezuma Castle); Pub. L. No. 95-625, § 301, 92 Stat. 3467, 3475 (1978) (Tumacacori); Pub. L. No. 104-333, § 205, 110 Stat. 4094, 4106 (1996) (Craters of the Moon); Pub. L. No. 105-355, § 201, 112 Stat. 3247, 3253 (1998) (Grand Staircase-Escalante).

Nat'l Park Serv., *Abolished National Monuments*¹⁶ (Congress rescinded Fossil Cycad National Monument after looters left the “site devoid of fossils”). Congress’s abolition of these monuments when they no longer contain the objects at issue underscores Congress’s agreement with the Presidents’ initial recognition that these objects are worthy of protection.

Third, Congress has twice limited the President’s power to declare new monuments—but not in a way that limits Presidents’ authority to protect the categories of objects at issue here. Responding to the establishment of Jackson Hole National Monument, Congress amended the Antiquities Act to bar, without “express authorization of Congress,” the “extension or establishment of national monuments in Wyoming.” 54 U.S.C. § 320301(d). And in 1980, Congress responded to President Carter’s Alaskan monuments with the Alaska National Interest Lands Conservation Act (“ANILCA”). 16 U.S.C. § 3101 *et seq.* Among other things, ANILCA limits future monuments in Alaska to 5,000 acres, unless the President provides notice in the Federal Register and Congress passes a joint resolution within a certain time. *Id.* § 3213(a).

¹⁶ <https://www.nps.gov/articles/000/abolished-national-monuments.htm#:~:text=Years%20of%20negligence%20at%20Fossil,monument%20better%20than%20the%20NPS> (last visited Jan. 16, 2024).

These statutes provide yet further evidence of acquiescence. “[T]he interpretive value of congressional acquiescence is strengthened where ‘Congress has amended various parts’ of a statutory regime, ‘including the specific provision at issue’ in the case at hand, ‘but has never sought to override’ the relevant interpretation.” *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 50 F.4th 164, 183 (D.C. Cir. 2022) (citation omitted). The Jackson Hole proclamation broadly protected, among other things, “structures of glacial formation and peculiar mineral deposits and plant life.” *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945). And the Alaska proclamations declared land, plants, and animals and their habitats to be objects of scientific interest. *See supra* pp. 10-11, 13. Despite responding to these proclamations, Congress did not undertake to prevent Presidents from protecting these objects as monuments. And aside from these two tailored modifications, Congress has rejected repeated legislative proposals to circumscribe the President’s authority under the Act.¹⁷ *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-601 (1983) (failure of bills to overturn IRS rulings indicated acquiescence).

¹⁷ *See, e.g., National Monument Fairness Act of 1997*, S. 477, 105th Cong. (1997); *Public Lands Management Participation Act of 1997*, S. 691, 105th Cong. (1997); *National Monument Fairness Act of 2001*, H.R. 2114, 107th Cong. (2001); H.R. 817, 112th Cong. (2011); *Preserve Land Freedom for Americans Act*, H.R. 382, 113th Cong., 1st Sess. (2013).

Finally, Congress passed the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, in 1976 to “moderniz[e]” the Nation’s “public land laws,” H.R. Rep. No. 94-1163, at 2 (1976). In so doing, Congress repealed the President’s implied authority to withdraw public lands, as well as all or parts of 29 statutes giving the President authority to create, modify, or terminate public-land withdrawals. Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976). Despite revising the President’s authority under other statutes, Congress left untouched the President’s authority under the Antiquities Act. *See* H.R. Rep. No. 94-1163, at 29. This is yet more “weighty evidence of congressional approval.” *Haig v. Agee*, 453 U.S. 280, 301 (1981).

C. The Legislative History Confirms That Congress Granted Presidents Broad Powers.

The 2021 Proclamation protects the *exact* archaeological sites Congress envisioned the Act would protect. The House Report recognized that “[e]very cliff dwelling, every prehistoric tower, communal house, shrine, and burial mound” in the American Southwest “is an object which can contribute something to the cultivation of knowledge, and hence is worthy of preservation.” H.R. Rep. No. 59-2224, at 2 (1906) (emphasis added). And the House Report specifically highlighted the need to protect “the numerous ruins in southeastern Utah,” including the ruins “along Montezuma Creek, Recapture Creek, Cottonwood Creek, Butler Wash, Comb Wash, and Grand Gulch.” *Id.* at 5.

