No. 23-4107

United States Court of Appeals for the Tenth Circuit

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

v.

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

On Appeal from the United States District Court
for the District of Utah
No. 4:22-CV-00059 (Hon. David O. Nuffer)

REPLY BRIEF OF INDIVIDUAL PLAINTIFFS
ORAL ARGUMENT REQUESTED

James M. Burnham
KING STREET LEGAL, PLLC
800 Connecticut Ave., N.W., Ste. 300
Washington, D.C. 20006
Telephone: (602) 501-5469
james@kingstlegal.com

Brady Brammer
BRAMMER RANCK, LLP
1955 W. Grove Parkway, Ste. 200
Pleasant Grove, UT 84062
Telephone: (801) 893-3951
bbrammer@brfirm.com

Brett A. Shumate
Harry S. Graver
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
bshumate@jonesday.com

Counsel for Individual Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

If the President declares a monument, then it is not illegal. That is the effect of the Government's argument, which rests on "a breathtakingly broad claim of non-reviewability of presidential action" that every appeals court to address has rejected. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). This Court should not be first to accept it, creating a circuit split and upsetting centuries of judicial practice.

At bottom, this case involves a textbook claim that the Executive is acting in excess of its statutory authority. That has been the daily bread of courts since before the Founding. And since then, it has been settled that when the Executive transgresses its bounds and acts *ultra vires*, sovereign immunity falls away, and equity supplies a cause of action for citizens to enjoin the government from injuring them with lawless action.

The Government offers no cogent reason why these principles do not control. Nor are its arguments about standing any sounder. At day's end, the entire point of the Proclamations, in letter and spirit, was to remove certain lands from certain actions—namely, ranching, mining, off-roading, and removing resources. Put otherwise, the Individual Plaintiffs—a rancher, a miner, an off-roading group, and a Native American who wishes to remove resources from monument lands—are the *very people* whose lives and livelihoods the Proclamations are designed to restrict. As the direct objects of the Proclamations, there is no serious argument that they lack standing to challenge them.

Last, the Government's pleas for this Court evade the merits are telling, but unavailing. Whether sovereign immunity attaches turns on whether the Proclamations

are *ultra vires*—something that itself turns on the merits, as this Court has held and as the Government has elsewhere emphasized. And as for the merits, the answer is clear: On its own account, the Government's interpretation renders the Act boundless; but Congress drafted a tailored law, not a blank check. This Court should enforce its limits.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS HAVE STANDING.

The Individual Plaintiffs are the precise individuals whose lives and livelihoods the Proclamations were designed to restrict. Indeed, keeping these restrictions was one of the main reasons the SUWA-Intervenors got involved in this case in the first place: "If the Dalton Plaintiffs obtain the relief they seek … [t]he lands would once again be open to mineral extraction and a multiple-use management regime that increases the risk of native vegetation removal and harmful off-road vehicle use." ECF-40, at 8.

Whatever the merits of those limits, there is no genuine argument the Individual Plaintiffs lack standing to challenge them. As then-Judge Kavanaugh has explained, "there is ordinarily little question that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated." *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015); *see also, e.g.*, *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021) (collecting cases holding same).

The Government provides no reason to depart from that "rule" here. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). Instead, it tries to raze a pasture of strawmen (or as it would put it, "objects"), rather than engage with

any of the real bases for standing the Individual Plaintiffs pressed below. And it does not, because it cannot. Here, the straightforward answer is the right one: The Individual Plaintiffs have standing to challenge the Proclamations that constrain their ways of life.

A. Zeb Dalton.

1. Zeb has dedicated his life to operating a ranch in southern Utah—the same sort of ranch his family has run for generations. Dalton Decl., ECF-90-8, ¶¶ 2-3, 6. During the Trump Administration, less than 1% of Zeb's ranch was within Bears Ears; now, near three-quarters is on monument land. *Id.* ¶ 5. That has caused a massive change to life at the TY Ranch, and poses an existential threat to Zeb's ability to run it.

Foremost, in order to manage a ranch, one needs to be able to fix, modify, and build range improvements (*e.g.*, fences, wells, pipelines). *Id.* ¶¶ 7-9. And when a ranch is on federal land, a rancher needs to get federal approvals to do so. Dalton Supp. Decl., ECF-90-8, ¶ 4; *see also* 43 C.F.R. § 4120.3-3 (listing required permits); Lundell Decl., ECF-113-10, ¶ 12 (detailing federal process for range improvement permit approvals).

Importantly, it is undisputed the Bears Ears Proclamation has augmented the standard for range improvement approvals. During the Trump Administration, permits were evaluated under the flexible multiple-use standard; but now, "typical multiple use management is superseded by the direction in Proclamation 10285 to protect monument objects." Memorandum, *Interim Management of the Bears Ears National Monument*, at 3 (Dec. 16, 2021); *compare* 82 Fed. Reg. 58081, 58085 (Dec. 4, 2017). That is a higher standard, as even Acting Monument Manager Lundell admits: "[B]ecause of

Proclamation 10,285, the BLM must determine that a range improvement is consistent with the protection of monument objects." Lundell Decl., ECF-113-10, ¶¶ 12-13.

Because of this new standard, Zeb's compliance costs have increased—costs that were already far from trivial, even before the ranch was largely atop monument land. Dalton Supp. Decl., ECF-90-8, ¶¶ 4, 7, 18. "This higher standard has caused—and will cause—me to spend more time and resources to comply with federal regulations." *Id.*

That is more than sufficient for standing, as then-Judge Gorsuch laid bare for this Court: "[T]he out-of-pocket cost to a business of obeying a new rule of government, whether or not there may be pecuniary loss associated with the new rule, suffices to establish an injury in fact." *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1144-45 (10th Cir. 2010) (en banc). The federal courts are "uniform" on this score. *Grand River*, 988 F.3d at 121 (collecting cases). Zeb has incurred greater "administrative costs" to comply with the new regime; he thus has standing to challenge it. *Hydro Res.*, 608 F.3d at 1145.

