IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTRODUCTION

The Antiquities Act of 1906 authorizes the President to designate national monuments and make reservations of land "confined to the smallest area compatible with the proper care and management of the objects to be protected [therein]." 54 U.S.C. § 320301(b). On December 4, 2017, President Trump signed Proclamation 9682 modifying the Grand Staircase-Escalante National Monument (the "Monument") to reflect what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. *See* Proc. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017). Plaintiffs—The Wilderness Society *et al*. (collectively "TWS") and Grand Staircase Escalante Partners *et al*. (collectively "GSEP")—vociferously disagree with the President's exercise of his discretion, and therefore bring this suit seeking to overturn the Proclamation.

But their claims have no merit. Plaintiffs assert that the Proclamation is ultra vires under the Antiquities Act, that it is inconsistent with several statutes addressing the Monument, and that it violates the separation of powers under the United States Constitution.[1] Contrary to their primary contention, the President lawfully exercised his authority under the Antiquities Act to modify the boundaries of the Monument to what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. 54 U.S.C. § 320301(b). Nothing in the Antiquities Act precludes one President from modifying another's determination on this basis, and the President's interpretation of the Act's grant of authority is "entitled to great respect" in light of Congress's acquiescence to the practice over many decades. *See AFL-*

[1] Plaintiffs also assert claims that the Proclamation was an abuse of discretion under the Antiquities Act and under the Administrative Procedure Act. However, pursuant to the Court's order adopting an agreed briefing schedule proposed by the parties, these claims are not at issue in this briefing. ECF No. 129.

CIO v.Kahn Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (citation omitted). And Plaintiffs' alternative theories fare no better. The Proclamation does not violate federal law because Utah's conveyance of some state-owned lands within the Monument to the United States, and the subsequent ratification of that transfer by Congress, did not permanently fix the boundaries of the Monument in place, or preclude future presidential modification of the boundaries. And, because the President was acting under the congressional authorization in the Antiquities Act, Plaintiffs can demonstrate no violation of the separation of powers doctrine.

STATUTORY AND FACTUAL BACKGROUND

I. The Antiquities Act

In 1906, Congress passed the Antiquities Act, delegating to the President power to declare landmarks, structures, and objects of historic and scientific interest to be national monuments, and to reserve federal lands for their protection. *See* Act of June 8, 1906, Pub. L. No. 59-209, ch. 3060, 34 Stat. 225 (codified at 54 U.S.C. § 320301). The legislation stemmed from proposals, primarily from archaeological organizations, to protect objects of antiquity on federal lands. *See Utah Ass'n of Ctys. v. Bush* ("*UAC*"), 316 F. Supp. 2d 1172, 1178 (D. Utah 2004). At the turn of the twentieth century, public lands were generally open to the public and available for homestead, mining, oil, gas, and other claims, unless Congress or the Executive Branch had "withdrawn" the land from the public domain and/or "reserved" the land for a particular purpose. As a result, many historic sites on public lands had been looted and destroyed. *See* H.R. Rep. No. 59-2224, at 3 (1906).

For several years, Congress debated proposals to provide withdrawal authority to the President or the Secretary of the Interior to protect historic and other resources. *See UAC*, 316 F. Supp. 2d at 1178. During these debates, some members of Congress expressed concern that such

proposed legislation would permit large areas of land to be withdrawn from entry. For example, Rep. John Stephens of Texas asked, "How much land will be taken off the market in the Western States by the passage of the bill?" The bill's sponsor, Rep. Lacey, responded, "Not very much. The bill provides that it shall be the smallest area [necessary] for the care and maintenance of the objects to be preserved." 40 Cong. Rec. 7888 (1906). *See also* ECF No. 82-2 at US_APP000150 (Mr. Rodey (Del. N.M.): "Well, whatever you agree upon, the only thing I want to prevent is the possibility of a tremendous reservation.") The House Report on the enacted bill also noted that it was intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times." H.R. Rep. No. 59-2224, at 1 (emphases added).

Congress understood that initial reservations of land might be inaccurate or uninformed, and therefore could be temporary or subject to modification, particularly in light of concerns by members of Congress in preventing over-expansive withdrawals. For example, Professor Edgar L. Hewett—acknowledged by Plaintiffs as the chief architect of the Antiquities Act—recognized in testimony to the House's Committee of the Public Lands that it was sometimes appropriate to reduce reservations addressing archeological resources. Responding to concerns about the potential size of such reservations, Professor Hewett noted:

> [T]he largest area that has ever been withdrawn for archaeological purposes is [an] area . . . of 7 ½ townships, in the case of the Pajarito National Park. This, however, can be reduced and has been reduced to 40 sections (a little more than 1 township), every section of which is covered with ruins. The Mesa Verde Park includes some 2 ½ townships, which probably could be reduced to 2 townships.

ECF No. 82-2 at US_APP000152. Later, addressing a question as to whether the proposed bill (a predecessor to the bill that ultimately became the Antiquities Act) would result in an "over-reservation of any sort there on the public domain," Mr. Hewett responded:

> I do not think it would have that effect, . . . if you say positively no more land shall be withdrawn than is necessary for the purposes. In the case of timber reserves, too much has been withdrawn; but the Department has gone to work to lop off and turn back what is not necessary.
>
> In the case of the Pajarito Park Reservation, which was made five years ago by the Department of the Interior, seven and a half townships were withdrawn. There is no reason why five of those townships should not now revert to the public domain. Since that time the reserve has been finally shaped so as to include only forty sections that are covered with ruins and leave the rest outside.

Id. at US_APP0000153.

As enacted, the Antiquities Act authorized the President "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ." 34 Stat. 225, § 2. The statute also authorized the President to reserve only those lands necessary to protect the monument objects, stating that he "may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

In 2014, the Antiquities Act was recodified, and now reads, in relevant part:

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

54 U.S.C. § 320301.

II. Presidential Action under the Antiquities Act.

Theodore Roosevelt, President at the time of the Antiquities Act's passage, used this new authority to proclaim eighteen monuments.[2] His successor, President Taft, proclaimed ten monuments, but also diminished two monuments established by President Roosevelt. *See* NPS Monuments List, *supra* n.2. In 1911, President Taft determined that the Petrified Forest National Monument, "through a careful geological survey of its deposits of mineralized forest remains," reserved "a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirement of the act authorizing the creation of National Monuments." Proc. 1167, 37 Stat. 1716 (Jul. 31, 1911). He reduced the area of the monument by over 40 percent. *Compare id.* (reducing reservation by approximately 25,856 acres); *with* Proc. 697, 34 Stat. 3266 (Dec. 8, 1906) (reserving 60,776.02 acres); NPS Monuments List. President Taft also reduced the Navajo National Monument in Arizona three years after its establishment, finding that, "after careful examination and survey of the prehistoric cliff dwelling pueblo ruins," the original proclamation "reserve[d] a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912). He substantially reduced the monument to three separate tracts—two containing 160 acres each, and one containing forty acres—to protect three ruins. *Id.* at 1734.

Many other Presidents have reduced monuments, finding that the lands to be removed "[we]re not necessary for the proper care and management of the objects of scientific interest

[2] *See* Nat'l Park Serv., Archeology Program, Monuments List ("NPS Monuments List"), at https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Feb. 12, 2020); Nat'l Park Serv., Archeology Program, Frequently Asked Questions, available at: https://www.nps.gov/archeology/sites/antiquities/FAQs.doc (last visited Sept. 26, 2018).

situated on the lands within the said monument." *See, e.g.*, Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940) (reduction of Grand Canyon National Monument by President Franklin Roosevelt); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (reduction of Black Canyon of the Gunnison National Monument by President Eisenhower).