The 2021 Proclamation protects those *very same ruins*—as well as many other cliff dwellings and prehistoric structures and towers. *See* 86 Fed. Reg. at 57,325 (identifying “Ancestral Pueblo sites within” “Cottonwood Canyons, at the bottom of which runs a perennial creek”); *id.* at 57,327 (“Comb Ridge, flanked on the west by Comb Wash and on the east by Butler Wash, holds additional evidence of centuries of human habitation, including cliff dwellings, ... kivas, ceremonial sites, and rock writings”); *id.* at 57,329 (“Grand Gulch ... is replete with thousands of cliff dwellings and rock writing sites, [and] likely contains the highest concentration of Ancestral Pueblo sites on the Colorado Plateau.”). The 2021 Proclamation thus notes that the density of cultural and archaeological sites in the Bears Ears region “was an impetus for passage of the Antiquities Act” itself. *Id.* at 57,321.

Plaintiffs read the legislative history as cabining Presidential authority under the Act. *See* Dalton Br. 20-22; Garfield Br. 38. To the contrary, the Act’s legislative history confirms that the clause “other objects of historic or scientific interest” was “intended to enlarge the authority of the President.” *Anaconda Copper Co. v. Andrus*, No. A79-cv-161, 1980 BL 175, *2 (D. Alaska July 1, 1980). The Antiquities Act grew out of several failed bills, some of which granted the President the narrow authority to protect archaeological resources, and others which granted the President the broad authority to protect objects of “scenic beauty, natural wonders or curiosities, ancient ruins or relics, *or other objects of scientific or historic interest.*”

H.R. 11021, 56th Cong. § 1 (1900) (emphasis added). The ultimate text of the Act functioned as a compromise. It specifically authorizes Presidents to protect archaeological resources like “prehistoric or historic structures,” while it further broadly empowers the President to protect “other objects of scientific or historic interest.” “This phrase essentially allowed the [broader] proposal, which Congress had previously rejected, to be included in the final bill.” *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004). This history belies Plaintiffs’ contention that Congress intended to grant the President only the narrow power to protect archaeological sites.

As for the size of monuments under the Act, there, too, Congress declined to restrict the President’s authority. Congress considered—and failed to pass—several bills imposing a monument acreage limit. *See* Cong. Rsch. Serv., *supra*, at 4 (discussing failed proposals.) Instead, Congress embraced the President’s judgment of the “smallest area compatible with proper care and management” of the protected objects.

D. The Supreme Court Has Held That Presidents Have Broad Authority Under The Antiquities Act.

Plaintiffs’ interpretation of the Act ignores judicial precedent. In *Cameron*, the Supreme Court unanimously held that the Grand Canyon is an object of historic or scientific interest. 252 U.S. at 455-456. And in *Cappaert*, the Court unanimously rejected the argument that the Act allows the President “only to protect archeologic

sites” and held that “[t]he pool in Devil’s Hole and its rare inhabitants”—desert pupfish—are “objects of historic or scientific interest.” 426 U.S. at 141-142. The D.C. Circuit has therefore rejected the argument that “land” is not a protectable object as “fail[ing] as a matter of law in light of” *Cameron. Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002); *see also Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (applying *Cappaert* to reject that “ecosystems” are not protectable objects). As one district court explained, “[o]bviously,” under *Cameron* and *Cappaert*, “matters of scientific interest which involve geologic formations or which may involve plant, animal or fish life are within th[e] reach of the presidential authority under the Antiquities Act.” *Anaconda Copper*, 1980 BL at *3.

CONCLUSION

For the foregoing reasons and those set forth in the Federal Defendants', Tribal Nations Intervenor-Defendants', and SUWA Intervenor-Defendants' briefs, this Court should affirm the District Court's dismissal. In the alternative, this Court should remand to allow the District Court to address Plaintiffs' arguments on the merits in the first instance.

January 16, 2024

Brent Manning
MANNING CURTIS BRADSHAW & BEDNAR
136 East South Temple
Suite 1300
Salt Lake City, Utah 84111

Respectfully submitted,

/s/ Adam M. Kushner
Adam M. Kushner
Jim Banks
William E. Havemann
Michael J. West
Brian Malat
Olivia Molodanof
Rebecca Wilton*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
adam.kushner@hoganlovells.com

**Admitted only in Minnesota;
practice supervised by principals of
the firm admitted in D.C.*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,490 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

January 16, 2024

/s/ Adam M. Kushner
Adam M. Kushner

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: (1) all required privacy redactions have been made pursuant to Federal Rule of Appellate Procedure 25(a)(5) and 10th Circuit Rule 25.5; (2) all hard copies filed with the Court are exact copies of this ECF submission; and (3) Symantec Endpoint Protection version 14 was run on the file containing the electronic version of the brief and no viruses were detected.

January 16, 2024

/s/ Adam M. Kushner
Adam M. Kushner

CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on January 16, 2024. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

January 16, 2024

/s/ Adam M. Kushner
Adam M. Kushner