2. The Government has no answer to this.

First, the Government notes that the requirement to obtain federal approval for range improvements predated the Proclamation, and applies to monument and non-monument land alike. Govt.87. True, but irrelevant. As explained, Zeb's costs have *increased* because obtaining a permit is now *more demanding*. And even if not, it would not matter: Complying with an unlawful permit scheme is *itself* sufficient for standing, regardless of whether it is in fact "stricter" or more costly than the old one. *Hydro Res.*, 608 F.3d at 1144; *see also, e.g.*, *NCAA v. Califano*, 622 F.2d 1382, 1389 (10th Cir. 1980).

Second, the Government emphasizes that none of Zeb's permits have been *denied* yet under the Proclamation. Govt.87-88. But as discussed, Zeb's injuries do not turn on any permit denial. *Compare Kane Cnty. v. Salazar*, 562 F.3d 1077, 1089-90 (10th Cir. 2009). Rather, Zeb's injuries stem from the costs of complying with the current permit regime. And again, as Judge Gorsuch explained in *Hydro Resources*—itself a permitting case—those "administrative costs" alone are sufficient for standing. 608 F.3d at 1144.[1]

At bottom, by intent and design, President Biden's Proclamation has affected—and will continue to affect—his ability to ranch. Just ask the SUWA-Intervenors (and the would-be intervenors), all of whom stressed the Proclamation's limits on grazing as a core reason why it was so impactful, and why intervention was warranted. *E.g.*, Kent Decl., ECF-27-6, ¶ 14 (SUWA, et al.); Hadenfeldt Decl. ECF-33-2, ¶ 55 (Cedar Mesa, et al.); Burillo Decl., ECF-34-2, ¶ 22 (American Anthropological Association, et al.).

B. Kyle Kimmerle.

1. Kyle has standing for similar reasons. Kyle runs a mining company with his dad, as his dad did himself, and his dad before him. Kimmerle Decl., ECF-90-7, ¶ 3. As with Zeb, Kyle's family has been working on these lands for generations; and as with Zeb, the Monument fundamentally threatens their livelihoods and ways of life.

[1] More, the Government ignores how the Proclamation has worsened the delays in Zeb obtaining permits—another Article III injury. Dalton Supp. Decl., ECF 90-8, ¶ 17; *Doyle v. Jewell*, 2014 WL 2892828, at *1 (D. Utah 2014) ("delay alone" can be injury).

Among much else, due to the Proclamation, Kyle can no longer move forward on any of his active mining claims within Bears Ears without now first doing a "validity exam." *Id.* ¶¶ 11-17. But those exams are both risky and expensive; they hazard the permits being declared invalid, and cost hundreds-of-thousands of dollars. *Id.* ¶ 14. Because of this, Kyle is holding off on breaking ground on his mining claims at "Geitus," and has already suffered $2-3 million in lost profits as a result. *Id.* ¶ 16. Related, Kyle has been unable to sell his other active claims in Bears Ears, whose value has plummeted due to being located in a national monument. Kimmerle Supp. Decl., ECF-90-7, ¶ 4.

This is all enough. Subjecting Kyle's claims to new and costly regulations satisfies Article III. *New Mexico v. DOI*, 854 F.3d 1207, 1218 (10th Cir. 2017). So too where government action directly causes a decline in property value. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring).

2. The Government raises two main counterarguments. Neither work.

First, the Government accepts the Proclamation's new regulations cause Kyle an Article III injury, but insists any such injury is non-redressable, because Kyle's land would be part of any monument given the Proclamation's severability clause. Govt.91.

Most fundamental, this argument confuses standing with the merits. Standing is about whether a plaintiff is entitled to the relief requested—here, that the Proclamation be declared invalid in full. If there is a problem with that remedy, that is a merits defect. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998); *see also Chafin v. Chafin*, 568 U.S. 165, 174 (2013). In *Seila Law v. CFPB*, for instance, the Supreme Court did not

dismiss the case on Article III grounds, even though it later held that the removability provision at issue was severable. 140 S. Ct. 2183, 2196 (2020). So too here: Kyle clearly has standing if the Proclamation is nonseverable; for jurisdictional purposes, that is it.

In fact, *especially* so here, because the Proclamation *is* nonseverable—as the Individual Plaintiffs explained, Op.32-35, and as the Government does not rebut. At most, the Government points to the Proclamation's nonseverability clause. But it never explains how this Court (or any court) is supposed to sensibly implement the clause, or why a salvaged monument would reach Kyle's claims in full, as opposed to just a portion.

The Government suggests none of this matters, because *some other* proclamation could conceivably designate the lands around Geitus as a monument. Govt.91 n.66. But this is no answer. Even if severability can be considered as part of standing, it is when a real statute can plainly continue to operate once the unlawful portion is excised. *See Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998). If a statute is in fact nonseverable, a plaintiff would not lack standing on the ground that Congress *could* pass a lawful alternative that got to the same place. The same rules apply here. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999).

Second, without more, the Government asserts that it is "speculative" to attribute the collapse in value for Kyle's other claims to the Proclamation. Govt.91-92. But that is absurd. As soon as the Proclamation put these claims on monument lands, and thus subjected them to an new regulatory regime, their value plummeted. Kimmerle Supp. Decl., ECF-90-7, ¶ 4. It does not even take "principles of elementary economics" to

see why. *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 727 (10th Cir. 1980). Nor to see why Kyle *still* cannot find a buyer for these claims, even at a steep discount; nor why Kyle and others rushed to sell off other claims in the area ahead of the monument. Kimmerle Supp. Decl., ECF-90-7, ¶ 4; *see also, e.g.*, Kimmerle Decl., ECF-90-7, ¶ 10.

As with Zeb, Kyle is not some "mere outsider." *State Nat'l Bank*, 795 F.3d at 53 (Kavanaugh, J.). He is a direct object of the Proclamation—precisely as intended. *See, e.g.*, Bloxham Decl., ECF-27-2, ¶ 33 (SUWA: "President Biden's Proclamation" is necessary to curtail "mining activities" within Bears Ears by "Kimmerle Mining LLC").