Presidents have also cited other rationales as the basis for monument reduction. For example, President Truman excluded lands from Santa Rosa National Monument because those lands were needed by "the War Department for military purposes . . . ." Proc. 2659, 59 Stat. 877 (Aug. 13, 1945); *see also* Proc. 3089, 69 Stat. c27 (Mar. 31, 1955) (elimination by President Eisenhower of some lands from Glacier Bay National Monument that were "being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes"); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (reduction of Wupatki National Monument by President Franklin Roosevelt, noting that "such lands are needed in the construction and operation of a diversion dam in Little Colorado River to facilitate the irrigation of lands on the Navajo Indian Reservation"); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (reduction by President Franklin Roosevelt of White Sands National Monument to allow for U.S. Highway 70). In some cases, Presidents reduced monument reservations without providing an explanation. For example, Mount Olympus National Monument (now Olympic National Park) was diminished—on three separate occasions by three different presidents—without any reason cited in the proclamations. *See* Proc. 1191, 37 Stat. 1737 (Apr. 17, 1912) (President Taft); Proc. 1293, 39 Stat. 1726 (May 11, 1915) (President Wilson); Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (President Coolidge).[3]

[3] Presidents have also modified monument boundaries after finding that additional lands are required for the protection of objects identified in a proclamation based on new or different

Presidents have even eliminated and added lands within the same proclamation. President Kennedy modified the boundaries of Bandelier National Monument, adding lands but removing other lands "containing limited archaeological values which have been fully researched and are not needed to complete the interpretive story of [the Monument]." Proc. 3539, 77 Stat. 1006 (May 27, 1963). President Eisenhower revised the boundaries of Hovenweep National Monument (established by President Truman) on the basis that certain lands "contain[ing] no objects of historic or scientific interest were erroneously included" in the Monument, while other lands containing valuable ruins were "erroneously omitted from the monument." Proc. 3132, 70 Stat. c26 (Apr. 6, 1956); *see also* Proc. 3138, 70 Stat. c31 (Jun. 7, 1956) (President Eisenhower, removing and adding lands to Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (President Eisenhower, removing and adding lands to Colorado National Monument); Proc. 3360, 74 Stat. c79 (Jul. 22, 1960) (President Eisenhower, modifying Arches National Monument to exclude lands "which have no known scenic or scientific value," while adding other lands found necessary for the proper care and management of the objects on those lands and the original monument). All told, Presidents have eliminated lands from monuments designated by prior Presidents monuments on at least eighteen occasions.[4]

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information. For example, in 1909, President Taft added lands to the Natural Bridges National Monument, noting that "at the time this monument was created nothing was known of the location and character of the prehistoric ruins in the vicinity of the bridges, nor of the location of the bridges and the prehistoric cave springs…." Proc. 881, 36 Stat. 2501, 2502 (Sept. 25, 1909). Recently, President Obama expanded Papahānaumokuākea Marine National Monument based on his finding that additional area was required to protect the resources identified in the original monument. Proc. 9478, 81 Fed. Reg. 60227 (Aug. 26, 2016).

[4] *See* Proc. 1167, 37 Stat. 1716 (July 31, 1911) (Petrified Forest National Monument); Proc.1186, 37 Stat. 1733 (Mar. 14, 1912) (Navajo National Monument); Proc. 1191, 37 Stat. 1737 (April 17, 1912) (Mount Olympus National Monument), Proc. 1293, 39 Stat. 1726 (May 11, 1915) (Mount Olympus National Monument), Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (Mount Olympus

III. Grand Staircase-Escalante National Monument

The Grand Staircase-Escalante National Monument (the "Monument") was established and its boundaries initially designated by President Clinton in 1996. *See* Proc. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (the "1996 Proclamation"). In his discretion, the President reserved approximately 1.7 million acres of federal land managed by the BLM for the Monument, and withdrew those lands from entry, location, selection, sale, leasing, or other disposition under the public land laws, subject to all valid existing rights. *See id.* at 50,225.

The 1996 Proclamation caused an instant controversy; there was significant local and national opposition to the creation, and size, of the Monument. *See UAC*, 316 F. Supp. 2d at 1182-83; *see also Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094, 1096 (10th Cir. 2006). This led to immediate litigation, with two suits consolidated in the District of Utah. *See generally UAC*, 316 F. Supp. 2d 1172. The district court ultimately rejected these challenges to the Monument's designation, concluding that, given the broad grant of discretion to the President in the Antiquities Act, the Proclamation was subject only to narrow review for compliance with the requirements of the Act. *See id.* at 1183.

On December 4, 2017, President Trump issued Proclamation 9682. 82 Fed. Reg. at

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National Monument); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (White Sands National Monument); Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940) (Grand Canyon National Monument); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (Wupatki National Monument); Proc. 2499, 55 Stat. 1660 (Jul. 18, 1941) (Craters of the Moon National Monument); 59 Stat. 877 (Aug. 13, 1945)Proc. 2659, 59 Stat. 877 (Aug. 13, 1945) (Santa Rosa National Monument); Proc. 3089, 69 Stat. c27 (Mar.. 31, 1955) (Glacier Bay National Monument); Proc. 3132, 70 Stat. c26 (Apr. 6, 1956) (Hovenweep National Monument); Proc. 3138, 70 Stat. c31 (June 7, 1956) (Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (Colorado National Monument); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (Black Canyon of the Gunnison National Monument); Proc. 3360, 74 Stat. c79 (July 22, 1960) (Arches National Monument); Proc. 3486, 76 Stat. 1495 (Aug. 14, 1962) (Natural Bridges National Monument); Proc. 3539, 77 Stat. 1006 (May 27, 1963) (Bandelier National Monument).

58,089. Pursuant to the authority delegated to him by the Antiquities Act, the President declared "that the boundary of the . . . Monument is hereby modified and reduced to those lands and interests in land owned or controlled by the Federal Government" within three "modified monument areas," which would be known as the Grand Staircase, Kaiparowits, and Escalante Canyons units. *Id.* at 58,093. The President determined that the modified boundaries—which still encompass more than 1 million acres—comprise "the smallest area compatible with the proper care and management of the objects to be protected" by the Monument designation. *Id.*; *see also* 54 U.S.C. § 320301(b).

While the Proclamation reduced the number of acres that are within the Monument, the lands now removed from the Monument remain in federal ownership, subject to management and protection under numerous federal statutes. *See* 82 Fed. Reg. at 58,090. These statutes include, *inter alia*, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1787; the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§ 470aa-470mm; the National Historic Preservation Act, 54 U.S.C. §§ 300101-320303; the Federal Cave Resources Protection Act of 1988, 16 U.S.C. §§ 4301-4310; and the Paleontological Resources Preservation Act ("PRPA"), 16 U.S.C. §§ 470aaa-470aaa-11. Certain of these statutes (such as the PRPA and ARPA) make violations punishable by criminal penalties. *See* 16 U.S.C. §§ 470ee; 470aaa-5.

In addition, approximately 221,436 acres of the lands that were formerly within the Monument and are now excluded continue to be managed as Wilderness Study Areas ("WSAs"), which under FLPMA must be managed "so as not to impair the suitability of such areas for preservation as wilderness . . . ." 43 U.S.C. § 1782(c); Declaration of Ed. Roberson ("Roberson Decl."), ECF No. 43-2 ¶¶ 6, 10.

IV. Plaintiffs' Claims

Plaintiffs brought their respective suits challenging the Proclamation shortly after it issued. In their amended complaints, ECF Nos. 119 ("TWS Am. Compl.") & 120 ("GSEP Am. Compl."), they assert the following claims against the President and the Secretary of the Interior (and in the TWS Complaint, the Deputy Director of the BLM):

i. the Proclamation exceeded the scope of the President's delegated authority under the Antiquities Act and therefore was *ultra vires* and unlawful (TWS Count I; GSEP Count II);

ii. the Proclamation is an unconstitutional exercise of legislative power and violates the Constitution's separation of powers (TWS Count II; GSEP Count I);

iii. the Proclamation is unlawful because it violates the Omnibus Public Land Management Act of 2009, the Utah Schools and Lands Exchange Act of 1998, and the Automobile Natural Heritage Area Act by revoking monument status from lands formerly within the Monument (TWS Count III), or alternatively, because these statutes demonstrate Congress' assertion of its plenary authority over the Monument boundaries (GSEP Count III);

iv. the Proclamation violates the Antiquities Act and was an abuse of discretion because it was based on improper considerations (TWS Count IV; GSEP Count IV); and

v. the implementation of the Proclamation (or non-implementation of the prior Proclamation) is therefore unlawful and can be enjoined under the APA (TWS Count V; GSEP Count V).

Based on these allegations, Plaintiffs seek a declaratory judgment that the Proclamation is invalid and injunctive relief (including, in the case of the GSEP Plaintiffs, directly against the President). *See* TWS Am. Compl. at 58; GSEP Am. Compl. at 72-73.

After the Court denied Federal Defendants' motion to dismiss Plaintiffs' complaints without prejudice, it ordered Plaintiffs to file amended complaints, and the parties to pursue an expedited, coordinated schedule for further merits briefing. The parties agreed to brief motions for partial summary judgment, addressing only Plaintiffs' first three claims (i.e., those included in numerals i, ii, and iii above), which address the President's authority for Proclamation 9682

(hereinafter Plaintiffs' "Authority Claims"). ECF No. 129.

STANDARD OF REVIEW

Summary judgment is appropriate when a party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)).