C. Suzette Morris.

1. Suzette is part of the Ute Mountain Ute Tribe. To practice her religious and cultural traditions, Suzette and her family depend on "ready access" to sacred lands within Bears Ears, where they can remove certain resources—*e.g.*, cedar post, medicinal herbs, and the like. Morris Decl., ECF-90-9, ¶¶ 7-8. But following President Biden's Bears Ears Proclamation, Suzette—as well as others in her community—have refrained from practicing this part of their heritage, because the Proclamation makes it unlawful for anyone to alter any "object" in the monument, including its "landscape" (and everything within it). Morris Supp. Decl., ECF-90-9, ¶¶ 5-7; *see also* 86 Fed. Reg. 57321, 57333 (Oct. 8, 2021) (Biden Proclamation: "Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument").

This suffices for standing as well. It is well-settled that people do not need to break the law to challenge that law, so long as they refrain from certain conduct due to

a "credible threat" of prosecution thereunder. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016). And that is happening here. Suzette is refraining from her religious and cultural traditions. And she is doing so because they are proscribed under the letter of the Proclamation. *See also* 18 U.S.C. § 1866(b) (providing that anyone who "injures" or "destroys" part of a "monument" faces imprisonment, a fine, or both).

2. The Government barely disputes this.

First, the Government underscores that the Proclamation does not stop Suzette from "visiting" Bears Ears. Govt.89. But nobody is complaining about that. The issue is not *accessing* these lands; it is *removing* certain resources from them. And because of the Proclamation, Suzette cannot do that, and return to her "prior use" of these lands. *See Grand Canyon Tr. v. Energy Fuels Res, Inc.*, 269 F. Supp. 3d 1173, 1191 (D. Utah 2017).

Second, the Government says the Proclamation protects "cultural and customary uses," incorporating President Obama's proclamation by reference. Govt.89. But that is not what it actually says. The Biden Proclamation only incorporates the Obama Proclamation *to the extent* the latter is consistent with the former. And the former expressly forbids "remov[ing]" any "feature" of the Bears Ears landscape (plus its areas, ecosystems, and habitats)—exactly what Suzette wishes to do. 86 Fed. Reg. at 57332.

D. The BlueRibbon Coalition.

BlueRibbon Coalition is a nonprofit that works on expanding and maintaining recreational access to public lands. It has thousands of members—individuals and businesses—joined by a shared appreciation of the outdoors and, among much else,

using off-road vehicles to explore them. Burr Decl., ECF-90-1, ¶¶ 8, 10-12. BlueRibbon has standing to sue both on behalf of its members, and also in its own right.

1. An organization has standing to sue on behalf of its members "(1) when its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Utah Physicians for a Healthy Env't v. Diesel Power Gear*, 21 F.4th 1229, 1241 (10th Cir. 2021).

a. BlueRibbon has associational standing for three independent reasons.

First, the Proclamations have caused a new, higher standard for getting "special recreation permits." BlueRibbon members have hosted—and wish to keep hosting—large group-rides and other off-roading events on lands within Bears Ears and Grand Staircase-Escalante, all of which require obtaining special recreation permits from BLM. *See, e.g.*, Burr Supp. Decl., ECF-90-1, ¶¶ 6-8, 14. But now, before granting such a permit, BLM must first ensure that any "recreation use or activity" is "consisten[t] with the proclamation," and has stated "this [new] requirement applies to special recreation permits that may come up for renewal, notwithstanding whether an event or activity has been permitted in the past." Bears Ears Interim Plan, *supra*, at 5; Memorandum, *Interim Management of the Grand Staircase-Escalante National Monument*, at 5 (Dec. 16, 2021).

That suffices. Each time a person applies for such a permit, he must pay a fee. BLM, *Utah Special Recreation Permits Program*, https://perma.cc/3BTX-DSPP (last visited February 7, 2024). As with Zeb, this "outlay of funds necessary to secure a … permit

from" BLM is enough for standing, because it is a monetary injury incurred to comply with the greater demands of an unlawful scheme. *Hydro Res.*, 608 F.3d at 1144; *see also Califano*, 622 F.2d at 1389 ("[T]he cost of obeying the regulations constitutes injury.").

Second, the Proclamations have caused the closures of existing areas, and have cut off the development of new roads or trails for future exploration. As to the latter, the Bears Ears Proclamation (by incorporation) bars any "additional roads or trails designated for motorized vehicle use," except for "public safety or protection of [the Monument's] objects." 86 Fed. Reg. at 57332. That is a change from the Trump Proclamations, which not only covered a smaller reach of land, but also widely allowed "motorized and non-mechanized vehicle use" on such lands. 82 Fed. Reg. at 58086.

Likewise, the Proclamations have closed off areas previously open during the Trump Administration. Some closures are more formal—such as with the Little Desert OHV Area that Simone Griffin and her family used to ride across. Burr Supp. Decl., ECF-90-1, ¶¶ 5-6; Griffin Supp. Decl., ECF-90-2, ¶ 4. And some are more informal—where federal land managers have informed BlueRibbon members they are not allowed to ride across areas recently available to them. Burr Supp Decl., ECF-90-1, ¶¶ 9-10.

These restrictions on BlueRibbon members' "recreational … interests" are textbook Article III injuries, which give rise to standing—as the SUWA-Intervenors know well. *See, e.g.*, *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013).

Third, the Proclamations subject BlueRibbon members to new criminal liability, and have thus deterred them from activities they otherwise would take. As touched on

above, both Proclamations invoke the Antiquities Act's enforcement provision, and issue a "[w]arning" to all "unauthorized persons not to appropriate, injure, destroy, or remove any feature of [either] monument." 86 Fed. Reg. at 57346; *id.* at 57333. But it is impossible to off-road on monument lands without affecting at least some aspect of their landscape, ecosystems, habitats, or the like. Burr Supp. Decl., ECF-90-1, ¶ 10. The result has been for members to stop—even in areas that have not been separately closed—lest they incur criminal sanction. *See, e.g.*, Griffin Supp. Decl., ECF-90-2, ¶ 4.

b. Where the Government does address the above, its responses are lacking.

First, the Government emphasizes no BlueRibbon member's permit has been denied under the Proclamations' new standards. Govt.93. But as above, that misses the point: The "administrative costs" of compliance suffice; complying successfully does not destroy standing. *Hydro Res.*, 608 F.3d at 1145. More, the Government ignores how the Proclamations' heightened regulatory burdens have *deterred* members' plans to host events on monument lands—areas they have concrete plans to use, but for the Proclamations. *See, e.g.*, Klein Supp. Decl., ECF-90-4, ¶ 4 (explaining for Trail Hero).

Second, the Government states that no roads or trails have been closed yet because of the Proclamations. Govt.94. For starters, the Government totally ignores how the Proclamations cut off *future* roads and trails on monument lands for off-roading—which itself injures BlueRibbon's members, given how building such paths is a regular part of their work. *See, e.g.*, Wright Decl., ECF-90-3, ¶ 8; Burr Decl., ECF-90-1, ¶ 10. Regardless, the Government's insistence does not survive scrutiny. For instance, below,

the Government argued that Little Desert OHV was not *really* closed, because the new signs telling people to stay off it started with "please." ECF-113, at 45 & n.239; *compare* Griffin Supp. Decl., ECF-90-2, at 3 (photo of sign). But Article III is not so wooden.

Third, the Government says that any "chilling effect" cannot give rise to standing, because BlueRibbon members do not face a genuine threat of prosecution. But note, the Government never denies that off-roading on monument lands would violate the letter of the Proclamations. Nor does it pledge not to prosecute BlueRibbon members for doing so. Put together, that is fatal under this Court's cases. *See, e.g.*, *United States v. Supreme Court of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016); *Cressman v. Thompson*, 798 F.3d 938, 947 (10th Cir. 2015); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012). In response, the Government observes that nobody has ever been prosecuted for similar activities. Govt.97. But this is little help: Never before has a monument designation declared every inch of a landscape a covered object thereunder. *Infra* at 30.

Related, the Government suggests refraining from off-roading and the like is not enough for standing—only refraining from constitutionally protected conduct will do. Govt.96. But this is wrong on both the law and the facts. On the law, the Supreme Court "has not limited standing to pursue pre-enforcement challenges only to plaintiffs intending conduct arguably affected with a constitutional interest." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 384 n.4 (2d Cir. 2015). So long as refraining causes harm to an Article III interest—like a recreational one—that is enough. *See New Hampshire Lottery Comm'n v. Rosen*, 986 F.3d 38, 50-51 (1st Cir. 2021). Anyways, BlueRibbon members *are*

refraining from activities with a constitutional interest. The First Amendment protects Americans' right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Fields v. City of Tulsa*, 753 F.3d 1000, 1009, 1012 (10th Cir. 2014). Restricting off-road access impairs BlueRibbon members' ability to come together to explore, maintain, and appreciate public lands—especially so for those that depend on motorized access to reach these lands at all. *See, e.g.*, Burr Decl., ECF-90-1, ¶ 12; Klein Decl., ECF-90-4, ¶¶ 3-4; Johansen Decl., ECF-90-5, ¶ 3.

2. BlueRibbon has organizational standing too. *See Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1396 (10th Cir. 1992) (same Article III test for organizations).

Namely, BlueRibbon has had to "divert resources from its core programs to new efforts designed to educate [members] about the [Proclamations'] effects and to mitigate [its harms]." *Cook Cnty. v. Wolf*, 962 F.3d 208, 219 (7th Cir. 2020). Absent the Proclamations, BlueRibbon would be working on expanding access to public lands. Burr Decl., ECF-90-1, ¶¶ 13-15 (describing efforts). But now, BlueRibbon needs to divert resources—to the tune of tens of thousands of dollars—to go on defense, such as by limiting the damage caused by the upcoming management plans. *Id.* ¶ 30; *see also* Burr Supp. Decl., ECF-90-1, ¶¶ 11-12 (discussing specific resource diversion from BlueRibbon Coalition's Dispersed Camping Access Alliance). It is "established" that this sort of "diversion of resources" affecting an organization's core mission is sufficient for Article III standing. *Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, 2022 WL 1266612, at *12 (D. Colo. 2022) (collecting cases).

The Government raises two points. Both fail.

First, the Government says this is all "hardly plausible," because the monuments have existed for years. Govt.100. But *these* monuments are different in kind than those from the Trump Administration—they are much larger, and cover novel and sprawling "objects." And *those* new demands have forced BlueRibbon to divert resources. Burr Supp Decl., ECF-90-1, ¶ 13 (explaining why new proclamations demand new actions).

Second, the Government insists that these sorts of resource diversions are simply self-inflicted injuries, insufficient for standing. Govt.100. But in this context, federal courts have distinguished between an advocacy organization that throws money at an issue to manufacture litigation, versus a group that is harmed because it needs to alter its existing operations to address a threat to its mission. *Wolf*, 962 F.3d at 219 (finding standing on theory identical to BlueRibbon's). And here, BlueRibbon falls comfortably on the latter side of the line: It has had to shift from affirmative efforts to expand access to public lands, to negative efforts to limit the Proclamations' damage. That suffices.

II. SOVEREIGN IMMUNITY DOES NOT BAR THIS SUIT.

A. The Proclamations Are *Ultra Vires*.

The Government accepts that it is inviting a circuit split, in that (at least) the D.C. Circuit has squarely rejected its unprecedented understanding of reviewability—a point its intervenors and *amici* echo. Trib.41; Am. Br. Law Professors 4-5. This Court should decline the offer. Under well-established law, sovereign immunity does not bar this suit, because the Proclamations are in excess of the Antiquities Act—*i.e.*, they are *ultra vires*.

1. The Government's main submission is that "routine" errors of law are not enough to be *ultra vires*—only really bad mistakes will do. Govt.62. That is very wrong.

Perhaps most telling, the Government cobbles together its argument mostly with stray lines from the D.C. Circuit. But as noted, it also concedes this precise suit would be reviewable in that court. *Compare* Govt.63, *with* Govt.56-57; *see also Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (holding such suit reviewable).

The D.C. Circuit's precedent is not at war with itself. Instead, the Government relies exclusively on cases relating to a specific strand of the *ultra vires* doctrine—where Congress has evinced some intent to limit judicial review over a given executive action, such as by carving it out from the APA. *See, e.g.*, *Fed. Express Corp. v. Dep't of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022). Starting with *Leedom v. Kyne*, the Supreme Court has explained that in *those* sorts of cases—absent a clear statement from Congress eliminating judicial review entirely—the federal courts may still review in equity executive actions that are egregiously outside an official's statutory bounds. 358 U.S. 184, 188-89 (1958). But to give due respect to Congress's intent to limit review in some fashion, any such residual review in equity is cabined to extremely limited circumstances. *See, e.g.*, *Changji Esquel Textile Co. Ltd. v. Raimondo*, 40 F.4th 716, 721-22 (D.C. Cir. 2022).