ARGUMENT

I. Plaintiffs Lack Standing to bring Claims against the President, and those Claims should be Dismissed, because Relief is available against Subordinate officials.

Plaintiffs bring their claims against agency officials and the President himself. *See* TWS Am. Compl. ¶ 56; GSEP Am. Compl. ¶ 52. But Plaintiffs lack standing to seek relief against the President, because they have not shown that entry of their requested declaratory and injunctive relief against him would redress their injuries, or that the Court is likely to award such relief against the countervailing separation of powers concerns when there are subordinate officials also named as defendants. *See Swan v. Clinton*, 100 F.3d 973, 976-77 & n.1 (D.C. Cir. 1996) (noting that an injunction or declaratory judgment against the President would present separation of powers concerns and was not warranted where relief was available against agency defendant); *see also, e.g.*, *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief" (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) and *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment)).

Here, both sets of Plaintiffs have acknowledged that their asserted injuries can be redressed by a declaratory judgment and potential remedies directed to the agency defendants. TWS Mem. in Supp. of Mot. for Partial Summ. J. 21, ECF No. 132-1 ("TWS Br."); GSEP Mem.

in Opp'n to Fed. Defs.' Mot. to Dismiss 22, ECF No. 63. Thus, the proper course of action is for the Court to dismiss the President as a defendant and dismiss Plaintiffs' Authority Claims to the extent they name the President as a defendant under Rule 12(b)(1).[5]

II. Federal Defendants are Entitled to Summary Judgment on Plaintiffs' Ultra Vires Claims Because the President Has Authority to Modify the Monument Boundaries

The fundamental question at issue in the parties' cross-motions for partial summary judgment is whether presidents have the authority under the Antiquities Act to modify the boundaries of national monuments. The answer is yes. The President possesses broad power under the Antiquities Act to modify reservations of land for national monuments, and in particular, to ensure compliance with the statutory directive to confine the reservation to the "smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). The President expressly relied upon and exercised this authority. Moreover, the fact that Congress enacted various statutes that touch upon the Monument does not eliminate this authority. Defendants are therefore entitled to judgment as a matter of law on TWS Plaintiffs' Count I and the GSEP Plaintiffs' Count II.

A. The President's interpretation of his authority is entitled to deference

Where the President is exercising authority delegated from Congress, judicial review of presidential decisionmaking is extremely limited in scope. *See Dalton v. Specter*, 511 U.S. 462,

[5] For purposes of this motion, Federal Defendants do not contest the associational standing proffer for Plaintiffs GSEP and Society of Vertebrate Paleontologists in *GSEP v. Trump* or the associational standing proffer for Plaintiffs TWS and Southern Utah Wilderness Alliance in *TWS v. Trump*.[5] It is therefore unnecessary for the Court to address whether the GSEP Plaintiffs have also demonstrated organizational standing. Federal Defendants maintain that they have not, for the reasons stated at pp. 11-13 of Federal Defendants' Reply in Support of their Motion to Dismiss, ECF No. 81,[5] and because even the GSEP Plaintiffs' new allegations fail to establish the requisite causal link between their injuries and the Proclamation. *See, e.g.*, GSEP Br. 34 (admitting that GSEP "do[es] not know . . . why BLM has ceased funding" projects). Federal Defendants reserve their right to later challenge jurisdiction to the extent evidence arises demonstrating that Plaintiffs lack standing.

476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."). This longstanding rule originates in concerns about separation of powers and the potential involvement of the judiciary in "considerations which are beyond the reach of judicial power." *Dakota Cent. Tel. Co. v. S. Dakota*, 250 U.S. 163, 184 (1919). Implicit in this limited review is the principle that courts should afford deference to the President's determination of the scope of the authority delegated to him by Congress. The Supreme Court has made clear that courts are to defer to an executive-branch agency's "interpretation of a statutory ambiguity that concerns the scope of [its] statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013) (rejecting argument that an "ultra vires" challenge was not subject to deference requirement). *See also Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) (recognizing "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (quoting *Arlington*, 569 U.S. at 301).

There is no reason why similar – or even greater – deference should not be afforded the President in addressing statutory delegations of authority to him. *See* Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 590 (2005) (arguing that "the reasons for according *Chevron* deference to the president are even stronger than those for applying it to agency action").[6] Indeed, in *AFL-CIO v. Kahn*, the D.C. Circuit did just that, deferring to the President's

[6]An amicus brief filed in *Western Watersheds Project v. BLM*, No. 08-cv-1472, 2009 WL 5045735 (D. Ariz.) cites favorably to this article, and argues that presidential interpretations of statutes should be afforded something akin to *Chevron* deference:

While the Supreme Court has not yet definitively resolved the level of deference

long-standing interpretation of his authority under a statute and noting that the "'construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" 618 F.2d at 790 (citations omitted). Consistent with this principle, the D.C. Circuit has regularly afforded deference to agencies interpreting statutory authority that was directed to the President. *See Consarc Corp. v. U.S. Treasury Dep't,* 71 F.3d 909, 914 (D.C. Cir. 1995) (deferring to agency, authorized to implement relevant "Presidential authorities" under 50 U.S.C. § 1702(a), in its interpretation of that statute); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991) (deferring to EPA's interpretation of statute that vested initial authority in "the President," who had in turn delegated his authority to EPA).

The Court should therefore give deference to the President's determination that the Antiquities Act provides him with authority to modify the boundaries of the Monument to ensure that the reservation of land is confined to the smallest area compatible with the proper care and management of the monument objects. *See* 82 Fed. Reg. at 58,093. But even if deference were unavailable, the President's determination did not exceed his authority. Contrary to Plaintiffs' allegations, the text of the Antiquities Act does not foreclose the President's assertion of this modification authority—it reinforces it. *See Safari Club*, 878 F.3d at 326. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the

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> due a President's view of the scope of authority delegated to him by statute, lower courts have almost *uniformly granted a substantial degree of deference*. *See* Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 563-568 (2005) (citing cases). This has been the case in Antiquities Act litigation. *See Mountain States Legal Foundation*, 306 F. 3d 1132; *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003). One commentator has argued persuasively that something akin to the so-called Chevron deference accorded agency interpretations of their statutory authority should be accorded to presidential interpretations as well. Stack, at 585-601 . . .

Id. (emphasis added). This brief was filed on behalf of some of the same Law Professors and Practitioners who filed an amicus brief in this case. Compare *Id.* Ex. 1 and ECF No. 98.

President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."). Congressional authorization is also corroborated by the fact that Presidents have repeatedly exercised the authority to reduce national monuments and Congress has not curtailed that conduct in 110 years, despite a clear opportunity to do so in the enactment of FLPMA in 1976. This Court should not disrupt the balance that has been struck between these co-equal branches.

B. The text, purpose, and history of the Antiquities Act demonstrate that it authorizes the President to modify monument boundaries.

1. Presidential modification authority is consistent with the text and context of the Act.

Presidential authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585; *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)). Here, the Antiquities Act delegates "broad power" to the President to designate national monuments and reserve lands for those monuments. *See Mountain States Legal Found. v. Bush* ("*Mountain States*"), 306 F.3d 1132, 1135 (D.C. Cir. 2002) (citations omitted). By its terms, the statute generally grants the President substantial flexibility, expressly leaving the declaration of a monument to the President's "discretion." 54 U.S.C. § 320301(a). Similarly, the President's decision to reserve lands for a monument is entirely discretionary. *See id.* § 320301(b) ("The President *may* reserve parcels of land . . . ." (emphasis added)).

However, the Antiquities Act provides an express directive to the President about the size of the reservations of land. Congress specifically instructed the President to ensure that "the limits of [such reservation] in *all cases* shall *be confined* to the smallest area compatible with the proper care and management of the objects to be protected." 34 Stat. 225, § 2 (1906) (emphasis added). In contrast to the discretionary language used in the rest of the statute, Congress used

strong and mandatory terms—"shall be confined"—to limit the area of lands reserved for a monument. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Dictionaries contemporaneous with the passage of the Antiquities Act confirm that "shall" indicated a firm obligation, defining the term as "[t]o be obliged; must." *See* Webster's Int'l Dictionary of the English Language 1322 (W.T. Harris ed. 1907), available at https://catalog.hathitrust.org/Record/100598138. Congress also chose the word "confine," which indicates an ongoing action or constraint. *See id.* at 300 (defining "confine" as "[t]o restrain within limits" and "to keep close"). In short, Congress departed from its use of discretionary language in other parts of the Antiquities Act to make clear that Presidents are to ensure that monument reservations are and remain "confined" to the smallest area the President deems to be consistent with protection of the monument objects. *See Sandifer v. U.S. Steel Corp*., 571 U.S. 220, 227 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks and citation omitted)).

The importance of confinement is confirmed by the Act's legislative history, where the limits on reservations were consistently emphasized. *See* H. R. Rep. No. 59-2224, at 1 (Antiquities Act intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times" (emphases added)). Indeed, a colloquy between the Act's sponsor, Representative John Lacey, and another representative, shows Congress' concern in ensuring that monument reservations would not be not unnecessarily expansive:

> Mr. STEPHENS of Texas. Will that take this land off the market, or can they still be settled on as part of the public domain?

> Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.
> Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?
> Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.
> Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?
> Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.

40 Cong. Rec. 7888 (1906). Were Congress not so intent on ensuring that monument reservations remained limited, Congress could have simply directed the President to "reserve" land in "*an* area compatible" with protection of monuments; its express instruction to "*confine*" the reservation to "*the*" area that is the "*smallest*" compatible with protection must be given significant weight.

It would be nonsensical to interpret this compulsory instruction from Congress to "confine" monument reservations as applying only to the initial reservation, and not encompassing the authority to modify monument reservation boundaries when the President subsequently finds that "the smallest area" compatible with protection is smaller than the area presently reserved. The President cannot fully comply with Congress' instruction to ensure that monument reservations remain "confined" to the smallest area without the power to revisit prior reservations. It is a well-settled principle that government entities have broad authority to reconsider decisions and correct errors. *See, e.g., Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("The prohibition against doing something *not* authorized by statute is altogether different from the power to reconsider something that is authorized by statute . . . [because t]he power to reconsider is inherent in the

power to decide") (citing *Trujillo v. Gen. Elec. Co*., 621 F.2d 1084, 1086 (10th Cir.1980)); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (same). A president is free to revoke prior presidents' executive orders, and take other actions—including reversals of prior decisions—necessary to fulfill his constitutional duty to "take Care that the Laws be faithfully executed." *See* U.S. Const. art II, § 3; Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 7 (2014) ("The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor."). In light of the Antiquities Act's text, there is no reason to think that a President lacks similar authority to revise the boundaries of a predecessor's national monument designation to ensure compliance with the confinement requirement.

2. Plaintiffs' textual counterarguments are without merit.

Plaintiffs' textual arguments cannot be accepted because they ignore the importance of the Act's confinement requirement. Plaintiffs argue that the President's authority to reserve land is a one-way ratchet—that is, a President has authority to reserve lands (and later, reserve additional lands), but lacks authority to reduce reservations, even if the President determines the reservations are too expansive and *not* "confined to the smallest area" necessary for protection of monument objects . Plaintiffs purport to find this one-way mandate in the terms "declare" and "reserve." *See, e.g.*, TWS Br. 24; Mem. in Supp. of Pls.' Mot. for Partial Summ. J. 34, ECF No. 133-1 ("GSEP Br."). But courts must "follow the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (internal citation omitted). As noted, Congress included the "confinement" requirement based on concerns about unnecessarily expansive reservations, and that requirement defines the contours of the authority Congress intended to delegate. Given this context, it would be inconsistent to find that Congress' use of the terms

"declare" and "reserve" meant to imply a one-way-ratchet restriction that forecloses further confinement of monument boundaries at the President's discretion. The term "declare" simply authorizes the President "to make known by language" his designation of a monument; it does not constrain his authority to modify the boundaries of the area reserved for that monument to comply with the statutory command. *See* Webster's Int'l Dictionary (1907), at 377. The President's authority to "reserve" lands is expressly constrained by the "shall be confined to the smallest area compatible" requirement.

Plaintiffs further argue that the Act cannot be read as sustaining an "opposite" power to that of "declaring" and "reserving." TWS Br. 25; GSEP Br. 34. But the President did not invoke an "opposite" power in Proclamation 9682—rather, he invoked his authority and mandate to ensure that lands reserved for a monument are "confined to the smallest area compatible with the proper care and management" of the protected objects. 82 Fed. Reg. at 58,093. The cases cited by Plaintiffs are inapposite because they involved statutory directives that are not analogous to those in the Antiquities Act. For instance, in *Cochnower v. United States*, 248 U.S. 405 (1919), the Court held that a statute authorizing the Secretary of the Treasury "to increase and fix the compensation" of customs inspectors did not include the authority to "decrease" the compensation. *Id.* at 406-08. *Cochnower* provides no guidance here, because in this case the President invoked a constituent authority—to ensure reservations are "confined to the smallest area" – not "opposite" authority under the statute. *North Dakota v. United States*, 460 U.S. 300 (1983) is also inapposite. The question in that case was whether a state could withdraw its consent to the United States' acquisition of wetland habitat—where consent was a prerequisite to the acquisition under the applicable statute. The Court held that the state could not withdraw consent because there was no suggestion to that effect in the statute's text, the state's position

was not supported by the statute's legislative history or the government's pre-enactment practice, and it would "severely hamper[]" the land acquisition program authorized by the statute. *Id.* at 314. None of those circumstances exists here.[7] The statute expressly references confinement of presidential reservations, there is an extensive presidential practice of modifying reservations for that purpose, and those modifications implement rather than thwart congressional intent.

Plaintiffs' reliance on *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013 (D. Alaska 2019), is similarly misplaced. *See* GSEP Br. 36-37; TWS Br. 26-27. The issue in *LCV* was whether Section 12(a) of the Outer Continental Shelf Leasing Act ("OCSLA") allows a President to vacate a prior withdrawal of lands *in its entirety*. *Id.* Section 12(a) provides that "[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." 43 U.S.C. § 1341(a). In *LCV*, as here, the plaintiffs argued that the lack of express statutory authorization to revoke a prior withdrawal conclusively established that any revocation was *ultra vires*. But in *LCV* the court did not accept that plain-text argument. The court found the statute ambiguous on this issue because of the phrase "from time to time." 363 F. Supp. 3d at 1024. The Court then proceeded to analyze the structure and history of OCSLA, and based on *that* analysis, concluded that OCSLA did not authorize revocation of a prior withdrawal. *Id.* at 1028.

The *LCV* court's determination that OCSLA was ambiguous does not support the

[7] The other cases cited by Plaintiffs are also inapposite. *See United States v. Seatrain Lines*, 329 U.S. 424, 432 (1947) (addressing whether certificate issued by Interstate Commerce Commission constituted a non-revocable "order," but focusing on question of whether a "certificate" constituted an "order" under the relevant statute); *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (holding that Attorney General's authority to naturalize citizen did not also include authority to denaturalize citizens in light of overall statutory scheme). *Gorbach* is discussed in greater detail below at p. 22.

Plaintiffs' argument that the plain text of the Antiquities Act unambiguously bars presidential modifications of monument boundaries. Furthermore, the decision is of limited relevance to this case because of the differences in the presidential actions and the statutes at issue. The *LCV* case concerns presidential authority to revoke a prior withdrawal in full, not the authority to modify the extent of a reservation pursuant to an express statutory requirement to confine the reservation to "the smallest area" compatible with protection. That the *LCV* litigation and this litigation both concern presidential actions about land management with which plaintiffs have a policy disagreement does not mean that the legal questions they present are identical, or even analogous.

Plaintiffs also mischaracterize Federal Defendants' statutory interpretation arguments. First, recognizing presidential authority to modify Monument boundaries does not require the Court to supply "absent provisions" to the Antiquities Act, as Plaintiffs suggest. *See* TWS Br. 24 (quoting *Rotkiske v. Klemm,* 140 S. Ct. 355, 360 (2019)).[8] To the contrary, the Court need only apply the express provisions in the Act that authorize, and in fact require, the President to ensure that the limits of Monument reservations are "confined to the smallest area compatible with the proper care and management to be protected." 54 U.S.C. § 320301(b). Nor, contrary to Plaintiffs' contentions, would doing so amount to finding an "implied" authorization. Plaintiffs speculate that the confinement requirement was meant only to limit the President's original reservation authority—not to authorize later modifications of national monuments. TWS Br. 28. But this speculation is contradicted by the structure of the statute. The text imposing the

[8] The facts in *Klemm* provide Plaintiffs with no help, and indeed, form a useful contrast. There, a party argued that a statutory limitations period began upon the *discovery* of a violation, in contradiction to the text of the statute stating that the limitations period began on the "the date on which the violation *occurs*." 140 S. Ct. at 360 (quoting 15 U.S.C. § 1692(d) (emphasis added)). Defendants are not asking the Court to rewrite the plain text of the statute, only to apply it.