Absent an intent by Congress to limit judicial review, however, the "settled" rule is that "if a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred," the federal courts have "jurisdiction" to stop that unlawful action. *Harper v. Jones*, 195 F.2d 705, 706 (10th Cir. 1952). That has been

true since the Founding—and well before, in the High Court of Chancery. *See* Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1-2 (1963). And then as now, ordinary *ultra vires* review has not parsed big excesses from small; an excess is an excess, and one operating in excess of one's authority is operating *ultra vires*. *See, e.g.*, *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326-27 (2015) (relying upon *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902)).[2]

Sure enough, as Individual Plaintiffs have already explained, an officer can act *wrongfully* without acting *ultra vires*. Op.41. But like the district court, the Government fails to grasp the distinction between errors in the exercise of one's power, and mistakes about the scope of that power. Govt.63. An officer acts *ultra vires* when he exceeds the limits that the sovereign has imposed on his authority. When he uses that authority to transgress some extrinsic source of law (*e.g.*, state tort law), he is acting illicitly in some manner, but not *ultra vires*. Sovereign immunity cloaks the latter—but not the former.

2. Contrary to the Government's misimpressions, this Court's precedent is completely in accord. For instance, in *Wyoming v. United States*, this Court reiterated that there is "an exception to the sovereign immunity doctrine … where a government

[2] While the "power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, the APA is not one such limitation. The APA "did not repeal the review of *ultra vires* actions that was recognized long before" its passage. *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see also, e.g.*, *Navajo Nation v. DOI*, 876 F.3d 1144, 1170 (9th Cir. 2017). *Ultra vires* review covers a discrete legal wrong (actions in excess of authority), and offers a specific remedy (an injunction). It complements APA review—it does not dilute it.

official acted ultra vires or beyond those powers Congress extended." 279 F.3d 1214, 1229 (10th Cir. 2002). And it distinguished between an officer acting "wrongfully," and an officer "not exercising the powers delegated to him by the sovereign." *Id.* at 1230.

The Government's repeated cites to *Wyoming* are odder still, because that case is fatal to its broader goal of avoiding the merits. There, this Court held that whether the "ultra vires" exception applied "turn[ed] solely" on its "legal construction" of the statute. *Id.* at 1230. It then proceeded to analyze the meaning of the statute, to decide whether the Executive exceeded the bounds of its authority. *Id.* at 1231-35. The Court rightly did not ask whether the Executive *egregiously* violated the law; instead, it just analyzed if it went past its bounds at all. The same exact *ultra vires* analysis is warranted in this case.

United Tribe of Shawnee Indians v. United States is of a piece. There, the tribe brought an action against the Government for failing to designate it a federally recognized tribe. 253 F.3d 543, 545 (10th Cir. 2001). This Court held sovereign immunity barred the suit, because *failing* to take a particular action is different than *exceeding* one's authority. *Id.* at 548-49. In that sort of case, it is at most a misuse of existing discretion. This case, by contrast, is more like if the Government recognized the Chicago Blackhawks as a tribe.

3. In all events, the Government's argument here fails on its own terms. The Government accepts the merits are banked into the *ultra vires* analysis in at least *some* form. Govt.65. And it accepts an act is *ultra vires* if it "crossed a congressionally drawn line" that is itself "plain on the face of the statute." Govt.66 (internal citations omitted).

But that is this case. Even if some of the Antiquities Act's limits have inherently blurrier lines—*e.g.*, historic, scientific, smallest—whether something is an "object" is not one of them. It is instead a "clear and specific" statutory term, Govt.67, which has a discernible, objective definition, as Individual Plaintiffs have detailed at length already.

The Government asserts the Proclamations fall within the Act's "broad" terms, but it makes no effort to justify that claim—or respond to any of the points raised by Individual Plaintiffs. Govt.68-69; *see infra* at 30-32. That silence is as telling as anything.

4. The Government also says the *ultra vires* doctrine does not reach the President. Govt.59. It cites no case holding this. Nor could it: Where it has been considered, it has been rejected. *See Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

And for good reason. As the Government accepts, the *ultra vires* doctrine holds that when an agent of the sovereign acts without its authorization, the agent's actions are "considered individual and not sovereign actions." Govt.59. That applies to the President as much as any other agent. True, the separation of powers might counsel against certain *remedies* running against the President. *Cf. Mississippi v. Johnson*, 71 U.S. 475 (1866). But whether sovereign immunity attaches to an *action* is a distinct question from whether a remedy can run against a given *officer*. And regarding *that*, there is no reason why the President's *ultra vires* actions are any less individual than anyone else's.

Curiously, the Government concedes that the *ultra vires* doctrine is available for when the President goes beyond his *constitutional* powers. Govt.60. But that gives away the ballgame. For sovereign immunity purposes, it is a distinction without a difference:

The question is whether the President has legal authority for his action—be it from the Constitution or federal law. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994). So long as he goes beyond what the sovereign has empowered him to do, his actions are *ultra vires*.

And of course, none of this helps the *other* defendants—whose implementing actions for the unlawful Proclamations are *ultra vires* all the same. *See also* Part II.B *infra*.

B. The APA Waives Immunity Regardless.

In all events, for everyone but the President, the APA waives immunity. Op.44-45. The Government barely responds to this. It does not deny that § 702's plain terms allow this suit to proceed against those *implementing* the Proclamations. And it does not deny that suits against the President's subordinates are a usual way to combat unlawful executive orders. *See, e.g.*, *NAM v. DHS*, 491 F. Supp. 3d 549, 561, 569 (N.D. Cal. 2020).