confinement obligation was originally in the same *sentence* as the declaration and reservation provision, and the later modification to the placement of this provision was not intended to modify the substance of the text. *See id*. at 22 n.8. The preservation purpose of the statute cannot be invoked as a basis to read out the plain text that calls for monument reservations to be confined "in all cases." Congress's intent was to protect monument objects while ensuring that only those lands necessary to do so are included in the reservation.[9]

Similarly, Plaintiffs argue that Defendants rely on a "free-floating, inherent power to undo prior monument designations," arguing that "[t]here is no general principle that what one can do, one can undo.'" TWS Br. 28 (quoting *Gorbach*, 219 F.3d at 1095). But Plaintiffs misconstrue Federal Defendants' position. As discussed supra at pp 15-18, Defendants rely on the text and context of the Act—which are corroborated by—but do not depend upon, the general principle that reconsideration "is inherent in the power to decide." *See, e.g., Albertson*, 182 F.2d at 399; *Antwerp*, 560 F. Supp. 2d at 23. Plaintiffs' citation to *Gorbach* is therefore inapposite. In that case, the court determined that Congress's delegation of authority to the Attorney General to naturalize citizens, did not, by that same delegation, also delegate the authority to "denaturalize citizens." *Id.* at 1093. The court did not reject outright the Attorney General's argument that such denaturalization authority could have been implied, *id.* at 1095; rather, it determined that, under the relevant circumstances, construing the delegation to include that authority would conflict with an "established and carefully constructed scheme: the Attorney General naturalizes, the district courts denaturalize, and the Attorney General can cancel certificates but the

[9] As a result, the facts here are therefore completely inapposite to those in Plaintiffs' cited case, *Nestor v. Hershey*, 425 F.2d 504, 516 (D.C. Cir. 1969) (cited at TWS Br. 28), where the court made the common-sense determination that a statute's sentence clarifying that "[n]othing in this paragraph shall be deemed to preclude the President from" undertaking actions already granted under a prior subsection was not itself "a grant of authority."

cancellations affect only the certificates and not citizenship itself." *Id.* at 1094. This stands in contrast to the Antiquities Act, which does not establish a scheme of distributed authority between the executive branch and the courts.

Finally, it is beyond cavil that presidential executive orders are routinely revised or revoked by subsequent presidents. *See supra* at p. 18. Plaintiffs present no valid reason why national monument proclamations should be given a different status, one effectively equivalent to legislation. To the contrary, such proclamations are properly the subject of revision and modification because Congress has instructed the President to ensure that the reserved lands are "confined to the smallest area" necessary to protect the objects. The Antiquities Act grants the President this authority.

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

Their textual arguments failing, Plaintiffs contrast the Antiquities Act with other statutes that more expressly reference modifications of reservations, implying that Congress' failure to do so in the Antiquities Act was intentional. TWS Br. 26; GSEP Br. 35-36. But close inspection of these statutes reveals that their argument is misplaced.

Plaintiffs rely heavily on the Forest Service Organic Administration Act of 1897,[10] which addressed presidential authority to modify or revoke forest reserves created under a prior statute, the Forest Reserve Act of 1891. TWS Br. 26; GSEP Br. 35. While Plaintiffs claim that Congress believed the 1897 statute was necessary because the 1891 statute did not grant the

[10] This statute, formally entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," has been variously referred to in the Plaintiffs' briefing in this case and *Hopi Tribe v. Trump* as the Sundry Civil Appropriations Act of 1897, the Forest Service Organic Act, and the Forest Service Organic Administration Act.

President this authority, the legislative history shows that Congress' rationale was more complex. During debates leading up to its enactment, several members of Congress thought the President already had the authority. *See* 29 Cong. Rec. 2677 (Mar. 3, 1897) (Rep. Pickler: "The President has had that power always."); 30 Cong. Rec. 917 (May 6, 1897) (Sen. Clark, noting "that it was expressly decided in the Department of the Interior . . . that the Executive always had the exact right . . . to modify an Executive proclamation"); 29 Cong. Rec. 921 (May 6, 1897) (Sens. Hawley and Pettigrew, suggesting that the Executive already has the right to modify reservations).[11] The 1897 statute therefore expressly adopted a "belt and suspenders" approach. Indeed, it provided "*to remove any doubt which may exist pertaining to the authority of the President* thereon to, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations." Act of June 4, 1897, 30 Stat. 11, 34 (emphasis added).[12]

Plaintiffs note that Representative Lacey (who later was a sponsor of the Antiquities Act), did not agree that the President possessed implied modification authority for forest reserves. TWS Br. 26. But this fact is by no means dispositive. *See Mass. Lobstermen's Assn. v. Ross*, 349 F Supp. 3d 48, 62 (D.D.C. 2018), *aff'd* 945 F. 3d 535 (D.C. Cir. 2019) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history, . . . particularly where the record lacks evidence of an agreement among legislators on the subject." (internal quotations omitted)). Moreover, he also unequivocally maintained that the President

[11]These and other documents are contained in the appendix filed by Federal Defendants in support of their motion to dismiss, at ECF No. 82-2.

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

should be able to correct overbroad reservations of land. 29 Cong. Rec. 2677 (Mar. 2, 1897); *see also* 30 Cong. Rec. 911 (May 6, 1897) (Rep. Gray admitting "it should have been in the power of the President to modify, repeal, or abrogate the orders already made"). It defies logic that, after the sponsor of the Antiquities Act and a majority of Congress agreed that the President either already possessed, or should possess, the power to correct overbroad reservations of land, Congress would then enact a statute that did not include this authority.

The other statutes relied upon by Plaintiffs are inapposite for similar reasons. These statutes did not contain any language comparable to the limiting conditions on the scope of reservations in the Antiquities Act. For example, the Pickett Act authorized President to "temporarily withdraw from settlement, location, sale, or entry *any* of the public lands of the United States," with no constraints on the scope of those withdrawals. Pickett Act of 1910, Ch. 421, 36 Stat. 847, 847 (emphasis added)). Moreover, the Pickett Act, contrary to Plaintiffs' contention, does not contain language expressly granting revocation authority to the President—rather it assumes that authority exists (consistent with the Organic Act). *See* 36 Stat. at 847 (providing that "such withdrawals or reservations shall remain in force until revoked by [the President] *or by an act of Congress*") (emphasis added). The clause referencing revocation authority was not necessary to reserve such authority to Congress, but the Act mentioned it regardless, indicating that the President's revocation authority, mentioned in the same clause, was likewise undisputed.

The Reclamation Act of 1902, relied upon by GSEP, is also distinguishable. *See* GSEP Br. 35-36. That statute affirmatively *required* the Secretary of the Interior to withdraw lands from entry when investigating potential reclamation projects. Pub. L. No. 57-161, § 2, 32 Stat. 388, 388. However, implicitly recognizing that Interior would determine that some projects were

not feasible, Congress also required Interior to return any withdrawn lands to the public domain upon such a determination—and made this requirement to do so manifest in light of the fact that the Secretary had no discretion to forego the withdrawals initially. *See id.* The Antiquities Act, by comparison, did not need to emphasize modification authority because the initial power to declare and reserve land for monuments was discretionary, not compulsory.[13]

C. Plaintiffs' arguments regarding the purpose and history of the Antiquities Act have no merit.

Plaintiffs argue that the legislative history and "essential purpose" of the Antiquities Act are incompatible with presidential authority to modify monument boundaries. *See, e.g.*, TWS Br. 30. But modification of a monument to ensure that the reservation meets Congress' instruction that "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," is in no way contrary to the "essential purpose" of the Antiquities Act. *See* 54 U.S.C. § 320301(b).

In fact, as discussed above, it is consistent with Congress' overall intent. In the years leading up to the passage of the Antiquities Act, Congress was equally concerned with the Executive Branch making unnecessarily large reservations of public land. *See, e.g.*, 29 Cong. Rec. 2678 (Mar. 2, 1897) (Rep. Mondell objecting that "they have reserved these vast areas" as forest reserves within Montana); *id*. (Rep. Gamble objecting to "immense area" of forest reserves in South Dakota); 29 Cong. Rec. 909-10 (May 6, 1897) (Sen. Wilson expressing concern about large reservations in Washington). Thus, when debating the Antiquities Act, numerous members

[13] The four statutes cited by GSEP Plaintiffs in a footnote are distinguishable on various grounds. *See* GSEP Br. 35 n.71. One, like the Reclamation Act, *required* the Secretary to withdraw lands. *See* 32 Stat. 388, 388. Another dealt with identifying administrative "land districts," not withdrawals or reservations. 30 Stat. 409, 414. Another authorized the President to repeal a withdrawal that the statute itself directly created. *See* 25 Stat. 505, 527 (1888). And finally, one authorized only temporary withdrawals. 36 Stat. 847, 847.

of Congress expressed their concern about the potential for the President to "lock[] up" large swaths of land using this authority, and were repeatedly assured that the bill would not permit this.[14] Thus, while Congress intended to preserve objects of historic significance, it firmly intended to ensure unnecessarily large amounts of land for monuments were not reserved. The President's issuance of Proclamation 9682 falls squarely within the purpose of the statute.

Plaintiffs also argue at length that Congress intended the Act to provide permanent—not temporary—protections. Even assuming that is the case, however, there is no question that the Act also intended (indeed, it directed) the reservations to be "confined to the smallest area compatible with the proper care and management of the objects to be protected." Congress clearly did not intend permanent "protection" of land that was unnecessary for that purpose. In other words, the precise delineation of a monument reservation need not be permanent to be consistent with that general intent. To the contrary, Congress' express instruction to limit the size of monument reservations is consistent with the idea that Monument reservations can be modified.

Finally, the GSEP Plaintiffs argue that "Presidential power to later modify monuments was explicitly considered and rejected by Congress." GSEP Br. 38. The GSEP Plaintiffs rely on proposed bill S. 5603, which they claim included both "creation authority and elimination

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

authority." *Id.* But this misconstrues the proposed bill. In that bill, Congress would have authorized the Secretary of the Interior to make "temporary withdrawals of the land on which such historic or prehistoric ruins, monuments, archaeological objects and other antiquities are located, including only the land necessary for the preservation of such ruins and antiquities," and to "make permanent withdrawals of tracts of land on which ruins and antiquities of special importance, *not exceeding six hundred and forty acres in any one place."* S. 5603, 58th Cong. (1905) (emphasis added). That Congress previously contemplated authorizing "temporary" withdrawals—as well as very restricted permanent withdrawals—does not indicate that Congress considered and rejected modification authority.

D. Congressional acquiescence to the longstanding and extensive practice of presidential modification of monument boundaries should be afforded significant weight.

While the text, purpose, and history of the confinement provision amply demonstrate that modification of monuments is within the scope of the President's delegated authority, that conclusion is cemented by decades of presidential practice in modifying monument designations and congressional acquiescence to that practice despite numerous opportunities to curtail it.

1. Congress has never rejected modification authority under the Antiquities Act

When the elected branches of government are in accord on the meaning of a statute, courts are properly reluctant to intervene. "[T]he longstanding 'practice of the government' can inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819), and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Thus, courts afford a presumption of congressional consent to presidential action that is "known to and acquiesced in by Congress" over an extended period of time. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Dames & Moore*,

453 U.S. at 686 (same). *See also Medellin*, 552 U.S. at 524 ("Presidential authority can derive support from 'congressional inertia, indifference or quiescence.'" (quoting *Youngstown*, 343 U.S. at 637) (Jackson, J., concurring)); *Al-Bihani v. Obama*, 619 F.3d 1, 26 (D.C. Cir. 2010) (en banc) ("courts presume that Congress authorized the President, except to the extent otherwise prohibited by the Constitution or statutes, to take at least those actions that U.S. Presidents historically have taken . . . ." (Kavanaugh, J., concurring)).

Presidents have modified monument boundaries to exclude lands at least eighteen times, with the first modification taking place only five years after the passage of the Antiquities Act. *See supra* at 7-8. That modification was based, like Proclamation 9682, on the President's finding that the original reservation covered "a much larger area of land than is necessary to protect the objects for which the Monument was created." Proc. 1167, 37 Stat. 1716 (July 31, 1911). Certainly, eighteen modifications over many decades qualifies as the "longstanding 'practice of the government,'" which can "inform [a court's] determination of 'what the law is.'" *Noel Canning*, 573 U.S. at 525 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 401 (1819)); *Al-Bihani,* 619 F.3d at 26.

Plaintiffs argue, based on a few instances of contrary statements, that "[e]xecutive practice in this area has hardly been consistent." GSEP Br. 41. But the Supreme Court has emphasized that it has "treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute." *Noel Canning*, 1573 U.S. at 525. Further, those instances where the Court has not found a "particularly longstanding practice" are quite distinct. For instance, in *Medellin*, the Court found congressional acquiescence not applicable when the action at issue was described by the "United States itself . . . as 'unprecedented action,'" and was unable to identify a single, parallel instance. 552 U.S. at 532. That stands in

marked contrast to the situation here, where the Federal Defendants can point to eighteen prior examples over many decades.

Moreover, the handful of data points identified by Plaintiffs—suggesting that in the mid-1920s, there was some question within the *Department of the Interior* about the scope of the President's authority—do not undermine the long history of *Presidents* actually exercising their modification authority. In 1924, the Interior Solicitor opined, in cursory fashion, that the President lacked statutory authority to restore lands from two specific monuments "to entry" (e.g., to claims by homesteaders, miners, and others). M. 12501 and M. 12529 at 1 (June 3, 1924). The 1925 request by *Interior* for legislation clarifying *presidential* authority to restore monument reservations to the public domain resulted from this cursory, unsupported opinion. *See* TWS Br. 34 (citing H.R. Rep. No. 68-1119 at 2).

But other federal officials concluded the opposite. Much closer to the Act's passage, the Interior Solicitor opined in 1915 that the President possessed authority to modify the boundaries of the Mount Olympus National Monument. Solicitor's Opinion of Apr. 20, 1915. And in 1935, the Solicitor reviewed all the prior opinions, and prepared a detailed legal analysis (unlike the 1924 Opinion) concluding that the three proclamations reducing Mount Olympus National Monument were valid. Solicitor's Opinion, M. 27657 (Jan. 30, 1935). He opined that, like the withdrawal authority upheld by the Supreme Court in *Midwest Oil Co.*, 236 U.S. at 459, the "history of Executive Order national monuments and analogous Executive order Indian reservations shows a similar long continued exercise of the power to reduce the area of these reservations by the President with the acquiescence of Congress." M. 27657 at 4. He noted that more than 23 such orders had been issued for Executive Order Indian reservations, and that eight national monument reductions had been issued between 1909 and 1929. Since "Congress has

made no objection to these orders, and so far as it has been determined it has continued to appropriate money for the administration of the reduced areas," the Solicitor concluded that there was an implied power to reduce monument reservations. *Id.* at 5. Again in 1947, the Solicitor concluded that the President is authorized to reduce the area of national monuments. M-34978, 60 Interior Dec. 9 (1947). Thus, the opinion of an Interior official in 1924 cannot overcome the more consistent contrary opinions by executive officials—and extensive evidence of actual exercise of this authority by numerous Presidents.[15]

Under binding precedent, the President's interpretation of his statutory authority is entitled to deference when he has acted on that interpretation and Congress has not acted to reverse that interpretation. In *AFL-CIO v. Kahn,* the D.C. Circuit addressed whether an executive order, authorizing denial of government contracts to companies that failed to comply with certain employment standards, was within the authority granted the President under the Federal Property and Administrative Services Act ("FPASA"). 618 F.2d at 785. In light of the FPASA's "imprecise definition" of presidential authority, the Court relied heavily on the President's past exercise of his authority under the Act and congressional acquiescence to that practice. The Court reasoned:

> Of course, the President's view of his own authority under a statute is not controlling, but *when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is "entitled to great respect*." As the Supreme Court observed this Term, the "construction of a statute by those charged with its execution *should be followed* unless there are *compelling*

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

indications that it is wrong."

Id. at 790 (quoting *Bd. of Governors of Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978) & *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979) (emphases added)). The court thus upheld the executive order. *Id.* at 793.

Consistent with *Kahn*, the President's view of modification authority under the Antiquities Act indisputably has "been acted upon over a substantial period of time without eliciting congressional reversal," and is therefore "entitled to great respect." *See id.* at 790 (citation omitted). The Court, therefore, should follow the President's construction of the Act unless there are "compelling indications that it is wrong," *see id.* (citation omitted). There are no such compelling indications here.