The Government's sole response is any such suit is "premature," because the President's subordinates have not taken any "agency action" yet. Govt.40-41 n.29. But that operates from a flawed premise. Section 702's waiver is not limited to APA claims; and in turn, it does not require "action" as defined by the APA (let alone final action). *Rivera v. IRS*, 708 F. App'x 508, 511 n.2 (10th Cir. 2017); *see also Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006). So it does not matter whether any formal agency "action" has occurred. As long as there is colloquial "action," and as long as those actions support standing (as here, *see* Part I *supra*), that suffices for a suit to fall within the terms of § 702's immunity waiver. (Of course, many of the actions above—like in processing permits—qualify as "agency action" under the APA regardless. *See* 5 U.S.C. § 551(13).)

III. THE INDIVIDUAL PLAINTIFFS HAVE A CAUSE OF ACTION.

Three years before the Antiquities Act was passed, the Supreme Court reiterated that a law's meaning is not left to the "discretion" of the officers implementing it, and when executive officers exceed their statutory authority, the federal courts may grant equitable "relief" to citizens injured by those excesses. *McAnnulty*, 187 U.S. at 108. And three weeks before this brief was filed, the Government's top advocate reaffirmed that it is the "role of the judiciary historically under the Constitution to police the line between the legislature and the executive to make sure that the executive is not operating as a king, not operating outside the bounds of the authority granted to them by the legislature." Oral Arg. Tr., at 142-43, *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (U.S. Jan. 17, 2024); *see United States v. Trump*, 2024 WL 436971, at *9-11 (D.C. Cir. 2024).

Those principles resolve this issue. From the Founding, the federal courts have provided a "cause of action" in "equity" for parties harmed by governmental actors operating in excess of their authority. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005). This longstanding equitable practice operates hand-and-glove with the *ultra vires* exception to sovereign immunity: While the latter assures the court's jurisdiction over injurious executive actions in excess of authority, the former provides both the cause of action (*i.e.*, the right to sue) as well as the remedy (*e.g.*, an injunction).

1. The Government primarily argues that nonstatutory review is nevertheless unavailable under *Dalton* and its predecessors. *See* Govt.47. But it confuses those cases.

In essence, each case involved a statute that tasked the President with making a discrete, discretionary decision that (as the Government later recognizes) lacked any "judicially manageable standards" for review. Govt.49. That is, in each, the President needed to determine the existence of some circumstance, where there was really no law to apply to check that determination. *See, e.g.*, *Martin v. Mott*, 25 U.S. 19, 29, 32 (1827) (whether there was an "actual invasion" or "imminent danger" of one); *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919) (whether taking control of a phone company was "necessary for the national security or defense" during a war); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (whether altering the tariff rates was "necessary to equaliz[ing] [] differences in the costs of production").

Absent a discernible legal standard from these statutes, the Court recognized it would be left to review the President's decisions for nothing but "abuse of discretion." *Dakota Central*, 250 U.S. at 184. And in light of the separation of powers, plus equity's longstanding limit on checking *excesses* of authority, the Court held that it lacked the authority to review these sorts of discretionary decisions under some free-floating judicial authority, which would effectively replace the President's judgment with its own.

But again, this case is different in kind. The Individual Plaintiffs' principal argument is that key items in the Proclamations are not "objects"—a specific statutory term that lends itself to a plain meaning, not a pure judgment call. "Judicial review of such claims resembles the sort of statutory interpretation with which courts are familiar." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54-55 (D.D.C. 2018); *see also Franklin*

v. Massachusetts, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring in part and concurring in the judgment) (courts may review if presidential "directive" transgresses authority).[3]

2. The Government next turns to the *Sandoval* line of cases. Govt.53. But this is further afield. Those cases all involved whether federal courts can *imply* a cause of action under a *statute*—for instance, whether private individuals can themselves sue to enforce a statue's disparate-impact provisions. *See Alexander v. Sandoval*, 532 U.S. 275, 278 (2001). But that is not this case; nobody is asking this Court to imply a private right of action under the Antiquities Act. ECF-90, ¶ 27 (asking for remedy under court's "inherent equitable powers"). And there is a fundamental difference between a court *creating* a cause of action so that citizens can affirmatively *enforce* a statute in a given way; and employing an *existing* cause of action so that citizens can *stop* the Government from unlawfully acting against them. As for the latter, the *Sandoval* line of cases is irrelevant.

3. The Government further asserts that even if a cause of action is available, the Individual Plaintiffs cannot use it—either because they fall outside the Antiquities Act's zone of interests, or because it does not create any substantive rights thereunder. Govt.54-55. Both of these claims rest on the same intuition; and both are fatally flawed.

For starters, even if equity was only available to those who fell within the violated statute's "zone of interests," the Individual Plaintiffs would clearly meet that standard.

---

[3] The Tribes emphasize the Antiquities Act vests the President with "discretion." Trib.44-45. Surely, but as to *whether* to declare a monument at all—it does not leave to the President's whim what the Act means in the first place.

The zone-of-interests test is not "especially demanding," and only bars those raising interests "so marginally related to or inconsistent with the purposes implicit in the statue," that it is unreasonable for them to bring suit under it. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). But here, by the Government's own account, the Act reflects a "compromise" across conservationists and those wishing to use the land productively. Govt.14. The Individual Plaintiffs are half of that supposed deal—they are the very people whose lives and livelihoods are directly restricted by a monument designation. *See supra* Part I. They are in the *heartland* of its zone-of-interests.

More fundamental, the zone-of-interests test does not even apply here. It applies only to "statutorily created causes of action"—*i.e.*, it helps determine who *Congress* wanted to give the right to sue under a federal *statute*. *Lexmark*, 572 U.S. at 129. But this tool of statutory construction does not bear on the *nonstatutory* review context. Nobody would say, for instance, the mill owners from *Youngstown* would "be required to show that their interests fell within the zone of interests of the Presidents' war powers." *Haitian Ref. Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (Bork, J.).

Related, the Government intimates a plaintiff can only avail himself of the federal equity power when the violated law expressly confers a substantive right. But that is obviously wrong. Continuing with the above, take *Youngstown*. There, the mill owners suffered textbook injuries to core private rights—rights that exist outside of any positive law grant, *see Axon Enter., Inc. v. FTC*, 598 U.S. 175, 197 (2023) (Thomas, J., concurring). They relied on the federal equity power to provide the cause of action, and the remedy.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583-84 (1952). And they asserted that the President's order was unlawful because it was *ultra vires*—neither authorized by statute, nor the Constitution. Of course, the Supreme Court agreed; but nobody thought for a minute the mill owners needed to assert some federal right under a statute or the Constitution's war powers to stop executive actions in excess of those authorities.

That makes sense. Rights, causes of action, and remedies are "distinct" concepts in the law. *Davis v. Passman*, 442 U.S. 228, 239 (1978). To bring a suit, a party must be injured—*i.e.*, he must incur a legal wrong. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). And this injury may come from any number of sources: It may be a right under the Constitution, a federal statute, state law, or the common law. *In re Trump*, 958 F.3d 274, 293-94 (4th Cir. 2020) (Wilkinson, J., dissenting). Separate from this is whether someone has a cause of action to pursue redress; and distinct from that too is whether a remedy exists that a court may enforce. *See generally* John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 Fla. L. Rev. 849 (2016). Last, for a party to assert a legal wrong against the government, the governmental action must be unlawful—and here as well, that can be for any number of reasons (*e.g.*, it is *ultra vires*).

This all applies cleanly here. Equity provides a cause of action (and remedy) for those directly injured by unlawful executive action; and here, the Individual Plaintiffs may proceed in equity to enjoin the Government from injuring their core private rights by way of *ultra vires* federal action. To say otherwise, because the Antiquities Act only

imposes a limit on the Government—and does not independently confer a right upon individuals—is to collapse concepts, and conflate rights, remedies, and causes of action.

This Court did not upend all of this in *Safe Streets Alliance v. Hickenlooper*. There, the plaintiffs sought to use the federal court's equity power to unravel Colorado's entire apparatus for legalized marijuana, reasoning that it was preempted under the Controlled Substances Act. 859 F.3d 865, 894 (10th Cir. 2017). This Court declined to do so, on the ground that the plaintiffs could not effectively enforce the CSA against Colorado, absent at least some private right under that statute. *Id.* at 897. But this is not a case where a party is seeking a "free-floating" general right to enforce federal law. *Id.* at 895-96. Nor is it one where a party is using equity as a sword rather than a shield, enforcing a "federal statute's preemptive effects" without any substantive interest thereunder. *CNSP, Inc. v. Webber*, 2020 WL 2745456, at *2 (D.N.M. 2020) (describing *Safe Streets*). Rather, the Individual Plaintiffs are seeking to use equity in its traditional manner—to stop governmental actors from directly injuring them by way of exceeding their powers.

4. Further, the Government downplays how its position conflicts with other circuits. Govt.57. But this Court should not be mistaken as to the split it would create.

To start, in *American Forest Research Council v. United States*, the D.C. Circuit rejected every argument the Government has raised here. 77 F.4th 787 (D.C. Cir. 2023). It reaffirmed its longstanding view that "a claim alleging that the President acted in excess of his statutory authority is judicially reviewable even absent an applicable statutory review provision." *Id.* at 796. It rejected (once again) the Government's *Dalton*

arguments, reasoning that those precedents have no applicability where a statute "cabin[s] the discretion it grants the President" through certain concrete "limits." *Id.* at 797. And it reiterated that in light of the above, that court has "consistently reviewed claims … that the President [has] exceeded his authority under the Antiquities Act." *Id.*

So much so with the Ninth Circuit's decision in *Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023). There, the court endorsed the D.C. Circuit's approach to "the reviewability of claims against the President." *Id.* at 1130. And it held that "whether characterized as *ultra vires* or constitutional, the result is the same: we resolve that Murphy's claims against the President regarding [the Proclamation] are justiciable." *Id.*

The Government tries to distinguish these cases on the ground they involved a claim that a specific proclamation conflicted with another statute (the O&C Act). But as above, that is a distinction without a difference. The question in those cases (as here) is whether the President acted in *excess* of his authority; it makes no difference whether that is so because the President exceeded the terms of the organic statute (as here), or because he went past the bounds imposed by a separate law (as there). In short, *AFCR* and *Murphy*—like every other appellate panel—hold this sort of challenge is reviewable.

5. As above, the Government argues too a cause of action cannot run against the President without a clear congressional statement. Govt.42. But this is backwards.

Notably, the Government accepts remedies *can* run directly against the President. But its clear statement rule limiting *when* does not extend to this case. As the precedents cited by the Government say expressly, a clear statement is required before a President's

actions are "reviewed for abuse of discretion." *Franklin*, 505 U.S. at 801. Rightly so: The federal courts sitting in equity do not have the inherent power to subject any governmental action (to say nothing of the President's) to some floating abuse-of-discretion review; there is no historical tradition of that, and therefore nothing in Article III's judicial power conferring such authority. *Cf. Grupo Mexicano de DeSarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). To do so, a statute is required. And the Supreme Court has sensibly held that Congress must speak clearly in any such statute before it is read as subjecting the *President's* action to abuse-of-discretion review.

But as already explained, this case does not involve an abuse of discretion; it is about the President exceeding his statutory authority. And for *those* sorts of lawsuits—where litigants are relying on equity to enjoin "unlawful executive action," *Armstrong*, 575 U.S. at 327—the clear statement rule is indeed reversed: Congress must speak expressly to "restrict[] the court's jurisdiction in equity." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In other words, since the cause of action here is in equity, it does not turn on any statute, nor does it require any clear statement; it is on Congress to speak clearly if it wants to *scrap* this otherwise available action. Anyways, as above, even if this argument had some purchase, it does nothing for the *other* defendants here.

IV. THE DEFENDANTS CANNOT AVOID THE MERITS.

1. Should the Proclamations be found to be reviewable, the Government—along with its intervenors and *amici*—urge this Court to at least leave the merits for another day. Govt.129. But as explained, that does not work. The question of whether

sovereign immunity bars jurisdiction here turns on whether the Proclamations are *ultra vires*—which "turns solely" on the "legal construction" of the Act. *Wyoming*, 279 F.3d at 1230. Indeed, the Government itself has not been shy to emphasize this, at least in cases where it thinks it has a better hand. *Cf. Apter v. HHS*, 80 F.4th 579, 583, 588 (5th Cir. 2023) (court "must consider the merits to some degree even at the pleading stage").