Plaintiffs insist that "many of the prior monument modifications were different in kind" and thus distinguishable. GSEP Br. 42. But this contention is irrelevant; if the President had authority to modify monuments eighteen prior times, there is no reason why he lacks it here. Moreover, Plaintiffs are wrong that the prior modifications materially differ from Proclamation 9682. Just five years after its enactment, President Taft invoked the Act to reduce the Petrified Forest National Monument by 42% (60,776 acres to 35,250.42 acres).[16] Proc. 1167; NPS Monuments List, *supra* n.2. Similarly, President Wilson diminished Mount Olympus National Monument in 1915 by nearly 50% (almost 300,000 acres). Proc. 1293; NPS Monuments List. Finally, that some prior reductions were smaller in size necessarily flows, in part, from the enormous size of the Monument compared to the vast majority of other monuments established

[16]Similarly, President Taft reduced the Navajo National Monument from an estimated size of 160 *square miles*, to three parcels comprising 380 *acres,* after finding that the original proclamation reserved "a much larger tract of land than is necessary." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912); NPS Monuments List, *supra* n.2.

under the Act. *See generally* NPS Monuments List.[17] Accordingly, this effort by Plaintiffs to gloss over congressional acquiescence fails.

2. The enactment of FLPMA conclusively demonstrates acquiescence to presidential modification authority.

Plaintiffs' next argument, relying on the enactment of FLPMA (and its express prohibition of *the Secretary* modifying any withdrawal made under the Antiquities Act), ultimately is conclusive, but contrary to Plaintiffs' position. *See* TWS Br. 37. In FLPMA, Congress acted to comprehensively govern the executive branch's withdrawal and reservation authority. Subsection 1714(j), relied upon by Plaintiffs, focuses only on the Secretary's withdrawal authority, imposing general limits on that authority:

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

43 U.S.C. § 1714(j).

Elsewhere, FLPMA deliberately and specifically addresses (and limits) the President's authority. In Section 704(a), FLPMA expressly repealed all "implied authority of the president to make withdrawals and reservations resulting from acquiescence of the Congress"—and also repealed, in part or entirely, thirty specific statutes addressing withdrawal and reservation

[17]Plaintiffs refer to a few instances where Congress did not enact proposed legislation that would have expressly recognized presidential authority to undo monument designations or restore monument lands to the public domain. TWS Br. 34-35. But "[n]on-action by Congress is not often a useful guide to statutory interpretation . . . , because [a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.'" *Citizens for Resp. & Ethics v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C. 2018) (internal quotation marks and citations omitted) *appeal docketed,* No. 18-5261 (D.C. Cir. Aug. 30, 2018).

authority. Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976). FLPMA did not, however, limit the authority of the President to modify "any withdrawal creating national monuments under chapter 3203 of title 54," as it did for the Secretary. *Cf. id.* Under these circumstances, FLPMA should be interpreted as continuing Congress' acceptance and acquiescence to the President's authority to modify national monuments. *Nat'l Ass'n of Broadcasters v. FCC (*"*NAB*"*)*, 569 F.3d 416, 421 (D.C. Cir. 2009) (noting that an "omission is intentional where Congress has referred to something in one subsection but not in another"); *Kahn*, 618 F.2d at 790 (Presidential interpretation "acted upon over a substantial period of time without eliciting congressional reversal," and is "entitled to great respect." (citation omitted)).

Plaintiffs gloss over the fact that FLPMA addressed only the *Secretary*'s ability to modify monuments, and left the President's authority intact. They instead emphasize a House Report that they interpret as demonstrating Congressional intent that Congress alone would have authority to modify monument withdrawals under the Antiquities Act. TWS Br. 38 (citing H.R. Rep. No. 94-1163 at 9 (1976)). In emphasizing this interpretation, Plaintiffs violate the "first canon" of statutory construction—"that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 818 (D.C. Cir. 2008) (citation omitted). *See also Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (explaining that "rebutting the presumption created by clear language is onerous"). As the Supreme Court has emphasized, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 583-84 (1994) (internal quotation omitted). *See also Overseas Educ. Ass'n v. FLRA*, 876 F.2d 960, 974 (D.C. Cir. 1989) (Buckley, J., concurring) (discounting "the reliability of legislative history," including committee reports, "as a tool of

statutory construction").

Indeed, the D.C. Circuit rejected a similar argument in *NAB*, 569 F.3d at 418–19. At issue there was the FCC's authority to regulate distance separations between four types of FM radio stations under the Radio Broadcasting Preservation Act ("Preservation Act"), which "restricted the [FCC's] authority to eliminate or reduce those separations in only one category, third-adjacent channels." *Id.* at 421. Plaintiff NAB argued that the Preservation Act should be deemed to also restrict the FCC's authority for the other categories of stations based on, inter alia, the Preservation Act's legislative history. Like Plaintiffs here, NAB referred to a statement from the legislative history indicating "the bill *maintains Congressional authority* over any future changes made to the interference protections that exist in the FM dial today." *Id.* at 422 (quoting 146 Cong. Rec. 5,611 (2000)). But the court rejected the argument—relying instead on analysis of the language and structure of the statute. *Id.* at 422 (reasoning that "an omission is intentional where Congress has referred to something in one subsection but not in another") (citation omitted). The court rejected NAB's "evidence that Congress had a broader purpose" because the statement had "no statutory reference point." *Id.* (quoting *Shannon*, 512 U.S. at 584).

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

Plaintiffs' arguments about congressional action subsequent to FLPMA are also unpersuasive. *See* TWS Br. 38-39; GSEP Br. 43-4. Their citation to 54 U.S.C. § 100101(b)(2),

addressing legislative policy for the National Park System, fails because (1) the Monument is not part of the National Park System; and (2) the statute says nothing about modifying land designations. *See* 54 U.S.C. § 100101(b)(2) (describing broad policy that *management* of NPS units, including authorization of activities, "shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress"). Plaintiffs also refer to isolated statements in the legislative history of the Alaska National Interest Lands Conservation Act ("ANILCA"). But ANILCA's legislative history cannot be used to interpret earlier-enacted statutes. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (citation omitted)); *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 878–79 (D.C. Cir. 1999) ("Post-enactment legislative history—perhaps better referred to as 'legislative future'—becomes of absolutely *no significance* when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute." (emphasis added)). This is even more the case because ANILCA did not address modification authority for national monuments. See Pub. L. No. 96-487, 94 Stat. 2371 (1980).[18] In sum, Plaintiffs cannot rebut Congress' longstanding acquiescence to the President's exercise of modification authority under the Antiquities Act, and their claims fail.

III. Congress Did not Codify the Monument's Boundaries by Statute

In Count III of their respective complaints, Plaintiffs argue that any adjustment of the Monument's boundaries by Presidential proclamation is unlawful because Congress has "set the

[18]Furthermore, many of the statements cited by Plaintiffs are not relevant—they address only whether a monument designation can be completely repealed absent Congressional action—not whether monument boundaries can be modified. *See* TWS Br. 52; GSEP Br. 43-44.

boundaries of Grand Staircase" in more recent enactments. GSEP Br. 30; *see also* TWS Br. 40. But these claims fail because most of the statutes invoked by Plaintiffs did no such thing, and to the extent Congress did establish or modify limited portions of the Monument's boundary, the Proclamation carefully left those portions in place. Plaintiffs nowhere explain why Congress' exercise of *its* authority under the Property Clause automatically abrogates authority it also granted to the President under the Antiquities Act.

Plaintiffs first argue that the President "purports to eliminate from the Monument roughly 80,000 acres of land and 16,600 additional acres of mineral interests that *Congress itself* incorporated to the Monument" in the Utah Schools and Lands Exchange Act ("Exchange Act"). TWS Br. 41; *see also* GSEP Br. 31-32. But the Exchange Act addressed a narrow issue—the ownership of "school lands" inholdings within federal lands across the state of Utah, including those within the original Monument boundaries. Pub. L. No. 105-335, §§ 8, 9, 112 Stat. 3139 (1998); S. Rep. No. 105-574 at 2 (1998).[19] The Exchange Act allowed Utah to trade these inholdings—the majority of which were *not* associated with the Monument—for federal lands and interests elsewhere in the State. *Id.*at 1-2.[20] And in doing so, the Act ratified a land-exchange agreement between Utah and the Department of the Interior that was reached as part of

[19] When Utah became a state, it was granted alternating sections of public domain lands to support its schools, ensuring that it would receive a broad sample of any valuable mineral, agricultural, timber, or commercial lands in the state. H. R. Rep. No. 105-598 at 1 (1998); *see also* S. Rep. No. 105-331 (1998). But before most of these lands could be developed or sold, the federal government shifted to a policy of retention of federal public lands; thus, many State school lands became isolated tracts surrounded by undeveloped federal land. H.R. Rep. No. 105-598, at 1 (1998).