The Defendants suggest there are other threshold 12(b)(6) issues that need to be resolved on remand. Govt.129 n.89. But that is just not true. If this Court resolves the various issues discussed above, all that is left is to resolve for Individual Plaintiffs' principal claim is the exclusively legal question of whether the Proclamations are unlawful, because they are premised on items that are not "objects" under the Act as a matter of law. And if the answer to that is yes, it is not necessary to reach anything else.

Nor are there prudential reasons to evade the merits. The Individual Plaintiffs press a pure question of law that has been fully briefed—the Government incorporated its district court filings (Govt.64), bolstered them here (*infra*), and has received able support from *amici* who develop every possible point in defense of the Proclamations. All the while, the Defendants urge delay, because they alone are the ones that benefit from it. As they know well, the longer the Proclamations stay in effect, the more they become fixed as a practical reality, regardless of their ultimate legal fate. There is no reason to indulge the stall tactics; the Proclamations are properly before the Court now.

2. In all events, across its overall brief, the Government does offer its case-and-chief on the merits, consistent with its briefing below. Nothing persuades. Besides what the Individual Plaintiffs have already argued, three points warrant response here.

First, the Government says decades of practice have come to bless its capacious view of the Act. Govt.69; *see also* Am. Brief Utah Dine Bikeyah, et al. 21. Of course, "past practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008). Adverse possession is not a tool of statutory interpretation. Regardless, as the Government does not contest, monuments like the one here are principally a modern phenomenon. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting denial). And while it cites examples of proclamations that declare certain lands are valuable *because* they contain certain "objects," it cannot cite a single example of any president ever declaring the *land itself* to be an "object." Govt.20-21 n.21. But those are different: Johnny Cash's house could merit a historic designation because he once lived there; but that does not turn the man in black into a "structure."[4]

All told, implicit ratification arguments are very tall orders. And the Government lacks the "overwhelming evidence" that "Congress considered … the *precise issue* presented" here, necessary for such an argument to hold any water. *Rapanos v. United*

[4] The Supreme Court did not suggest anything otherwise in *Alaska v. United States*, where Alaska did not even raise an Antiquities Act argument, and the Court only raised a reading of the Act that "[i]f true" would bolster one manner of deciding the case. 545 U.S. 75, 101-03 (2005); *see also Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting denial) (explaining *Alaska*'s discussion of Act was entirely "dicta").

States, 547 U.S. 715, 750 (2006) (plurality); *see also, e.g.*, *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 81 (2021) (holding that Congress did not ratify the consensus view of eight federal circuit courts even when it amended different section within same provision).[5]

Second, the Government states the Act's legislative history supports its position. Govt.13-14. But that is startling, in light of what the legislative history actually says. *See, e.g.*, H.R. Rep. No. 59-2224, at 1 (explaining Act authorized "small reservations" to protect "interesting relics of prehistoric times"). Perhaps more basic, the Government describes the Act as a "compromise" among conservationists and westerners. Govt.14. That is true, but it is hard to see how that does not foreclose the Government's view. Indeed, if the Government is right, art of the deal this was not. After all, it does not deny that its view of the Act allows the President to set aside any and all federal land for any reason he wants—the *precise thing* that the Western States sought to avoid. Op.27.

Third, the Government closes by telling this Court to stop worrying, and learn to love its open-ended view of the Act (and cribbed view of judicial review). Govt.72-81. In the main, the Government says that if the President ever *really* missteps, Congress can always fix his mistake. But that is true in every statutory interpretation case. And that has never alleviated federal courts of their independent constitutional duty to keep the Executive within its bounds. *Bowen v. Mich. Academy of Family Physicians*, 476 U.S.

[5] Nor did Congress ratify the Grand Staircase-Escalante Monument, in particular. *Utah Ass'n of Cntys. v. Clinton*, 1999 U.S. Dist. LEXIS 15852, at *46-67 (D. Utah 1999).

667, 681 (1986). More fundamental, the Government's "trust us" defense is no defense at all; and one that the Supreme Court has rejected time and again. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 480 (2010). Especially so where, as here, the Government *is* in fact wielding a frontier construction of a law against regular citizens. In that case, when ordinary Americans are being hurt by lawless executive action, they get their day in court. They need not write their congressman; the judiciary is supposed to protect them.

CONCLUSION

This Court should reverse the decision below and remand for summary judgment.

Dated: February 9, 2024

Respectfully submitted,

/s/ Brett A. Shumate

James M. Burnham
KING STREET LEGAL, PLLC
800 Connecticut Ave., N.W., Ste. 300
Washington, D.C. 20006
Telephone: (602) 501-5469
james@kingstlegal.com

Brady Brammer
BRAMMER RANCK, LLP
1955 W. Grove Parkway, Ste. 200
Pleasant Grove, UT 84062
Telephone: (801) 893-3951
bbrammer@brfirm.com

Brett A. Shumate
Harry S. Graver
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
bshumate@jonesday.com

Counsel for Individual Plaintiffs

REQUEST FOR ORAL ARGUMENT

The Individual Plaintiffs respectfully request oral argument. This appeal raises important questions about the scope of the Antiquities Act, the reach of the Federal Government's sovereign immunity, and the reviewability of presidential action. The Individual Plaintiffs thus respectfully submit that oral argument will help the Court analyze and resolve these issues.

Dated: February 9, 2024

Respectfully submitted,

/s/ Brett A. Shumate
Brett A. Shumate

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and with the September 14 order of this court, because it contains 8,998 words, excluding the parts of the brief exempted by Rule 32(f) and 10 Cir. R. 32(B), as counted using the word-count function on Microsoft Word 2016 software. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016, in Garamond style, 14-point font.

Dated: February 9, 2024

Respectfully submitted,

/s/ Brett A. Shumate
Brett A. Shumate

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing Brief of Individual Plaintiffs: (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Safety Scanner—version 1.403.3449.0, updated February 9, 2024, and according to the program are free of viruses.

Dated: February 9, 2024

Respectfully submitted,

/s/ Brett A. Shumate
Brett A. Shumate

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, I electronically filed the original of the foregoing Brief of Individual Plaintiffs with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

Dated: February 9, 2024

Respectfully submitted,

/s/ Brett A. Shumate
Brett A. Shumate