[20] Specifically, the Act involved transfer to the United States of 200,000 acres of land and 76,000 acres of mineral interests within the boundaries of national parks and forests in Utah, as well as 176,000 acres of land and 24,000 acres of mineral interests within the boundaries of the Monument. *Id.* at 1-2.

a process begun *before* the Monument was established. *See* Pub. L. No. 105-335, §§ 3, 7, 112 Stat. 3139 (1998).[21] The Exchange Act, therefore, cannot reasonably be interpreted as intending to establish permanent Monument boundaries or eliminate the President's modification authority under the Antiquities Act.[22]

Moreover, the Exchange Act did not opine as to the outer boundaries of the Monument (or any of the other federal land management units at issue). *Id.* In fact, Plaintiffs' suggestion that Congress found that the newly acquired lands should necessarily be part of the Monument is rebutted by the language of the statute. The Exchange Act noted only that "*certain* State school trust lands within the Monument . . . have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources," clearly implying that "certain" *other* school lands within the Monument did *not* (and therefore were not necessarily appropriately within the Monument). *Id.* § 2 (emphasis added). The statute cannot reasonably be interpreted as "finalizing" the Monument's boundaries.[23]

Next, while Congress made minor Monument boundary adjustments in the Automobile

[21] The Exchange Act was intended to fully implement a process started with a 1993 statute—well prior to the establishment of the Monument—to facilitate the exchange of state inholdings. H.R. Rep. No. 105-598, at 2 (noting that the land "exchanges anticipated in Public Law 103-93 were never consummated and the funds never expended" but the Land Exchange Act "will finally enact that process.")

[22] Indeed, the Exchange Act was clear in its purpose: "to enact into law and direct prompt implementation" of the land-exchange Agreement between Utah and the United States. Pub. L. No. 105-335 §2(16), 112 Stat. 3141. Notably, permanently affixing the Monument's boundaries was not mentioned.

[23] The GSEP Plaintiffs claim that "any inherent reconsideration authority" could not apply because "Congress has spoken" through legislative action. GSEP Br. 31 (quoting *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014)). Contrary to GSEP's implication, *Ivy Sports Medicine* did not involve a circumstance where Congress had addressed the same matter as the President or executive agency—rather, the court's point was that Congress can displace an agency's "inherent reconsideration authority" by expressly providing a process for rectifying the agency's mistakes. *Id.* Here, modification is consistent with the Act's confinement requirement *and* the President's inherent reconsideration authority.

National Heritage Area Act ("Heritage Act") (which otherwise addressed unrelated topics), that legislation does not advance Plaintiffs' position either. The Heritage Act slightly adjusted segments of the Monument's boundary by excluding lands near four Utah communities, primarily to address several "issues of concern to local citizens and their representatives;" added some federal lands to the Monument along East Clark Bench; and transferred some Monument lands out of federal ownership so they could become part of a Utah state park. *Id.*; *Hearing on* H.R. 3963 *et al*., 105th Cong., 98 (1998). The Act's minor adjustment of discrete boundaries does not evidence a greater, unstated Congressional intent to eliminate the President's power to modify the Monument—and indeed, part of its function was to convey federal lands to the State. Moreover, the lands along East Clark Bench remain within the Monument. *See* 82 Fed. Reg. at 58,096.[24] Similarly, there is no merit to Plaintiffs' reliance on the Omnibus Public Land Management Act ("OPLMA"), which conveyed 25 acres of federal lands managed as part of the Monument to a private party. *See* TWS Br. 7; Pub L. No. 111-11, § 2604, 123 Stat. 991 (2009). Like the Heritage Act, the relevant section of OPLMA was not intended to codify the boundaries of the Monument, only to convey certain lands out of federal ownership. *See* Pub. L. No. 111-11, § 2604.

The TWS Plaintiffs argue that Congress "appropriated $19.5 million to buy back preexisting coal leases [for lands in the Monument] and thereby prevent their development." TWS Br. 41. But the 2000 Appropriations Act they cite merely appropriated funds "to acquire mineral rights within the [Monument]"; it did not address the President's modification authority.

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

Pub. L. No. 106-113, § 601, 113 Stat. 1501 (1999). Further, even if it were the case that the appropriation demonstrated Congress's "understanding" that the Monument could not be subsequently modified by the President, TWS Br. 42, that "understanding" would be irrelevant. *See GTE Sylvania, Inc*., 447 U.S. at 117–18 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted). Furthermore, the Appropriations Act from the *very next year* indicates that Congress believed the President *could* modify national monument boundaries. In its 2001 Appropriations Act, Congress provided that "[n]o funds provided in this Act may be expended to conduct preleasing, leasing and related activities under either the Mineral Leasing Act . . . within the boundaries of a National Monument . . . *as such boundary existed on January 20, 2001*. . . " Dept. of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107–63, §331, 115 Stat 414 (emphasis added). The italicized text would be unnecessary if Congress believed that the President could not modify the boundaries of national monuments.

Finally, GSEP's argument that the "codification" of the National Landscape Conservation System ("NLCS") in the OPLMA eliminated the President's authority to modify monuments finds no support in either the statute or its legislative history. OPLMA disclaimed any congressional intent to modify other statutory authority. *Id.* § 7202(d)(1). Furthermore, the NLCS existed prior to enactment of OPLMA, because it had been administratively created in 2000 by BLM. S. Rep. No. 110-116 (2007). GSEP does not explain why "formalizing" BLM's existing program could result in altering the President's authority under the Antiquities Act.

Ultimately, the statutes identified by Plaintiffs demonstrate no congressional intent to eliminate the President's modification authority under the Antiquities Act with respect to the Monument. Nor do Plaintiffs show that the Proclamation violates any instruction or direction in

any of those statutes. Federal Defendants are entitled to summary judgment on the TWS Plaintiffs' Count III and the GSEP Plaintiffs' Count III.

IV. Federal Defendants are Entitled to Summary Judgment on Plaintiffs' Constitutional Claims.

In their remaining claims, Plaintiffs assert that Proclamation 9682 was an unconstitutional exercise of legislative power by the President and therefore violated the separation of powers doctrine. TWS Count II; GSEP Count I. But because, as demonstrated above, the President acted pursuant to lawfully delegated authority, there is no separation of powers violation. Congress has delegated authority to modify monument boundaries to the President in the Antiquities Act, and the President's exercise of this authority therefore cannot violate any constitutional principle.

The claims are defective for other reasons as well. First, because Plaintiffs' constitutional claims are all founded on the same allegations as their *ultra vires* claims, they should be dismissed for that reason alone. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996) (declining to address constitutional claim addressing FCC order when its validity could be addressed on statutory basis); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 40 (D.D.C. 2018) (dismissing separation of powers count because statutory claim alleged "the same infirmities that underlie their separation of powers claim").

Even if this judicial canon could be avoided, Plaintiffs fail to demonstrate a cognizable separation of powers violation. Plaintiffs' separation of powers claims assert that the President improperly exercised legislative authority by reducing the boundaries of the Monument. But,

where a statute authorizes Executive branch action and "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," there is no constitutional concern. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The "intelligible principle" standard is clearly met here, where Congress has instructed the President to confine monument reservations to the "smallest area compatible" with protection of the objects. *See Mountain States*, 306 F.3d at 1137 (Antiquities Act "includes intelligible principles to guide the President's actions"); *Tulare*, 306 F.3d at 1143 (same). And because Congress has properly delegated its authority under the Property Clause to the President in the Antiquities Act, and the President has exercised this authority in issuing the Proclamation, there is no separation of powers concern or violation of the Property Clause here. *See Mountain States*, 306 F.3d at 1136-37 (rejecting Property Clause claim); *UAC*, 316 F. Supp. 2d at 1184 (same).

V. Plaintiffs are not entitled to Injunctive Relief.

Plaintiffs assert that they are entitled to injunctive relief. But even if the Court were to rule for Plaintiffs on the merits of their claims, the GSEP Plaintiffs make no showing whatsoever, GSEP Br. 45, and NRDC makes only cursory arguments, TWS Br. 45, that the standard for permanent injunctive relief is met. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Plaintiff also seek vacatur of Proclamation 9682, but they provide no reason that the "drastic and extraordinary remedy" of injunctive relief should *also* be granted. *See id.* ("If a less drastic remedy (such as . . . vacatur . . .) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.")[25]

[25] To the extent there arises any question about the need for injunctive relief, the Court should order remedy briefing.

CONCLUSION

For the reasons set forth above, Federal Defendants have demonstrated that there is no genuine issue of material fact, and they are entitled to judgment as a matter of law.

Respectfully submitted this 19th day of February 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Romney S. Philpott
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